

## Penal Abolition as the End of Criminal Behavior<sup>1</sup>

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In this paper, I argue for penal abolition on the grounds that the logic, practices and justification for the ‘criminal justice system’ derive from ideas of ‘criminal’ deviance and people as ‘criminals’, which are revealed to be fictional. I present evidence for the ubiquity of violent and non-violent ‘crimes’ in everyday life and the participation of most people in transgression, which together nullify the notion that such behavior is abnormal and void the concepts of ‘criminal’ deviance, ‘crime’ and ‘criminal’. In the face of a world suffused by transgressive acts and transgressive actors, the penal system daily functions to label certain transgressions as ‘criminal behavior’ and to sort certain transgressors into the category of ‘criminals’. In this sense, the purpose of the penal system is exposed as preoccupied with the management of only certain transgression. Consequently, penal abolition can be seen for what it is: a call to end the ‘criminal behavior’ discourse which hides the ubiquity of transgression. The implications for penal thinking are severe, as the penal system is based on the felt necessity to respond to deviant, ‘criminalized’ behavior and deviant ‘criminals’. When it is revealed that transgression is not deviant but is in fact the norm, one must conclude (1) that the penal system is not (and never will be) able to effectively address the transgression of social norms, (2) that it should therefore be abolished, and (3) that we re-conceptualize and re-design our social response to the transgression of norms as the management of *difference* (and not deviance). [*Article copies available for a fee from The Transformative Studies Institute. E-mail address: [journal@transformativestudies.org](mailto:journal@transformativestudies.org) Website: <http://www.transformativestudies.org> ©2016 by The Transformative Studies Institute. All rights reserved.*]

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<sup>1</sup> This paper draws on my extensive work on the central role of language in ‘criminal justice’. For example, see Coyle 2010a, 2010b, 2013, 2014, and 2015.

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“Words have lives of their own. However much sociologists insist that the term ‘deviant’ does not diminish the worth of the person or group so-categorized, the implication of inferiority adheres to the word. ...majorities usually categorize persons or groups as ‘deviant’ in order to set them apart as inferior beings and to justify their social control, oppression, persecution, or even complete destruction.”

Thomas Szasz. *The Manufacture of Madness*, xxv-xxvi

## INTRODUCTION

I begin this essay with two arguments designed to disrupt normative perceptions of what we call ‘criminal justice’. The first is that, because language plays a central role in shaping the thought and practices of ‘criminal justice’, studying ‘criminal justice’ language highlights the mythological character of ‘crime’, ‘criminals,’ and ‘criminal behavior’. The second is that what we call ‘crimes’ are not, as widely supposed, deviant acts, but are actually common and ordinary behaviors for human beings. Next, I trace the implication of these two arguments: that categories such as ‘crimes’, ‘criminals’ and ‘criminal behavior’ are by necessity fictions. Finally, having distinguished the constructed fiction of ‘crime’, I argue that the penal system itself propagates a multitude of harms even as it constantly creates ‘crime’ categories (law) and chases ‘crime’ (police, courts, prisons, etc.); therefore, it is necessary to abolish penal thinking and the practices of the penal system and replace them with intellectual constructs, institutions and practices that respond to the conflicts and harms of interpersonal relationships without further increasing harms.

## LANGUAGE AND “CRIMINAL JUSTICE”

### *Language and Everyday Life*

As we go about our everyday life, words are more often thought of as tools that we use to describe things (*language as a tool for describing human action*) than they are thought of as habits that create things (*language as generating human action*). For example, the phrase “his crime is serious” may be understood as a neutral, passive characterization (serious) of a fact (‘crime’). However, careful consideration may lead us

to recognize that invoking ‘crime’ is an active assessment with particular entailments. Finally, some reflection may bring the insight that we abdicate responsibility for these consequences when we habitually characterize certain actions as ‘crimes’.

In our daily life, we use language to communicate a diversity of responses to countless circumstances. Most of our waking moments, most of our work and our play, and almost all our actions, happen in and through language. Indeed, language is central to almost everything we do. Throughout these activities we think of language as a tool whose workers (words) are often readily available (as when words come effortlessly to mind), while at other times they are found only with effort as we sift through alternatives for the desirable word to convey our desired meaning. In all these ways we experience and think of *language as a tool for describing human action*.

Given this central and lifelong experience of language as a tool for communication, it is understandable that daily we largely forget that language is deeply complex and far more than a user-directed tool. In important ways, the words we use are seldom so carefully chosen by us to build descriptions and arguments, as they are a series of habits that determine the very architecture of our descriptions and arguments (Coyle 2013). For example, we may consider the language that has accompanied genocide: ‘uncivilized barbarians’ (Native Americans) and ‘vermin’, ‘parasites’ and ‘plague’ (European Jews). A simple explanation would be that these descriptions reflected what was taught about such peoples, but built into the habitual use of these words is the argument that we need to defend ourselves by ridding ourselves of such people (Bosmajian 1983 and 1992). Although nowhere in these words are protection and extermination directly invoked, everywhere they are implied. Similarly, in the language of sexism, of war, and of punishment, there exist not only *descriptions* of persons, but also the *creation* of persons in such a way as to invite unambiguous interpretations and prompt (sometimes require) specific actions and responses. Certainly, verbal characterizations make otherwise unsavory suggestions palatable, such as unequal treatment (sexism), killing (war), and torture (punishment).

The important point here is that the language we use to name and call our world into existence is made up not only of those words we select each time to describe it, but also of entire groupings of words (discourses). These discourses are habitually performed and by their use not only describe the world, but also generate it. As Sapir phrased it, “The fact of the matter is that the ‘real world’ is to a large extent unconsciously built up on the language habits of the group... We see and hear and otherwise

experience very largely as we do because the language habits of our community predispose certain choices of interpretation” (1956: 75). Language, then, fabricates; not because words are false or because they lie, but because their habitual everyday use is a mostly unregistered act of creation. The issue, then, is that words not only make the fabric of our lives, but also its design. To experience and think of language in such a way is to think of *language as generating human action*.

### *Language and Justice*

The implications of language as a creative force are varied and deep. In social and ‘criminal’ justice situations, the consequences of language choices are far-reaching, and have been skillfully demonstrated by both lay persons and academics. For example, George Orwell demonstrates the power of language as a tool for domination when he shows how moral entrepreneurs frequently use (and abuse) clever language choice, metaphor, and meaningless words, in order to deceive publics around justice issues (2000). Frank Burton and Pat Carlen advance a similar argument about the language of ‘Official Discourse’ in government reports; they expose how the government’s rhetorical positions leverage disproportionate power to that of other discourses on the same topic, and hence exert a far greater capacity to define situations in social life (1977). Michel Foucault masterfully demonstrates how the study of dominant language unmask not only the capacity of some groups to control the justice discourses and justice realities of their own groups, but also those of the public at large, in other words, the perception of reality and thus reality itself (1977). The work of these authors and that of others across multiple fields of study demonstrate that the use of language in social life can privilege certain discourses, while marginalizing alternative discourses to subordinate positions or even to irrelevancy.

The implications of habitually performed words and discourses for the study of justice are multiple. For one, we are alerted to the daily use of words and of ways of talking (i.e. thinking), which tell us that the world is one thing and not another, that the problems of justice and their solution are one thing and not another, and that the logics of justice and injustice are one thing and not another. It also means that daily justice language choices, that once were seen as deliberate creations and choices, have now become habits of language, which carry a reality similar to that of bricks and stones. For example, what was once a deliberate and novel drawing of certain social situations as the encounter of a ‘criminal’ and ‘victim’ in a ‘crime’ situation, is hardly ever experienced today as a discourse creation,

as an option, or as only one of many possible ways of describing such situations. Today, a long time after that *first* striking portrayal, the linguistic distinctions ‘criminal’, ‘victim’, and ‘crime’ are now intrinsic to how publics widely think of, or describe, these social situations. In particular, the myriad meanings associated with these terms help us to understand why responses to some actors in such situations belong in the domain of ‘criminal justice’ and not social justice, and why ‘criminals’ are deemed worthy of punishment while ‘victims’ merit sympathy. Yet there are numerous other ways to *experience* and *describe* these social situations, both real and imaginary: some can be found in the literature of sociocultural anthropology, some in the literature of restorative justice, some in the imaginings of classical utopian literature and some in the imaginings of anarchist dystopian visions. Though these may not have a broad public life, they do exist.

Over time, *justice language choices possess enormous power to support, create and recreate an entire justice discourse* that seemingly describes an inherent social reality. Imagine, for example, how a discussion about “the appropriate sentence, in prison years, to punish the crime of murder” (a logical question in the penal paradigm) would wholly collapse if any of the normative words ‘prison’, ‘punishment’, ‘crime’ or ‘murder’ suddenly lacked intellectual standing and/or operational practice.

Seen in this way, a set of justice language choices cumulatively builds complex perceptions that construct an entire justice paradigm, such as the penal paradigm. All justice paradigms, no matter how *real* they appear to be, are never more than a discourse creation, and importantly, constitute only one of many available or imaginable discourses and, consequently, paradigms. Thus, in time, justice (language) paradigms, such as the retributive/punitive one that is based on the distinctions ‘offenders’, ‘victims’, ‘crimes,’ and the like, become deeply accepted *obvious* interpretations of social situations. In the right political climate, these interpretations then become dominant justice (language) movements, such as the ‘tough on crime’ discourse became in the latter part of the 20<sup>th</sup> century, or as the ‘smart on crime’ discourse has become since then (Altheide and Coyle 2006).

### *‘Criminalized’ Deviance Language*

One of the most central precepts of ‘criminal justice’ and the penal paradigm, if not its very foundation, is the idea of deviance. As the word itself suggests, deviant behavior refers to actions seen as abnormal, unexpected, unusual, nonstandard, or out of the ordinary. While some of

what we call deviant behavior refers to actions that violate folk customs or mores, in this essay I am interested in the deviant behavior whose actions violate formal laws, and are thus labelled 'crimes' and 'criminal behavior'.

Sociologists – especially pragmatists, symbolic interactionists, social constructionists and labeling theorists – have long been interested in 'criminal' deviance and have been responsible for most of its theoretical development. Their vision is one that sees human beings as constructs of everyday interactions. William Thomas provided a foundational insight with his emphasis on the "definition of the situation," a straightforward distinction arguing that people enter social situations which are already defined (1923). His argument is that human beings are born into communities that have already defined the vast majority of situations which any individual will encounter. For example, I was born into a community where the act of taking things that belong to someone else was already defined as 'a crime of theft' that carries significant 'criminal' sanction. George Mead further argues that as individuals, not only are we born into and encounter such ready-made situations, but we are indeed constructed by them (i.e. that each of us is a product of all the interactions we have had and are having with others) (1934).

Emile Durkheim contributes the distinction that naming (labeling) an individual's behavior, e.g. calling an act a 'crime', is more accurately seen as an expression of society's desire to control that behavior, than as an individual's defiance of penal regulations (1951). In drawing this distinction, Durkheim launches a way of thinking that has become known as labeling theory. Howard Becker most clearly distinguishes this power of naming things in his work *Outsiders*, a study of marijuana users, where he demonstrates that marijuana smoking is not seen by users or others as deviant, until social groups make it so by creating it as an infraction (a 'crime') (1963).

The implication of this research is that 'crime' is more significant as an indicator that someone is naming another's behavior than it is as a characterization of a person's behavior. Consequently, a 'criminal' person indicates nothing more than a person to whom the 'crime' behavior has been attached. To abandon this central insight is to enter the mythology of 'crime', 'criminals,' and 'criminal behavior' out of which 'criminal justice' and the penal paradigm function (i.e. that 'criminal' acts, persons and behavior are independent of those assigning such labels).

From the interactionist/constructionist/labeling perspective then, the study of 'criminalized' deviance language promises insight into three things: (1) who is labeling 'criminality', (2) who is being labeled 'a criminal', and (3) what behavior is being labeled 'criminal.' Importantly,

scholars can use this type of analysis to develop insights that elucidate the social construction of justice performances: the routines of the ‘criminal justice system’, the development of ‘criminal justice’ discourse and policy, and consequently, ‘criminal justice’ outcomes.

The importance and usefulness of analyzing ‘criminalized’ deviance language is easily showcased with examples of studies that examine justice performances. In Paul Mason’s, *Captured by the Media: Prison Discourse in Popular Culture*, various authors highlight how media reflect and create a particular discourse about prisons and punishment (2006). The authors demonstrate that collectively, media performances construct punitive public attitudes that, in turn, encourage punitive constructions of ‘offenders’, support punitive public policy, and ultimately lead to the greater use of increasingly punitive prisons. In *The Cultural Prison: Discourse, Prisoners, and Punishment*, John Sloop traces media discourse from a rhetorical perspective to pursue similar themes of cultural discourse on prisons and punishment (1996). In a fifty-year long study of US media coverage, Sloop theorizes four, distinct, media periods of imagining people in prison as either redeemable or ‘criminal’: first, in the 1950s, the person in prison is characterized as a good white male facing challenging social circumstances, next, in the 1960s as an angry black male, then in the 1970s as a black male who is unmasked as trapped between his ‘violent nature’ and an unfairly racially charged society, and finally, in the 1980s as an incorrigible “bad” person whose behavior justifies a ‘tough on crime’ attitude. These authors show that the study of ‘criminalized’ deviance language gives insight into who is labeling ‘criminal’ behavior (moral entrepreneurs, the media), and who is being labeled a ‘criminal’ (a group of persons named ‘offenders,’ a white male lacking opportunity, and a black male who is alternatively seen as problematic for his color, his anger, and his ‘violent nature’).

The importance and usefulness of analyzing ‘criminalized’ deviance language is also showcased by examining how language choices and distinctions create and sustain entire social discourses about race and “crime” that, in turn, seem to describe an innate social reality. While ‘race’ groupings reflect phenotypic and genotypic traits, beyond this they are merely a social construction (Lie 2004; Palmie 2007). As the American Anthropological Association bluntly states, “differentiating species into biologically defined ‘races’ has proven meaningless and unscientific” (AAA 2009). Research demonstrates that the interpretation ‘race’ is not a matter of biology, as more genetic variability exists within such grouping than between them (Long and Kittles 2003). Moreover, conceptions of ‘race’ and ‘races’ are not timeless fixtures but social products that are

invented, maintained, and eliminated as they serve an age and a society (Delgado and Stefancic 2001). As such, 'race' belongs to the study of history and sociology that interprets all human inventions (language) used to negotiate the imaginings called perceptions and experiences of difference (Smedley 1999). Put differently, the creation 'race,' reflects a *linguistic device* to express intellectual and popular beliefs about human groups and to justify ideologies with definitive historic and economic purposes (colonization, slavery, etc.).

The implications of 'race' are far reaching. In the human and social sciences, scholars face a call to use sharp and critical eyes to identify not just the constructed nature of 'race,' but also the hegemonic role that the distinction itself supports (Zuberi and Bonilla-Silva 2008). This is a call to observe and decry racism, but importantly it is also a call to recognize that modern social environments are hyper-racialized and necessitate that scholars examine the *color* of social theory, the *color* of analytic frames, and the *color* of practice. Some scholars have found color in the "unconscious racism" of law (Lawrence 1987), and some have found evidence of color in the "petit apartheid" practices of jury nullification and racial profiling (Milovanovic and Russell 2001). Yet others, encouraged by the postmodern turn, point to the usefulness of examining narratives and storytelling, analyzing the construction of subjectivity and viewpoints, as well as re-imagining methodology through which knowledge is validated – all to locate the oppression inherent in racist discursive activities (Arrigo, Milovanovic, and Schehr 2005).

In the study of 'crime,' 'race' is more commonly encountered as a research variable that endless generations of bean-counting criminologists take for granted and accept as unproblematic. Here 'race' is encountered as a construction whose very study perpetuates and encourages racist 'criminal justice' thinking and practices it purports to deconstruct. Karen Glover's *Racial Profiling: Research, Racism and Resistance*, calls for a "critical race criminology" that "specifically addresses traditional and contemporary examinations of race in criminology and contests the ways the discipline produces and represents race by focusing on and indeed validating experiential knowledge via the social narrative of marginalized communities" (2009:2).

Glover's call denotes the point of entry for the study of language as it contributes to a critical race criminology and the study of racism which resides in the discourse and practices of the 'criminal justice system.' My point here is that to study the specific language of 'criminal justice' discourse is to visit the site where 'race' and 'racism' infuses 'criminal justice discourse.' Indeed, it is in everyday language (reality) that people



of color are criminalized; it is in everyday word choice, word use, and word control that the racist 'criminal justice system' discourses and practices are built, maintained, and reproduced (even while the problem of 'race' and 'racism' in matters of 'crime' and 'criminal justice' is being fully acknowledged).

'Racism' reflects the ways in which social relations are constructed to advantage and disadvantage human groups that are distinguished as belonging to disparate 'racial' categories (Bonilla-Silva 2003). More important to my project here, 'racism' reflects the ways in which social relations are *continuously maintained, recursively reconstructed, and creatively innovated* to advantage and disadvantage human groups that are distinguished as belonging to disparate 'racial' categories. To accomplish the latter, it becomes important to expose the mechanisms that sustain 'racist' discourse and 'racist' practices *even amidst a discourse and practices that claim to recognize and contest such 'racism.'* Thus, the study of justice-related language provides for the study of mechanisms that sustain 'racist' discourses and practices.

Further support for the value and importance of studying 'criminalized' deviance language is a series of works examining language in the legal process. In "Is it Sex or Assault? Erotic Versus Violent Language in Sexual Assault Trial Judgments," Janet Bavelas and Linda Coates examine the language used to describe sexual 'offenses' in British Columbia trial judgments (2001). Their findings reveal that descriptions in judgments are more frequently likely to use sexual (erotic or affectionate) language than they are likely to use language indicating violence or force. The authors argue that sexualized descriptions hide both the violence of sexual assault and the experience of the (usually female) victims. Language is here being used to hide an 'offense'. In "'Baby' or 'Fetus?': Language and the Construction of Reality in a Manslaughter Trial," Brenda Danet demonstrates how words do not so much describe, as they construct, facts and intentions in the trial of a doctor who performs a late term abortion (1980). She shows how opposing lawyers create opposing realities through their word choice. Depending on the intent to prosecute or defend, the lawyers either used "baby," "child," "person," and "the deceased" (in an attempt to create a 'crime'), or employed "fetus," "embryo," and "products of conception" (to show that no 'crime' occurred). Finally, in *Just Words: Law, Language, and Power*, John Conley and William O'Barr examine how power and ideology pervade the legal process (2005). They demonstrate that the work of law is done through careful and intelligent manipulation of language to the distinct advantage of some and to the loss of others. In one example, the authors detail the use of language in court

by a lawyer constructing a rape “victim” as being “interested” in her attacker (in other words, making an attempt to argue no ‘crime’ was committed). In another example, they show how language work resulted in the advantageous positioning for one party in divorce mediation. These studies of language in the legal process demonstrate the work required to employ a label (such as ‘crime’), and the work involved to avoid such a label. In this work, ‘crime’, ‘criminal’ and ‘criminal behavior’ language is understood to not refer to the quality of persons or their behavior, but to the actions of those naming the person or their behavior.

A final example is taken from my own work – a series of language studies driven by a variety of goals (2002, 2010a, and 2010b). Each study is an investigation into a word or a phrase commonly used in ‘criminal justice’ discourse (‘evil’ as it relates to ‘crime’, ‘victim’, etc.). I argue that such everyday language takes place within a body of interpretations, metaphors, rhetorical frames, and ultimately ideology, that are rarely acknowledged and are, instead, mostly accepted as self-evident. These language studies get to the language habits that we have forgotten are generating (and not just describing) our ‘criminal justice system’. In this research, I discover that the language of ‘criminal justice’ is designed to generate encounters with people of color, as well as those of lower socio-economic status and of certain gender (Coyle 2013). In another project, a colleague and I demonstrate that the currently occurring discursive shift from ‘tough on crime’ to ‘smart on crime’ does not reflect any change in ‘criminal justice’ ideology (despite the wish that the shift somehow recognizes the racist consequence of the ‘tough on crime’ movement) (Altheide and Coyle 2006). Instead, the shift to ‘smart on crime’ denotes a rhetorical device that is designed to mask the political and economic infeasibility of sustaining funding for what has become a gargantuan ‘criminal justice system’ (see Kappeler and Kraska 1999 for a similar analysis of the shift from law enforcement and ‘crime control’, to community policing).

This literature demonstrates the interactionist-constructionist-labelling understanding that ‘crime’ does not refer to a quality of a person’s behavior, but to the actions of those naming the person’s behavior; that ‘a criminal’ is nothing other than the person to whom that behavior has been attached; and that ‘criminal behavior’ is only the behavior that has been labeled as such. The above examples of studies that examine the everyday language of ‘criminal justice’ performances demonstrate the power of studying language to elucidate the social construction of these performances in a way that does not participate in a mythological creation of ‘crime’, ‘criminals’ and ‘criminal behavior’ as separate from those

assigning it. Finally, the research examined in this section also demonstrates the power and importance of asking the key question of how our ‘crime-making’ and ‘criminal justice-making’ work corresponds with our supposedly commonly accepted values, such as ‘equal justice for all’<sup>3</sup>, (i.e. who wins with such language and who loses). Importantly, this type of analysis elucidates the social construction of justice performances: the routines of the ‘criminal justice system’, the development of ‘criminal justice’ discourse and policy, and consequently, ‘criminal justice’ outcomes.

## **THE UBIQUITY OF TRANSGRESSION**

In the above discussion of deviance theory, I reviewed the broad history of how sociologists become interested in deviance as the study of aberrant behavior. For them, the very notion of deviance entails the study of behavior that deviates from the norm: abnormal, unexpected, unusual, nonstandard, or out of the ordinary behavior. Deviance sociologists are interested in people whose behavior somehow places them on the fringe, the border, the edge; they are interested in the acts that place people on the perimeter or outskirts of normalcy; they are interested in people defined as somewhere on the sidelines or the periphery of typically behaving human beings. As a consequence, deviance sociologists are often examining marginalized behavior (uncommon sexual expressions), marginalized situations (mental illness), and, of course, marginalized actors (the ‘criminal’).

With its emphasis on the marginal, the concept of deviance has had a very specific impact on the study of ‘criminal’ behavior. As demonstrated in the previous section, this emphasis can fruitfully be employed to deconstruct the mythology of ‘crime’, the ‘criminal’ person and ‘criminal’ behavior. As seen above, with its emphasis on the marginal, the concept of deviance also allows us to analyze some disturbing trends in modern ‘criminal justice’ performances, e.g. how the work of law is done through careful and intelligent manipulation of language to the distinct advantage of a privileged few, how ‘criminal justice’ practices in general are designed to encounter people of color (especially black males), and how in courtrooms language is used to transform the violence and force of

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<sup>3</sup> By “equal justice for all” I mean the popular American (constitutionally protected) understanding of equality of all citizens under the various systems of social control (law, policing, imprisonment, etc.). For example, The US Department of Justice webpage includes a description that it is an office charged “to ensure fair and impartial administration of justice for all Americans” (The United 2012).

sexual assault on women into an erotic and affectionate encounter. However, the emphasis on the marginal has also come at a cost because the full study of ‘criminal’ behavior shows that such behavior is more a deeply shared human expression than it is deviant one.

My argument here is that those acts which we call ‘crimes’ are not deviant as we imagine them to be, but are actually widely common behaviors. To demonstrate this, I will dissect the logic and arguments of the ultimate, liberal, ‘criminal justice’ worker who, in a career that spanned more than three decades, recognized the constructed and mythological character of ‘criminal justice’ probably more than anyone else in the US.<sup>4</sup> Nonetheless, as I will show, Michael Hennessey, the Sheriff of San Francisco County until his retirement in 2012, operates out of a mythology that views ‘criminal’ behavior as deviant.

In an interview with Michael Kransky in the year of his retirement, Hennessey reveals how the everyday operation of ‘criminal justice’ occurs in an environment that is founded on the conceptions of responding to and managing ‘criminal’ deviance and ‘criminal’ deviants (Kransky 2011). The interview begins with a discussion of the county’s jail population. Asked about “what kind of people go to jail,” Hennessey is quick to agree that it is “the rabble,” or “drunks and homeless,” “petty criminals,” and “petty thieves” that Kransky suggests, but he also adds that “40% of people in jails are there for drugs,” “25% are in for a violent crime,” and “a smaller percentage for public nuisance.” While he admits that to some degree “county jails keep the undesirables out of the view of the public eye,” he stresses that jails are “also a place where people who are charged with very serious violent crimes await disposition of their case” as “society fears violent criminals more, and rightly so.”

When Hennessey is asked to comment on the fact that African Americans constitute only 5% of the general population in the county but constitute more than ten times that percentage (55%) of the jail population for the county, he claims that the disparity “is one of the most troubling issues that I have had to deal with and had to look at during my entire 32 years as sheriff” and labels it “just scandalous” and “a real tragedy.” His rationalization for why, in a county that is only 5% African American, more than half the jail population is African American is that “it comes down to a lot of social factors such as unemployment and unemployment leading to people going to the underground economy to make a living selling drugs” and “many African American families having had generations of people incarcerated and therefore it sort of seems

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<sup>4</sup> This discussion was first developed in Coyle 2013.

inevitable.” He concludes, “It is something that I’ve brought to the public’s attention many times but [it] does not seem to be abating.”

Hennessey’s progressive politics shine through when he discusses the ‘criminals’ in his jails as “people (that) can change their worldview,” “rehabilitate themselves” and “become productive members of society.” As Kransky congratulates him for his work to transform these persons, Hennessey says, “I do think San Francisco is a compassionate city, and will continue to support programs that help ex-offenders get back on their feet.” He appeals for “giving people in custody education,” for “getting the riskier population... counselors and therapists,” and for helping “these men to first recreate their own life and what has caused them to commit violence.”

Hennessey’s discourse about “what kind of people go to jail,” is so familiar that most would not recognize its profound inaccuracies. He characterizes the people who go to jail as ‘criminals,’ drug addicts, and those committing very serious violent ‘crimes’. However, research repeatedly and consistently tells a very different story: the full population of ‘criminals,’ drug addicts, and those committing very serious violent ‘crimes’, would include the majority of Americans. Most people habitually violate the law committing a variety of both non-violent and violent ‘crimes’ in their lifespan (Gabor 1994). For example, property ‘crime’ is a very common occurrence. In 2013, it is estimated that 9.0% of all households in the US experienced one or more property ‘crime’ victimizations (Truman and Langton 2014). In other words, in the last year, almost 1 in 10 households experienced at least one property ‘crime’! Similarly, a large proportion of people experiment with or regularly use illegal drugs; more than one third of all Americans have tried an illicit drug and 22.6 million (1 in 13 Americans) are currently illicit drug users (America’s Drug 1997 and Results From 2011). Lastly, high numbers of people commit very serious violent ‘crimes’. For example, one in four college women in the US is sexually assaulted and one in six women in the US will be sexually assaulted in their lifetime – all these usually by someone they personally know (Fisher et al. 2000, and Tjaden and Thoennes 1998).

The banality and regularity of people treating each other with a violence that is categorized by law as ‘criminal’ is especially worth noting – not only because of how deeply this is collectively denied, but also because the most popular defense of the entire penal project is responding to and managing violent ‘crime’. In their study of violence prevalence, Patricia Tjaden and Nancy Thoennes sampled both women and men in the US on their experiences with violent victimization (2000). These researchers

surveyed for physical assault, forcible rape and stalking experienced at any time in the lifespan and by any type of perpetrator. What they found would boggle the mind of anyone who thinks of ‘violent crime’ as deviant. As they write, “Physical assault is widespread among adults in the United States: 51.9% of surveyed women and 66.4% of surveyed men said they were physically assaulted as a child by an adult caretaker and/or as an adult by any type of attacker” (p. iv). Similarly, their findings report that more than 1 in 10 adults report being stalked at some point in their life; in conjunction with the above-reported, extraordinary rates of forcible rape, the amounts of violent ‘crime’ committed by those mostly intimately known to the victims becomes staggering to conceive of – especially if one continues to insist on thinking of violent ‘crime’ as somehow deviant. As the report summarizes, “The data show that violence is more widespread and injurious to women’s and men’s health than previously thought—an important finding for legislators, policymakers, intervention planners, and researchers as well as the public health and criminal justice communities” (p. iii). Indeed, for penal “criminal justice communities,” this prevalence will mean thinking of their work as placing more people inside of prison than out.

Another problem with Hennessey’s classic and typical interpretation of “what kind of people go to jail” (with the accompanying constructions of ‘crime’, ‘criminals’ and ‘criminal justice’), is that it does not recognize that the majority of harms (economic damage, violent acts, and death), derive from and take place in widely ignored contexts: white collar, environmental, corporate and state ‘crimes’. As a result, the many individuals involved in these ‘crimes’ are rarely counted, massively under-policed, and even less frequently arrested, prosecuted, or incarcerated.

Although the cost of a single corporate ‘crime’ (e.g. Enron) is likely to be exponentially greater than the sum of a year’s worth of robberies, burglaries, larcenies, and motor vehicle thefts, most harms committed by and in corporations will go as unnoticed and unstudied as they are unprosecuted (in its first and last study of the kind, the Justice Department found that approximately two-thirds of large corporations violated the law, see Clinard and Yeager 1987). Finally, while the FBI reports that the annual U.S. murder rate is about 16,000 people, more than 70,000 die in the same time period from product-related accidents (Friedrichs 1996); these numbers do not include the thousands of annual deaths connected to corporate pollution, such as the more than 11,000 who die annually from industrial pollution alone (Steingraber 1997).

The annual cost of white collar ‘crime’ alone is estimated to be more than 80 times that of the total amount stolen in all thefts (Reiman 2010).

Likewise, the annual cost of antitrust and trade violations is estimated to be more than 60 times that of the total amounts in all thefts (Cullen et al. 1987). Global fraud studies alone estimate that the typical business loses 5% of its revenues to fraud each year (Report 2012). These acts of fraud are committed by individuals working in diverse posts (such as accounting, operations, sales, management, purchasing or customer service), most of whom are first-time offenders with clean employment histories (87% have never been charged or convicted of a fraud-related offense) (Report 2012). The cumulative cost of all these inconceivably-many, individual ‘crimes’ is estimated at 3.5 trillion annually, or 5% of the annual Global World Product (Report 2012).

What is important to grasp about all this harm is its pervasiveness and that it represents the actions of a majority of us and not the actions of a special category of ‘criminal’ persons that the penal system is – or could – address.

The words and images that – the hyper-liberal for the US – Hennessey uses to discuss the people in his jails are all *clichés*. The discourse of the far more typical, conservative ‘criminal justice’ worker is even more rooted in this mythology of ‘the criminal’. Hennessey’s constructions – and for that matter almost all constructions of ‘criminal justice’ – not only fail to recognize the mythology of the ‘criminal’ deviant, but in fact perpetuate it. Hennessey does this most clearly when he speaks about the need for religion in jail to “get people the values they need to avoid future criminal activity,” for “getting the riskier population... counselors and therapists,” for helping “these men to recreate their own life and what has caused them to commit violence,” or the need for “rehabilitation,” “giving people in custody education,” and “programs” where “people can change,” where “people can change their worldview,” “rehabilitate themselves” and “become productive members of society.” Yet the meaninglessness of his construction in the face of the ubiquity of ‘crimes’, and the targeting of only some for participation in the ‘criminal justice’ system appear to escape him.

As it turns out, the only accurate way to speak about “what kind of people go to jail” is to ask about “what kind of people are chosen for jail?” This conclusion comfortably fits the interactionist-constructionist-labeling understanding 1) that deviance does not indicate the quality of a person’s behavior, so much as it indicates the actions of those naming the person’s behavior, 2) that who we call the deviant is nothing other than the person to whom that behavior has been attached, and 3) that deviant behavior is only the behavior that has been labeled as such. Indeed, as reported in the appropriately titled study, “Who Gets Caught Doing Crime?” (a 1985

Department of Justice study that has never been repeated or updated), who gets caught are people who “are not high rate, serious offenders,” but rather who “are somewhat inept, unprofessional criminals who may be arrested nearly every time they commit a crime” (Chaiken and Chaiken 1985, p. iv). Interestingly, the report goes on to say that “The offenders who are arrested frequently despite their relatively low rate of committing crimes” actually “tend to be relatively inexperienced offenders” who are “relatively straight, hardworking men who are not involved with drugs or heavy drinking,” and “were disproportionately black” persons of which “the vast majority had not completed high school” (pp. v and vi).<sup>5</sup>

As it turns out, the majority of what we call ‘crimes’ are not in fact deviant acts, but in their majority (despite their harmfulness), boringly banal acts. The ubiquity of violent as well as nonviolent harms in everyday life, and the participation of so many in their commission nullify the notion that such behavior is abnormal or deviant in any way and render the very concepts of ‘crime’ and ‘criminal’ as nonsensical.

## THE END OF ‘CRIMINAL’ BEHAVIOR

As I stated at the outset, my purpose in this essay is to make two proposals that disrupt normative perceptions of what we call ‘criminal justice’ in order to argue against continuing the penal thinking and penal practices that dominate modern day responses to harms. I began by examining the theory and language of ‘criminal’ deviance to make the argument that ‘criminal justice’ is less engaged in a process that is about identifying harms and harm-making, than it is in creating a mythology of ‘crime’, ‘criminals’ and ‘criminal behavior’. I then demonstrated that what we call ‘crimes’ are not in fact deviant acts, but behaviors that are so frequent, common and ordinary, that the very concepts of ‘crime’ and ‘criminal behavior’ as abnormal or deviant behavior lose all meaning.

The implications of these two proposals for penal thinking are severe, as the penal system is based on the necessity to respond to deviant ‘criminal’ behavior, and deviant ‘criminals’. At least two implications instantly emerge. The first is that if transgression is not deviant, but the norm, then we need to re-conceptualize and re-design our response to norm-transgression as the management of *difference* (and not deviance), and begin the all-important work of figuring out what difference we do not

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<sup>5</sup> The language of this report is a fascinating case study of the confusion that typically reigns in ‘criminal justice’ discourse. The report is immersed in the typical ‘crime’ and ‘criminal’ language, while simultaneously pointing out the meaninglessness and incongruity of using such language and constructions.



want to live with, and how we are going to live with the difference we are willing to accept.<sup>6</sup> The second, which is the concern of this section, is that since the penal system is not designed to address the numerically prodigious transgressions of social norms, penal abolition needs to be seen for what it is: the end of the mythological ‘criminal behavior’ discourse which hides the ubiquity of transgression and maintains the mythology of ‘crimes’ and ‘criminals’.

In the study of ‘criminal’ behavior, the deviance concept has brought us to the surprising conclusion that because transgression (‘crime’) is a ubiquitous social performance, we are all, at least in part, ‘criminal’ deviants – which is to say that we are all normal.<sup>7</sup> If we remain with Durkheim’s (1951) distinction that naming (labeling) transgressive behavior is a healthy expression of a community’s desire to control that behavior, i.e. that we are socially organized to reject norm violations, then we need to re-conceptualize the social response to transgression (‘crime’) with a distinction that recognizes we are all simultaneously maintainers and transgressors of the social order. Similarly, we need to reconsider how the routinely present transgressive act reconfigures the insider-outsider distinction. It is not the case, as Becker suggests in *Outsiders* (1963) that social groups create norms by making the rules whose infraction then constitutes deviance, but that social groups respond to only some of the deviance that actually all are involved in. In other words, while we are all, sooner or later, outsiders to the social norms, only some are singled out to be named as such.

On the face of it, the persistence of the ‘criminal’ interpretation appears odd. But as social constructionists argue, interpretations are maintained as real because we continue to use them and assume that they are valid and objectively true (Berger and Luckmann 1966). In William Thomas’ terms (1923), the ‘criminal’ interpretation has been remarkably consistent in “defining the situation” of “what kind of people go to jail” despite its completely fictitious character – so successful in fact that moral entrepreneurs anywhere on the political spectrum employ the same ‘crime’

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<sup>6</sup> This discussion is fully developed in Coyle 2015.

<sup>7</sup> As Gottfredson and Hirschi first demonstrated (1986), the concept of ‘career criminals’ (also known as ‘chronic offenders’, ‘habitual offenders’ and the like), that claims there exists a group of ‘offenders’ whose ‘criminality’ spans the length of a career, cannot in any way be demonstrated. In fact, the opposite case (that after 13 years of age ‘offending’ rates drop precipitously and continuously), is probably the most clearly demonstrated fact in the disciplines of criminology and criminal justice. Yet, to this day, the most frequent justification for incarceration schemes is the argument for imprisoning ‘career criminals’, and addressing this fictional population remains a staple of ‘criminal justice’ research, federal funding of such research, and ‘criminal justice’ policy.

and ‘criminal’ interpretations.

If the categories ‘crimes’, ‘criminals’ and ‘criminal behavior’ are by necessity fiction, then any system built to respond to these, whether intellectual or organizational, will be immensely problematic for the obvious reasons. This is certainly true of the penal project. The work that the penal project has attempted has been defined by the partiality of its response to norm transgressions. In the face of a world infused with transgressive actors and transgressive acts, the penal system (the so-called ‘criminal justice system’) daily functions to label only some transgression as ‘criminal behavior’ and only some transgressors as ‘criminals’.

In this sense, the purpose of the penal system is exposed as preoccupied with the management of only certain transgression. Far from referencing an unusual or non-standard (‘criminal’) other, the ‘criminal justice system’ only references attempts of dominance by certain persons over others. Replayed and repeated countless times in everyday life, ‘criminal’ deviance language, like the language of genocide discussed in the beginning of this essay, becomes a language whose habitual use does more than simply describe: it constructs and continuously regenerates not only the very architecture of our descriptions and our arguments about ‘criminal’ persons, but when followed, also creates unambiguous interpretations of them and invites (and often requires) specific actions toward them: social exile, physical punishment and torture via incarceration, and the death of their future. But this is, of course, only the fate of those harms that have not been accepted and that have been sent through the ‘criminal justice system’. All the other harms are accepted, i.e. they are responded to by reconstructing them into something else (as in ‘he is a good kid, not a criminal’) or by ignoring them (as in ‘the cost of doing business’).

We are forced to shift our sociological analysis of harms from those acts distinguished within the mythology of the penal system as abnormal, unexpected, unusual, nonstandard, and unordinary behavior, to an analysis of transgressions as normal, expected, usual, standard and as ordinary as the behavior of talking. Sociologically speaking, we now need a concept to distinguish how certain ‘criminalized’ behavior is treated differently than other ‘criminalized’ behavior. We also need a way to think about whose harms (and their victims) are being socially tended to and whose are not.

## CONCLUSION

In light of these thoughts, penal abolition is seen as the end of an era and a beginning of a new one. It is the end of an era because it means accepting that we have seen the foundation of the penal house ('crimes', 'criminals' and 'criminal behavior') crumble before our eyes. But we are also at the dawn of another era because we now need new intellectual constructs (such as *difference*) to conceptualize norms, their transgression, and our response to their transgression. Along the way we will need to build new cultural institutions and practices that respond to the ceaseless waves of everyday conflicts and harms that seem innate to interpersonal relationships and social living. Above all, we need to figure out how to do all this response-work in a way that the penal project was never able to do: without increasing harms to ourselves and others.

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