



Editorial

Reflections on the shadow carceral state

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Abstract

In 2012 we urged scholars to explore the extension of penal power through the “shadow carceral state.” The shadow carceral state operates through legally hybrid and institutionally serpentine forms that stretch beyond the criminal legal system. *Theoretical Criminology*’s special issue invited us to reflect on the issues we raised in that piece. We are impressed by the transformation of punishment and society scholarship, which has grown deeper and more sophisticated with each wave of activism. Yet it will take more than a thriving subfield to confront the present and likely future: tenacious and expansive carceral and shadow carceral states that are continually deployed to address the compounding global crises of climate change, mass displacement, and structural poverty.

Keywords

Shadow carceral state, mass incarceration, climate change, immigration detention, Black Lives Matter

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Looking back: what transformed the field? Activism led, academia followed

Academic fields move through terms, and sometimes a new term is offered as a course correction. In the summer of 2011 we drafted “Mapping the Shadow Carceral State” as a course adjustment, and so it is worth remembering the central preoccupations of punishment and society scholarship of that time (Beckett and Murakawa, 2012). Michelle Alexander’s (2010) *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* was released in February 2010. Its subtitle named, we believe, the central preoccupations of the previous decade: mass incarceration and colorblindness. By the year 2000, the United States had become the world’s leading jailer. U.S. prisons and jails held two million people, and in 2001 sociologist David Garland coined the term “mass imprisonment” as shorthand for the “systematic imprisonment of whole groups of the population” (Garland, 2001: 1).

This was a turning point for the academic world, which was, broadly speaking, catching up with activist worlds all too familiar with systematic and collective punishment directed at whole groups. Many researchers had examined incarceration rates and their relationship to crime rates, recidivism, and a host of other measures, but the new prominence of terms like “mass incarceration” and “the New Jim Crow” signaled a renewed openness to critical inquiry and normative challenges, not just technocratic assessment of the efficacy of punishment.

Academic research was also confronting colorblindness—the refusal to acknowledge the causes and consequences of enduring racial inequality. This national pedagogy of unknowing racism permeated academic scholarship and hit triumphal levels after Barack Obama’s 2008 election. Belief in a “post-racial America” elevated the sanguine perspective of some of the most-widely cited social scientists who built careers and cottage industries by arguing that incarceration and associated practices were nonracist responses to crime (see, e.g., Blumstein, 1982, 1993, 1995).¹

Together, the urgency of mass incarceration and the denialism of colorblindness put a premium on delivering “smoking gun” evidence of racism, especially among lawmakers who used tough-on-crime rhetoric to enact mandatory minimums and drug war policies like the infamous crack–powder cocaine sentencing disparity. In a sense, many punishment and society scholars answered the call to prove it, prove that mass incarceration is a problem, prove that lawmakers and bureaucrats exploit racism to build and “justify” the carceral state. It was in this context, one in which imprisonment and overt racism were the lodestars, that we hoped to sketch a more expansive map of the racialized carceral state and its pernicious effects.

If this 2011 academic context sounds unimaginably stifling to you, then you have social movements to thank for changing prevailing norms about what makes for a relevant research topic. State and federal politics tend to be closed-loop systems that enact the policy preferences of the rich few (Gilens, 2014), but social movements sometimes open new possibilities, new conversations. They open academic fields, too. After the 2008 global financial crisis and the First Arab Spring, Occupy Wall Street protesters took over Zuccotti Park in 2011 amid rolling layoffs, evictions, and subprime mortgage default and bankruptcy. Occupy protests spread globally with the slogans “We Are the

99%" and "Capitalism Isn't Working," fueling a curiosity that turned Thomas Piketty's (2014) 685-page *Capital in the Twenty-First Century* into an unlikely 2014 *New York Times* best seller.

Returning to Michelle Alexander's *The New Jim Crow* once more, it is important to note that the book was released in February 2010 but first hit the *New York Times* best seller list two years later with rising activism (Media Impact, 2014). Following the February 2012 murder of Trayvon Martin and the July 2013 acquittal of the self-appointed cop who killed the Black teenager, protesters compelled a national conversation about racism and the criminal legal system. Grassroots organizing led to the formation of new organizations like the Dream Defenders, the Million Hoodies Movement for Justice, and Black Youth Project 100 (Murch, 2022; Ransby, 2018). In 2013, people in Pelican Bay State Prison and throughout California organized the largest prison hunger strike in U.S. history to protest indefinite solitary confinement and conditions of confinement (Herzing and Piché, 2024). After Ferguson police killed Michael Brown in summer 2014, organizing under the umbrella Black Lives Matter flourished again. And in the context of economically, racially, and internationally stratified vulnerability during the COVID-19 pandemic, racial justice uprisings hit unprecedented global levels after police killed of Breonna Taylor and George Floyd in 2020 (Murch, 2022). *The New Jim Crow* hit the *New York Times* best seller list once again with the summer 2020 protests.

The point here is not about *New York Times* best sellers! The point is that activism changed the subject. "Changing the subject," as Ruth Milkman and colleagues have argued, has a double meaning: movement work can change the political worldview of participants, and it can change the national political conversation (Milkman et al., 2013). In retrospect, it is clear that protests, activism, and movement lawyering prior to 2011 set the stage for us to conceive of and describe "Mapping the Shadow Carceral State." For example, our discussion of "crimmigration" relies on a secondary literature that blossomed after the millions-strong 2006 Immigrant Uprisings (Narro et al., 2007; Stumpf, 2006).

While critics fault activists for narrow, representational, or single-issue analyses, research on contemporary activism suggests that activism tends to connect so-called single issues to common structural causes. Consider the cross-fertilization of subjects (participants and topics) over the past 15 years: many unions and immigrant rights groups joined the 2011 Occupy protests; many Occupy participants continued their activism through debt collectives and in Black Lives Matter; Black Lives Matter connected policing and racism at home to apartheid in Israel/Palestine, paving the way for widespread protests against Israel's illegal occupation and genocidal wartime tactics (Kelley, 2019; Li, 2024; Milkman et al., 2013; Narro et al., 2007; Qutami, 2024). It is impossible, of course, to identify the motivations for the millions of people who protested during the summer of 2020, but survey research suggests that protesters were motivated by racial justice and overlapping concerns about women's rights and reproductive justice, LGBTQ+ liberation, environmental justice, immigration and labor rights, and social welfare and healthcare (Fisher and Rouse, 2022). In a similar vein, Bonilla and Tillery (2020) found that identifying with Black nationalism, feminism, or LGBTQ+ rights tends to generate mobilization for Black Lives Matter (see also Mayo-Adam, 2020).

Academic norms often encourage sub-specialization down to the microscopic level, but there is heartening evidence that many people have cultivated an everything-is-connected understanding of oppression.

In short, activism has expanded academic conversations and informed our ideas about the shadow carceral state. At the same time, there has been considerable synergy between advocacy, movement lawyering, and university-based researchers. In the first decade of the 21st century, research increasingly documented the numerous ways contact with the criminal legal system marked and shaped people's lives. This research shows that aggressive policing and nonconfinement-based forms of criminal legal supervision—including, increasingly, electronic home monitoring—also cause significant harm by imposing a vast array of burdensome rules and restrictions, enhancing debt, and generally destabilizing people's lives. For example, sociologist Devah Pager's seminal work revealed that low-level felony convictions (even absent evidence of incarceration or criminal legal supervision) reduce job applicants' prospects. The effect of the "mark of a criminal record" interacts with, and is compounded by, racial discrimination, exacerbating inequality over time (Pager, 2007). Research on the nature and consequences of legal financial obligations (LFOs) showed that the imposition of fees, fines, and other LFOs increased notably as courts and other criminal legal institutions struggled to fund their bloated operations. These studies also drew attention to the long reach of the carceral state: millions of (overwhelmingly poor) people—many of whom have never been convicted—now carry legal debt (Harris et al., 2010; see also Beckett and Harris, 2011; Harris, 2016).

There is now a massive body of research confirming and expanding what researchers were beginning to explore in the aughts: although confinement in jail or prison is especially harmful, many of the negative effects of criminal legal system surveillance and contact do not depend on incarceration or even conviction. For example, aggressive policing undermines the health and well-being of targeted individuals and communities (Beckett and Herbert, 2010; Drucker, 2002; Fagan et al., 2007; see also Geller et al., 2014; Lerman and Weaver, 2014; Sewell et al., 2016). Arrest and lower court system involvement create a variety of burdens, including reporting and program requirements, fines, and more (Natapoff, 2012; see also Kohler-Hausmann, 2013; Kohler-Hausmann, 2018).

These and so many other studies showed that criminal legal system contact and surveillance have adverse effects on people's lives not only because they lead to punishment, but also because they impact residents' everyday lives, including the routes by which they travel, the institutions they can access (or must avoid), the balance of power in their personal relationships, their financial resources, and more, in consistently unhelpful ways (see also Stuart, 2016). Police presence in hospital emergency rooms, for example, induces some people who have had contact with the criminal legal system to leave without receiving treatment, a pattern that likely reproduces health inequalities over time (Lara-Millan, 2014). Similarly, people who have had any form of contact with the criminal legal system are significantly less likely to interact with organizations that engage in formal record-keeping (such as medical, financial, labor market and educational institutions) than people who have not. Insofar as access to these institutions is an important means by which people improve their quality of life and achieve upward

mobility, this “system avoidance” is an important mechanism by which the criminal legal system reproduces social inequality over time (Brayne, 2014).

The emergence of this body of research, along with evidence of the harm associated with immigrant and other forms of civil detention, banishment, and other non-criminal legal practices, drew our attention to the sprawling state control apparatus we called “the shadow carceral state.” That is, we were primarily concerned with the ordinary ways in which punishment, along with its avatars and its so-called alternatives, caused unnecessary suffering. In some cases, new forms of control and surveillance depended on civil or administrative legal authority that obscured their punitive nature.

On this point, we would like to clarify something. We used the categories of civil and administrative law as scaffolding to conceptualize punishment beyond traditional criminal law. In trying to provide an expansive map of carceral state power, we emphasized that what government officials call “alternatives to incarceration” and “non-punishments” in fact use the law to exploit and reproduce inequality, create various states of unfreedom, and inflict pain and suffering. In describing these varied pathways and sites of punishment, we also noted that civil and administrative processes entail fewer procedural protections than criminal law, which in theory guarantees what the 1972 Supreme Court called “the full panoply of rights due a defendant” (*Morrissey v. Brewer*, 1972: 479).

But we did not mean to suggest that the traditional criminal legal system delivers robust, consequential procedural protections. For most people processed through the criminal legal system, procedural rights do little to facilitate fact-finding or lighten the heavy presumption of guilt (Leo, 1998, 2001; Stuntz, 1997). The sheer numbers of people processed through courts mean that the vast majority of people are punished through plea bargains, and courts penalize people who slow the assembly line by going to trial. Angela Davis explained this phenomenon in the context of her own trial, writing in 1971: “Court-appointed attorneys, acting in the twisted interests of over-crowded courts, convince 85 percent of the defendants to plead guilty. Even the manifestly innocent are advised to cop a plea so that the lengthy and expensive process of jury trials is avoided” (Davis, 1971: 49; Chakravarti, 2021). Imperatives to speed up the production line have only intensified since 1971. An estimated 98% of federal cases and 95% of state-level cases are now resolved through plea bargains (Dervan, 2024). Courts also impose a “trial tax” on people who exercise their constitutional rights: wasting court time at least doubles the odds of imprisonment and leads to a 15–60% increase in average sentence length (Johnson, 2019).

Courtroom dramas romanticize legal procedures and trials, but in reality “the full panoply” of procedural rights delivers little protection to those who face pretrial detention, fines, jail, and prison. Consider what happened in the wake of a decision thought to enshrine procedural rights, the Supreme Court’s 1966 decision requiring police to read people their *Miranda* rights (*Miranda v. Arizona*, 1966). Police organizations complained but adapted. Police learned that *Miranda* certified the legitimacy of essentially unchanged police interrogation procedures; police could still confine, intimidate, and lie to secure incriminating statements. After this ruling, they did so in 55–65% of all interrogations, rates that are comparable to those that prevailed pre-*Miranda* (Leo, 1996, 1998, 2001; Li 2016).

Looking ahead: longer shadows still

Unfortunately, mass incarceration is alive and well, though this may not be obvious at first glance. The U.S. incarceration rate peaked in 2008 when it reached 755 per 100,000 residents; that rate is now 531 per 100,000 residents (World Prison Brief, 2024). The number of people under any form of correctional supervision has also fallen notably (Carson and Kluckow, 2023; Phelps and Seligman, 2024). These declines are not trivial, but they do not tell the whole story.

If the intensity of the criminal legal system response to crime remained constant, we would expect incarceration rates to drop in the context of falling crime rates. And crime rates have been mostly flat or falling for decades. Recent research that takes crime trends into account shows that penal intensity continued to increase even as incarceration rates fell (Beckett, 2022). This suggests that criminal legal authorities, especially prosecutors and judges, have been sustaining high incarceration rates even in the face of a declining “supply” of crime.

Moreover, it appears that some of the recent decline in the use of U.S. prisons and jails was a temporary, pandemic-related phenomenon. In 2020 and 2021, court filings and dispositions dropped precipitously, creating massive backlogs in court systems and notable declines in prison and jail populations (Sawyer, 2023). Courts have largely cleared these backlogs and prison and jail populations are increasing once again. In 2022, the prison population rose by 2% (Carson, 2023). This trend appears to have persisted in 2023, including in states where prison populations did not grow in 2022 (Sawyer, 2023). Further, the Federal Bureau of Prisons plus 19 of the 22 states that have recently produced prison population projections expect the number of imprisoned people in their jurisdictions to continue to increase in future years (Sawyer, 2023). The number of people in jails grew in 2022 by 4% (Carson, 2023). It seems quite possible that the jail population numbers will continue to rise given recent crackdowns on drug violations and the desperation of broke counties filling jails to collect per-diem fees (Norton and Schept, 2019; Pelot-Hobbs, 2023; Schept, 2022).

We fear that conditions are ripe for a broader expansion of carceral state power as well. These conditions include the mutually compounding crises of climate change, mass displacement, widespread poverty, and governance in the service of capitalism. These conditions have important implications for immigration policy and the related exercise of state power in the Global North. According to World Bank and United Nations estimates, climate change will displace 200 million people worldwide by 2050, with as many as 143 million displaced from the three world regions of sub-Saharan African, South Asia, and Latin America (McCoy, 2021).

Climate catastrophe is likely to displace millions in the coming decades but recall that it took “only” about two million people leaving Syria, Afghanistan, and Iraq in 2015–2016 for Britain to withdrawal from the European Union and for Trump to campaign on a “Muslim ban.” Indeed, many European and U.S. politicians and voters have used migration as an opportunity to double-down on anti-immigrant populism, Islamophobia, and climate change denialism (Malm and the Zetkin Collective, 2021; McCoy, 2021). As frosts and heatwaves destroyed agricultural communities in Guatemala, El Salvador, and Honduras, people migrated north only to find hardened

borders. Of the 50,000 Guatemalan families apprehended at the U.S. border in 2018, roughly half came from the highland mountain range that suffered crop-killing frosts and heat surges. Trump responded by sending 5200 U.S. troops to the southern border as part of a midterm election publicity stunt (McCoy, 2021).

Harsh border regimes only partially block migration; they serve an additional function of creating, through criminalization, a pool of disposable and politically disenfranchised racialized labor (Walia, 2021). These dynamics have also, already, fueled a trend toward externalized border control in which states delegate the power to exclude to other states, which in turn rely on administrative and civil law to accomplish these ends (Campesi, 2024; Ticktin, 2023). The serpentine extended reach of immigration detention makes for an inscrutable system that subjects people to frequent forced transfers and legally liminal chaos (Ryo and Peacock, 2020).

These crises reflect and unfold in the context of what Ruth Wilson Gilmore (2007) has long called the anti-state state, built on carceral foundations and dismissive of any government agency or capacity that might be used to guarantee social well-being. Direct federal transfers to municipalities provided 12% of the average city's revenue in 1977 but just 5% by 2012 (Randall et al., 2018). Federal lawmakers left localities to sink or swim with little more than unpredictable state aid, property tax revenues diminished by tax revolts, and regressive sales taxes and user fees (Peck, 2014, 2018). The imperative of local self-sufficiency entrenched a politics of defunding, downsizing, and privatizing (Battle et al., 2024). The Great Recession of 2008 accelerated this neoliberal spiral. Instead of recovering lost revenue by taxing corporations, lawmakers took the hatchet to public provisions and public sector workers (HoSang and Lowndes, 2019; Moody, 2017; Moynihan, 2022). Between 2007 and 2011, state and local governments eliminated 765,000 jobs; African Americans held two in ten of these eliminated jobs, women held seven in ten (Laird, 2017).

Atrophy from decades of neoliberalism prevents apparent anti-carceral victories from landing as sustainable victories. In the realm of housing, for example, it was considered a victory when the Ninth Circuit held in *Martin v. City of Boise* (2019) that cities must have shelter beds as a prerequisite for enforcing anti-camping ordinances. But many city officials simply reframed the offer of shelter as a technicality that justified criminalization. As Sacramento Mayor Darryl Steinberg put it: "Homeless people should have a legal right to shelter and a legal obligation to utilize it" (quoted in After Echo Park Lake Research Collective, 2022: 75). Moreover, the Supreme Court has reversed even this quite limited gain.² Consider also pay-to-stay policies that charge incarcerated people fees for their confinement. As Friedman, Kirk-Werner, and Fernandes show in this issue, Illinois lawmakers in 1981 adopted pay-to-stay statutes, built them up through years of austerity and tough-on-crime cultures, and then repealed them in 2019. But such victories proved difficult to sustain when fiscal austerity remained a baseline reality. And in true neoliberal form, lawmakers have increasingly deputized non-state actors to enforce the criminal legal system's official designations. For example, housing ordinances have asked, trained, and sometimes even required landlords to deny rentals or to evict tenants who have a record of contact with the criminal legal system (Reosti et al., 2024).

More alarming still, lawmakers have authorized private individuals to do the adjudication and enforcement of police work. For example, the original Stand Your

Ground statute illustrates how individual-level police authority “resolves” two of the crises listed above—climate catastrophe and state incapacity and unwillingness to address it and other on-going devastations. Florida pioneered the nation’s first Stand Your Ground bill in 2005, just after four hurricanes pummeled the peninsula. As political scientist Marcus Lee (2019) explains in a detailed legislative history, lawmakers struggled to deliver adequate and timely relief to the people in Florida, and homeowners complained that police were nonresponsive to their calls about “looters.” To allow individuals to do their own work of “policing the crisis,” Florida lawmakers enacted Stand Your Ground to grant civil and criminal immunity to any person who uses force, even deadly force, in the face of real or perceived threat to person or property. In the context of climate disaster, strained state infrastructure, and inadequate federal relief, Stand Your Ground was meant to save money for the state and for the self-appointed police who should not be saddled, Florida legislators argued, with the unbearably high costs of arrest, pretrial detention, and legal defense (Lee, 2019). The national spotlight on the murder of Trayvon Martin and the exoneration of the man who killed him popularized Stand Your Ground statutes, which are currently on the books in an estimated 38 states.

In effect, shoot-to-kill without duty-to-retreat complements traditional state violence, even though the agents do not wear police uniforms or carry a badge. There are additional examples of lawmakers authorizing private individuals to be “entrepreneurial” in undertaking police work. For example, during Black Lives Matter protests between 27 May and 5 September 2020 at least 96 civilian drivers and 8 police drivers hit protesters with their cars. Since then, three states have extended immunity to drivers who run over protesters (Hayes and Kaba, 2023; Murakawa, 2023). In the fulcrum of Black Lives Matter and “Blue Lives Matter” protests, police made open alliance with their supporters and sometimes referenced paramilitary white supremacist organizations and militias as “armed friendlies” (Shanahan and Wall, 2021; Williams, 2020).

Conclusion

At the close of our 2012 article, we wrote that “Analyses of these developments will require attending not only to the macro-level, overt politics that accompany publicized efforts to change crime policy, but also to the subtle, complex, and often hidden politics that lead institutional actors to create novel yet consequential pathways that lead directly to the carceral state” (Beckett and Murakawa, 2012: 238). We also urged scholars not to rely on official accounts of what is and is not punishment, but rather to “build a bridge between our academic research and the pedestrian minutiae of what is really happening around us” (Beckett and Murakawa, 2012: 238). We commend all the scholars whose work appears in this volume—and so many others—who are taking up this important work. We are gratified to witness and learn from scholarship that reveals a deep sense of connection to the social world and attends to how things actually play out on the ground. And we are grateful to the path-breaking activists and advocates who have made this work possible.

The worsening of the domestic and global crises we identify here (and so many others, such as the near-total destruction of Gaza and devastation of its residents) raise important

questions about whether and how transformative change can be affected and the role of academia. Still, it is heartening to see the flourishing of academic scholarship that refuses to accept official accounts of how things really are, that makes room for the voices and experiences of the marginalized, and that expands our understanding of whether and how academic research can contribute to the public good.

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Notes

1. For example, Beck and Blumstein (2018: 854) recently concluded that “[i]t is easy to blame the higher rate of incarceration among blacks than whites on discrimination... [but] black disproportionality is simply a reflection of greater involvement in crimes that lead to prison.” By presenting institutional discrimination, on the one hand, and “simple” (decontextualized) rates of criminal offending on the other as the only two possible explanations, Blumstein and others both ignore and mask the ways that racism reproduces the conditions that generate comparatively high rates of interpersonal violence and homicide in very poor Black neighborhoods (Currie, 2020; Murakawa and Beckett, 2010: 704; Ward, 2015).
2. In summer of 2024, the Supreme Court ruled in *City of Grants Pass v. Johnson* that arresting, fining, and jailing people for sleeping outside in the absence of available housing or shelter does not violate the 8th Amendment’s prohibition of cruel and unusual punishment and is therefore permissible. This ruling reverses decades of decisions that (modestly) limited how far states and localities can go when punishing people. See Chammah et al. (2024).

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