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# Mapping the shadow carceral state: Toward an institutionally capacious approach to punishment

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**Katherine Beckett and Naomi Murakawa**

University of Washington, USA

## Abstract

The expansion of the US carceral state has been accompanied by the emergence of what we call the ‘shadow carceral state’. Operating beyond the confines of criminal law and justice institutions, the shadow carceral state expands penal power through institutional annexation and legal hybridity, including: (1) increased civil and administrative pathways to incarceration; (2) the creation of civil ‘alternatives’ to invalidated criminal statutes; and (3) the incorporation of criminal law into administrative legal processes in ways that enhance state carceral power. Although legal doctrine deems civil and administration sanctions to be ‘not-punishment’, we call for a broad understanding of penal power and the carceral state.

## Keywords

administrative detention, banishment, carceral state, civil detention, immigration, punishment

## Introduction

A significant body of literature calls attention to the unparalleled growth of the US penal system and analyzes the causes and consequences of its expansion. In this literature, the penal state is typically conceived as the criminal justice institutions that adjudicate and sanction criminal wrong-doing. This research also pays particular attention to the

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### Corresponding author:

Katherine Beckett, Department of Sociology Law Societies & Justice Program, Box 353340, University of Washington, Seattle, WA 98195-3340, USA

Email: [kbeckett@u.washington.edu](mailto:kbeckett@u.washington.edu)

tail-end of the criminal process—namely, incarceration—and to the overt political and criminal policy developments that have fueled rising incarceration rates. Numerous researchers have analyzed, for example, the highly publicized ‘war on drugs’ and the transformation of criminal sentencing policies across the United States (e.g. Alexander, 2010; Beckett, 1997; Provine, 2007; Reinerman and Levine, 1997; Western, 2006). Many have also illuminated the symbolically—and racially charged nature of criminal law and policy making, in which political parties use crime as a racial signal (Mendelberg, 2001) and lawmakers use ‘toughness’ for re-election credit-claiming and blame-avoidance (Huber and Gordon, 2004; King, 1997; Smith, 2004).

Although this scholarship illuminates the growth of the US penal state, we suggest that criminal law and criminal justice institutions increasingly represent only the most visible tentacles of penal power. The penal system has become not only larger, but also more legally hybrid and institutionally variegated than is sometimes recognized. Here, we map the more submerged, serpentine forms of punishment that work in legally hybrid and institutionally variegated ways. Our analysis shows how overt get-tough policies and rhetoric are supplemented and extended by a range of seemingly small policy innovations and complex institutional adaptations, including the creation of civil ‘alternatives’ to criminal sanctions, coercive efforts to recoup criminal justice expenditures, and heightened immigration enforcement. The sanctions that have been created and imposed through these adaptations are not necessarily imposed via criminal law or processed through criminal justice institutions. Nonetheless, they significantly enhance carceral state power.

We call these less visible penal developments the ‘shadow carceral state’.<sup>1</sup> In legal terms, the shadow carceral state often makes use of *legally liminal authority*, in which expansion of punitive power occurs through the blending of civil, administrative, and criminal legal authority. In institutional terms, the shadow carceral state includes *institutional annexation* of sites and actors beyond what is legally recognized as part of the criminal justice system: immigration and family courts, civil detention facilities, and even county clerks’ offices. Although these institutions are not officially recognized as ‘penal’, they have nonetheless acquired the capacity to impose punitive sanctions—including detention—even in the absence of criminal conviction. The shadow carceral state also operates in opaque, entangling ways, ensnaring an ever-larger share of the population through civil injunctions, legal financial obligations, and violations of administrative law. Over time, these seemingly small incursions compound the heightened surveillance that comes with institutional enmeshment, longer (if not technically ‘criminal’) rap sheets, and inescapable debt.

We refer to these policy and institutional innovations as the ‘shadow’ carceral state for two reasons: their functions mimic traditional punishment, even when incarceration is called ‘detention’ and financial penalties are called ‘fees’; they also create pathways to, and entanglement in, the criminal justice system. In many ways, the shadow carceral state—characterized by institutional spread, legal fungibility, and opaque mechanisms—resembles Stanley Cohen’s (1979) dystopian vision of ‘the punitive city’. In this vision, the formal control system features blurred boundaries between inside and outside; broadened and fuzzy definitions of crime; an expanded social control net; and dispersed state social control mechanisms beyond prison walls. Similarly, the shadow carceral state has

many entryways and few exits, as ostensible ‘alternatives’ to punishment simply double back to the carceral state. The politics surrounding these penal developments are complex and include high-profile initiatives such as ‘three strikes’ legislation as well as more subtle politics and covert institutional processes that drive innovation and adaptation (see also Hacker, 2004).

By neglecting the adaptations and practices we highlight here, and the dynamics that give rise to them, punishment and society scholars may overlook important features of contemporary carceral state power. As noted above, many of these scholars limit their analyses to the legal sanctions imposed by criminal courts upon criminal conviction. As David Garland (1990) notes, this definition omits some types of punishments; for example, it explicitly excludes extra-legal violence that is unauthorized by law (such as lynchings), as well as penalties that are authorized by law but imposed by non-legal actors (such as teachers and parents). It also excludes legal processes that target suspected deviants or criminals but precede conviction.<sup>2</sup> Most relevant to our analysis, this definition omits sanctions (including compulsory incarceration) imposed via civil and administrative law and, more generally, the process by which behaviors are legally defined (and re-defined) as the target of civil, administrative, or criminal law (Braithewaite, 2003; Freiberg, 1987; Freiberg and O’Malley, 1984). Such exclusions may or may not be problematic, depending on the analytic purpose of the study in question. For example, Garland’s (1990) comparatively narrow focus on the legal punishment of convicted criminal law violators was well suited to his objective: to understand the social foundations of *criminal legal punishment*. Indeed, Garland (1990: 18) juxtaposed this goal with efforts to ‘trace all of the forms in which state power is exercised through the criminal justice apparatus’. Yet much punishment and society scholarship actually does, in fact, pursue the latter goal: to map the development and operation of carceral state power. Many scholars also analyze whether and how the penal apparatus shapes social life and reproduces social inequality (see, for example, Western, 2006).

We argue here that a comprehensive understanding of the nature, operation, and effects of carceral state power requires attention to subterranean politics and covert institutional innovations that, along with more overt policy developments, shape penal practices and outcomes. It also requires a comprehensive definition of the penal state, one that is independent of official claims about what is and is not punishment and legal technicalities that distinguish ‘civil’ incarceration and ‘administrative’ criminal justice sanctions from ‘real’ criminal punishment. To support these arguments, we describe a number of recent adaptations and reconstructions in penal practice that have significantly enhanced carceral state power—even in the absence of formal policy revision toward that goal. In drawing attention to these institutional innovations, our analysis shows that the penal state increasingly encompasses both criminal and non-criminal institutions and illuminates new civil, administrative, and legally hybrid pathways to punishment. Some of these pathways are new; others are not new but have expanded so significantly in recent years that they must be addressed as expansions of carceral state power.

In calling attention to these institutional developments, we highlight the importance of adopting a broad and institutionally robust definition of the carceral state, one that recognizes the full range of policies and agencies that employ penal power. Our understanding of carceral state power must be as capacious, complex, and adaptive as the

policies and institutions involved in it. Recognition of expanded carceral power is also important to elucidate how penalty reinforces social and racial inequality. High-profile policy debates have been replete with oblique but symbolically powerful images and assertions of the criminality of Black and Latino people. As powerful as these racially charged electoral politics are, the shadow carceral state operates in more low-profile, pedestrian ways that increasingly punish marginalized groups, especially the economically disadvantaged, undocumented populations, and Black and Latino people. Central features of the shadow carceral state—including punishment without violation of criminal law and detention without criminal due process—ensnare vulnerable and racially marginalized individuals through mechanisms that, in many ways, simply presume their guilt.

This article maps the shadow carceral state and explores its implications for analyses of penal power. In the first part, we analyze how institutional actors located in diverse settings have adapted, reconceived, and re-combined civil, administrative, and criminal legal authority in ways that proliferate pathways to, and forms of, punishment. Specifically, we identify three ways in which institutional actors have manipulated legal boundaries to expand these pathways and penalties: (a) the expansion of civil and administrative pathways to incarceration; (b) the creation of civil alternatives to invalidated criminal social control tools; and (c) the incorporation of criminal law into administrative legal processes in ways that enhance state carceral power. This expanded and legally hybrid shadow carceral state ensnares a growing share of the population and diminishes opportunities for exiting the system.

As mentioned above, new administrative and civil penalties often entail sanctions that are officially considered ‘not-punishment’—even when they involve compulsory detention. In the second part, we examine how legal doctrine maintains the idea that such penalties are not, in fact, punishment. Courts have upheld the illusion that civil and administrative sanctions—including compulsory detention in jails and prisons—are ‘not-punishment’ by equating (only) criminal legal authority with punishment, and by deferring to legislative descriptions of sanctions as civil, administrative, or criminal in nature. This legal categorization matters enormously because all sanctions deemed ‘not-punishment’ receive less than full criminal due process, and because failure to recognize the operation and effects of other pathways to punishment obscures important aspects of carceral state power. Finally, our conclusions demonstrate the importance of developing a scholarly conception of the penal state that is independent of official claims about what is and is not punishment—one that illuminates rather than obscures all the roads that lead directly to it.

### **Diversified institutions, hybrid processes**

As many punishment and society scholars have noted, the rapid expansion of the criminal justice system was fueled by the idea that criminal justice policies must become more severe in order to effectively deter and incapacitate potential criminals. Numerous policies were enacted during the 1980s and 1990s that reflected this idea. In particular, the increase in drug arrests associated with the war on drugs, more aggressive prosecutorial practices, and harsher sentences for all types of offenders contributed importantly to the

expansion of the penal system, especially state prisons (Alexander, 2010; Beckett, 1997; Gottschalk, 2007; Provine, 2007; Western, 2006).

In recent years, a more complex set of institutional dynamics has unfolded alongside these high-profile and overt developments. In many ways, get-tough policies fueled the growth of other kinds of initiatives such as efforts to recoup criminal justice expenditures. At the same time, increased national security and border control expenditures in the wake of 9/11 fueled the expansion of an ostensibly civil and non-punitive detention apparatus. Each of these institutional developments has contributed importantly to the emergence the shadow carceral state. This section outlines the administrative and civil pathways to prison and jail. We then show how the creation of new civil alternatives to criminal legal authority and the mobilization of criminal law in administrative legal settings also increased the state's power to punish. Although legal doctrine defines administrative and civil sanctions as 'not-punishment', these sanctions are often identical to practices that are widely considered by both scholars and state officials to be punitive. To the extent that academic studies of punishment focus exclusively on the criminal legal processes and sanctions that flow solely from criminal conviction, these pathways and sanctions fall outside their purview.

Often, institutional actors have expanded penal power by manipulating legal boundaries and classifications. At first glance, legal categories appear fixed rather than fungible, and the difference between these categories seems clear: civil law pertains to private injuries; administrative law governs interactions between state agencies and members of the public; and criminal law governs acts considered so serious that they injure all. But the construction of particular behaviors as either civil or criminal law violations is not independent of politics and culture. As a result, the legal construction of behaviors as the object of civil, administrative, or criminal law varies geographically and temporally (Braithewaite, 2003; Freiberg, 1987; Freiberg and O'Malley, 1984). As Braithewaite (2003) and others have persuasively argued, punishment and society scholars' focus on criminal, post-conviction sanctions reifies rather than illuminates these shifting legal constructions. Below, we build on this argument by showing how recent reconstructions, adaptations, and fusions of civil, administrative, and criminal law in the contemporary United States have significantly enhanced carceral state power. In particular, we show how the creation and expansion of administrative and civil pathways to incarceration, and the creation of civil 'alternatives' to criminal legal regulation, have expanded carceral state power. We begin with administrative pathways to prison and jail.

### *Administrative pathways to prison and jail*

This section shows how government agencies are incarcerating record numbers of people who have not been convicted of any crime—or even, in some cases, of an administrative violation. We focus on two areas of administrative law: the increased incarceration of alleged immigration law violators and the expansion of parole revocation.

*The expansion of immigration detention.* The US government now routinely employs what is often used as a criminal penalty—compulsory detention—in cases involving non-criminal

immigrants and asylum-seekers awaiting adjudication. The daily capacity of immigration detention centers has increased sharply from 6800 in 1994 to 38,000 in 2008; over the course of one year, the number of people detained by Immigration and Customs Enforcement (ICE) increased from roughly 80,000 to nearly 400,000 (Kalhan, 2010). Undocumented migrants are not the only group to experience this shift: an estimated 95 percent of all asylum-seekers are now detained alongside unauthorized migrants, unaccompanied minors, and stateless persons while awaiting adjudication of their asylum application (Frelick, 2005). More than half of those detained in these facilities—which include detention centers, local jails, juvenile justice facilities, and others—have never been convicted of a crime; for many of the detainees who have been convicted of a crime, their conviction relates to an immigration-specific behavior such as illegal entry (Kerwin and Lin, 2009).<sup>3</sup> In short, whereas pre-adjudication immigrant detention was formerly reserved for unusual cases, immigrants with pending immigration or asylum cases are now routinely detained.

State officials rarely define the compulsory ‘detention’ of migrants and asylum seekers as punishment or even as incarceration, but it is difficult to find a meaningful distinction between the practice and experience of (immigrant) detention versus (criminal) incarceration. Alleged immigration law violators and asylum-seekers are frequently held in local jails while awaiting adjudication and pending deportation orders. As Kalhan (2010: 43) noted, ‘if convergence [between criminal and immigration law] more generally has given rise to a system of “cimmigration” law ... then perhaps excessive immigration detention practices have evolved into a quasi-punitive system of “immcarceration”’. The growing inter-penetration of the criminal and administrative legal systems and the increased detention of non-criminal immigration law violators (sometimes in local jails) illustrate the increased administrative power to punish. By failing to recognize this development, punishment and society scholars neglect these important new aspects of carceral state power.

*Parole revocation.* Parole revocation is a compelling illustration of the fact that many US residents are now sent to prisons and jails by administrative agencies rather than by criminal courts. In the United States, roughly five million individuals are either serving a probation sentence or have been conditionally released (paroled) from prison. In recent decades, parole systems have not only expanded but also have moved away from the Second World War era ‘clinical’ models, which focused on the therapeutic process and individualized treatment tailored to reform a specific transgressor, toward ‘waste management’ styles concerned with efficiently managing the risk of reoffending (Feeley and Simon, 1992; Simon, 1993).<sup>4</sup>

Parolees are subject to myriad rules and requirements, violations of which frequently lead to (re)incarceration (Lynch, 1998, 2000; Petersilia, 2003; Simon, 1993). Importantly, revocation hearings—in which correctional officers present evidence of technical violations that may lead to (re)incarceration—are not construed as a criminal legal process requiring criminal due process standards. Instead, revocation hearings have been governed by administrative law since the 1970s. Although the extension of administrative due process to the parole and probation context was originally intended to strengthen the rights of legal subjects (Greenspan, 1994), administrative processes have weaker

procedural protections than their criminal counterparts. For example, the evidentiary standard in administrative proceedings is ‘preponderance of the evidence’ rather than ‘beyond a reasonable doubt’, and defendants in administrative proceedings often do not have the right to legal counsel (Lin et al., 2010: 770).

The construction of revocation hearings as administrative (rather than criminal) in nature has therefore had important consequences for the nature and strength of parolees’ rights protections, and has significantly enhanced carceral state power. In 1980, parole revocations represented 18 percent of US prison admissions; by 2000, 34 percent of all prison admissions were triggered by parole violations (Travis, 2005; see also Clear, 2007; Lin et al., 2010). The legal construction of violation hearings as administrative rather than criminal matters has thus had a dramatic impact on the nature and scope of the carceral state.

In sum, institutional actors have increased carceral state power in part by expanding administrative pathways to incarceration. These administrative pathways are significantly less encumbered by procedural requirements than their criminal counterparts, and in the immigration context, can result in detention that is defined as ‘not-punishment’. The following section demonstrates how civil pathways to jail and prison have also proliferated.

### *Civil pathways to prison and jail*

Institutional actors have mobilized civil legal authority to incarcerate legal subjects, including debtors, juvenile status offenders, and sex offenders who have completed their criminal sentence—sometimes indefinitely. In these cases, the use of civil law also enables authorities to avoid the procedural requirements associated with criminal law, and to circumnavigate prior legal or policy prohibitions on practices considered to be unconstitutional. Our first example concerns the increased use of civil contempt charges to incarcerate legal and other debtors.

*Civil contempt and the incarceration of debtors.* Mass incarceration has been extraordinarily expensive. In the face of ballooning criminal justice costs, many states and localities have authorized the assessment of a range of legal financial obligations (LFOs) in an attempt to recoup criminal justice expenses. LFOs include the fees, fines, restitution orders, and other financial obligations that may be imposed by the courts and other criminal justice agencies on persons accused and/or convicted of crimes (see Bannon et al., 2010; Harris et al., 2010, 2011). In most states, criminal defendants may be charged by the courts for the cost of their adjudication and court-mandated tests, and by state Departments of Correction for the cost of their imprisonment and supervision. Jails also increasingly charge inmates for the cost of their incarceration. In many states, indigent defendants are also required to pay a fee for the cost of the legal representation that was provided to them as a result of their indigence (Anderson, 2009; Bannon et al., 2010). Unpaid legal debt is typically subject to interest, surcharges, and/or collection fees (Bannon et al., 2010).

Fees and fines are increasingly imposed, and the number of people processed by criminal justice institutions has skyrocketed. As a result, increasing numbers of individuals have outstanding legal financial obligations (Harris et al., 2010). By 2004, courts had

required two-thirds of those convicted of felonies and sentenced to prison, and more than 80 percent of other felons and misdemeanants, to pay fees and fines (Harris et al., 2010). As a result, the number of individuals in the United States living with legal debt is likely in the tens of millions. Unlike European 'day-fines', US fees and fines are not usually graduated to reflect defendants' ability to pay (Beckett and Harris, 2011); neither are judges required to assess defendants' employment status or income when deciding whether to impose discretionary fees and fines, although in some states, post-sentencing payment plans are meant to reflect defendants' financial circumstances (Beckett and Harris, 2011). The debt that accrues from the assessment of fees and fines is typically substantial. In 2004, the mean fee and fine assessment for a single felony conviction was \$2450, the median was \$1347, and the maximum was \$11,960. By 2008, defendants sentenced in 2004 had been charged an average of \$11,471 by the courts over their lifetime (Harris et al., 2010). As a result, legal debt tends to be long-term in nature (Beckett et al., 2008; Harris et al., 2010).

Just as states and localities have endeavored to recoup criminal justice costs, welfare reform legislation adopted in the 1990s was aimed at improving child support collection from non-custodial parents (Sorensen et al., 2007). According to the federal Office of Child Support Enforcement, in 2006 11.1 million obligors owed more than \$105 billion in arrearages. Most child support arrears are owed to the state as compensation for welfare payments, and the primary reason for the increase in child support arrears is the fact that many states have begun to assess interest on them (Sorensen et al., 2007). Collecting these monies has been quite difficult, in large part because nationally an estimated 70 percent of unpaid child support is owed by parents who earn less than \$10,000 a year (May and Roulet, 2005; Sorensen et al., 2007).

Legal financial obligations and child support payment orders have created a host of new institutional actors with authority to extract payments and to impose sanctions for non-payment. In many localities, for example, county clerks negotiate monthly payment plans with legal debtors and sanction those who fail to adhere to these plans. In such cases, clerks possess a range of civil tools they may use in an effort to collect payments. In Washington state, county clerks may impose additional collection fees, garnish up to 25 percent of the wages of the debtor or his/her spouse, and seize bank assets, home equity, and tax refunds (Beckett et al., 2008; see also Lawrence-Turner, 2009). They may also request that judges issue warrants for the arrest of legal debtors, which leads not uncommonly to their incarceration. As a result of their acquisition of these new powers and responsibilities, clerks' offices (and, in some instances, private collection agencies) have become an important component of the shadow carceral state.

The incarceration of indigent debtors is surprising given the legal prohibitions on this practice. In the first half of the 19th century, most states and the federal government banned the incarceration of debtors who were unable to pay their debts (Blackmon, 2008; Coleman, 1974; Mann, 2002). While the incarceration of indigent debtors was thus prohibited, debtors who had the means to pay their debts, but did not, remained subject to criminal prosecution (Mann, 2002). Similarly, a variety of state and federal statutes criminalize failure to comply with child support decrees only when the parent has the means to pay child support (Ressler, 2006). Defendants in such criminal cases are entitled to the usual procedural protections, including the right to legal representation;

successful prosecution generally requires that the state prove that the delinquent parent ‘willfully’ chose not to comply with a court order (Patterson, 2008; Ressler, 2006). Similarly, the incarceration of legal debtors is permitted only if the legal debtors’ non-compliance is determined to be ‘willful’.<sup>5</sup> As a result of this and related reforms, it is commonly assumed that indigent debtors living in the United States are no longer incarcerated for failing to meet their financial obligations.

However, emerging evidence indicates that non-payment of three types of financial obligations—consumer debt, child support decrees, and legal financial obligations—by indigent persons results in arrest and incarceration in locales across the country (American Civil Liberties Union, 2010; Bannon et al., 2010; Beckett et al., 2008; Harris et al., 2010; Patterson, 2008; Rhode Island Family Life Center, 2007). Authorities have circumvented legal constraints on the incarceration of indigent debtors in a number of ways (Beckett and Harris, 2011), but the use of civil contempt charges appears to be the most important of these. Debtors appear to be increasingly arrested and incarcerated not for nonpayment, but rather for civil contempt of court—that is, failure to comply with a court order to pay their financial obligations (American Civil Liberties Union, 2010; Bannon et al., 2010).

Civil contempt of court charges are (in theory) used to compel compliance only when the contemnor can, in fact, comply with that order. In legal parlance, the idea is that the civil contemnor ‘holds the key to the prison cell’ (Ressler, 2006: 358). Increasingly, however, civil contempt charges are leading to the incarceration of indigent consumer debtors. For example, in the Minneapolis area, private debt collectors recently secured court decrees ordering debtors to pay, then requested that civil contempt warrants be issued for debtors who did not comply with those court orders (Serres and Howatt, 2011). Similarly, a *Wall Street Journal* investigation found that judges in nine counties across the country signed warrants for the arrest of more than 5000 consumer debtors on civil contempt charges between January 2010 and early 2011. Many parents who fail to comply with child support decrees and legal debtors have also been arrested and incarcerated for civil contempt of court (American Civil Liberties Union, 2010; Bannon et al., 2010; May and Roulet, 2005; Patterson, 2008; Ressler, 2006). The use of civil contempt charges to incarcerate debtors is quite controversial because persons charged with civil contempt are not entitled to legal representation or other criminal procedural safeguards. As a result, the courts cannot meaningfully assess whether a person has the ability to comply with the court order—that is, whether they in fact hold the key to their jail cell (Patterson, 2008; Ressler, 2006).<sup>6</sup> In short, this civil route to prison or jail is not only characterized by relatively few procedural roadblocks, but has enabled judges and others to revive an especially controversial practice—the incarceration of indigent debtors.

*The civil commitment of sex offenders.* Sex offenders have been subject to both criminal and civil legal regulation for much of the 20th century. From the 1930s to the 1970s, roughly half the US states adopted ‘sexual psychopath’ laws that enabled the preventative and indefinite detention of sex offenders thought to be at high risk of reoffending (Janus and Prentky, 2008; Sutherland, 1950). By 1985, most states had repealed these laws. Analysts attribute their repeal to several factors, including criticism by professional psychiatric associations, the feminist critique of the ‘medicalization’ of sexual violence,

and heightened concern about the lack of due process and procedural protections in these proceedings (Janus and Prentky, 2008).

Since 1990, a 'second generation' of these statutes has been underway, with at least 20 states and the federal government adopting civil commitment laws (Janus and Prentky, 2008). Like their predecessors, these 'sexually violent predator' (SVP) laws allow authorities to detain, indefinitely, offenders who are believed likely to re-offend even after their criminal sentence has been served in its entirety. SVPs have been challenged in a number of states, often on the grounds that these 'regulatory' and 'preventive' laws are, in reality, punitive. The courts have consistently rejected this reasoning: 'Uniformly ... the courts have held that the states acted with proper, non-punitive motive, and rejected these challenges' (Janus and Prentky, 2008: 90). Other kinds of constitutional challenges have also failed. While the number of people preemptively and indefinitely detained under these statutes is not especially large (an estimated 2700 in 2007; Janus and Prentky, 2008), it is nonetheless significant that courts accept the claim that preventive, indefinite detention is not punitive because the legislature does not intend it to be.

*Incarceration of juvenile status offenders via the valid court order.* The juvenile justice system was created over a century ago to handle troublesome youth, including delinquents (youth accused of violating criminal laws), neglected and dependent children, and 'status offenders'. Status offenses are behaviors that are illegal only because the offender is underage. Today, the most common status offenses include running away, ungovernability, truancy, curfew violations, and possession of alcohol and tobacco (Steinhart, 1996). Historically, the distinction between status offenders and delinquents was not especially meaningful, and status offenders were routinely detained alongside their more criminal counterparts (Steinhart, 1996). In 1974, however, policymakers adopted the Juvenile Justice and Delinquency Prevention Act (JJDPA), which, among other things, prohibited the detention of juvenile status offenders.

As Steinhart (1996: 90) explains, the JJDPA stands out as a remarkable piece of legislation in that it achieved its stated goal of reducing juvenile detention levels: 'By 1988, according to the U.S. General Accounting Office, the 50 states participating in the JJDPA had reduced national status offender detention levels by 95 percent.' However, in reauthorization hearings held in 1980, the National Council of Juvenile and Family Court Judges protested the Act's limitations on detention of status offenders (Raley and Dean, 1986). The Council successfully lobbied Congress to amend the JJDPA by creating an exception to the prohibition against the detention of status offenders. Known as the Valid Court Order (VCO) amendment, this new provision permitted the secure detention of adjudicated status offenders if youths violated a valid order of the juvenile court (Arthur and Waugh, 2009; Raley and Dean, 1986). Violation of a 'valid court order' is not a criminal offense, but violation of such orders can trigger incarceration.

After 1980, many states followed the federal lead by adopting or modifying legislation to enable the secure detention of adjudicated status offenders when they violated a VCO. Between 1980 and 1988, the VCO exclusion was adopted in 38 states; in 1988 alone, 5345 status offenders were detained under the VCO exclusion (Steinhart, 1996). The number of status offenders arrested and detained has continued to climb in recent

years. On any given day in 2003, approximately 19,000 status offenders and technical violators (i.e. juvenile offenders detained as a result of a technical violation, typically a violation of a valid court order) were detained. This figure represents 20 percent of youth in custody (American Bar Foundation, nd).

The discussion above elucidated the expansion of two administrative routes and three civil pathways to incarceration. Often, these pathways were quietly created by institutional actors seeking to re-establish practices that had been restricted by courts and/or policymakers. The creation of such routes to detention not only facilitated the revival of a formerly prohibited penal practice, but also has the advantage of imposing few procedural requirements. Below, we identify two other types of legal reconstructions that also create new penalties and pathways to detention.

### *Civil regulation as adaptive criminalization*

At the local level, innovative bureaucratic actors have created civil alternatives to traditional criminal legal control mechanisms in an attempt to increase official control over the urban landscape. Historically, municipalities relied extensively on criminal vagrancy and loitering statutes to regulate the movement and activities of the socially marginal. The US Supreme Court's invalidation of vagrancy and loitering laws in the 1960s and 1970s was predicated, in part, on the Court's recognition that these laws were broadly used to regulate access to and movement through space, particularly by people with marginalized social statuses. In these decisions (including *Papachristou v. Jacksonville*, 1972; *Powell v. Texas*, 1968; and *Robinson v. California*, 1962), the Supreme Court ruled that penalizing people for behaviors over which they had no control—that were, in legal terms, based on status—was unconstitutional (Kelling and Coles, 1996). In the 1990s, many municipalities adopted criminal 'civility' codes in an attempt to restore 'order' and 'civility' to urban landscapes increasingly populated by the un-housed. These laws criminalized many of the behaviors associated with homelessness, such as panhandling, sitting and lying on sidewalks, and camping, if not homelessness itself (Harcourt, 2001; Hermer and Mosher, 2002; Mitchell, 2003). Yet in many cities, these statutes also proved to be vulnerable to constitutional challenge.

In response to legal challenges to the constitutionality of such measures, many cities innovated and adopted more broadly applicable and legally hybrid social control tools aimed at eradicating 'disorder' (Beckett and Herbert, 2008, 2010; Crawford, 2009; Ramsay, 2008; Sanchez, 1997).<sup>7</sup> Each of these tools entails a civil order to comply with certain spatial restrictions, and violations of such orders may be a criminal offense and/or trigger criminal punishment. Examples of such social control tools are numerous and include civil gang injunctions (Maxson et al., 2005; Stewart, 1998), no-contact orders (Suk, 2006), and innovations in trespass law that authorize officials to exclude individuals perceived as disorderly from urban spaces (Beckett and Herbert, 2008, 2010). These legally hybrid techniques blend elements of civil and criminal law; they also shift the burden of proof and restrict rights in ways that benefit the State. Police and prosecutors have embraced these strategies for these reasons, and because they believe such tools are more likely to be deemed constitutional than the criminal statutes they replace. In the

words of one scholar, ‘officials believe that civil remedies offer speedy solutions that are unencumbered by the rigorous constitutional protections associated with criminal trials’ (Cheh, 1991: 1327).

These new tools significantly extend the reach and power of the penal state, both by authorizing civil sanctions (exclusions) that are often experienced as painful and punitive and by creating new crimes that would not otherwise exist (Beckett and Herbert, 2008, 2010). A recent case study of the development and use of these tools in Seattle suggests that these tools are widely used and generate a significant number of criminal cases.<sup>8</sup> Deployment of these new tools is thus best understood as a supplement rather than an alternative to criminal justice intervention. Indeed, their legal hybridity strengthens the state’s capacity to punish (Beckett and Herbert, 2008, 2010). Omission of these legally hybrid state control practices would lead punishment and society scholars to misidentify the increasingly complex contours of carceral state power.

In sum, the new paths to prison and jail identified above significantly extend the carceral power of the State—the capacity of government to incarcerate and otherwise curtail the liberty and mobility of subjects. Definitions of punishment that include only the sanctions that flow from criminal conviction therefore preclude a comprehensive assessment of carceral state power and its social effects.

### *Administrative law as adaptive criminalization*

The preceding discussion showed how the mobilization of administrative or civil legal authority in the (formerly) criminal context has enhanced the penal power of the state. At the same time, the extension of criminal law into (formerly) administrative or civil contexts has also increased the capacity of the state to punish. In particular, authorities increasingly define and treat unauthorized immigration as a criminal offense. This extension of criminal law into the administrative legal realm has been accomplished in a number of ways. We describe several of these below, and argue that these tactics have blurred the boundary between criminal and administrative legal process and undermined the capacity of immigrants to assert their rights and avoid punishment in both settings. As a result, the criminalization of immigration has significantly increased carceral state power.

The most common type of criminalization involves the legislative adoption of criminal statutes that define a behavior (or status) as a crime. Arizona’s recently adopted Senate Bill 1070, for example, makes failure to carry immigration documents a crime. Criminalization can also be accomplished in other ways. In another example of ‘crim-migration’, prosecutors collaborating with Immigration and Customs Enforcement (ICE) have begun to criminally prosecute unauthorized immigrants detained in ICE sweeps for ‘identity theft’ and ‘government document fraud’ for using a fictitious social security number (Camayd-Freixas, 2008). Prior to the adoption of Arizona’s Senate Bill 1070, Arizona authorities used the state’s human trafficking statute to prosecute undocumented immigrants—for smuggling themselves (Miller, 2010). In these examples, authorities apply a pre-existing criminal statute in new (and arguably unintended) ways and in primarily administrative settings to strengthen the sanctions that flow from administrative law violations.

Criminalization can also involve the intensification of criminal law enforcement. As a result of the federal government's 'Operation Streamline' program, for example, federal authorities began in 2005 to criminally prosecute first-time border crossers for illegal entry before deporting them. Although illegal entry has long been statutorily defined as a federal misdemeanor, this fact was, until 2005, largely ignored. Now, undocumented migrants detained at the border are often routed through the federal criminal justice system and into US prisons prior to deportation (National Immigration Forum, 2010).

In these cases, criminalization not only increases the penalties attached to immigration violations; it also diminishes the capacity of legal subjects to exercise their due process rights in both criminal and administrative legal forums. The arrest by federal authorities of unauthorized workers in Postville, Iowa illustrates how this works (Camayd-Freixas, 2008). To process the approximately 400 detainees arrested in a nearby meat-processing plant, authorities constructed a temporary court and detention center in a 60-acre cattle fairground. The workers were charged not only with immigration violations, but also with 'knowingly using a false social security number' for using fictitious social security numbers on their job applications. On paper, many of the defendants had strong cases against these charges: the fabricated social security numbers were often supplied by the employer, and in theory, a showing of intent is required to secure conviction. However, the 'fast-tracked' nature of the criminal process to which the workers were subjected, and their administrative legal status, meant that the risks associated with pleading not guilty were prohibitive. As Camayd-Freixas (2008: 5) explained,

If you plead guilty to the charge of 'knowingly using a false Social Security number,' the government will withdraw the heavier charge of 'aggravated identity theft,' and you will serve 5 months in jail, be deported without a hearing ... If you plead not guilty, you could wait 6 to 8 months in jail for a trial (without right of bail since you are on an immigration detainer). Even if you win at trial, you will still be deported, and could end up waiting longer in jail than if you just plead guilty.

Thus, by bringing criminal charges to bear on what would otherwise be an administrative matter, authorities weakened the capacity of alleged immigration law violators to contest their criminal as well as their administrative conviction; they also increased the administrative penalties that would apply if these workers were to return to the United States without authorization (Camayd-Freixas, 2008).<sup>9</sup>

As authorities increasingly bring criminal law to bear on (formerly) administrative immigration matters, the definition of 'criminal alien' has expanded and an increasing number of individuals who have been so classified are held in federal and state prisons and local jails. Yet, between 300,000 and 450,000 of the criminal aliens arrested in 2010 were arrested for non-criminal immigration violations (US General Accounting Office, 2011: 21, Table 2). These criminal aliens include persons convicted of, for example, Government document fraud for using a fictitious social security number. The immigration and criminal systems are increasingly intertwined at an institutional level, too. For example, the now-mandatory Secure Communities program requires that the fingerprints of all persons booked into jail are checked not only against the FBI's criminal record

**Table 1.** Pathways to prison/jail

Pathway to prison/jail	Underlying offense	Legal charge	Legal process	Incarceration as possible outcome?	Incarceration defined as punishment?
Criminal	Use of false social security number	Identity theft/ document fraud	Criminal-administrative	Yes	Yes, when results from criminal conviction
Criminal	Unauthorized migration	Illegal entry	Criminal, then administrative	Yes	Yes, when results from criminal conviction
Administrative	Unauthorized migration	Immigration law violations	Administrative	Yes	No
Administrative	Technical violation of parole/probation conditions	Technical violation	Administrative	Yes	No
Civil	Non-payment of financial obligation	Civil contempt	Civil	Yes	No
Civil	Status offense	VCO or civil contempt	Civil	Yes	No

database, but also the Department of Homeland Security's database, which includes information regarding (administrative) immigration law violations.<sup>10</sup>

In summary, criminalization is not a new technique, but it is occurring in the administrative immigration context in novel ways, and on an unusually large scale. Along with the creation of new civil and administrative pathways to detention, and the development of civil social control tools at the local level, the application of the criminal law in (formerly) administrative legal settings illustrates how the manipulation and deployment of varied sources of legal authority has enabled the creation of a variety of new penal practices. The following section clarifies how these penal practices have come to be legally defined as other-than-punishment—and to be largely omitted from punishment and society scholarship.

### **The legal construction of 'not-punishment'**

We have demonstrated that a variety of civil, administrative, and legally hybrid routes now lead to punishment, including, in some cases, incarceration. Yet in many such cases, the sanction imposed is officially defined as not-punishment. As Table 1 shows, the courts

define the same outcome—compulsory detention in penal institutions that impose significant deprivations—as punishment only when it flows from a criminal conviction adjudicated by a criminal court.

To understand how civil and administrative penalties are defined in law as non-punishment, it is important to begin with the liberty-protecting imperatives of the criminal rights ‘revolution’. The Warren Court’s rights revolution achieved many things, including ‘nationalizing’ the Bill of Rights (Kadish, 1986), conceiving of the criminal justice system as a continuous and interconnected system (Greenspan, 1994; Kelling, 1992; Walker, 1992), and implicitly connecting procedural rights to Black and Latino civil rights (Allen, 1975). The Warren Court’s metric for evaluating punishment focused on the potential deprivation of liberty through criminal law. From this perspective, the threat of deprivation of liberty (the possible outcome) required strong criminal due process rights (the process). That is, when determining what was or was not punishment, the Court asked whether the possible sanction might involve the deprivation of liberty. When this was the case, the Warren Court considered the entire criminal justice system to be inherently adversarial, and extended due process protections once reserved for the criminal trial to earlier stages of the criminal justice process (Greenspan, 1994: 174). For example, the Warren Court extended the right to counsel back to arraignment (*Hamilton v. Alabama*, 1961), post-indictment police interrogation (*Massiah v. United States*, 1964), and to police interrogation before indictment (*Escobedo v. Illinois*, 1964). As the Court ruled in *Miranda v. Arizona* (1966: 477), being in held custody at a police station meant being ‘deprived’ of ‘freedom of action’ and therefore required extension of due process protections. In short, the criminal rights revolution rested on the logic that because criminal sanctions potentially involve the deprivation of liberty, all interactions between the criminal justice system and the individual are inherently coercive and adversarial, and therefore the standards for due process must be high and broadly extended.

The legal logic that defines civil and administrative punishments as non-punishment reverses the metric and methodology of the Warren Court criminal rights revolution. Whereas watershed decisions from *Hamilton* to *Miranda* began with sanctions that entailed the deprivation of liberty and then imputed procedural rights, contemporary case law defines punishment in terms of the offense type and venue of adjudication. Two legal logics have facilitated this shift. First, contemporary legal doctrine largely defers to legislative intent in defining offenses as ‘civil’ rather than ‘criminal’, such that even offenses that result in incarceration do not warrant criminal due process if the offense is labeled by lawmakers or others as civil. Second, legal doctrine ascribes limited due process according to venue, such that administrative and civil courts are not required to meet criminal legal standards even when incarcerating. The following section explores these doctrines and their ramifications.

### *Non-punishment by intent*

Increasingly, case law holds that if legislators do not explicitly state that a sanction is intended to be punitive, then it is not. This deference to lawmakers’ stated intentions is an important facilitator of carceral state expansion. Ironically, the roots of this argument were

planted by the Warren Court. In *Kennedy v. Mendoza-Martinez* (1963), the Warren Court held that a federal law stripping an American of citizenship for a crime (in this case, the crime of fleeing the country to evade military service in Vietnam) was a punitive measure as intended by members of Congress. To reach its conclusion, the Court examined legislative history and concluded that members of Congress (inappropriately) *intended* deportation as punishment. *Mendoza* was, in many ways, a liberal decision: issued by the Warren Court, the immediate implication for the defendant was that he could not be deported for 'draft-dodging' Vietnam. In so doing, however, the *Mendoza* Court laid the foundation for the idea that 'punishment' is determined by legislative intent.<sup>11</sup>

Unlike the cases that gave rise to the criminal procedure revolution, punishment in *Mendoza* was not linked to the realities of coercion and the deprivation of liberty. In subsequent cases, therefore, the seemingly liberal decision of *Mendoza* was easily applied to define punishment in constrained terms, such that even penalties of forfeiture and incarceration required only civil due process if lawmakers labeled the outcomes 'civil' penalties (see Cheh, 1991). As the Court has affirmed in a number of cases since *Mendoza*, what constitutes criminal punishment (and therefore the level of due process required) is a matter of legislative intent. In the language of the Court, 'Whether a given sanction is civil or criminal is one of statutory construction' (*One Lot Emerald Cut Stones and One Ring v. US*, 1972).

This logic has been sustained over time. In *United States v. Ward* (1980), the Rehnquist Court held that incurring a fine or incarceration without criminal due process was constitutionally acceptable because Congress labeled it a 'civil penalty' (*United States v. Ward*, 1980: 242). The *Ward* standard was even more deferential to legislative intent than *Mendoza*: it did not involve a complex version of intent as unearthed through legislative records, but only statutory labeling of the sanction as either 'civil' or 'criminal' (Porter, 1997: 551). In *Allen v. Illinois* (1986), the Rehnquist Court held that the requirement for a defendant to undergo and submit psychiatric evaluations under the Illinois Sexually Dangerous Persons Act did not violate the Fifth Amendment right against self-incrimination, because the statute did not authorize sanctions that were *intended* by lawmakers as punishment. In this case, the Rehnquist Court explicitly rejected the argument that incarceration in this case was punishment, stating that the defendant's coerced commitment to a maximum-security prison 'does not make the conditions of that person's confinement amount to "punishment," and then render "criminal" the proceedings that led to confinement' (*Allen v. Illinois*, 1986: 374–375). Deferring to legislative intent, the Court noted that the Illinois legislature labeled the proceedings under the Act 'civil' and that its intent was to provide treatment, not punishment; incarceration in such cases was thereby construed as regulatory detention rather than punishment (Richards, 1989).<sup>12</sup> Deference to legislative intent has held as the norm with only modest exception.<sup>13</sup>

### *Non-punishment by venue*

The preceding discussion revealed that the legislative labeling of a sanction as 'civil' is seen by the courts as justification to define that sanction as not-punishment even when it leads to incarceration. Contemporary case law similarly holds that cases processed in administrative venues require a lower level of due process, even when incarceration is a possible outcome. For example, in determining due process rights for parole revocation,

the Supreme Court in *Morrissey v. Brewer* (1972: 478–480, emphasis added) held that ‘parole officers are part of the *administrative system* designed to assist parolees’—the Court therefore began ‘with the proposition that the revocation of parole is not part of a criminal prosecution, and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations’. The Supreme Court validated a lower standard of due process even as it acknowledged that parolees accused of a crime are likely to face administrative revocation because state actors prefer ‘the procedural ease of recommitting the individual on the basis of a lesser showing by the State’ (*Morrissey v. Brewer*, 1972: 479). Similarly, probation revocation was also established as administrative and ‘not a stage in a criminal prosecution’ (*Gagnon v. Scarpelli*, 1973: 782). Both *Morrissey* and *Gagnon* referenced the benefits of avoiding the excessive formality and delay associated with the provision of counsel, and concluded that there is no absolute right to counsel (Greenspan, 1994: 185; *Morrissey v. Brewer*, 1972: 489–490).

Even as administrative hearings do not qualify for full due process rights, the Court has identified partial rights that should be afforded to particular administrative hearings. In parole hearings, for example, the parolee is entitled to notice of charges, the right to present evidence and to be heard, and the right to confront adverse witnesses (*Morrissey v. Brewer*, 1972). Similarly, the Supreme Court specified that prison disciplinary hearings require notice and the right to be heard (*Wolf v. McConnell*, 1974). Even the landmark case extending criminal due process into juvenile cases, *In re Gault* (1967), identified only certain rights, requiring judges only to advise on the right to counsel in proceedings that might result in incarceration. Appointment of counsel is not required, and therefore states and localities demonstrate considerable variation in appointing lawyers to juvenile offenders (Guevara et al., 2004; US General Accounting Office, 1995).

Granting selected rights for certain administrative agencies or non-criminal courts has imparted some legitimacy to those proceedings, and has established an important precedent for subsequent cases (Greenspan, 1994). For example, in holding that states need not provide counsel to a parent facing incarceration for non-payment of child support, the Court in *Turner v. Rogers* (2011) relied on *Mathews v. Eldridge* (1976) and *Gagnon*. The Court used the *Mathews*’ ‘standard’ to suggest that, even without counsel, the defendant had adequate protection against erroneous deprivation of liberty. Similarly, citing *Gagnon*, the Court held that full due process in these civil cases would ‘alter significantly the nature of the proceeding’ by adding ‘formality’ and ‘delay’ that would slow payment of child support (*Turner v. Rogers*, 2011: 14).<sup>14</sup>

In sum, the proliferation of civil, administrative, and legally hybrid pathways to jail and prison is legally codified and protected in contemporary case law. Legal doctrine preserves civil and administrative ‘detention’ as non-punishment by focusing on ‘front-end’ processes, namely the labeling of the offense and nature of the venue in which it is processed. Through its lack of focus on the ‘back-end’ outcomes of incarceration or other deprivations of liberty, legal doctrine reinscribes ‘civil’ and ‘administrative’ as nomenclature sufficiently powerful to sidestep the deprivation of liberty.

## Conclusion

The development of the shadow carceral state has important implications for punishment and society scholarship. Within the shadow carceral state, a variety of institutional actors

have manipulated the ostensibly discrete boundaries of civil, administrative, and criminal law, thereby creating and/or enlarging non-criminal pathways to punishment. Many of the practices we have highlighted involve civil or administrative legal authority and entail sanctions including jail and prison sentences. Nonetheless, state officials do not define these sanctions as punishment. Many courts have determined that such outcomes are ‘not-punishment’ precisely because they flow from the exercise of civil or administrative legal authority. The courts have also validated such claims by deferring to legislative intent; according to this logic, sanctions constitute punishment only when legislators specifically say that they intend this. Studies of penality that focus only on the tail-end of the *criminal* legal process overlook both the expansion of non-criminal routes to punishment and the legal fungibility that has made them possible. Accepting state definitions of punishment obscures the myriad ways the carceral state ensnares and sanctions millions, by, for example, regulating and restricting spatial mobility, imposing debt and sanctioning nonpayment, and preemptively detaining immigrants with unclear or contested legal status.

An accurate mapping of carceral power therefore requires a more comprehensive definition of it, one that is independent of both legislative intent and legal nomenclature. Scholarly reliance on legal definitions of what is and is not punishment leads to the absurd proposition that compulsory detention is only punishment if the government says it is. Moreover, by limiting our attention to the tail-end of the criminal legal process, we neglect the myriad ways in which institutions restrict the lives and liberty of millions, and, in the process, reproduce and exacerbate social inequality. 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.

In calling for the recognition of increased carceral state power, we end with a final caution. Given the magnitude of the penal state and the incredible racial disparities produced by the war on drugs and ‘retributive’ politics, it is tempting to see remediation in calling for more ‘alternatives’ to incarceration. We began this article with a reference to Stanley Cohen’s vision of ‘the punitive city’, and will end with a call to resurrect his investigation of the blurred and fine lines between innocence and guilt, rehabilitation and punishment, deviance and criminality. Cohen’s essay, published in 1979, was eclipsed by the policies of the 1980s and 1990s that took center stage in US politics—the force of the drug war, mandatory minimums, three-strike laws, truth in sentencing, and the incredible prison boom—all so overwhelmingly punitive and prison-centered that many scholars, activists, and politicians understandably call for more rehabilitation and more alternatives to incarceration. Given all the adaptations and subterranean politics that have produced the shadow carceral state, it is time to resurrect Cohen’s critical perspective that problematized community and other ‘alternatives’ to incarceration, and to build a bridge between our academic research and the pedestrian minutiae of what is really happening around us.

## Notes

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1. We use the phrases ‘shadow carceral state’ and ‘shadow penal state’ interchangeably to mean *government* policies, legal doctrine, and institutions with the power to impose sanctions that either mimic the coercive practices widely considered to be of punishment (e.g. incarceration, whether under the moniker of administrative detention or immigrant detention) or impose significant hardship and carry with them social and political opprobrium (see also Harcourt, 2005). This definition is expansive in many ways but is limited to *state* apparatuses.
2. Pre-trial detention is an example, but see Feeley (1979).
3. The uptick in the detention of migrants and asylum-seekers is not unique to the United States (Aas, 2011).
4. It is important to underscore that there was no clean ‘break’ from a singularly purposed rehabilitation to risk management; in the past, rehabilitation had punitive and coercive elements, while current ‘waste management’ practices vary according to field agents who do not simply adopt wholesale the rhetoric of risk management (Lynch, 1998, 2000).
5. In *Bearden v. Georgia* (1983), for example, the Court ruled that criminal courts must determine whether defendants made a bona fide effort to pay their legal debts; only if the defendant ‘willfully’ refused to pay can she or he be incarcerated. Several states also have statutes that forbid the incarceration of people who cannot pay their legal debt. (For a discussion of these statutes, see American Civil Liberties Union, 2010.)
6. Recently, the Supreme Court rejected this argument, ruling that civil contemnors are not entitled to legal representation; *Turner v. Rogers et al.* (2011: 10-10).
7. Similarly, the Anti-Social Behavioral Ordinance adopted by the British government allows authorities to grant CPOs (Civil Protection Orders) in civil or administrative proceedings. The terms of the prohibitions these orders entail may be broad and include spatial restrictions. A breach of a CPO is a criminal offense (Ramsay, 2008).
8. Very recently, however, the Seattle Police Department significantly modified its trespass exclusion program and will no longer issue admonishments that exclude people from places normally open to the public for extended periods of time (see Williams, 2010).
9. Securing these criminal convictions in what would otherwise be routine administrative cases inflates the share of ICE arrests that involve criminal as opposed to administrative violations. The dramatic surge in ICE funding since 9/11 has been predicated on the idea that ICE and the Department of Homeland Security more generally focus on criminal and terrorist threats to the nation’s security (Camayd-Freixas, 2008).
10. Although the program ostensibly targets immigrants previously convicted of a serious criminal offense for deportation, many of those deported as a result of Secure Communities had never been convicted of a crime (Preston, 2011).
11. The Court added that a ‘civil’ penalty might entail punishment if the sanction was sufficiently punitive by certain ‘considerations’, but no federal sanction has met these standards.
12. The supremacy of legislative intent held even though, as Justice Stevens pointed out in his dissent, the

Illinois ‘sexually dangerous person’ proceeding may only be triggered by a *criminal* incident; may only be initiated by the sovereign State’s *prosecuting* authorities; may only be established with the burden of proof applicable to the *criminal* law; may only proceed if a *criminal* offense is established; and has the consequence of *incarceration* in the State’s prison system—in this case, Illinois’ maximum-security prison at Menard.

(*Allen v. Illinois*, 1986: 379, emphases added)

13. *United States v. Halper* (1989) and *Austin v. United States* (1993) affirmed that sanctions are presumptively civil if labeled so by lawmakers, but added that sufficiently punitive force could overcome the presumption and qualify as quasi-criminal or criminal (Porter, 1997). Like the *Mendoza* test, the *Halper-Austin* standard has generated many challenges, but victories have been limited to cases of civil fines.
14. The Court listed four safeguards: (1) notice to the defendant that 'ability to pay' is a critical issue at the contempt hearing; (2) use of a form to gather financial information; (3) opportunity to respond to questions about his finances; (4) an express finding by the Court that the defendant has the ability of pay (564 US 14 (2011)). It is notable that these 'safeguards' are administrative forms, and there is no reference to Fifth or Sixth Amendment rights.

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**Katherine Beckett** is a Professor in the Department of Sociology and the Law, Societies, and Justice Program, and Adjunct Professor in the School of Law, at the University of Washington. She received her PhD in Sociology from the University of California at Los Angeles in 1994. Her research analyzes the causes and consequences of legal changes and penal practices. She is the author of numerous articles and several books on these topics, including, most recently, *Banished: The New Social Control in Urban America*, published in 2010 by Oxford University Press.

**Naomi Murakawa** is an Assistant Professor in the Department of Political Science at the University of Washington. Her research interests include race politics, American political development, and crime policy and the carceral state. Her book, *The First Civil Right: Racial Liberalism and the Construction of Carceral America*, is forthcoming with Oxford University Press.