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## The Carceral State(s)

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## THE CARCERAL STATE(S)

*Esther K. Hong\**

*The carceral state is everywhere. Legal and social science scholars are increasingly using the carceral state concept to criticize various aspects, or even the entirety, of the United States. But despite how popular and common this term has become in writings about mass incarceration, criminal processes and punishments, and other forms of social control, the definition, conceptualization, and theorization of the carceral state are far from settled. This Article analyzes and contributes to this discussion by highlighting the diversity and fluidity of ideas surrounding the carceral state.*

*Although the term often appears without an express definition, the limited ones that do exist vary in their construction. There are also multiple perspectives on the carceral state's characteristics, including its composition, relationship with the prison-industrial complex, its age, size, and form. Also, while many prominent scholars agree that its discriminatory actions and effects are defining features of the carceral state, notable differences remain in how this discrimination is framed.*

*This decentralized and varied understanding impacts both the theoretical development and practical applications of the carceral state concept. Rather than converging into a single, cohesive theory, multiple interpretations of the carceral state persist and will likely continue to do so. While this diversity of perspectives offers advantages, it also presents challenges in achieving the necessary consensus to dismantle the carceral state and build a noncarceral one.*

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## INTRODUCTION

The carceral state is everywhere. The term has become a “staple[] of . . . contemporary punishment and society literature.”<sup>1</sup> It is prevalent in legal scholarship, increasingly appearing in critiques about punishment and other forms of social control in various areas of the law, including criminal, immigration, juvenile, family regulation, and education law.<sup>2</sup> It has become a colloquial term among activists, advocates, and journalists,<sup>3</sup> and its

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1. Ashley Rubin & Michelle S. Phelps, *Fracturing the Penal State: State Actors and the Role of Conflict in Penal Change*, 21 THEORETICAL CRIMINOLOGY 422, 423 (2017).

2. See *infra* Part II.A.

3. See e.g., Andre Gee, *How Brittney Griner’s Plight Exposes the Hypocrisy of America’s Carceral State*, ROLLING STONE (Dec. 10, 2022), <https://www.rollingstone.com/politics/political-commentary/britney-griner-joe-biden-valdmimir-putin-criminal-justice-reform-1234645212/>; Andrew C. McCarthy, *Fictions of the ‘Carceral State’*, NAT’L REV. (Oct. 4, 2021), <https://www.nationalreview.com/magazine/2021/10/04/fictions-of-the-carceral-state/>; *Hope is a Discipline: Mariame Kaba on Dismantling the Carceral State*, THE INTERCEPT (Mar. 17, 2021), <https://theintercept.com/2021/03/17/intercepted-mariame-kaba-abolitionist-organizing/>; Sam Collings-Wells, *How Well-Intentioned Reforms Could Worsen Mass Incarceration*, WASHINGTON POST (Nov. 5, 2019), <https://www.washingtonpost.com/outlook/2019/11/05/how-well-intentioned-reforms-could-worsen->

significance (whether lauded or critiqued) is recognized in commentaries of various political ideologies.<sup>4</sup> It is also making its mark in legal casebooks,<sup>5</sup> legal filings,<sup>6</sup> interviews with politicians, and congressional hearings.<sup>7</sup>

While the term evokes Foucault's "carceral archipelago" from 1975,<sup>8</sup> its prolific usage is much more recent. One scholar credited Marie Gottschalk

mass-incarceration/; Gene Demby, *Hip-Hop, Mass Incarceration, And A Conspiracy Theory For The Ages*, NPR: CODE SWITCH (Oct. 9, 2020), <https://www.npr.org/2020/10/08/921869289/hip-hop-mass-incarceration-and-a-conspiracy-theory-for-the-ages>.

4. See, e.g., Joshua Zeitz, *What's Really in the AP African-American Studies Class DeSantis Rejected?*, POLITICO (Jan. 31, 2023), <https://www.politico.com/news/magazine/2023/01/31/ap-african-american-studies-desantis-00080265>; 'Gutfeld!' on Liberals' Crime Agenda, *Media Hypocrisy*, FOX NEWS (Jan. 5, 2022), <https://www.foxnews.com/transcript/gutfeld-liberals-crime-agenda-media-hypocrisy>; Pierre Lemieux, *Don't Forget the "Free" in Free Trade*, CATO INSTITUTE (2019), <https://www.cato.org/regulation/summer-2019/open>; Sam Adler-Bell, *Appalachia vs. the Carceral State*, THE NEW REPUBLIC (Nov. 25, 2019), <https://newrepublic.com/article/155660/appalachia-coal-mining-mountaintop-removal-prison-fight>.

5. See, e.g., SANFORD H. KADISH, ET. AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 7, 8 (11th ed. 2022); BENNETT CAPERS, ET. AL., *CRIMINAL LAW, A CRITICAL APPROACH* 1210, 1283, 1287, 1298 (1st ed. 2023).

6. See, e.g., Brief for Center for Constitutional Rights as Amicus Curiae Supporting Respondent, *La. v. Reddick*, No. 202-KP-01892 (2022), 2022 WL 1517095 ("Over 1500 individuals remain imprisoned after receiving non-unanimous convictions. The system has helped institute a carceral state, populated almost exclusively by African Americans, over denied rights which were intended to have been resolved by constitutional amendment in 1865."); Complaint at 4, *Immigrant Defense Project v. U.S. Immigration and Customs Enforcement.*, (S.D.N.Y. Dec. 17, 2020) (No. 20-cv-10660) ("The records requested in Plaintiffs' FOIA are essential to ensuring that the public is fully informed about current ICE supervision practices and able to effectively engage law and policymakers, who are presently discussing the future of immigrant detention and surveillance and the carceral state."); Reply Brief of Appellant at 14, *United States v. Ramos*, (2d Cir. June 15, 2020) (No. 19-4373) ("But the various organs of the carceral state have done an exemplary job, through various enhancements and recidivist statutes, to make sure that Ms. Ramos serves out the full term of a murderer's sentence.");

7. See, e.g., Don Lemon Tonight, (CNN Television Broadcast June 23, 2021) (interviewing Representative Ayanna Pressley who stated, "I support a radical re-imagining of community safety and public safety, which means reallocating and not further investing in a carceral state."); 168 Cong. Rec. 2564 (2022) (statement of Sen. Fischer) (stating support for police, and criticizing Representative Pressley's statement during her CNN interview with Don Lemon); *Controlled Substances: Federal Policies and Enforcement: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security*, 116 Cong. 3 (2021) (Testimony of Professor Howard Henderson) (stating that "the practice of accumulating revenue through fines and fees is related to the carceral State expanding by enforcing civil and administrative laws").

8. Dan Berger, *Finding and Defining the Carceral State*, 47 *REVIEWS IN AM. HIST.* 279, 281-82 (2019); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 297, 298, 301 (Alan Sheridan trans., Vintage Books 2d ed. 1995). The "carceral archipelago" refers to a "whole series of institutions, well beyond the frontiers of criminal law" that "transported [a] ['penitentiary'] technique from the penal institution to the entire social body." *Id.* at 297, 298. These institutions were "linked to one another" and created a "carceral continuum," such as

with its popularization,<sup>9</sup> who began writing about the carceral state circa 2006.<sup>10</sup> But even with its pervasive usage over nearly two decades, the definition, conceptualization, and theorization of the carceral state are far from settled. This Article analyzes and contributes to this ongoing work by underscoring just how varied, decentralized, and fluid ideas about the carceral state are. There are differing histories, core traits, motivations, reach, and impact.

There are at least three factors that contribute to this diversity of views. First, in the majority of instances when the term “carceral state” appears in academic and mainstream sources, it is not explicitly defined. This absence is so pronounced that scholars of different disciplines have commented on it.<sup>11</sup> For example, historian Dan Berger observed the oddity in “how little of the published work or conference sessions on the topic [of the carceral state] engaged in this most basic act” of defining it.<sup>12</sup> This preferred practice of not defining the carceral state continues. For example, in perhaps one of the most recent high-profile uses of the term, Justice Sotomayor in her dissent in *Utah v. Strieff*,<sup>13</sup> used the term “carceral state” without an explicit definition. She opined that the majority’s holding regarding Fourth Amendment searches would lead to distorted interactions between police and individuals that implied that one is “not a citizen of a democracy but the subject of a *carceral state*, just waiting to be cataloged.”<sup>14</sup>

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“public assistance with the orphanage, the reformatory, the penitentiary, the disciplinary battalion, the prison; the school with the charitable society, the workshop, the almshouse, the penitentiary convent; the work’s estate with the hospital and the prison.” *Id.* at 303. Here, the “frontiers between confinement, judicial punishment and institutions of discipline, which were already blurred . . . , tended to disappear” and created “a great carceral continuum that diffused penitentiary techniques into the most innocent disciplines.” *Id.* at 297.

9. Alice Ristorph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1992 n.168 (2019).

10. Marie Gottschalk, *THE PRISON AND THE GALLOWS, THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006) [hereinafter GOTTSCHALK, GALLOWS]; Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693 (2006) [hereinafter Gottschalk, *Dismantling the Carceral State*]. In these pieces, Gottschalk’s usage of the carceral state centered on prisons in modern America, including mass incarceration, death penalty and death row, and other punishments and policies related to imprisonment.

11. See *infra* Part I.A.

12. Berger, *supra* note 8, at 279.

13. 579 U.S. 232 (2016).

14. *Id.* at 254 (Sotomayor, J. dissenting) (emphasis added). Justice Sotomayor’s dissent in *Strieff* has received significant scholarly and media attention. See Linda Greenhouse, *The Books of the Justices*, 115 MICH. L. REV. 733, 734 & n.10 (2017); Wadie E. Said, *Law Enforcement in the American Security State*, 2019 WIS. L. REV. 819, 850–52 (2019). While legal scholars have not explicitly defined Justice Sotomayor usage of “a carceral state,” they have highlighted this specific phrase while expounding on her overall dissent. For example, Monica C. Bell observed that while bold, this phrase, alongside Sotomayor’s entire dissent, “understate[d] the problems on two fronts”: (1) that “poor people of color” often view

Other lower courts that have since quoted Justice Sotomayor also have not defined the term.<sup>15</sup> That so many commentators of the carceral state do not set forth an express definition keeps the concept fluid and open-ended. Writers may assume that readers just understand what the carceral state is, either from its common usage or from the context in which the term appears. But this practice inherently leaves it open to many interpretations.

Second, in the limited instances when the carceral state has been expressly defined or conceptualized in legal and social science scholarship, they have differed from one another.<sup>16</sup> There are at least four broad categories of conceptualizations that all allude to something that is inherently wrong, dysfunctional, or harmful. For example, the carceral state may signify a certain punitive phenomenon, such as mass incarceration. It may refer to all or specific state practices that punish, surveil, and/or control individuals. It may signify a type of governance, government, or governmentality, or a logic or ideology that permeates throughout society or the entire state. This practice too signals that the carceral state concept does not have a unified, overarching construction.

Third, and most significantly, scholars have a wide range of insights on the core and significant characteristics of the carceral state.<sup>17</sup> This divergence is apparent in its explicit definitions and conceptualizations. But more tellingly, they are evident in the descriptions that accompany

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themselves as “stateless”; and (2) that the word “you” misses that estrangement is a “collective institutional venture.” Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057–58 (2017). Bennett Capers noted that Justice Sotomayor’s dissent revealed how the Supreme Court frequently shapes the meaning of a “good citizen” in criminal procedure cases, thus enabling others to be treated as second-class citizens. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 654–55 (2018). Dorothy E. Roberts wrote that “Justice Sotomayor’s understanding that the carceral state subjects people to a form of racialized control that denies their freedom and democratic citizenship—and therefore must be curtailed” showcased how the Constitution could support an abolitionist framework. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 84–85 (2019). Wadie E. Said observed that in this dissent, “we begin to see the intersection of the carceral state—the personnel and institutions that comprise our system of mass incarceration—and the police state in the political sense of the term, where the authorities can pick up and remove opponents—real or perceived—on a mere whim.” Said, *supra*, at 850–52. Alice Ristroph questioned whether Justice Sotomayor’s reference to “a carceral state” here implied “a distinctive type of political system” that itself questions whether “carcerality” is not “merely a matter of the scale or scope of criminal interventions” but also “an unequal distribution of those interventions.” Alice Ristroph, *The Second Amendment in A Carceral State*, 116 NW. U. L. REV. 203, 209–10 (2021) [hereinafter Ristroph, *Second Amendment*].

15. See, e.g., *Watley v. Felsman*, No. 3:16-CV-02059, 2019 WL 2994235, at \*12 (M.D. Pa. July 9, 2019); *Johns v. City of Eugene*, No. 6:16-CV-00907-AA, 2017 WL 663092, at \*8 (D. Or. Feb. 15, 2017).

16. See *infra* Part I.

17. See *infra* Part II.

references to the carceral state. As the preferred usage of the term is in its undefined form, the context reveals the commentator's understanding of the carceral state. These contextual clues in turn show that ideas about its core characteristics span a broad spectrum.<sup>18</sup> There are varying descriptions of its composition, relationship with the prison-industrial complex (if any), size, form, and age. Also, while many prominent scholars view the discriminatory actions and effects of the carceral state as its key feature and harm, there remains notable differences in the intent, type, and scope of this discrimination.

This diverse understanding of the carceral state matters for both its theoretical development and real-world applications.<sup>19</sup> First, it speaks directly to the theorization of the carceral state. Rather than progressing towards a single overarching theory, there will be many theoretical frameworks or versions since some views cannot be reconciled or merged. This analysis may help solidify the boundaries between the different understandings of the carceral state.

Furthermore, while it is not unusual for popular terms and concepts to have diverse meanings and frameworks,<sup>20</sup> the theoretical development of the carceral state also conveys a distinct, broader message. The usage of the term reflects scholars' growing reluctance to use traditional labels for state institutions, systems, laws, or processes. The term often serves as an epithet, immediately evoking their illegitimacy and dysfunction, such as discrimination, corruption, and oppression. It also underscores how normalized and pervasive certain state-inflicted or state-sponsored harms have become. And yet, that so many commentators have such different conceptions of the carceral state should prompt reflection on why it is so difficult to come to a consensus about what exactly is wrong with our current systems, structures, laws, or governance.

In addition to its theoretical impact, this varied understanding of the carceral state has significant real-world consequences. Although there is a common goal of dismantling the carceral state, its different framings make it challenging to ascertain what dismantling means and how to achieve this goal. The initial framing of the concept directly influences the normative proposals for achieving this objective. In other words, different interpretations of the carceral state shape the laws, policies, and reforms that are proposed and implemented to dismantle it. For instance, solutions vary depending on whether the carceral state is limited to prisons and mass incarceration, or construed broadly to a form of governance that affects nearly all state institutions and systems.<sup>21</sup> While the variations of the

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18. See *infra* Parts I.A & II.

19. See *infra* Part III.

20. See *infra* Part III.A.

21. See *infra* Part III.

carceral state concept offer advantages, they also have ramifications for creating the necessary consensus to dismantle the carceral state, build up a noncarceral state, and evaluate progress on these goals. To begin, scholars, advocates, and policymakers should identify key features and harms of the carceral state, such as the discrimination and inequality that it perpetuates.

These arguments will unfold in the following Parts. Part I addresses the largely undefined or fluid nature of the carceral state concept. It explains that most uses of the term lack a specific definition, with some commentators deliberately choosing to keep the concept undefined and open-ended. Moreover, even the limited explicit definitions and conceptualizations of the carceral state underscore its varied interpretations. Part II then examines various characteristics of the carceral state, including its composition, discriminatory effects, relationship with the prison-industrial complex, size, form, and age. This analysis sets forth how these characteristics are described and framed in multiple ways, further highlighting the concept's diversity. The differing perspectives on the carceral state's discrimination, often considered a key feature by many prominent scholars, exemplify the wide range of views tethered to the carceral state. Lastly, Part III explores how these diverse interpretations impact both its theoretical development and the practical efforts to dismantle the carceral state and build a noncarceral one.

## I. THE NEBULOUS CARCERAL STATE

What exactly is the carceral state? Even as the term is increasingly making its mark in academic and public discourse, most commentaries do not set forth a specific definition of the term. Some scholars intentionally prefer to keep the term undefined. Others just find it unnecessary to do so. This largely undefined usage means that the term is left open to many interpretations. Moreover, even in the limited instances when the carceral state has been explicitly defined, these ideas have been varied and diverse.

This Part first describes the most common way that the term is employed—in its undefined form. It then turns to the limited instances when the term has been expressly conceptualized and defined and underscores four distinct categories of definitions and conceptualizations. Both constructions of the term contribute to the vagueness surrounding the carceral state.

### A. *The Mostly Undefined Carceral State*

The term “carceral state” largely appears without an accompanying definition.<sup>22</sup> This absence of a definition is so pronounced that scholars of different disciplines have expressly commented on it. Historian Dan Berger

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22. See *supra* note 12 and accompanying text.

observed that so few of “published work or conference sessions . . . engaged in this most basic act” of defining the carceral state.<sup>23</sup> Similarly, after reviewing carceral state literature, criminologist Kayla Marie Martensen concluded that “rarely have scholars explicitly defined what the Carceral State is.”<sup>24</sup> Sociologists Ashley Rubin and Michelle Phelps also observed that the carceral state (and its related term “penal state”) “are rarely precisely defined.”<sup>25</sup>

This absence is also apparent in legal authorities where one would expect to find such a definition. In addition to case opinions<sup>26</sup> and legal briefs<sup>27</sup> that refer to the carceral state without a definition, the term is increasingly appearing in legal casebooks without setting forth its exact meaning. For example, the most recent edition of the classic Sanford H. Kadish criminal law casebook<sup>28</sup> twice refers to the carceral state in the introductory critique of the American criminal system.<sup>29</sup> It asks how we can “reconcile these claims of underenforcement with the sweep of America’s *carceral state*,”<sup>30</sup> and whether there are “reliable ways to identify the situations in which enforcement needs to be strengthened, not restrained, without creating a risk that the *carceral state* will balloon even more and further aggravate racial disparities.”<sup>31</sup> In both instances, while the carceral state is not defined, the reader may gather from the context that the carceral state pertains, at a minimum, to mass punishment in the criminal system that results in racial disparities.

Similarly, in a newer criminal law casebook by legal scholars Bennett Capers, Roger Fairfax Jr., and Eric Miller, which aims to provide “a critical approach” to criminal law, there are multiple references to the carceral state.<sup>32</sup> For example, the casebook’s section on abolition begins with the “concern that any criminal law course inevitably adds legitimacy to the current *carceral state* is a sobering one”<sup>33</sup> It also explains why the discussion on abolition needs to start with slavery: “Given the fact that many abolitionists tie the current efforts to abolish the *carceral state* to race and our history of

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23. Berger, *supra* note 8, at 279.

24. Kayla Marie Martensen, *Review of Carceral State Studies and Application*, 14 *SOCIOLOGY COMPASS* 1, 1 (2020). *See also supra* note 12.

25. Rubin & Phelps, *supra* note 1, at 423.

26. *See supra* notes 13–15 and accompanying text.

27. *See supra* note 6.

28. The current Eleventh Edition of the Kadish casebook was published in 2022. KADISH, ET. AL., *supra* note 5. The first edition was published approximately sixty years earlier in 1962. MONRAD G. PAULSEN & SANFORD H. KADISH, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* (1962).

29. KADISH, ET. AL., *supra* note 5, at 7, 8.

30. *Id.* at 7 (emphasis added).

31. *Id.* at 8 (emphasis added).

32. *See, e.g.*, CAPERS, ET. AL., *supra* note 5, at 579–80, 1210–11, 1283, 1287, 1298.

33. *Id.* at 1283 (emphasis added).

slavery, it makes sense to begin not with the abolition of the *carceral state*, but with the movement to abolish slavery.”<sup>34</sup> The discussion on race and prison abolition also poses a question of “whether ending a system of racial oppression is a prerequisite to ending the *carceral state*.”<sup>35</sup> In addition, the casebook incorporates excerpts or summaries of influential law review articles that refer to the carceral state. These include Amna Akbar’s writings about abolitionists’ efforts to diminish the carceral state,<sup>36</sup> Benjamin Levin’s argument that wage-theft criminalization is growing the institutions of the carceral state,<sup>37</sup> and Alice Ristroph’s observations about the agents of the carceral state.<sup>38</sup> While the reader may assume from the context that the carceral state subsumes criminal matters, such as the criminal system, its state actors, laws, processes, and punishment, including prisons and incarceration, it is not explicitly stated, and also unclear if it includes more than these matters.

This strong preference to not provide a specific definition may reveal an insight into the term itself. For some commentators, the fluidity and impreciseness of the term may be what makes it an appealing one to use. A similar dynamic exists for the term “prison abolition.” Legal scholar Dorothy Roberts observed that “it is hard to pin down what prison abolition means,” and this difficulty is due in part to the fact that “[a]ctivists engaged in the movement have resisted ‘closed definitions of prison abolitionism.’”<sup>39</sup> Instead, abolition has been described as “‘a form of consciousness,’ ‘a theory of change,’ ‘a long-term political vision,’ and ‘a spiritual journey.’”<sup>40</sup> That the carceral state too appears frequently without a specific definition

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34. *Id.* at 1287 (emphases added).

35. *Id.* at 1298 (emphasis added).

36. CAPERS, ET. AL., *supra* note 5, at 1294 (citing Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1828 (2020)). Amna Akbar’s article regarding abolition refers to the carceral state more than a dozen times in the body of the article.

37. CAPERS, ET. AL., *supra* note 5, at 579–80 (citing Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429 (2021)). The article uses the term “carceral state” in the body of the article approximately twenty times.

38. CAPERS, ET. AL., *supra* note 5, at 1210 (stating that there are “a variety of individuals who enforce the law as agents of a carceral state” including the “obvious ones” like “police, prosecutors, and even judges” and the less obvious ones such as “probation officers, social workers, schoolteachers, medical workers, and other individuals who report criminal activity to the police as part of their job”) (citing Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1671–79 (2020) [hereinafter Ristroph, *Curriculum*]). Ristroph’s article includes approximately fifteen references to the carceral state in the body of the article, and in the conclusion of the article, makes the argument that the carceral state embodies the idea that criminal law is being employed in a manner that greatly shifts or changes our country’s “political regime.” *Id.* at 1706.

39. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 6 (2019) [hereinafter Roberts, *Abolition*].

40. *Id.*

also may be a feature of the term, not a bug. It may be intentional, not merely an oversight.

For example, some scholars are deliberately non-committal to a certain definition or conceptualization of the carceral state. Martensen observed that the carceral state concept is “constantly evolving”<sup>41</sup> and this is because the carceral state itself is changing. She wrote, “the complexities and power of the Carceral State demand that our scholarship be just as complex and anticipate change in a Carceral State.”<sup>42</sup> Under this mindset, a definition or theory of the carceral state should not be considered permanent, but rather fluid and open-ended.

Meanwhile, historian Dan Berger wryly analogized the task of defining the carceral state to Justice Potter Stewart’s approach in defining obscenity: “historians of the carceral state simply knew it when we saw it.”<sup>43</sup> But he ultimately acknowledged that there is more work to be done before a theory or definition of the carceral state could be set forth. He concluded that in time, “a more precise usage of” the concept of the carceral state may come as “greater attention” is paid to the “forms, sites, and ends through which state actors deploy carceral power.”<sup>44</sup> While he defined “carceral power” as “at its core, repressive social control,” he declined to expressly define the carceral state.<sup>45</sup>

Overall, the term should be noted for its indefiniteness, diffuseness, and fluidity. The most common usage of the term is in its naked form—without an accompanying express definition, concept, or theory. To some scholars, this work-in-progress nature is inherent in the carceral state concept itself. They may prefer to avoid being confined to a specific definition or may be using the term primarily for stylistic purposes. But even among the limited number of scholars who have defined the term explicitly, their works further underscore its variability.

### B. *The Limited and Diverse Meanings of the Carceral State*

Some scholars have set forth explicit definitions and conceptualizations about the carceral state that set it apart from other similar terms and concepts that allude to dysfunction and harm. The term is indeed resonant with other words that litter legal and social science scholarship. For example, the carceral state has been used more or less interchangeably

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41. Martensen, *supra* note 24, at 8.

42. *Id.*

43. Berger, *supra* note 8, at 279; *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring).

44. Berger, *supra* note 8, at 285.

45. *Id.*

with the terms prison-industrial complex,<sup>46</sup> the penal state,<sup>47</sup> and the criminal justice system.<sup>48</sup> Rubin and Phelps observed that the carceral state (and its synonym penal state) have been a “shorthand for the cumbersome criminal justice system, mass incarceration, the punitive turn, or normative corrections nomenclature.”<sup>49</sup> According to Martensen, scholars have identified the carceral state with other terms like “hyper-criminalization or punishment, prison-industrial-complex, golden gulag, the new Jim Crow and prison nation.”<sup>50</sup> These words all share “an exploration of the nuances of mass incarceration, including its origin and expansion.”<sup>51</sup> However, for some scholars, the carceral state concept stands apart. For example, Martensen observed that unlike other similar terms, the carceral state distinctly examines “how carceral logic and carceral control expand beyond the prison, and is in fact embedded in the social fabric of the United States.”<sup>52</sup> Others have a different take.

There are at least four categories of distinct conceptualizations of the carceral state.<sup>53</sup> These categories are not mutually exclusive; they often share similarities with one another. There is also a diversity of views intra-category as well. Yet, each category emphasizes what is distinct about a particular framing. The main purpose of this categorization is to underscore just how varied and decentralized the understanding of the carceral state is. It also shows that there is no clear progression in time in its conceptualization.

First, scholars have conceptualized the carceral state to signify a certain problematic penal phenomenon that is present in the modern United States. In 2006, political scientist Marie Gottschalk, who has been credited with popularizing the term,<sup>54</sup> identified “three features”<sup>55</sup> of the modern American carceral state that distinguished it from its past or other Western countries: “the sheer size of its prison and jail population; its

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46. See, e.g., Erica R. Meiners, *Trouble with the Child in the Carceral State*, 41 SOC. JUST. 120, 121–22 (2014).

47. Rubin & Phelps, *supra* note 1, at 423; see also JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (1st ed. 2007).

48. Rubin & Phelps, *supra* note 1, at 423; Ristroph, *Second Amendment*, *supra* note 14, at 208–09.

49. Rubin & Phelps, *supra* note 1, at 423.

50. Martensen, *supra* note 24, at 1.

51. *Id.*

52. *Id.*

53. Other scholars have also analyzed the different ways that the carceral state term is defined or used. See, e.g., Rubin & Phelps, *supra* note 1. While the categories observed here share some similarities with Rubin and Phelps’ observations, this categorization exclusively focuses on the term “carceral state” and does not include penal state or other synonyms.

54. See *supra* note 9 and accompanying text.

55. Gottschalk, *Dismantling the Carceral State*, *supra* note 10, at 1693.

reliance on harsh, degrading sanctions; and the persistence and centrality of the death penalty.”<sup>56</sup> Likewise, Rubin and Phelps observed that the most common usages of the phrase (and its synonym “penal state”) is “as an undefined synonym for other terms that reference the recent growth and increasing severity of punishment in the USA[.]”<sup>57</sup> These “recent penal trends” include mass incarceration and growth in punitiveness.<sup>58</sup>

Second, scholars have conceptualized the carceral state concept to refer generally to state practices that punish, surveil, and/or control individuals, with some scholars adhering to a narrow view, and others to a much broader framing. In its narrowest form, some scholars equate the carceral state with a very specific type of punishment. Rubin and Phelps observed that for some scholars, the carceral state is distinctively “construed as reflecting only that which *is formally* carceral: jails and prisons.”<sup>59</sup> This interpretation is in line with both the etymology of “carceral”—“prison”—as well as the meaning and historical uses of the term— “[o]f or belonging to a prison.”<sup>60</sup> Others, however, have a wider perspective, expanding it to not only include *all* types of state punishments, but also other forms of social control. For example, later works by Gottschalk adopted a more expansive definition of the carceral state from her earlier work.<sup>61</sup> In 2015, she again summoned Foucault when she defined the carceral state as not only including the “country’s vast archipelago of jails and prisons, but also the far-reaching and growing range of penal punishments and controls that lies in the never-never land between the prison gate and full citizenship.”<sup>62</sup> In 2016, historian Elizabeth Hinton provided the “formal definition” of the carceral state as “the formal institutions of the criminal justice system” which includes “the law enforcement officers who police the streets and help maintain order—it’s the court marshals, the lawyers, the probation and parole officers and, of course, correctional officials.”<sup>63</sup> But, in the spirit of

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56. *Id.*

57. Rubin & Phelps, *supra* note 1, at 424.

58. *Id.*

59. *Id.* (emphasis in original). Meanwhile, they interpreted the term “penal state” to more accurately reflect a “variety of non-custodial punishments.” *Id.* As explained in the following paragraphs, other scholars, however, would label these “non-custodial punishments” as part of the carceral state.

60. *Carceral*, THE OXFORD ENGLISH DICTIONARY (Sept. 2023), [https://www.oed.com/dictionary/carceral\\_adj?tab=meaning\\_and\\_use](https://www.oed.com/dictionary/carceral_adj?tab=meaning_and_use).

61. See, e.g., MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2016) [hereinafter GOTTSCHALK, CAUGHT].

62. *Id.* at 1.

63. Timothy Shenk, *Booked: The Origins of the Carceral State*, DISSENT (Aug. 30, 2016), <https://www.dissentmagazine.org/blog/booked-origins-carceral-state-elizabeth-hinton>; see also ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 2 (2017) (“The result was a significant expansion of America’s carceral state: the police, sheriffs, and marshals responsible for law

Foucault’s “carceral continuum” or “network,” she wanted to “expand” the meaning of the carceral state to include “social programs . . . in low-income, urban communities” that “impose various forms of supervision and surveillance.”<sup>64</sup> In 2018, legal scholar Janet Moore stated that the term denoted “the sprawling, dynamic network of policies, institutions, personnel, and apparatuses through which federal, state, local, and tribal governments exercise power to police, prosecute, and punish.”<sup>65</sup> While Moore’s framing of the carceral state appeared to still focus on the criminal aspects of this “dynamic network,” she also underscored the inevitable decreased democratic participation by poor people of color to pass policies in areas such as education, employment, and housing that would actually lead to “equal self-governance.”<sup>66</sup>

A third category of explicit conceptualizations of the carceral state underscores that it refers to a form of governance, government, or governmentality. In 2010, political scientists Vesla Weaver and Amy Lerman defined the carceral state as “the totality of this spatially concentrated, more punitive, surveillance- and punishment-oriented system of governance.”<sup>67</sup> Phelps and Rubin also recognized that some scholars use the term carceral state (and its synonym penal state) “to signal the transition away from a penal-welfarist model of governance (the ‘welfare state’).”<sup>68</sup> In 2021, legal scholar Alice Ristroph set forth a similar construction of the term for purposes of the Second Amendment by highlighting a generalized difference between using “an indefinite article rather than a definite one” before the term “carceral state.”<sup>69</sup> Accordingly, the phrase “*the* carceral state” more commonly indicated “the sprawling entirety of public institutions and practices related to criminal law, including prisons but extending far beyond them”; generally, the “criminal justice system.”<sup>70</sup> But the phrase “*a* carceral

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enforcement; the judges, prosecutors, and defense lawyers that facilitate the judicial process; and the prison officials and probation and parole officers charged with handling convicted felons.”).

64. Shenk, *supra* note 63.

65. Janet Moore, *Isonomy, Austerity, and the Right to Choose Counsel*, 51 IND. L. REV. 167, 177 (2018). Moore wrote that austerity-driven policies that disinvest from social supports in combination with policies that increase surveillance and punishment of disadvantaged communities lead to reduced democratic participation among poor people, who are disproportionately people of color. She proposed granting poor people the right to choose their attorney under the Sixth Amendment to eventually increase attorney performance as one way to counter the carceral state.

66. *Id.* at 176–79.

67. Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SC. REV. 817, 818 (2010).

68. Rubin & Phelps, *supra* note 1, at 423.

69. Ristroph, *Second Amendment*, *supra* note 14, at 208–09.

70. *Id.* at 209–11 (noting however that some scholars used the definite article “the” before “\_\_state” to “identify a ‘form of governance’ if not quite a type of government”).

state” had the effect of “modify[ing] the entire political structure of a given nation, not simply a subset of state institutions”; generally “a type of government.”<sup>71</sup> She then defined “[a] carceral state” as “one that uses criminality to rationalize and naturalize the unequal distribution of political power and social goods.”<sup>72</sup> While Ristroph limited this definition to the context of the Second Amendment, it is consistent with her prior reflections about the carceral state. Previously, in an article about the criminal law curriculum in law schools, she wrote that the term “carceral state” “reflects a shift in the use of criminal law so profound that the very character of the political regime is altered.”<sup>73</sup> In 2022, anthropologist Aisha Kahn defined the carceral state as “governmentality that relies on institutionalized means of punishment and surveillance (including mass incarceration), particularly of targeted populations.”<sup>74</sup>

The fourth construction of the carceral state adds or emphasizes a certain mindset, logic, purpose, philosophy, or ideology that permeates throughout the entire state or even the whole of society through various networks. In 2014, Professor Erica R. Meiners defined the carceral state to not only include punishment *per se*, but even the mindset or “logic” of punishment. She wrote that the “term *carceral state* alludes to how the *logic* of punishment shapes other governmental and institutional practices, even those not perceived as linked to prisons and policing.”<sup>75</sup> What is distinct about the carceral state is that it underscores “the multiple intersecting state agencies and institutions—including not-for-profits doing the work of the state—that have punishing functions and effectively regulate poor communities, including child and family services, welfare/workfare agencies, public education, immigration, and health and human services.”<sup>76</sup> In 2022, abolitionists Mariame Kaba and Andrea Ritchie relied on Meiner’s interpretation to create their definition of the carceral state: “a web of ideologies and institutions wielding cops, cages, laws, stories, and surveillance to meet the generalized insecurity of racial capitalism.”<sup>77</sup>

Similarly, in 2018, Professor Ruby C. Tapia construed the carceral state in the following way at the Carceral State Project’s 2018–2019 Symposium: “Yes, the carceral state encompasses the formal institutions and operations and economies of the criminal justice system proper, but it

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71. *Id.* at 209, 212 (emphasis added).

72. *Id.* at 211.

73. Ristroph, *Curriculum*, *supra* note 38, at 1706.

74. Aisha Khan, *The Carceral State: An American Story*, 51 ANNU. REV. ANTHROPOLOGY 49, 50 (2022).

75. Meiners, *supra* note 46, at 121, 122 (emphasis added).

76. *Id.* at 122.

77. MARIAME KABA & ANDREA J. RITCHIE, NO MORE POLICE: A CASE FOR ABOLITION 28 (2022). Relying on the work of Cedric Robinson, they defined “racial capitalism” “as an economic system premised on exploitation of a racialized other.” *Id.*

also encompasses logics, ideologies, practices, and structures, that invest in tangible and sometimes intangible ways in punitive orientations to difference, to poverty, to struggles to social justice and to the crossers of constructed borders of all kinds.”<sup>78</sup> In 2020, Martensen observed that the carceral state is “a state that values a carceral logic, which identifies a variety of social problems—like homelessness, poverty, racism, homophobia and immigration—as criminal problems that require a criminal solution.”<sup>79</sup> This “carceral logic and carceral control” is not just limited to the state, but is “embedded in the social fabric of the United States.”<sup>80</sup> However, she added some caveats to the definition, including that this is a “current” definition “[b]ased on the literature” that the paper reviewed, and that the carceral state concept is “constantly evolving.”<sup>81</sup>

The intra-category diversity is also apparent here, such as differences in opinions regarding the main logic that drives the carceral state. Brett Story and Judah Schept recognized the centrality of a punishment or criminal-based mindset in the carceral state concept, but then emphasized that a different primary motivation could be at work. They wrote instead that in many carceral environments, there are “an array of forces that in many cases have little to do with crime as a social phenomenon or punishment as an ideology.”<sup>82</sup> For example, the building of prisons in eastern Kentucky was driven not by “punishment, fears of crime, or even racial animus.”<sup>83</sup> It was instead driven by “diverse logics arising out of the relations of racial capitalism, specifically, for our purposes, the ideology of work and the fraught social relation of wage labor.”<sup>84</sup> Thus, in “mapping” out the carceral state, they called for a “decentering of punishment and a renewed focus on the production of poverty and wage labor.”<sup>85</sup> In contrast, in expounding on the role of the family regulation system in the carceral state, legal scholar Lisa Washington focused on the prevalence of the pathology logics within this system that justify state intervention and oppression of marginalized families.<sup>86</sup> Specifically, the pathology logics here consist of the creation or emphasis of “individual ‘deficits’” while ignoring structural issues that impact family safety, such as racism and poverty.<sup>87</sup> As drivers of carceral control, Washington recognized the necessity of

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78. *What is the Carceral State?*, DOCUMENTING CRIMINALIZATION AND CONFINEMENT (May 2020), <https://storymaps.arcgis.com/stories/7ab5f5c3fbca46c38f0b2496bcaa5ab0>.

79. Martensen, *supra* note 24, at 8.

80. *Id.* at 1.

81. *Id.* at 8.

82. Brett Story and Judah Schept, *Against Punishment*, 45 SOCIAL JUSTICE 10 (2018).

83. *Id.*

84. *Id.*

85. *Id.*

86. S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1533 (2023).

87. *Id.* at 1522, 1535–44.

dismantling these logics, in conjunction with “divest[ing] financially from punitive institutions,” in order to prevent their reappearance in other places.<sup>88</sup>

In summary, in the limited instances when the carceral state has been expressly defined or conceptualized, commentators have emphasized different features of what makes the carceral state a distinct concept. While the categories set forth here share similarities, they still illustrate the various understandings of the carceral state. The diversity of views becomes even more pronounced when examining its main characteristics.

## II. THE CHARACTERISTICS OF THE CARCERAL STATE

Even when the carceral state is not expressly defined, it is apparent that opinions on its main characteristics also vary. This Part highlights some of these differences by breaking down the aforementioned definitions, as well as examining contextual clues that accompany references to the carceral state. These traits are significant because they shed light on its ultimate meaning. While this is not a comprehensive study of all traits, this analysis again shows the different perspectives on what exactly the carceral state is. There are various opinions on its composition, discrimination, relationship with the prison-industrial complex, size, form, and age.

### A. Composition

What is the carceral state actually made of? There are numerous answers to this question.<sup>89</sup> At one end of the spectrum, the carceral state appears to include all of society or most of it. For example, the carceral state represents the “carceral logic and carceral control” that “is in fact embedded in the social fabric of the United States.”<sup>90</sup> It is the intertwining of numerous state institutions, state agencies, and even non-state organizations, that punish and regulate the poor<sup>91</sup> or other targeted populations. On the other end of the spectrum, the carceral state expressly refers to the criminal system

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88. *Id.* at 1578. Washington made four recommendations: “(1) recognizing parental expertise, (2) divesting from pathologizing language and narratives, (3) investing in community knowledge, and (4) building legal and policy advocacy around community knowledge.” *Id.* at 1578–87.

89. In this section, the composition of the modern, contemporary carceral state will be considered. A historical take on the carceral state will be presented in a later section. See *infra* Part II.E.

90. Martensen, *supra* note 24, at 1.

91. Meiners, *supra* note 46, at 122.

itself,<sup>92</sup> or just a certain aspect or phenomenon of the criminal system, such as jails and prisons, or mass incarceration.

In addition to the multiple perspectives on its composition, there are numerous ways to approach this question from the outset. This section applies two approaches. First, it considers the specific systems and institutions that are within the carceral state. Second, it considers which state actors make up the carceral state. It should be noted that some constructions of the carceral state do not fall neatly into either of these approaches. For example, some of the explicit definitions from Part I allude to a nearly omnipresent carceral state. Nevertheless, this composition analysis again underscores the various ways in which it is conceptualized.

### 1. Systems and Institutions

One way to break down the composition of the carceral state is to consider the institutions and systems that are within it. In certain works about the carceral state, the term refers to the criminal legal system, or even more narrowly, a specific aspect of it. Other writings about the carceral state include all, or nearly all state institutions and systems, and even non-state ones. The first section will address criminal and quasi-criminal systems and institutions, and the second section will address civil and social systems and institutions.

#### a) Criminal and Quasi-Criminal

Perhaps the easiest and least-controversial place to start is the criminal legal system. It is widely accepted that this system, including its institutions, laws, policies, processes, practices, and punishments, is part of the carceral state. Many of the express definitions of the carceral state rely on criminal terms and ideas, such as criminality, prisons, punishment, policing.<sup>93</sup>

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92. See *supra* note 48. The labels “criminal justice system,” “criminal legal system,” and “criminal system” also have varied meanings. See, e.g., Benjamin Levin, *After the Criminal Justice System*, 98 WASH. LAW. REV. 899 (2023) [hereinafter Levin, *After the Criminal Justice System*]. Also, the idea that there is one coherent, unified criminal “system” is disputed. See, e.g., Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419 (2018).

93. See, e.g., Khan, *supra* note 74, at 50 (“The carceral state as “governmentality that relies on institutionalized means of *punishment* and surveillance (including *mass incarceration*), particularly of targeted populations.”) (emphasis added); Tapia, *supra* note 78 (“Yes, the carceral state encompasses the formal institutions and operations and economies of the *criminal justice system* proper, but it also encompasses logics, ideologies, practices, and structures that invest in tangible and sometimes intangible ways in punitive orientations to difference, to poverty, to struggles to social justice and to the crossers of constructed borders of all kinds.”) (emphasis added); Ristroph, *Second Amendment*, *supra* note 14, at 208–09

Even scholars who argue against the dominant “criminal justice logic”<sup>94</sup> or punishment mindset<sup>95</sup> still recognize that the carceral state concept is currently entangled with and justified by criminal language and thought.<sup>96</sup> Also, even if they present a different framing to understand the carceral state, they still seek to diminish or abolish criminal institutions, such as prisons.<sup>97</sup>

Therefore, it appears that the carceral state concept partially, or in some constructions, wholly includes criminal matters. Yet, even within this large criminal umbrella, there are nuanced disagreements. For example, scholars disagree on which aspects of the criminal system are actually part of the carceral state, and which features contribute most to it.

For example, scholars have various takes on the primacy, or even the exclusivity of jails, prisons, and other places of confinement in the carceral state concept. As already stated, scholars observed in some instances the term “penal state” is distinguished from “*carceral* state” because the latter refers exclusively to “only that which *is formally* carceral: jails and prisons.”<sup>98</sup> Others equate the carceral state to the phenomenon related to these institutions, such as mass incarceration. Mass incarceration is often cited as the most apparent evidence—the Exhibit A—of either the existence of a carceral state in the United States, or that the United States is a distinctive carceral state.<sup>99</sup>

Meanwhile, other scholars de-emphasize or de-center jails, prisons, and imprisonment by highlighting other forms of controls and punishments from the criminal system or by clumping them all together. Michelle Alexander

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(“The carceral state encompasses all of what has long been called “the *criminal justice system*.”; A carceral state is “one that uses *criminality* to rationalize and naturalize the unequal distribution of political power and social goods.”) (emphasis added). See also Ristroph, *Curriculum*, *supra* note 38, at 1706 (“The term reflects a shift in the use of *criminal law* so profound that the very character of the political regime is altered.”) (emphasis added).

94. The authors here wrote that a “‘criminal justice’ logic” includes the “intellectual disciplines rationalizing and promoting theories of “crime” (criminology) and responses to it (criminal justice) in addition to their role in training violence workers.” Michael J. Coyle & Judah Schept, *Penal Abolition Praxis*, CRITICAL CRIMINOLOGY 319, 320 (2018).

95. Story & Schept, *supra* note 82, at 10.

96. See Coyle & Schept, *supra* note 94, at 319–20.

97. See Story & Schept, *supra* note 82, at 10.

98. Rubin & Phelps, *supra* note 1, at 424 (first emphasis added).

99. See Gottschalk, *Dismantling the Carceral State*, *supra* note 10, at 1693–94 (referring to the millions of individuals incarcerated and under other forms of penal supervision, and the observing that the “incarceration rate has accelerated dramatically, increasing more than five-fold between 1971 and 2000” and the rate is now “five to twelve times the rate of other industrialized nations.”); KADISH, ET. AL., *supra* note 5, at 5–8 (referring to the “sweep of America’s carceral state” and discussing mass incarceration); Marie Gottschalk, *Bring It On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 559–60 (2015).

observed that “we could slash the number of people in . . . prisons but still manage to increase the size of the carceral state” through processes such as probation, house arrest, and e-monitoring.<sup>100</sup> Legal scholar Naomi Murakawa wrote that “[a]s the infrastructure of criminalization, the carceral state includes police, criminal courts, probation and parole, criminal records databases and risk-assessment tools, brick-and-mortar incarceration, and ‘e-carceration’ with electronic shackles”<sup>101</sup>—and its “bedrock legitimacy” is largely unchallenged.<sup>102</sup> Gottschalk wrote that “a tenacious carceral state has sprouted in the shadows of mass imprisonment and has been extending its reach far beyond the prison gate. It includes not only . . . jails and prisons, but also the far-reaching and growing range of penal punishments and controls that lie in the never-never land between the gate of the prison and full citizenship.”<sup>103</sup>

However, even with these differences, there is a general understanding that that which is criminal is included in the carceral state concept. Also, while it is important to recognize that some legal scholars are challenging the primacy or exceptionalism of criminal law,<sup>104</sup> they are still not arguing for the exclusion of the criminal legal system or criminal matters from the carceral state concept.

In addition to the criminal system (including its various institutions and processes), it is also common for quasi-criminal systems, such as the

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100. Michelle Alexander, *Foreword to MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS*, at ix, xii–xiii (2020) (emphasis omitted).

101. Naomi Murakawa, *Mass Incarceration Is Dead, Long Live the Carceral State!*, 55 TULSA L. REV. 251, 251–52 (2020).

102. *Id.* at 251.

103. GOTTSCHALK, CAUGHT, *supra* note 61, at 1.

104. Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1385 (2022) [hereinafter Levin, *Criminal Law Exceptionalism*] (questioning whether criminal law is not exceptional, but merely “illustrative” of “the state itself or, at least, a set of power relations that define the U.S. political economy”). Levin relied on Ristroph’s three categories of exceptionalism to explain the current exceptionalism of criminal law: (1) “burdens exceptionalism”; (2) “subject-matter exceptionalism”; and (3) “operational exceptionalism.” *Id.* at 1391 (citing Alice Ristroph, *The Wages of Criminal Law Exceptionalism*, CRIM. L. & PHIL. (Oct. 12, 2021); Ristroph, *Curriculum*, *supra* note 38, at 1689 (here, Ristroph uses the term “exceptionalism” to “emphasize that teachers and scholars have depicted criminal law as an exception to a general norm; they have suggested that criminal law avoids or solves challenges that exist across all of the rest of law.”)).

immigration system<sup>105</sup> and the juvenile legal system,<sup>106</sup> to be housed within the carceral state. The label “quasi-criminal” indicates the criminal-esque nature of these systems. These quasi-criminal systems have similar institutions (e.g., courts, prosecutors’ offices, detention/confinement centers); processes (e.g., arrests, charges, adversarial proceedings) and consequences (e.g., probation/oversight, confinement, collateral consequences) as those in criminal law. For example, both youth and noncitizens who are confined are counted in many mass incarceration statistics, including the popular “Mass Incarceration: The Whole Pie” chart that the Prison Policy Initiative creates yearly.<sup>107</sup>

Overall, it is widely accepted that the carceral state is composed in part, or in whole, of criminal and quasi-criminal systems and institutions.

### b) Civil and Social

But what about civil and social systems and institutions? Are they too part of the carceral state? This question invites more controversy. To some scholars, it is pivotal to the carceral state concept that it includes these systems, institutions, and programs. Others disagree.

For example, Professor Elizabeth Hinton stressed that social welfare programs were fundamental in creating and growing the carceral state. These programs worked in conjunction with criminal processes and also functioned in similar ways against poor, minority communities.<sup>108</sup> The

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105. See e.g., Marie Gottschalk, *The Carceral State and the Politics of Punishment*, in THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY 205, 222 (Jonathan Simon & Richard Sparks eds., 2012) [hereinafter Gottschalk, *Carceral State and the Politics of Punishment*] (observing that “[a]nother growing and related area of scholarly and public interest is the criminalization of immigration policy”); Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594, 660–61 (2016) (“Analyzing immigration enforcement within the context of the broader *carceral* state not only helps expose the shortcomings in reform strategies . . . , but also helps provide an opening to produce both scholarship and advocacy that generate viable alternatives to the current criminal justice system” (emphasis added)); Meiners, *supra* note 46, at 122. (“Also important is the dramatic growth of immigration policing, detention, and the militarization of US borders.”).

106. Esther K. Hong, *The Federal Juvenile System*, 102 B.U. L. REV. 2025 (2022); Barbara Fedders, *The Anti-Parent Juvenile Court*, 69 UCLA L. REV. 746 (2022); HINTON, *supra* note 63, at 223 (observing that the federal Juvenile Justice and Delinquency Prevention Act of 1974 “critically shaped the rise of the carceral state”); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1932 (2000) (stating that juvenile delinquency is one “obvious example” of “arguably civil proceedings” that “have been recognized as criminal or quasi-criminal in nature”).

107. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POLICY INITIATIVE (MARCH 14, 2024), <https://www.prisonpolicy.org/reports/pie2024.html> (noting the 25,000 youth who are confined, and the 46,000 people in immigration detention).

108. HINTON, *supra* note 63, at 55–62.

“War on Poverty” went hand-in-hand with the War on drugs and crime.<sup>109</sup> There were twin goals of social welfare and control.<sup>110</sup> Similarly, the explicit definitions of the carceral state by Meiner, Martensen, and Tapia all recognize that the carceral state concept is unique *because* it includes these social institutions, some which are not even state-run. For example, the carceral state includes “the multiple intersecting state agencies and institutions—including not-for-profits doing the work of the state—that have punishing functions and effectively regulate poor communities, including child and family services, welfare/workfare agencies, public education, immigration, and health and human services.”<sup>111</sup> The carceral state is composed of “everyday *social* institutions all over the United States, and increasingly on a global scale” that have a “prison logic and practice.”<sup>112</sup> The carceral state “encompasses logics, ideologies, practices, and structures, that invest in tangible and sometimes intangible ways in punitive orientations to difference, to poverty, to struggles to social justice and to the crossers of constructed borders of all kinds.”<sup>113</sup> It is this network, continuum, intersection, and intertwining of social/civil *and* criminal systems, agencies, and institutions (some not even state-run), all working against certain targeted people under a similar logic, ideology, or function, that make up the carceral state.

This expansive narrative of the carceral state also finds support in the increasing usage of the concept in research about social and civil systems and institutions. Professor Dorothy Roberts wrote that the carceral state unleashes “state violence” and “benevolent terror” against families in the “name of child protection”<sup>114</sup> through the family policing system or family regulation system, more traditionally referred to as the child welfare system.<sup>115</sup> She is not alone in recognizing the carceral state’s control of this system.<sup>116</sup> Some scholars also place the education system within the carceral state, and not merely because of the school-to-prison pipeline, but

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109. *Id.*

110. *Id.*

111. Meiners, *supra* note 46, at 122.

112. Martensen, *supra* note 24, at 5 (emphasis added).

113. *What is the Carceral State?*, *supra* note 78.

114. DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 24 (2022) [hereinafter “ROBERTS, TORN APART”].

115. See, e.g., Brianna Harvey, et. al., *Reimagining Schools’ Role Outside the Family Regulation System*, 11 COLUM. J. RACE & L. 575 (2021) (using term “family regulation system”); ROBERTS, *supra* note 114, at 24 (using term “family policing system”).

116. See, e.g., Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 YALE J.L. & FEMINISM 37 (2022); Washington, *supra* note 86, at 1523 (“The pathology label legitimizes intrusive state intervention into marginalized families’ lives and reifies their subjugation.”).

because school themselves are places of violence, oppression, and inequality against marginalized children.<sup>117</sup> Hospitals too are sites of the carceral state, as policing logics and practices infiltrate hospital policy and practice.<sup>118</sup> The welfare system,<sup>119</sup> asylums,<sup>120</sup> and other mental-health institutions<sup>121</sup> also have been identified as systems and institutions of the carceral state.

Meanwhile, other conceptualizations explicitly exclude these social and civil institutions. At times, this distinction may appear minor, especially since there is a general acknowledgment that the carceral state still impacts and distorts these social and civil institutions and systems. But even if the practical effects may be the same, these technical differences matter in expounding on the concept of the carceral state.

For example, Gottschalk described the “metastasizing carceral state”<sup>122</sup> as threatening and distorting democratic institutions, such as elections and schools.<sup>123</sup> While the carceral state affects these democratic institutions, they are *not* yet the carceral state. Rather, the carceral state grows at the expense of social welfare programs.<sup>124</sup> This framing is also supported by the exchange between that which is inside the carceral state versus outside of it. For

117. See, e.g., Jyoti Nanda, *Web of Incarceration: School-Based Probation*, 21 NEV. L.J. 1117 (2021); Harvey, et. al., *supra* note 115, at 580–84; LaToya Baldwin Clark, *Barbed Wire Fences: The Structural Violence of Education Law*, 89 U. CHI. L. REV. 499, 508 (2022). See also Kerryn Dixon & Hilary Janks, *Location and Dislocation: Spatiality and Transformation in Higher Education in TRANSFORMING TRANSFORMATION IN RESEARCH AND TEACHING AT SOUTH AFRICAN UNIVERSITIES* 89, 91 (Robb Pattman ed., 2018) (observing that Foucault “argues that schools serve the same social functions as prisons and mental institutions to define, classify, control and regulate people”).

118. See, e.g., Ji Seon Song, *Policing the Emergency Room*, 134 HARV. L. REV. 2646 (2021) (describing policing in emergency rooms that result in their criminalization); Ji Seon Song, *Patient or Prisoner*, 92 GEO. WASH. L. REV. 1, 56 (2024) (stating that “characterizing hospitals’ role as part of a shadow carceral state downplays their importance and participation in the central work of mass incarceration, including the ultimate power of carceral authorities to take away liberty” and instead arguing that “[w]hen hospitals are viewed as part of the infrastructure of mass incarceration, or carceral infrastructure, it is not surprising then that they are sites of policing and criminalization”).

119. See, e.g., Kelly Lytle Hernández, et. al., *Introduction: Constructing the Carceral State*, 102 J. AM. HIST. 18, 21 (2015); HINTON, *supra* note 63, at 55–62.

120. Berger, *supra* note 8 (reviewing and supporting Anne E. Parson’s claim in her book *From Asylum to Prison: Deinstitutionalization and the Rise of Mass Incarceration After 1945* (2019) that asylums are part of the carceral state).

121. See, e.g., Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401 (2021); Simone Rowe & Leanne Dowse, *Disability, Race, and the Carceral State: Toward an Inclusive Decolonial Abolition in THE ROUTLEDGE INTERNATIONAL HANDBOOK ON DECOLONIZING JUSTICE* 268, 271 (Chris Cunneen, et. al., eds. 2023).

122. Marie Gottschalk, *Hiding in Plain Sight: American Politics and the Carceral State*, 11 ANNUAL REVIEW OF POLITICAL SCIENCE 237 (2008).

123. *Id.*

124. Gottschalk, *Carceral State and the Politics of Punishment*, *supra* note 105, at 224.

example, “[s]tates and countries that spend more on social welfare tend to have relatively lower incarceration rates.”<sup>125</sup> In certain states, there was a “direct dollar-for-dollar trade-off as budgets for higher education shrank and corrections budgets grew.”<sup>126</sup> Similarly, even as Professor Wendy Bach recognized that the carceral state and social welfare system “do not work entirely independently” but “are in fact, quite intertwined,” she still regarded them as distinct entities.<sup>127</sup>

Relatedly, Professors Katherine Beckett and Naomi Murakawa opined that the carceral state casts a long shadow, and creates a “shadow carceral state” where “civil, administrative, and criminal legal authority” all work together to “impose punitive sanctions.”<sup>128</sup> This shadow carceral state then “significantly enhance[s] carceral state power.”<sup>129</sup> The *shadow* carceral state does not appear to be the *actual* carceral state, but the two are surely working together. The shadow is still created by and attached to the carceral state, even if it is technically not the carceral state. These constructions still recognize the carceral state’s influence on civil or social systems and institutions, but it is the carceral state intruding upon them, stealing from them, distorting them, rather than them already being part of the carceral state.

Furthermore, this divide between that which is criminal/quasi-criminal versus social/civil is apparent when considering the normative proposals for dismantling the carceral state. Often, the antidote to the carceral state is to increase state funding for education, mental health, or welfare programs.<sup>130</sup> For example, calls to dismantle the carceral state are frequently accompanied by calls for funding and investment in “social safety net programs,” as well as “meaningful justice reinvestment to strengthen the social arm of the state and improve human welfare.”<sup>131</sup> Such proposals appear to assume that when it comes to the carceral state, there is a distinction between those institutions and systems that are criminal and quasi-criminal versus civil and social.

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125. *Id.*

126. *Id.*

127. Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809, 819 (2019) (“But these two systems, the carceral state on the one hand and the social welfare system on the other, do not work entirely independently.”). Bach relied on Janet Moore’s definition of the carceral state. See Moore, *supra* note 65 and accompanying text.

128. Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEORETICAL CRIMINOLOGY 221–44 (2012).

129. *Id.*

130. See, e.g., Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 471 (2018).

131. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015).

This debate need not be resolved here. For now, one of the key takeaways from this breakdown is that there are various views on which systems and institutions compose the carceral state.

## 2. State Actors

Another way that scholars have considered the composition of the carceral state is to list the specific categories of state actors who work for it. This approach also introduces further insights and perspectives on the composition of the carceral state that can be overlooked in an institution or system analysis.

The most prominent example of this breakdown is the one done by Rubin and Phelps. Relying on the approach by David Garland, they identified the various categories of “agents who constitute the state (rather than treating the state as a single actor).”<sup>132</sup> Similar to Garland, they included the following state actors: “police and court actors funneling individuals into the criminal justice system; legislators and other political elites shaping the state’s legal code; and the institutional actors responsible for implementing punishment.”<sup>133</sup> In addition to this list, they also included: “front-line workers who supervise, assign, and mete out punishment (including police, prosecutors, judges, wardens, and parole officers), although [their] focus remains on elite rhetoric and the macro-level outcomes produced by those front-line workers.”<sup>134</sup>

Their main purpose in doing this work was to emphasize the fractured and fragmented nature of the state—due in large part to the different environments, contexts, preferences, and/or conflicts among state actors—and to argue against a single, coherent, unified state.<sup>135</sup> And while they explicitly used the term “penal state” in this analysis, it is still very relevant to the carceral state. As they acknowledged, the penal state and carceral state are often used as interchangeable terms.<sup>136</sup> Moreover, their construction of the term “penal state” (e.g., a “popular way of referring to a variety of criminal justice and adjacent institutions, actors, and activities”)<sup>137</sup> is what many scholars would refer to as the carceral state.<sup>138</sup>

Hinton likewise acknowledged that the traditional definition of the carceral state was composed of specific state actors who worked in the

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132. Rubin & Phelps, *supra* note 1, at 428.

133. *Id.* (citing David Garland, *Penalty and the Penal State*, 51 *CRIMINOLOGY* 475–517 (2013)).

134. Rubin & Phelps, *supra* note 1, at 428.

135. *Id.* at 428–29.

136. *Id.* at 423.

137. *Id.* at 426.

138. See *e.g.*, *supra* notes 61–65 and accompanying text.

criminal legal system: “the police, sheriffs, and marshals responsible for law enforcement; the judges, prosecutors, and defense lawyers that facilitate the judicial process; and the prison officials and probation and parole officers charged with handling convicted felons.”<sup>139</sup> Her work aimed to expand this traditional idea of the carceral state to include social programs.

This state-actors approach to breaking down the carceral state stands in stark contrast to other constructions. Under this state-actors approach, it is much easier to separate the carceral state from non-state and irrelevant state actors, and to recognize the differences among the applicable state actors, thus making the carceral state appear less cohesive. Meanwhile, other conceptualizations of the carceral state do not fit within this state-actors framing. The carceral state cannot be separated from society writ large, much less broken down into specific types of state actors. Rather, the carceral state appears as a main character that has a more cohesive function and goal. Also, rather than tabulating state actors, the expansive version can include even non-state organizations, and highlight that the intersecting connections between state and non-state institutions and organizations are pivotal to understanding the composition of the carceral state.

### B. *Racism, Discrimination, Inequality*

A prominent feature of the carceral state is the discrimination that it creates or perpetuates. It is rare for discussions about the carceral state to not include at least some acknowledgment of how certain groups of people are discriminated against due to their race, class, disability, or other identities by the carceral state or within the carceral state. This discrimination also appears to be a key reason that the carceral state remains such a negative term and concept.<sup>140</sup> Yet, even though there is wide agreement that racism, discrimination, and inequality are tethered to the carceral state, opinions vary on *why* the carceral state discriminates and *who* its primary targets are.

#### 1. Reasons

For some commentators, the very essence and purpose of the carceral state—the reason for its existence—is to discriminate and create inequality in society. Sociologist and criminologist Tony Platt described the “economic, racial, and gendered prejudices of the carceral state” as “not occasional and erratic but its lifeblood.”<sup>141</sup> The carceral state has

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139. HINTON, *supra* note 63, at 2. See also Shenk, *supra* note 63.

140. As explained in Part III.B, those who rely on the carceral state construct agree that the carceral state must be dismantled.

141. TONY PLATT, BEYOND THESE WALLS: RETHINKING CRIME AND PUNISHMENT IN THE UNITED STATES 53 (2019). Of note, Platt’s early work on the child-saving movement,

“a critically important role in legitimating and preserving inequality[.]”<sup>142</sup> Likewise, Khan’s definition included the “punishment and surveillance . . . particularly of *targeted* populations.”<sup>143</sup> Tapia’s concept of the carceral state highlighted the “punitive orientations to difference, to poverty, to struggles, to social justice and to the crossers of constructed borders of all kinds.”<sup>144</sup> In other words, the carceral state punishes “difference, . . . poverty, . . . struggles,” and efforts to make society more equal and just.<sup>145</sup> It bears down on those who “cross” “constructed borders.”<sup>146</sup> In all of these examples, the carceral state maintains a divide between those who are deemed acceptable and those who are not.

This sentiment is common; it has appeared in many writings about carceral systems, including the criminal system. For example, in describing the criminal system as a means to “control African-Americans and devalue their lives,” legal scholar Paul Butler concluded that, “the system is working the way it is supposed to.”<sup>147</sup> That the carceral state writ large punishes, oppresses, surveils, and harms a certain segment of the population—while ignoring or even benefitting other segments of the population—*that* is the very purpose and point of the carceral state. The inequality and discrimination are not unintentional byproducts; they are the goal.

Other analyses, however, present a slightly different perspective. Again, there is very little disagreement that the carceral state discriminates and perpetuates inequalities. For example, it is rare for discussions about mass incarceration—which is often associated with the carceral state—to not recognize that the people who are incarcerated are disproportionately black, brown, and/or poor.<sup>148</sup> Racism and other forms of discrimination are also mainstays in other systems that have been tied to the carceral state,

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child-savers, and the juvenile legal system dispelled their benign origin story and instead established a narrative about their punitive and oppressive control over children. ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 119 (Rutgers Univ. Press Expanded 40th Anniversary ed., 2009) (1969). Platt’s then-controversial analysis is now considered foundational and seminal in the study of the juvenile legal system. See Miroslava Chávez-García, *In Retrospect: Anthony M. Platt’s The Child Savers: The Invention of Delinquency*, 35 *REVIEWS AM. HIST.* 464, 464 (2007).

142. PLATT, *BEYOND THESE WALLS*, *supra* note 141, at 244.

143. Khan, *supra* note 74, at 50 (emphasis added).

144. Tapia, *supra* note 78.

145. *Id.*

146. *Id.*

147. Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 *GEO. L.J.* 1419, 1469 (2016).

148. See, e.g., Gottschalk, *Dismantling the Carceral State*, *supra* note 10, at 1694–95; Hernández et al., *supra* note 119, at 18.

including the juvenile legal system,<sup>149</sup> the immigration enforcement system,<sup>150</sup> the family regulation system,<sup>151</sup> and the education system.<sup>152</sup>

But in some accounts of the carceral state, its intent or *mens rea* is different. To borrow from the four mental states from the Model Penal Code of criminal law, its discriminatory effects appear less in the realm of purposely or knowingly, and more in the reckless or negligent mindset.<sup>153</sup> Moreover, in some framings, the carceral state does not have a singular mental state, or even a singular motivation or interest. There are instead many intents, motivations, interests because the carceral state is composed of numerous state actors, institutions, and agencies. There is a lack of a singular, overarching intent or purpose by “*the*” carceral state to discriminate or oppress certain groups of people.

For example, while Gottschalk acknowledged that “policies of mass imprisonment are undeniably about race and social control,”<sup>154</sup> she observed that “the United States did not end up with the carceral state merely because racial cleavages have been so central to American political development.”<sup>155</sup> Gottschalk’s framing of the carceral state here is limited to penal policies and in particular, the “unprecedented nature of the incarceration boom in the USA since the 1970s.”<sup>156</sup> She wrote that the “creation of the carceral state was not merely the latest chapter in a book that began with slavery and moved on to convict leasing, Jim Crow, and the ghetto to control African-Americans and other ‘dangerous classes.’”<sup>157</sup> While noting that there were similarities between these historic institutions and the carceral

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149. See, e.g., Kristin Henning, *The Challenge of Race and Crime in a Free Society: The Racial Divide in Fifty Years of Juvenile Justice Reform*, 86 GEO. WASH. L. REV. 1604 (2018); KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* (2021); Namita Tanya Padgaonkar, Amanda E. Baker, Mirella Dapretto, & Adriana Galván, *Exploring Disproportionate Minority Contact in the Juvenile Justice System Over the Year Following First Arrest*, 31 J. RESEARCH ON ADOLESCENCES 317 (2020).

150. See, e.g., Robert Koulish & Kate Evans, *Punishing with Impunity: The Legacy of Risk Classification Assessment in Immigration Detention*, 36 GEO. IMMIGR. L.J. 1, 67 (2021).

151. See, e.g., ROBERTS, *TORN APART*, *supra* note 114; Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL’Y REV. 217, 258 (2022).

152. See, e.g., Baldwin Clark, *supra* note 117; Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education Is More Than Just A Tort*, 96 NW. U. L. REV. 99 (2001).

153. See MODEL PENAL CODE § 2.02.

154. See, e.g., GOTTSCHALK, GALLOWES, *supra* note 10, at 15.

155. *Id.* at 24–25. See also Gottschalk, *Dismantling the Carceral State*, *supra* note 10, at 1705 (“In short, the construction of the carceral state was the result of a complex set of historical, institutional, and political developments. No single factor explains its rise, and no single factor will bring about its demise.”).

156. GOTTSCHALK, GALLOWES, *supra* note 10, at 15.

157. Gottschalk, *Carceral State and the Politics of Punishment*, *supra* note 105, at 208.

state, she also highlighted material differences.<sup>158</sup> She observed that “[t]he country’s racial divide both thwarted and facilitated the establishment of the carceral state.”<sup>159</sup> This framing is different from other framings, which would hold the carceral state responsible for this “racial divide” to begin with.

Fear and neglect (as opposed to discriminatory intent alone), also contribute to the inequality and overall nonsensicalness in the carceral state. As Rachel Barkow observed, the “politics of fear” and lack of “institutional checks” led to the irrational and discriminatory behavior reflected in the criminal legal system, and thereby the carceral state.<sup>160</sup> She observed that “[c]ase by case, statute by statute, the carceral state metastasized, without anyone looking to see whether it made any sense overall or even policy by policy.”<sup>161</sup> As an example, various state actors at different points in history weaponized the politics of fear, based on racism or other forms of bias,<sup>162</sup> to create “irrational policies”<sup>163</sup> that were then carried out in an irrational and discriminatory manner.<sup>164</sup> In other instances as legal scholar David Jaros explained, it is cognitive biases, such as cultural cognition,<sup>165</sup> that lead to “flawed coalitions”<sup>166</sup> between opposing political parties to pass laws and policies that grow the carceral state, even when these laws go against some parties’ interests and values.<sup>167</sup>

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158. *Id.*

159. *Id.* at 209. Gottschalk explained that “racial, ethnic and regional divisions” throughout America’s history sometimes blocked the “development of criminal justice institutions, especially at the federal level[.]” *Id.*

160. RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 140–41 (2019) [hereinafter, BARKOW, POLITICS].

161. *Id.* at 140.

162. *Id.* at 108, 112. As one example, racial bias skews media coverage of crime, which in turn influences elections of “legislators, . . . sheriffs, judges, and prosecutors in most jurisdictions.” *Id.* at 111.

163. *Id.* at 140.

164. *Id.* at 2, 4, 15.

165. David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1476 (2014) (defining cultural cognition as “individuals’ tendency ‘to conform their perceptions of risk and other [factual beliefs] to their cultural worldviews’”) (quoting Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 23 (2011)).

166. Jaros, *supra* note 165, at 1476–77 (identifying three examples of “flawed coalitions”: “(1) when the parties possess incompatible long-term goals; (2) when powerful cultural cues are embedded in the proposed policy; and (3) when the parties delegate future resolution of contentious aspects of the policy to third parties.”).

167. As examples, Jaros analyzes the “flawed coalitions” that led to the passage of mandatory federal sentencing guidelines under the Sentencing Reform Act of 1984, as well as the problem-solving court movement. *Id.* at 1489–1516. Problem-solving courts perpetuate discriminatory practices and grow the carceral state. *See, e.g.*, Bach, *supra* note 127, at

That the carceral state creates or perpetuates inequality based on race, class, or other identities, is acknowledged far and wide. But the underlying intent and motivation for this inequality and discrimination differ. For some commentators, the very purpose of the carceral state, the reason for its existence, is to discriminate and create inequality against certain people. From this perspective, the carceral state has a single, unified, malicious purpose. Other framings acknowledge the varied, and even conflicting, intents, motivations, and interests of numerous state actors, agencies, and institutions of the carceral state over time. While undoubtedly, some of these state actors were driven by racism or other forms of discrimination, other state actors may not have been. They cannot be easily stitched together, and the “why” behind the pervasive discrimination or inequalities against certain groups of people is much more complicated. There are differing perspectives and reasons given for the discrimination tied to the carceral state.

## 2. Primary Targets

In addition to the differing reasons for the discriminatory or unequal treatment, there are also various viewpoints on the primary targets of the carceral state. Many scholars recognize that certain groups of people are disproportionately affected by the carceral state’s oppressive punishment, regulation, and/or surveillance. These include racial minorities, nonwhite noncitizens, people with disabilities, and the poor. For example, according to Platt, it was the carceral state that maintained and perpetuated slavery, the genocide of Native Americans, the separation of families, and the violence against immigrants.<sup>168</sup> As noted in the Kadish criminal law casebook, the “sweep of America’s carceral state” is largely comprised of those from the “most disadvantaged segments of the population.”<sup>169</sup> As evidenced by research from the National Research Council (within the National Academy of Sciences), those who are incarcerated are “mainly minority men under age 40, poorly educated” and often have “drug and alcohol addiction, mental and physical illness, and a lack of work preparation or experience.”<sup>170</sup>

Some scholars bring to the forefront the carceral state’s mistreatment of certain groups of people in order to reveal an important insight or understanding of the carceral state itself. There is also an increased awareness that the carceral state especially harms those with intersectional

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827–29; Shreya Subramani, *Productive Separations: Emergent Governance of Reentry Labor*, 47 *FORDHAM URB. L.J.* 941, 947 (2020).

168. PLATT, *supra* note 141, at 14, 19, 61.

169. KADISH, ET. AL., *supra* note 5, at 2, 7.

170. *Id.* at 2–3.

identities.<sup>171</sup> For example, some scholars emphasize the carceral state's discrimination by race or ethnicity. As Jonathan Simon observed about the carceral state, from the very founding of our country "the organization of legal authority—prosecutors and police—at the local level, has been an outgrowth of the need for a race-based system of social control" to legally defend "whiteness, whether against black, Mexican, Chinese, or Native American peoples as needed by location."<sup>172</sup> Michael Coyle described today's "criminal justice" and penal infrastructure as just another iteration of the "white supremacy, colonialism, slavery, and racial capitalism"<sup>173</sup> of "the inhumanity, terror, and oppression that is the carceral state."<sup>174</sup>

Some scholars are more specific, highlighting the particular mistreatment of certain nonwhite people, especially Black and Indigenous people, to reveal a fundamental insight into the carceral state itself. As Martensen noted, many "[c]arceral state studies amplify that disproportionately, people of color, especially Black people, are targets of the Carceral State."<sup>175</sup> Some abolitionists "trace the roots of today's carceral state to the racial order established by slavery."<sup>176</sup> According to some, prison and slavery both "defined the boundaries of citizenship" and are therefore "two sides of the same coin."<sup>177</sup> During the antebellum period, Black and Indigenous people were technically outside of prisons, but they suffered even more "brutal and capricious physical punishments" than the poor Whites who were in prisons.<sup>178</sup> After the abolition of slavery, there was "mass imprisonment of the formerly enslaved and of indigenous populations and non-European immigrants on an unprecedented scale."<sup>179</sup> Jackie Wang too emphasized that racial capitalism is inherent in the carceral state and profits off people of color, particularly Black people.<sup>180</sup> Aya Gruber underscored the historic and present-day suffering of Native and Indigenous people to describe "[t]he American carceral state" as an "archetypal colonial

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171. Martensen, *supra* note 24, at 3; Simone Rowe & Leanne Dowse, *Disability, Race, and the Carceral State*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK ON DECOLONIZING JUSTICE 268, 270 (Chris Cunneen et al., eds., 2023).

172. Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America's Peculiar Carceral State and Its Prospects for Democratic Transformation Today*, 111 NW. UNIV. L. REV. 1625, 1636–37 (2017).

173. Michael J. Coyle, *Transgression and Standard Theories: Contributions Toward Penal Abolition*, 26 CRITICAL CRIMINOLOGY 325, 325 (2018).

174. *Id.* at 326.

175. Martensen, *supra* note 24, at 3.

176. Roberts, *Abolition*, *supra* note 39, at 19.

177. Hernández et al., *supra* note 119, at 21.

178. *Id.*

179. *Id.*

180. JACKIE WANG, CARCERAL CAPITALISM (2018).

institution.”<sup>181</sup> Its development “has everything to do with confinement of Native people.”<sup>182</sup> This “colonial nature” was then carried out in the carceral state’s other practices throughout history, including the enslavement of Black people, creation of Black codes, and modern policing practices.<sup>183</sup>

Other scholars place people with disabilities within the primary victims of the carceral state’s abuse. Disability scholars Simone Rowe and Leanne Dowse wrote that people with disabilities “have always been primary among the intended targets of the colonial carceral machine.”<sup>184</sup> The longstanding “mass” institutionalization of people with disabilities was “deeply entwined with the development of the penal system and both are central in the creation of the carceral state.”<sup>185</sup> These include “early poorhouses, asylums, hospitals, institutions, or later in prisons.”<sup>186</sup> Black people with disabilities were treated even worse.<sup>187</sup>

Poor people also have been key targets of the carceral state. In writing about people with disabilities, Rowe and Dowse also recognized that, “poverty . . . has remained a constant throughout the history of the carceral state.”<sup>188</sup> In other words, those who are poor have always been mistreated by the carceral state. Hinton’s framing of the carceral state identifies our country’s “War on Poverty” as pivotal to the carceral state’s creation.<sup>189</sup> Meiners’s explicit definition of the carceral state incorporates the targeting of “poor communities.”<sup>190</sup>

Furthermore, an increasing number of carceral state scholars are relying on the theory of intersectionality to argue how people who have more than one targeted identity, especially race *and* “other social identities, like gender, sexuality, class, ability and perceived documentation status, and/or religion,” are oppressed by the carceral state.<sup>191</sup>

The harms of the carceral state are not distributed equally. Certain individuals, particularly racial and ethnic minorities, the poor, the disabled, or those with intersectional identities, are disproportionately affected by its

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181. Aya Gruber, *Colonial Carceral Feminism in THE ROUTLEDGE INTERNATIONAL HANDBOOK ON DECOLONIZING JUSTICE* 235, 235-39 (Chris Cunneen et al., eds., 2023).

182. *Id.* at 237 (quoting Luana Ross, *Settler Colonialism and the Legislating of Criminality*, 40 AM. INDIAN CULTURE AND RSCH. J., 1, 1 (2016)).

183. Gruber, *supra* note 181.

184. Rowe & Dowse, *supra* note 171, at 271.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. HINTON, *supra* note 63.

190. Meiners, *supra* note 46, at 122.

191. Martensen, *supra* note 24, at 3 (citing various scholars’ works on the pronounced effects of the carceral state on people of color who also identify or are identified as LGBTQ, non-citizen, young, poor, Muslim, or disabled).

policies and actions. The fact that so many prominent scholars recognize or even foreground the carceral state's discriminatory behavior suggests that discrimination and inequality are fundamental elements of the carceral state concept. If this holds true, it is still likely that differences in the specifics of *why* the carceral state discriminates and *who* its primary targets are will continue to persist.

### C. Prison-Industrial Complex

Another difference in opinion pertains to the carceral state's relationship with the prison-industrial complex. Not all scholars' works recognize a relationship between the two. This may signify that some conceptualizations of the carceral state do not depend on the prison-industrial complex, or perhaps, that it is not a necessary component to fully understand it.<sup>192</sup>

But even among scholars who do expressly write about the prison-industrial complex and the carceral state together, their associations vary. For example, depending on the commentator, the prison-industrial complex is basically equivalent to the carceral state; or it is separate from the carceral state; or it is inside and thereby one part of the carceral state. Although all of these constructions recognize an intertwined, symbiotic relationship between the two, these distinctions are still material when considering the meaning of the carceral state.

In some commentary, the carceral state is equated with the prison-industrial complex and serves the same purpose in supporting the author's argument. In 2014, Meiners used the two terms "interchangeably" to explicate how the child "frames transactions" in the carceral space, even as she set forth distinct yet interconnected definitions for each term.<sup>193</sup> In 2020, Martensen recognized that various terms refer to the carceral state,

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192. This absence also does not necessarily mean that these scholars would disagree that the prison-industrial complex exists, or that there is some relationship between the prison-industrial complex and the carceral state.

193. Meiners, *supra* note 46, at 121. As for the prison-industrial complex, Meiners relied in part on Angela Davis's definition to define it as "the construction of prisons and detention centers as a perceived growth economy in an era of deindustrialization. It also comprises 'a set of symbiotic relationships among correctional communities, transnational corporations, media conglomerates, guards' unions, and legislative and court agendas.'" *Id.* at 121–22. The carceral state "highlight[s] the multiple intersecting state agencies and institutions—including not-for-profits doing the work of the state—that have punishing functions and effectively regulate poor communities, including child and family services, welfare/workfare agencies, public education, immigration, and health and human services." *Id.* at 122. It "alludes to how the logic of punishment shapes other governmental and institutional practices, even those not perceived as linked to prisons and policing." *Id.*

including the prison-industrial complex, and then proceeded to create a distinct definition of the carceral state.<sup>194</sup>

In another framing, the prison-industrial complex and carceral state are distinct, but they work very closely together. In 2022, anthropologist Aisha Khan distinguished the two terms when defining the general concept of “carcerality.”<sup>195</sup> The carceral state refers to “governmentality that relies on institutionalized means of punishment and surveillance (including mass incarceration), particularly of targeted populations.”<sup>196</sup> The prison-industrial complex, on the other hand, includes the “business interests that capitalize on prison construction” that resulted from the “consolidation of social welfare programs and crime control policies” and that “led others to approach the prison primarily as a core political institution rather than an economic one.”<sup>197</sup> These two concepts—the carceral state and the prison-industrial complex—together are the “basic incarnations” of carcerality.<sup>198</sup> Meanwhile, according to Khan, a “carceral culture” is “the extensive combined impact of the carceral state, the prison-industrial complex, and their enablers—the legal system, policing, and neoliberal racial capitalism.”<sup>199</sup> These components together—not solely the carceral state—lead to the “atmosphere in which everyone inside or outside of penal confinement is affected.”<sup>200</sup>

Similarly, Critical Resistance, an abolitionist organization, views the carceral state and the prison-industrial complex as “related but distinct concepts.”<sup>201</sup> The prison-industrial complex refers to the “symbiotic relationships between people, entities, and systems fueling the reliance on policing, incarceration, surveillance, borders, and the criminal justice apparatus.”<sup>202</sup> Meanwhile, the term carceral state “emphasize[s] the many ways criminalization, punishment, and different methods of social control form a core function of the state.”<sup>203</sup>

In another take, the prison-industrial complex is within the carceral state. Dorothy Roberts described the prison-industrial complex as an “aspect of the carceral state.”<sup>204</sup> She defined the prison-industrial complex as the

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194. Martensen, *supra* note 24, at 1.

195. Khan, *supra* note 74, at 50.

196. *Id.*

197. *Id.* at 50–51.

198. *Id.* at 50.

199. *Id.* at 58.

200. *Id.*

201. CRITICAL RESISTANCE, RESOURCE GUIDE FOR TEACHING AND LEARNING ABOLITION 3 (2021), [https://criticalresistance.org/wp-content/uploads/2021/08/CR\\_GuideforTeachingLearningAbolition-1.pdf](https://criticalresistance.org/wp-content/uploads/2021/08/CR_GuideforTeachingLearningAbolition-1.pdf).

202. *Id.*

203. *Id.*

204. Roberts, *Abolition*, *supra* note 39, at 9.

“expanding apparatus of surveillance, policing, and incarceration the state increasingly employs to solve problems caused by social inequality, stifle political resistance by oppressed communities, and serve the interests of corporations that profit from prisons and police forces.”<sup>205</sup> In addition to the prison-industrial complex, Roberts also identified the foster-industrial complex as another part of the carceral state.<sup>206</sup>

Other times, the relationship between the prison-industrial complex and the carceral state is not so clear, but the entanglement is still present. For example, Gottschalk separated the two concepts when she wrote that “the prison-industrial complex was not a central factor in constructing the carceral state.”<sup>207</sup> However, she acknowledged “it has become a significant factor in sustaining it today, as prison guards unions, private prison companies, and the suppliers of everything from telephone services to Taser stun guns press on local communities, states, and the federal government to maintain the carceral state.”<sup>208</sup> Under this theory, the prison-industrial complex was not pivotal in creating the carceral state, but now works to prop it up.

These descriptions recognize the relationship between the prison-industrial complex and the carceral state as a significant one. Yet, while this analysis provides further insight into the carceral state concept, it also adds to its complexity. The definitions of the prison-industrial complex are themselves varied,<sup>209</sup> and therefore, unsurprisingly, the ways that the prison-industrial complex and the carceral state interact are left open to many different interpretations.

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205. *Id.* at 6.

206. ROBERTS, TORN APART, *supra* note 114, at 25, 141–160. According to Roberts, the foster-industrial complex includes “[c]hild welfare agencies and the private companies” that collude and “profit off families not only by receiving government funds for taking children, but also by extracting payments and property from the very families they break up.” *Id.* at 148.

207. Gottschalk, *Dismantling the Carceral State*, *supra* note 10, at 1701.

208. *Id.* Gottschalk referred to the reporting of Silja J.A. Talvi for a “revealing glimpse of the wide range of companies and organizations that have a financial stake in the carceral state.” *Id.* at 1701 n.53. Describing the exhibitors at a conference hosted by the American Correctional Association, Talvi listed various goods and services that were being advertised in the prison industry, including “restraint chairs, tracking systems, drug-detection tools, suicide-prevention smocks and prison facility insurance,” internet and phone services, as well as “storage systems, money wiring, surveillance, security transport, fencing and prison medical packages.” Silja J.A. Talvi, *Cashing in on Cons*, IN THESE TIMES 16, 19 (Feb. 28, 2005). At the time of reporting in 2005, the prison industry was estimated to have a yearly revenue of \$50 billion. *Id.* at 17. According to recent figures, the entire criminal legal system and other systems of confinement are estimated to cost approximately \$182 billion a year. Wendy Sawyer & Peter Wagner, PRISON POL’Y INITIATIVE, *Mass Incarceration: The Whole Pie 2024* (Mar. 14, 2024), <https://www.prisonpolicy.org/reports/pie2024.html>.

209. This section shows that there is no overarching and single definition of the prison-industrial complex. For more analysis on the meaning and usage of the term, see Levin, *After the Criminal Justice System*, *supra* note 92, at 931–38.

*D. Size and Form*

On a related note, the prior analyses of the composition of the carceral state and its relationship with the prison-industrial complex also result in differing ideas on the size and form of the carceral state.

If what is unique about the carceral state concept is the intertwining and entangling of state, non-profit, and for-profit institutions and interests (including the prison-industrial complex), then the carceral state's size encompasses nearly all of society, and its form is akin to that of a net, web, or mesh.<sup>210</sup> Similarly, if the carceral state concept signifies a form of governance, then it includes "the entire political structure of a given nation, not simply a subset of state institutions."<sup>211</sup> In these framings, it is challenging to separate the carceral state from other parts of the United States as it impacts the whole country.

Meanwhile, if the carceral state is limited to only prisons or jails, or what is typically encompassed by the term mass incarceration, then the size of the carceral state is relatively smaller. It is also more definite as it can be comprised of the number of people who are imprisoned, and/or the number of certain state actors who are affiliated with jails or prisons.

Others emphasize a fragmented and fractured form of the carceral state. Rubin and Phelps identified which categories of state actors should be included in order to shatter the illusion that the penal state (but also applicable to the carceral state)<sup>212</sup> is a "single homogenous, unified, or coherent entity shaping punishment."<sup>213</sup> Their version of the state underscored the "conflict among those actors," especially over time.<sup>214</sup> This fractured version is also supported by past research that found that "penal power, policy, and decision making" involves "fragmentation, variation, and contestation."<sup>215</sup>

Tony Platt too noted the "fragmented" nature of the carceral state.<sup>216</sup> But his fragmentation is of a different type. It highlights the carceral state's ability to inhibit various state institutions and systems, not just penal or criminal ones. It is different from Rubin and Phelps's usage which underscores the lack of consensus between state actors or state agencies across different locations and time periods. His description instead highlights the many spaces that the carceral state occupies and controls.

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210. Meiners, *supra* note 46, at 122; ROBERTS, TORN APART, *supra* note 114, at 143–46; KABA & RITCHIE, *supra* note 77, at 28.

211. Ristroph, *Second Amendment*, *supra* note 14, at 209. *See also* Weaver & Lerman, *supra* note 67.

212. *See supra* Part II.A.2.

213. Rubin & Phelps, *supra* note 1, at 427.

214. *Id.* at 423.

215. *Id.*

216. PLATT, *supra* note 141, at 16, 21.

In another more creative description of the carceral state's form, Elizabeth Hinton compared it to an octopus. The "prison system" is the "head of the octopus of the carceral state."<sup>217</sup> And presumably, other forms of carceral control are its tentacles. All of these examples again underscore the various ways to measure and describe the carceral state's form and size. These descriptions also exemplify the diverse understandings of the carceral state concept.

### E. Age

The age of the carceral state is also contested. Many scholars do not provide any details that date the carceral state, and merely speak of it in present-day terms. But, for those who do, the age varies. As detailed below, some accounts of the carceral state assume that it is centuries old. But others explicitly describe the carceral state as a modern entity, arising sometime in the 1960s and 1970s. To the extent that it is discussed, the age of the carceral state matters because it influences how other traits of the carceral state are construed, such as the systems and institutions that create the carceral state. For example, historic institutions like slavery are often included in the more-ancient version of the carceral state. The age also speaks to the motivations behind the carceral state's discriminatory behavior or its target. As described in the next section, scholars may search for a throughline of motivations and purposes throughout generations.

On one end of the spectrum, the carceral state is hundreds of years old, existing at, or even before, the founding of America. For example, the carceral state carried out the genocide and oppression of Indigenous people throughout our country's history.<sup>218</sup> It is responsible for other historic atrocities, such as slavery and the dehumanizing treatment of noncitizens.<sup>219</sup> As Michael Coyle wrote, "the punitive power the carceral state daily wields with a penal system [is] inseparable from its past of slavery and colonialism."<sup>220</sup> Even as Jonathan Simon acknowledged that the "American carceral state in its inception was (and remains today) inseparable from . . . colonial projects," including slavery and abuse of Native Americans,<sup>221</sup> he asserted that its establishment solidified in the Reconstruction period.<sup>222</sup> He opined that although a "race-based system of social control" was needed and in existence "from the beginning of the Republic," it was primarily the "period after Reconstruction . . . perhaps more than the early Republic (including slavery

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217. Shenk, *supra* note 63.

218. Gruber, *supra* note 181, at 235, 237; PLATT, *supra* note 141, at 61.

219. PLATT, *supra* note 141, at 61–64.

220. Coyle, *supra* note 173, at 335.

221. Simon, *supra* note 172, at 1627–28.

222. *Id.* at 1637.

itself)” that sealed the “fate of the United States” as “an exceptional carceral state.”<sup>223</sup> While Simon did not provide an express definition of the carceral state, this particular project of his “explor[ed] the ‘twinning’ of the carceral state between its legal penal sphere and its police/prison sphere, which is a universal feature of the modern carceral state.”<sup>224</sup>

In contrast, and perhaps on the other end of the spectrum, other scholars describe a much younger carceral state, with the 1960s or 1970s serving as its decade of birth. While Coyle wrote about a historic carceral state in one piece,<sup>225</sup> in another piece with Judah Schept, they described the “rise of the carceral state as a response to various crises, including multiracial struggles for freedom in the 1960s and 1970s as well as growing surpluses of people and places produced by the changes wrought by neoliberalism.”<sup>226</sup> Hinton also traced the founding of the carceral state to the War Against Poverty programs in the Johnson administration in the 1960s.<sup>227</sup> Gottschalk, who limits the carceral state to more contemporary penal practices, wrote that the “creation of the carceral state was not merely the latest chapter in a book that began with slavery and moved on to convict leasing, Jim Crow, and the ghetto to control African-Americans and other ‘dangerous classes.’”<sup>228</sup> She cautioned against “[t]reating these institutions as one and the same” because it “minimize[d] the unprecedented nature of the incarceration boom in the USA since the 1970s.”<sup>229</sup> For example, the modern incarceration of Black men is more problematic than past forms of control and punishment; the number of black men incarcerated trounces the number of those who were under convict leasing in prison in the South.<sup>230</sup>

Yet, Gottschalk also acknowledged that “[a] number of historically embedded institutional developments laid the foundation for the construction of the carceral state,” and cited numerous examples from the mid-nineteenth-century and on.<sup>231</sup> She also described past institutions and practices in America as the “deep historical and institutional roots” of the carceral state.<sup>232</sup> In this telling, the carceral state arose in the 1960s or 1970s, even if its roots and groundwork were in place long before. It is a different framing than a fully-formed carceral state that operated for

223. *Id.* at 1636–37.

224. *Id.* at 1627.

225. Coyle, *supra* note 173.

226. Coyle & Schept, *supra* note 94, at 319.

227. Shenk, *supra* note 63; HINTON, *supra* note 63.

228. Gottschalk, *Carceral State and the Politics of Punishment*, *supra* note 105, at 208.

229. *Id.*

230. *Id.*

231. *Id.* at 207.

232. *Id.* See also Roberts, *Abolition*, *supra* note 39, at 19 (observing that some abolitionists find the “roots of the carceral state” in slavery).

hundreds of years, and transitioned into different institutions (slavery, prisons, etc.) throughout history.

The varying ages of the carceral state—from very old to relatively young—again underscore the diversity of this concept. These differences are meaningful as age is not merely a number but shapes how other traits of the carceral state, such as its composition and motivation, are construed. Analyzing these and other characteristics of the carceral state highlights both the inherent complexity and ambiguity of the concept.

### III. THEORETICAL AND PRACTICAL IMPLICATIONS

That there are so many views on the core traits and overall meaning of the carceral state carries significance for both its theoretical development and real-world application. This Part will first consider the theoretical implications and then the practical ones.

#### A. *Theoretical Implications*

As a starting point, there should be a shared understanding that there is currently no single, overarching, universal definition or theory of the carceral state. It is not merely that there are various definitions of the carceral state. Rather, there are divergent and even conflicting views on its core traits. Commentators should not merely assume that readers interpret the carceral state in the same way that they do, or vice versa.

Thus, to the extent that it is important to an argument to rely on a particular framing of the carceral state or to construct a trait a certain way, it should be done so expressly. However, there may also be deliberate choices to avoid explicitly defining it or its traits. That the term remains so open-ended, fluid, and undefined allows for some creativity and openness in its usage. One does not need to be confined to a particular construction or definition. After all, this undefined usage is pervasive and may be what makes the term so attractive to use.<sup>233</sup> This practice supports the work-in-progress approach that some deem necessary in expounding on the carceral state.

As for its theoretical development, there will likely be multiple versions of the carceral state. It may not be necessary—or even possible—to reconcile these divergent views or merge them into a single cohesive theory or definition. The varying opinions on its core traits,<sup>234</sup> as well as categories of definitions and conceptualizations of the carceral state<sup>235</sup> may eventually form the dividing lines between these distinctive theories.

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233. See *supra* Part I.

234. See *supra* Part II.

235. See *supra* Part I.B.

It may be helpful to consider the theorization of other terms and concepts to anticipate how the theorization of the carceral state may occur. Popular terms and concepts often encounter this same issue of multiple theories, meanings, interpretations, and categorizations throughout their decades of use. Even terms and concepts that are not readily associated with the carceral state, such as originalism,<sup>236</sup> access to justice,<sup>237</sup> and environmental justice<sup>238</sup> are ambiguous and diverse. This ambiguity and vagueness help to popularize the terms, bringing together a wide array of people.

Moreover, other terms and concepts that are often incorporated within the carceral state, such as mass incarceration,<sup>239</sup> prison-industrial complex,<sup>240</sup> the criminal system<sup>241</sup>—also have multiple meanings. Even if we analyze the most basic terms that lay the groundwork for the carceral

236. See, e.g., Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1245–54 (2019) (noting the “puzzling fact” that “there is substantial disagreement about what should count as “originalism,” and creating various terms to describe the different forms); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 246–47 (2009) (observing that “it has become virtually impossible today to define what exactly originalism entails” and that “originalism has become something of a moving target, evolving from speech to speech, opinion to opinion, and law review article to law review article”).

237. See, e.g., Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 532–33 (2013) (“One central problem in discussions about access to justice is a lack of clarity or consensus about what exactly the problem is.”); Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 497–500 (2014) (providing an overview of different theories of the access to justice, including broad and thin approaches); J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 1994–96 (2017) (writing that “[t]he phrase ‘access to justice’ means many things to many people” but that it often involves access to state courts); Katherine S. Wallat, *Reconceptualizing Access to Justice*, 103 MARQ. L. REV. 581, 625–26 (2019) (arguing against “conflating access to justice with access to courts” as it ignores the ways that lawyers through other means can solve problems that poor people encounter).

238. See, e.g., David Schlosberg, *Reconceiving Environmental Justice: Global Movements and Political Theories*, 13 ENV’T POL. 517, 517 (2004) (stating that various scholars in environmental political theory have tried to define environmental justice, but that “given movement demands, and the theoretical innovations of some social justice theorists, most theories of environmental justice are, to date, inadequate”); Ryan Holifield, *Defining Environmental Justice and Environmental Racism*, 22 URB. GEOGRAPHY 78, 79 (2001) (observing that even “[t]he terms environment and environmentalism are themselves notoriously ambiguous”).

239. See e.g., Frank Rudy Cooper, *Hyper-Incarceration as a Multidimensional Attack: Replying to Angela Harris Through the Wire*, 37 WASH. U. J.L. & POL’Y 67, 68–69 (2011) (noting that the more accurate term for describing incarceration in the United States is “hyper-incarceration” and not “mass incarceration” because the former term reflects that only certain types of people, such as Black, Latine, and poor people are incarcerated (citing Loïc Wacquant, *Racial Stigma in the Making of America’s Punitive State*, RACE, INCARCERATION, AND AMERICAN VALUES 57, 59 (2008)).

240. See, e.g., Part II.B.

241. See *supra* note 48 and accompanying text.

state—such as crime and deviance—there is a wide range of views. There is a “great kaleidoscope of theorems” on crime and deviance in criminology, and sociology of crime and deviance.<sup>242</sup> Each of these theories have their “separate way of seeing such conduct and . . . separate way of *not* seeing such conduct.”<sup>243</sup> Overall, “[c]rime and deviance cannot constitute a single problem with a single explanation. They are so significant that they have been forced to serve a multitude of purposes.”<sup>244</sup> For example, there is the theory of “radical criminology” which “speak[s] of the social harms wrought by the institutions of an inherently criminogenic capitalist society.”<sup>245</sup> There is the “control theory” which “depict[s] institutional restraints as indispensable to a properly conducted society.”<sup>246</sup> Meanwhile, “functionalism[] portrays deviance as an unrecognized and unintended buttress of social order, and what passes for disruption actually, and ironically, supplies control.”<sup>247</sup> Scholars state that this “lack of unity” should not be automatically regarded as a failure, but rather that an “exploration of the diversity of intellectual positions can be instructive.”<sup>248</sup> This “[c]onfusion” in theories “is an important phenomenon in itself and its very existence can emphasize special properties of deviance.”<sup>249</sup> As crime and deviance are entangled with discussions about the carceral state, it is natural that ideas surrounding the carceral state too are diverse and divergent.

Yet, there is also something very distinct and unique about the carceral state’s theoretical development. The vagueness and diversity of the concept itself communicate a larger message. For example, its critiques appear to claim that it is actually the carceral state that is deviant and criminal. Essentially, the carceral state is not acting the way that it should. It is violating higher laws, such as laws of equality, fairness, justice, human rights, and dignity. Therefore, it must be dismantled because it is not redeemable. But the exact ways in which the carceral state is criminal or deviant varies from one scholar to the next. These critiques thus provide valuable insights about the commentators themselves, including their underlying expertise, viewpoints, or principles.

Yet, this vagueness also has its costs. With increasing usage and varying interpretations, there is a risk that the concept can be weakened and become

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242. DAVID DOWNES, PAUL ROCK, & EUGENE MCLAUGHLIN, UNDERSTANDING DEVIANCE: A GUIDE TO THE SOCIOLOGY OF CRIME AND RULE-BREAKING 6 (7th ed. 2016).

243. *Id.*

244. *Id.*

245. *Id.* at 3.

246. *Id.* at 3–4.

247. *Id.* As an example, “[p]rostitution . . . is held to preserve marriage.” *Id.*

248. *Id.*

249. *Id.*

less effective.<sup>250</sup> There are also specific challenges in relying on the carceral state concept in the legal field. While the carceral state is increasingly appearing in legal writings, such as law school casebooks, legal scholarship, briefs, and court opinions,<sup>251</sup> it is not a legal term. If legal terms are known for their preciseness and definiteness, the term carceral state lacks that. For example, the law often relies on binary labels that carry significant consequences, such as civil *vs.* criminal; punishment *vs.* regulation; police power *vs.* *parens patriae* power. It matters that courts have labeled deportation as a civil penalty and not a criminal punishment,<sup>252</sup> and classified pretrial detention as a regulatory act, and not punishment.<sup>253</sup> Entire legal systems are built on the primary exercise of the state police power versus the state *parens patriae* power.<sup>254</sup>

The carceral state concept, however, often disregards these distinctions. In many of its analyses, legal labels, systems, and binary classifications are set aside, implying that there is not much of a difference between them.<sup>255</sup> By adopting the term carceral state, some scholars may be highlighting the fact that our systems, laws, and authorities not only fail to fulfill their duties, but also impose additional harms through analogous practices and methodologies. Benjamin Levin, for example, questioned the exceptionalism of criminal law in carrying out the carceral state's agenda, wondering if it is just another typical manifestation of the carceral state's

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250. As Jeremy K. Kessler and David E. Pozen observed, there is a “life cycle” of some of the most “influential public law theories in recent memory,” such as originalism, where the theory begins with “core commitments” that then become “increasingly complicated and compromised.” Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1821–24 (2016) (emphasis in original). For example, while in the beginning the term “‘originalism’ meant something fairly specific to its supporters and critics,” over time as the term became more popular, it “gradually became more complex, capacious, and even at times self-contradictory.” *Id.* at 1833–34.

251. See *supra* notes 5–6, 13–15 and accompanying text.

252. See, e.g., Aaron S. Haas, *Deportation and Double Jeopardy After Padilla*, 26 GEO. IMMIGR. L.J. 121, 121, 130 (2011); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 471–72 (2007); Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders As Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261, 2274, 2288 (2013); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 392, 412 (2006).

253. See, e.g., Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 373 (1990); Wendy R. Calaway, *Probable Cause Reform As Bail Reform*, 67 ST. LOUIS U. L.J. 295, 304–05 (2023); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1317 (2012).

254. See, e.g., Esther Hong, *A Reexamination of the Parens Patriae Power*, 88 TENN. L. REV. 277, 282–91 (2021) (explaining that the state juvenile system was created from the state *parens patriae* power, and not its police power).

255. See *supra* Parts I–II.

overall harmful behavior.<sup>256</sup> Alice Ristroph criticized the standard law school curriculum of criminal law for providing a veneer of legitimacy and rationality to our country's criminal legal system, when in reality, it is essentially a means for the carceral state to impose inequalities in society.<sup>257</sup> Again, perhaps this is what makes the term so effective and attractive, and why its understanding is so varied. It decenters the "exceptionalism" of certain legal systems as causing the most harm and it undermines the idea that our current laws or systems are rationally and justifiably implementing state surveillance, punishment, and social control.

The increasing reliance on the carceral state term and concept, especially by legal scholars, may serve to diminish the effectiveness and significance of legal terms and categories. Alternatively, they may merely be bringing attention to the fact that these labels and categories already lack meaningful significance. This may be both the challenge and the very point of the carceral state concept.

### B. Practical Implications: Dismantling the Carceral State

The diversity of the carceral state concept also has real-world, practical implications, particularly in relation to dismantling the carceral state. For all the diverse viewpoints that are within the definitions and descriptions of the carceral state, there is one dominant response to what should be done—it must be dismantled, deconstructed, and destroyed. But like the carceral state concept itself, there are various ideas on what it means to dismantle it and how to achieve that goal. Here, how the carceral state is framed, defined, and interpreted directly shapes the normative proposals that are made to dismantle it. While the vagueness of a term may be pivotal in bringing together diverse groups of individuals that are required to build political support for change in society, the ambiguity also risks undermining "grassroots claims" for "other political interests."<sup>258</sup> As Lawrence Solum observed in general, "Words and concepts matter, and not because conceptual clarity is more important than normative substance," but

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256. Levin, *Criminal Law Exceptionalism*, *supra* note 104, at 1385. See also GOTTSCHALK, *supra* note 105 and accompanying text.

257. Ristroph, *Curriculum*, *supra* note 38, at 1689–90.

258. For example, regarding the term "environmental justice," Ryan Holifield observed "the absence of limits on the kinds of issues" that this term "can address gives the term much of its rhetorical power" and helps to "mobilize communities with diverse grievances." Ryan Holifield, *Defining Environmental Justice and Environmental Racism*, 22 URB. GEOGRAPHY 78, 82 (2001). Its "vagueness" allows for it to be "extremely effective as populist political rhetoric." *Id.* However, at the same time, this absence of a "universal standard of justice" can also risk weakening "grassroots claims over those of other political interests." *Id.* (citing DAVID HARVEY, *JUSTICE, NATURE, AND THE GEOGRAPHY OF DIFFERENCE* (1996)). See also Jaros, *supra* notes 165–167 and accompanying text.

“because conceptual clarity brings normative substance to the fore.”<sup>259</sup> This is true of other terms and concepts with multiple meanings.<sup>260</sup> It also holds true here. The practical effects of such a diverse carceral state concept are more consequential than the theoretical ones.

With its pervasive reach and immense harms, the carceral state simply cannot be transformed into a “kinder, gentler carceral state.”<sup>261</sup> To those who rely on a carceral state construct, there is a shared sentiment that it must be “dismantl[ed]”<sup>262</sup> or abolished.<sup>263</sup> But scholars’ conceptions of dismantling differ and there is no single guide or roadmap for how to do so. Rather, both the meaning of dismantle and the path to dismantling depend largely on how the carceral state is framed from the outset. Take for example these three different interpretations of the carceral state—all largely dependent on a criminal-law framing—and how the meaning and process of dismantling are linked to the scholar’s initial outlook on the carceral state.

First, Barkow’s interpretation of the carceral state largely focuses on the irrationality of the operation of criminal law if the goal is public safety. She highlights the politics of fear and lack of institutional checks as the

259. *Solum*, *supra* note 236, at 1296.

260. For example, the vagueness of the terms originalism, access to justice, and environmental justice, *see supra* notes 236–250 and accompanying text, also have presented challenges in the implementation of ideas associated with these terms. *See, e.g.*, Reva B. Siegel, *Memory Games: Dobbs’s Originalism As Anti-Democratic Living Constitutionalism-and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1143–44 (2023) (acknowledging the various meanings of originalism, and creating another definition of originalism as a “movement-identified, goal-oriented political practice” in order to better understand the Supreme Court’s ruling in *Dobbs v. Jackson Women’s Health Org.*, and also find ways to counter the anti-democratic consequences of *Dobbs*); Peter Salem & Michael Saini, *A Survey of Beliefs and Priorities About Access to Justice of Family Law: The Search for A Multidisciplinary Perspective*, 17 CARDOZO J. CONFLICT RESOL. 661, 664–65 (2016) (stating that “[t]he ambiguity surrounding the term access to justice creates challenges in developing workable solutions to meet the needs of litigants” and providing examples of various approaches to meet the problems identified with access to justice); Emily S. Taylor Poppe, *Institutional Design for Access to Justice*, 11 UC IRVINE L. REV. 781, 789–90 (2021) (calling for “new institutions and the reorientation of others” to align with a “new definition of access to justice” and noting that “earlier definitions of access to justice focused on access to courts, lawyers, and formal law” and therefore the “civil justice system” was held largely responsible for this need, but was eventually found to be insufficient to provide “justice more broadly”); Schlosberg, *supra* note 238, at 517–18 (critiquing that “most theories of environmental justice are, to date, inadequate” and are also “insufficient in practice”).

261. Murakawa, *supra* note 101, at 260 (highlighting Issa Kohler Hausmann’s critique that the manifestations of this gentler carceral state, like “drug courts, ankle monitors, probation” are still forms of managerial justice that exerts social control).

262. GOTTSCHALK, *supra* note 61, at 2.

263. *See, e.g.*, *Introduction*, 132 HARV. L. REV. 1568 (2019) (quoting Harvard Law School, *HLS in the World | The Changing Political and Intellectual Landscape of Criminal Justice Reform* at 33:01, YOUTUBE (Nov. 17, 2017), <https://youtu.be/cWjIL9-bVq0>).

reasons for this disconnect.<sup>264</sup> She writes that “[i]t is critical to understand the mechanism that creates irrational policies because better policymaking will require us to move away from this failed paradigm.”<sup>265</sup> The heart of her proposal in dismantling the carceral state and restoring the rationality, accountability, and actual realization of the public safety goals of the criminal legal system is “to create and foster an institutional framework that prioritizes data, not stories, to drive decisionmaking.”<sup>266</sup> Those who are “responsible for making criminal justice decisions must be held accountable for improving public safety[.]”<sup>267</sup>

Meanwhile, Brett Story and Judah Schept argue against the primacy of the “punishment” logic that defines the carceral state. Relying on the Appalachian regions of Kentucky, they instead conclude that rather than punishment, what really drives the carceral state in certain places is “diverse logics arising out of the relations of racial capitalism, specifically, for our purposes, the ideology of work and the fraught social relation of wage labor.”<sup>268</sup> Thus, in their efforts to both “map[]” out the carceral state and to “organiz[e] efforts against it,” they call for a “decentering of punishment and a renewed focus on the production of poverty and wage labor.”<sup>269</sup>

As a third example, Aya Gruber’s theory of the carceral state relies on defining it as “a colonial institution at its core, and it serves to maintain colonial domination.”<sup>270</sup> Therefore, “[d]ecolonizing criminal ‘justice’, . . . appears no less than an impossibility.”<sup>271</sup> In other words, “[a] decolonized American penal system is an oxymoron; it is a logical contradiction.”<sup>272</sup> She writes that the “American carceral state” “cannot be decolonized—only dismantled.”<sup>273</sup> She criticizes the idea—among “certain feminists and progressives” that “justice” can be achieved “by punishing the ‘right’ criminals (rapists, bigots, rich people).”<sup>274</sup> Since Gruber’s framing of the carceral state, including the criminal legal system, is that it is a colonial institution, it cannot merely be made better or “decolonized.” Dismantling here is more akin to abolishing.

In addition to dismantling the carceral state, it is also necessary to consider what will take its place—in other words, what a noncarceral state

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264. BARKOW, POLITICS *supra* note 160, at 5.

265. *Id.* at 15.

266. *Id.*

267. *Id.*

268. Story & Schept, *supra* note 82, at 10.

269. *Id.*

270. Gruber, *supra* note 181, at 235.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

would look like.<sup>275</sup> If a noncarceral state is the absence or the antithesis of the carceral state, then it matters how the carceral state is framed. Thus far, ideas pertaining to a noncarceral state largely have been presented in broad strokes and principles, which is again consistent with the fluid and diverse ideas surrounding the carceral state. There are at least three categories of normative proposals for the state: invest in more care-based and social programs;<sup>276</sup> do nothing or intervene less;<sup>277</sup> and/or abolish,<sup>278</sup> minimize,<sup>279</sup> or reform institutions and processes that prosecute, punish, or exert other forms of social control.<sup>280</sup>

To meaningfully work towards a noncarceral state, we must consider which normative proposals to adopt and how they should interact. Here, too, the framing of the carceral state is inseparable from the framing of a noncarceral state. For example, if the carceral state is understood primarily as mass incarceration, or as criminal or quasi-criminal institutions, then the path to a noncarceral state will largely focus on reforming, diminishing, or eliminating these phenomena or systems, and/or replacing them with civil and social institutions. However, if the carceral state is construed more expansively to refer to a form of governance that encompasses nearly all institutions and systems in society, including civil and social ones, then achieving a noncarceral state demands a much more expansive and fundamental shift in society as a whole. Moreover, given that racism, discrimination, and/or inequality are central to so many conceptualizations of the carceral state, implies that their absence should be a key feature of a noncarceral state. Efforts must focus on eliminating these core injustices.

Implementing a certain vision of dismantling the carceral state, and by extension, creating a noncarceral state, also carries more significant consequences and risks because carceral controls may shift to other forms that are less visible. Scholars have noted, for instance, that the deinstitutionalization movement that closed large state mental health facilities led to many former

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275. Levin, *Criminal Law Exceptionalism*, *supra* note 104, at 1427 (noting the importance and necessity of setting forth a theory of a noncarceral state).

276. See, e.g., McLeod, *supra* note 131, at 1161 (calling for “meaningful justice reinvestment to strengthen the social arm of the state and improve human welfare.”).

277. See, e.g., SCHENWAR & LAW, *supra* note 100, at 196 (“[S]ometimes the best ‘alternative’ is . . . nothing. Sometimes the most useful action is no action at all.”); Lisa Kelly, *Abolition or Reform: Confronting the Symbiotic Relationship Between “Child Welfare” and the Carceral State*, 17 STAN. J. C.R. & C.L. 255, 312–13 (2021) (recommending that mandatory reporting requirements be abolished as a first step, especially as they are enforced by criminal sanctions for failure to report in forty-nine states).

278. See, e.g., ROBERTS, *TORN APART*, *supra* note 114, at 276–304.

279. Aliza Hochman Bloom, *Reviving Rehabilitation as a Decarceral Tool*, 101 WASH. U. L. REV. 1989, 1990 (2024).

280. See, e.g., Gottschalk, *Dismantling the Carceral State*, *supra* note 10, at 1696–98; Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 284–87 (2023).

patients becoming unhoused or incarcerated,<sup>281</sup> which contributed to the “criminalization of mental illness.”<sup>282</sup> More recently, the shutdown of state-run youth prisons in California was initially hailed as a significant milestone in the national movement to eliminate youth incarceration.<sup>283</sup> Yet, some experts with extensive experience working in the juvenile system warned that children would now be shuffled to county facilities, where conditions and transparency may be worse.<sup>284</sup> These examples show that even shutting down carceral spaces must be done with great care to prevent the creation of new carceral settings or the transfer to more problematic ones.

The practical implications of the carceral state’s many meanings and perspectives are far more significant than the theoretical ones. A particular understanding of the carceral state and its traits directly shapes what it means to dismantle it and create a noncarceral alternative. It impacts the type of normative proposals that are presented to achieve these goals. Such laws and policies may materially reduce carcerality, but if implemented improperly, may also exacerbate it.

#### CONCLUSION

A popular folk tale from India recounts the story of six blind people, each offering a distinct description of an elephant.<sup>285</sup> It is a tale that has been referenced in legal scholarship across generations.<sup>286</sup> To determine

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281. Barkow, *supra* note 280, at 308–09; Corinna Barrett Lain, *The Road to Hell Is Paved with Good Intentions: Deinstitutionalization and Mass Incarceration Nation*, 65 WM. & MARY L. REV. 893, 913 (2024); Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U. L. REV. 685, 699–701 (2022).

282. Hasbrouck, *supra* note 281, at 700.

283. Nell Bernstein, *California’s Once-Notorious Youth Prisons Shut Down Today, Accelerating a National Trend*, THE IMPRINT (June 30, 2023, 2:00 AM), <https://imprintnews.org/top-stories/californias-once-notorious-youth-prisons-shut-down-today-accelerating-a-national-trend/242699>.

284. James Rainey & James Queally, *California Is Closing Its Last Youth Prisons. Will What Replaces Them Be Worse?*, L.A. TIMES (June 2, 2023, 5:00 AM PT), <https://www.latimes.com/california/story/2023-06-02/california-closing-youth-prisons-will-what-replaces-them-be-worse>; Bernstein, *supra* note 283; Montse Reyes, *Advocates Call for Investment in Community Alternatives After Closure of California’s Division of Juvenile Justice*, PRISM (Aug. 14, 2023), <https://prismreports.org/2023/08/14/california-youth-prison-system-community-alternatives>.

285. *The Blind Men and the Elephant*, PEACE CORPS, <https://www.peacecorps.gov/educators-and-students/educators/resources/blind-men-and-elephant/story-blind-men-and-elephant/> (last visited Nov. 23, 2024).

286. See, e.g., Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 104–06 (2022); Vasuki Nesiah, *An Un-American Story of the American Empire: Small Places, from the Mississippi to the Indian Ocean*, 67 UCLA L. REV. 1450, 1452–54 (2021); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1485–86 (1994); Albert J. Haro, *Tort-Relations*, 30 YALE L.J. 145, 145, n.1 (1920); Nathan Isaacs, *The Schools of Jurisprudence*, 31 HARV. L. REV. 373, 373 (1918).

who was telling the truth, they decided to touch an elephant.<sup>287</sup> However, each ended up touching a different part, which only led to further disagreement.<sup>288</sup> For example, the one who felt the tusk described the elephant as “sharp and deadly as a spear,” while the one who touched its four legs described it as “an extremely large cow.”<sup>289</sup> Another, after pulling its tail, dismissed the elephant as “nothing more than a piece of old rope.”<sup>290</sup> The discord grew until a wise man advised: “Each man touched only one part. Perhaps if you put the parts together, you will see the truth.”<sup>291</sup>

At first blush, the study of the carceral state may seem like this folk tale. Various scholars are making generalizations about the carceral state from what they have specifically observed or experienced. What they discovered provides an additional insight about the carceral state. Perhaps, it is only when we bring all these different perspectives together that we might discover the Truth about what exactly the carceral state is.

But once one actually investigates all of the different perspectives tethered to the carceral state and its key traits, this advice falls short. A more accurate conclusion may be that there isn’t just one particular elephant or carceral state to figure out, but rather several different breeds, each with its own mannerisms and mindset. This may better capture the current diversity of the concept.

As scholars increasingly rely on the carceral state construct, it is imperative to recognize the wide range of ideas that are associated with it. This Article highlighted just how diverse, open-ended, and decentralized the concept is. Along the way, it also identified some of its key traits, including the points of departure and points of convergence, that may eventually form the boundaries of these different versions of the carceral state.

There is space for all of these ideas to eventually contribute to a theory or theories of the carceral state, even though it may pose unique conceptual challenges. However, the practical consequences of working with such a diverse concept are more consequential. Here, how one defines the carceral state directly impacts what it means to dismantle it and create a noncarceral one. The normative proposals, changes to laws, and impact on policies, all flow from the starting point of what the carceral state is, and/or what its key traits are. For these tasks, it is all the more imperative and significant to understand and take into account these wide-ranging perspectives, and to ensure that the proposals that are given truly dismantle it, and do not merely allow for different and even more harmful forms of carceral control to take shape.

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287. *The Blind Men*, *supra* note 285.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

