

# Retributive Abolitionism

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*The rejuvenated movement for prison abolition has been experimenting with various conceptions of criminal justice, but one option that has yet to receive serious consideration is retribution. This article makes a threefold case for retributive abolitionism: descriptive, normative, and prescriptive. First, critically engaging with both scholarly and activist manifestations of prison abolition, the article claims that the abolitionist project is primarily concerned with racial and economic justice and does not seek the abolition of punishment, nor is it committed to any specific theory of punishment. It then argues that this turn away from theoretical justifications of punishment is a mistake. Perhaps counter-intuitively, the article contends that not only is abolitionism fully consistent with retribution, but that retributive abolitionism alleviates conceptual difficulties within the prison abolition framework. The moral basis the prison abolition movement currently lacks and that retribution facilitates is the principle that crime is not a social status but an act, for which responsibility—criminal and democratic—ought to be established. Finally, the article points to how a program of wholesale decarceration may be established by reconceptualizing what has come to be pejoratively called “collateral consequences.” Rather than civil side-effects, this article proposes treating as criminal punishment all sanctions—collateral and otherwise—imposed by the state on individuals in response to committing public wrongs. Hence, collateral consequences need not be abolished, but incorporated into the sentencing process, loaded with*

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*condemning meaning, and supplant incarceration. This would eliminate both the “civil death” collateral consequences potentially entail, and the “social death” imprisonment potentially entails, while realizing the intrinsic value of sanction.*

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## INTRODUCTION

Punishment for criminal acts can be justified; prisons cannot. Is it possible to reconcile these two propositions? Reconsidering the question in light of the rejuvenated movement for prison abolition, this article argues in the affirmative. The key for developing a framework for the vindication of punishment and the abolition of prisons, the article goes on to argue, lies in treating all sanctions imposed by the state on individuals, in response to committing public wrongs, as punishment.

Prison abolitionism is increasingly garnering scholarly attention and theoretical articulations. Yet, despite the focus on prisons, these developments have surprisingly little to do with questions about the nature of legal punishment. Thus, the editors of the Harvard Law Review, who devoted the publication’s 2019 “developments in the law” symposium to prison abolition, identify the influx of literature as coming from “scholars

and activists—mostly outside of the legal academy,”<sup>1</sup> and that “lawyers have, for the most part, yet to contemplate prison abolition in any serious way.”<sup>2</sup> While the symposium aimed “to further demonstrate the need for continued engagement with abolitionism within the legal academy,”<sup>3</sup> the selected contributions include only one penned by a lawyer or law professor (Allegra McLeod).<sup>4</sup> Indeed, the gap between abolitionism and punishment theory is striking, and suggests the possibility for still underdeveloped abolitionism-inspired ideas. The primary purpose of the article is to fill this gap. Abolitionists have been experimenting with various conceptions of criminal justice, such as preventive, transformative, and transitional. I will argue that the best option, which has thus far been granted no serious consideration by abolitionists, is retribution.

Although reconciling retribution and abolition demands sacrifices on both sides, the chasm between them might not be as wide as it seems at first glance. Correspondingly, the gap between theorizing punishment within the tradition of analytical philosophy, and the understanding of punishment rendered by critical theory, may not be as large as it initially appears. Prison abolition provides fertile ground for retributivist theories of punishment, precisely because retribution is focused on the *justification* for punishment. Abolitionism focuses on the most common *form* of punishment, and the system of control it encapsulates: incarceration. Retributivism lacks—and needs—a non-carceral reclamation, while abolitionism lacks—and needs—non-carceral punitiveness. Inclusive, caring, non-carceral punishment satisfies both.

This article makes the argument for retributive abolitionism—the

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<sup>1</sup> Introduction, in *Developments in the Law – Prison Abolition*, 132 HARV. L. REV. 1568, 1569 (2019) [hereinafter *Developments in the Law Introduction*].

<sup>2</sup> *Id.* at 1571.

<sup>3</sup> *Id.* at 1574.

<sup>4</sup> Allegra M. McLeod, *Envisioning Abolition Democracy*, in *Developments in the Law – Prison Abolition*, 132 HARV. L. REV. 1613 (2019) [hereinafter McLeod, *Abolition Democracy*]. An important contribution to the legal development of abolitionism, from a constitutional perspective, was later published by the same Harvard Law Review, on the eve of this article’s publication: Dorothy E. Roberts, *The Supreme Court, 2018 Term – Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019). Although I am unable to comprehensively engage with Roberts’ discussion at this time, I will note that it reinforces many of the points made herein, including the central argument that retribution and abolition are not incompatible. *See id.* at 34 (“The purpose of carceral punishment was [. . .] not to give black people what they deserved, but to keep them in their place”).

proposition that punishment can be justified but carceral practices cannot. Retributive abolitionism is an analytically coherent and a normatively appealing framework for thinking about criminal justice. It alleviates conceptual difficulties within abolitionism, primarily the tension between indignation at impunity and reluctance to blame. Moreover, coming to terms with the moral and social values of public condemnation of wrongdoing allows abolitionism to realize crucial components of justice that are missing from or are distorted by the alternative frameworks. An abolition-retribution synthesis promotes these components of justice, including that the way we respond to wrongdoing is a matter of responsibility, criminal and democratic; that it has not only *effects* but also *meaning*—and people care about this meaning—for who we are and for how we relate to each other; and that the criminal law must not be a project of population control based on social status, but one committed to the moral worth of every member in a normative community.

If retribution can be imagined as a just and humanistic social force, and prisons can be recognized as the destructive and dehumanizing enterprise that they are, then it becomes clear that we need to broaden our punitive vocabulary rather than seek alternatives to punitiveness. In the second part of this article, I suggest that “collateral consequences” (CCs), namely civil disabilities imposed on persons who have been convicted of criminal activity, provide just that broadened vocabulary. The proposed prescription—offered as a conceptual reorientation more than as a blueprint for positive redesign—will be that CCs should cease being collateral, but not cease to be. CCs should be imposed by the sentencing court within the sentencing process, such that they establish a program of wholesale decarceration.

The abolition of prisons ought to be conceptually tied to embracing collateral consequences as the primary, and justified, punitive response to crime. Establishing and developing these two projects as a joint enterprise offers one solution to two problems: the end of social life that prisons facilitate, and the end of civil life that CCs facilitate. The goal is to treat offenders as fellow citizens deserving of flourishing lives within a political community, but also deserving of hard treatment imposed by this community when they commit an offense.

The article unfolds by intervening these two inter-related, contemporaneously evolving, and critical conversations: the call for prison abolition, and the critique of CCs. Part I opens with the descriptive claims that today’s abolitionism does not seek the abolition of punishment (section I.A.), nor does it require an abandonment of the liberal state

generally, or the U.S. constitutional order specifically (section I.B.). Moving from the descriptive to the normative, section I.C.1. situates the most salient abolitionist innovations for dealing with interpersonal violence—preventive justice and transformative justice—in the realm of punishment theory. Both are rejected as insufficient, for moral as well as political reasons. Following is the positive claim that prison abolition should espouse retribution, capaciously understood, and recognize the intrinsic value—moral and political—of sanction (sections I.C.2.–3.). The second part opens with an introduction to collateral consequences and the major critiques of their nature and operation, which are focused, like abolition, on the use of the criminal law for population control (section II.A.). Finally, the article brings the two arguments together, contending that CCs provide a promising path to non-carceral coping with criminal acts. Section II.B presents a rough sketch of how retributive abolitionism might work, if CCs are de-collateralized.

## I. RETRIBUTION AND ABOLITION

### A. Prison Abolition is Not Punishment Abolition

The prison abolition movement is complex and multi-faceted, resists theoretical uniformity, and is irreducible to a single reproach or demand. To abolish prisons is seemingly the primary goal, but it can be articulated as various, conflicting ends and processes that harbor strategic differences.<sup>5</sup> Most of these articulations are *not* directed at absolute, much less immediate, abolition of prisons.<sup>6</sup> Moreover, abolition is set within a broader “emergent social movement focused on criminal law reform and racial and social justice that has taken shape in recent years,”<sup>7</sup> and there is no one person or body who can speak for it.<sup>8</sup> Prison abolition’s viability

<sup>5</sup> See, e.g., Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 148–49 (2018); Liat Ben-Moshe, *The Tension between Abolition and Reform*, in THE END OF PRISONS: REFLECTIONS FROM THE DECARCERATION MOVEMENT 83, 86 (Mechthild E. Nagel & Anthony J. Nocella II eds., 2013); Julia C. Oparah, *Why No Prisons?*, in WHY PRISONS? 278, 282 (David Scott ed., 2013).

<sup>6</sup> See, e.g., Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015) [hereinafter McLeod, *Prison Abolition*] (arguing that prison abolition does not mean “an immediate and indiscriminate opening of prison doors” but rather “a gradual project of decarceration”).

<sup>7</sup> Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 655 (2017) (reviewing MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015)).

<sup>8</sup> Hence the following account and critique will, alas, include generalizations. It may

as a social movement is attained via a dialectic between activist efforts, in recent years most notably the Movement for Black Lives (MBL) and associated organizations,<sup>9</sup> and legal, social and political theorization.

Prison abolition stems in part from, and continually converses with other abolitionist movements of the past and present, such as slavery, capital punishment, psychiatric institutions, immigration detention, and policing.<sup>10</sup> For current purposes, the pivotal knot to be examined and undone is that between prisons and punitiveness. Here it is important to note that the prison abolition project is at its core independent from critical criminological strands that have cast the very concept of state-defined and

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partially defend itself against such charges by noting that abolitionists speak of the project in generalized terms as well. See Dan Berger et al., *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration>. Angela Davis has stated she “would hesitate to characterize the contemporary prison abolition movement as a homogenous and united international effort,” referring to the global scene and highlighting the differences between American activists and international ones, the former group much more concerned with the racial aspects of incarceration. Angela Y. Davis & Dylan Rodríguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST. 212, 213–14 (2000). As my focus is on the U.S. and my claim that its abolitionist project is primarily concerned with cultural pathologies like racial relations, Davis’ words reinforce my argument.

<sup>9</sup> See Oparah, *supra* note 5, at 280–82 (discussing the activist roots of prison abolition in the 1990s and before).

<sup>10</sup> On prison abolition as relating to slavery, see, e.g., Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, in *Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1575 (2019); Webb, *supra* note 5. Relating to capital punishment, see, e.g., Stephen D. Soble, *A Regime of Social Death: Criminal Punishment in the Age of Prisons*, 21 N.Y.U. REV. L. & SOC. CHANGE 497 (1994). Relating to psychiatric institutions, see, e.g., Ben-Moshe, *supra* note 5. Relating to immigration detention, see, e.g., César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245 (2017). Relating to policing, see, e.g., V. Noah Gimbel & Craig Muhammad, *Are Police Obsolete? Breaking Cycles of Violence Through Abolition Democracy*, 40 CARDOZO L. REV. 1453 (2019); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018). Abolitionists may resent my separating prison abolition from other abolitions and insist on a comprehensive abolitionist project that fundamentally resists such distinctions and sees social struggles as a joint endeavor against the hegemony that uses analytical and political “divide and rule” strategies via the entirety of the state apparatus. See, e.g., *Developments in the Law Introduction*, *supra* note 1, at 1569; Oparah, *supra* note 5; ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* 73 (2005). I recognize the strength of such claims for the leftist agenda as well as its conceptual and historical underpinnings. Nonetheless, considering that my question is whether retribution and imprisonment are necessarily connected, and that my purpose is to provoke abolitionist thinking from this perspective, I favor analytical dissection of abolitionisms over a normatively driven insistence on their inseparableness.

state-regulated crime and punishment in a dubious light. Some of these critiques predate the movement for prison abolition as it is known today and mostly hail from Europe.<sup>11</sup> Other voices have emerged from prison abolition out of a desire to broaden its scope.<sup>12</sup> In both cases, fundamental challenges are leveled against the liberal social order and a criminal rule of law as enterprises ideally driving toward fairness and justice. However, these voices are not representative of the primary concerns of the *new* “new abolitionists,”<sup>13</sup> on the scholarly or activist levels.

Prison abolitionist priorities in the United States are shaped by the country’s unique historical and social conditions relating to racial relations and other economic, political, legal, and cultural factors.<sup>14</sup> Fundamentally, it takes issue with the cluster of phenomena labeled “the prison industrial complex.”<sup>15</sup> The pioneering abolitionist organization, Critical Resistance, defines it as “the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems [. . . it] helps and maintains the authority of people who get their power through racial, economic and other privileges.”<sup>16</sup> Similar foci are articulated by other

<sup>11</sup> See, e.g., ABOLITIONS: TOWARDS A NON-REPRESSIVE APPROACH TO CRIME (Herman Bianchi & René van Swaaningen eds., 1985); NILS CHRISTIE, LIMITS TO PAIN (1981). For an American example, see, e.g., Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977).

<sup>12</sup> See Ben-Moshe, *supra* note 5, at 85–86.

<sup>13</sup> Oparah, *supra* note 5, at 278. On the original “new abolitionists,” civil rights activists of the 1960s, see Charles R. Lawrence III, *The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law*, 65 J. LEGAL EDUC. 381, 390–97 (2015) (discussing HOWARD ZINN, SNCC: THE NEW ABOLITIONISTS (1964)).

<sup>14</sup> This is not to say that American abolitionism is oblivious or disregarding of European abolitionist efforts, such as Finland’s decarceration project during the 1970s. McLeod, *Beyond the Carceral State*, *supra* note 7, at 690–701. McLeod is nonetheless careful to note that “[t]he purpose of this detour into Finnish and Scandinavian prison reform is not to suggest that the problems of the U.S. carceral state might be resolved as they have been in Finland [. . .] but we might nonetheless learn from their experiences.” *Id.* at 700. Berger, Kaba & Stein take a more stringent approach: “[T]he history of the American carceral state is one in which reforms have often grown the state’s capacity to punish [. . .] Instead of pushing to adopt the Finnish model of incarceration [. . .] abolitionists have engaged these contradictions by pursuing reforms that shrink the state’s capacity for violence.” Berger et al., *supra* note 8; see also Benjamin Ewing, *Socializing Punishment*, 17 POINT 77, 77 (2018), available at <https://thepointmag.com/2018/politics/socializing-punishment>.

<sup>15</sup> See, e.g., ABOLITION NOW! TEN YEARS OF STRATEGY AND STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX (CRI0 Publications Collective eds., 2008).

<sup>16</sup> Critical Resistance, *What is the PIC? What is Abolition?*,

prominent abolitionists as well. They see the dismantling of the prison industrial complex as necessary in order to “ameliorate the conditions for all of those in our society who live on the periphery and beyond, before and after they are criminalized.”<sup>17</sup> Prison abolitionists oppose incarceration’s centrality in addressing social conditions that should really be handled by non-criminal means. These include concrete policy issues such as homelessness, addiction, and inner-city neglect, as well as broader cultural issues such as racism and rape culture. It is stipulated that by incarcerating the individuals victimized by these circumstances they have little to no control over, authorities and corporations use them as means for the material and political benefit of the powerful. This in turn perpetuates the same political-economic cycle that only yields more victims and perpetrator-victims. In order to end this cycle and address root causes, abolitionists understand decarceration to encompass a divestment of resources away from criminal law enforcement and an investment into the social arm of the state,<sup>18</sup> as “a part of egalitarian democratic political change.”<sup>19</sup> Penal skepticism of an analytical nature does figure in prison abolition as well, yet moral concerns relating to punishment are parasitic to concerns about political economy,<sup>20</sup> and hence are, at most, on the conceptual margins of the project.

The disciplinarian contours of abolitionism are elucidated by the practice of MBL and the Occupy movements in which it is rooted:<sup>21</sup> racial and economic justice. What prison abolition sets out to abolish is thus not the institution of crime and punishment,<sup>22</sup> but the use of prisons as

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<http://criticalresistance.org/about/not-so-common-language> (last visited Dec. 20, 2019). See also, e.g., Oparah, *supra* note 5; andré douglas pond cummings, “All Eyez on Me”: America’s War on Drugs and the Prison-Industrial Complex, 15 J. GENDER RACE & JUST. 417 (2012); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 84–104 (2003) [hereinafter DAVIS, PRISONS].

<sup>17</sup> Berger et al., *supra* note 8.

<sup>18</sup> McLeod, *Prison Abolition*, *supra* note 6, at 1161.

<sup>19</sup> McLeod, *Beyond the Carceral State*, *supra* note 7, at 705.

<sup>20</sup> See Davis & Rodriguez, *supra* note 8, at 213.

<sup>21</sup> See Akbar, *supra* note 10, at 417; Berger et al., *supra* note 8; Mechthild Nagel & Anthony J. Nocella II, *Introduction: Imprisoning the Ninety-Nine Percent*, in THE END OF PRISONS, *supra* note 5, 1.

<sup>22</sup> On punishment as a political institution, see, e.g., VINCENT CHIAO, CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE (2018); Benjamin Ewing, *The Political Legitimacy of Retribution: Two Reasons for Skepticism*, 34 L. & PHIL. 369 (2015); Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321 (2002).

“catchall solutions to social problems.”<sup>23</sup> This set of problems is linked to but still independent of the set of questions relating to whether and how to punish for performing wrongful acts, and the solution to one set does not entail a solution to the other set. After all, genealogical methodology notwithstanding, questions about punishment predate questions about American capitalism by millennia.<sup>24</sup> Criticism of the prison industrial complex has a lot to say about authoritative misuse and abuse of punishment, but has little to say about punishment itself.<sup>25</sup>

This remains true even considering McLeod’s articulation of a “prison abolition ethics” as a “moral orientation.”<sup>26</sup> Its gist is twofold: resisting the use of punitive apparatuses to address “what are essentially social, economic, and political problems;” and recognizing “the violence, dehumanization, and moral wrong inherent in any act of caging or chaining—or otherwise confining and controlling by penal force—human beings.”<sup>27</sup> The underlying assumption is of a necessary association between incarceration and punitiveness, and ergo the false belief that by attacking the former one inherently attacks the latter.<sup>28</sup> Consider

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<sup>23</sup> RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 5 (2007). See also Davis & Rodriguez, *supra* note 8, at 212; McLeod, *Prison Abolition*, *supra* note 6, at 1172.

<sup>24</sup> See, e.g., WILLIAM IAN MILLER, *EYE FOR AN EYE* (2006); DANIELLE S. ALLEN, *THE WORLD OF PROMETHEUS: THE POLITICS OF PUNISHING IN DEMOCRATIC ATHENS* (2000).

<sup>25</sup> Julia Oparah lists five key arguments for the abolition of prisons: their roots in racial subordination; using politics of fear that do not really advance safety; diverting resources from social services; silencing democratic opposition; and reproducing patriarchal violence. Oparah, *supra* note 5, at 282–83. For a discussion of the abolitionist advocacy of alternatives to punishment, see *infra* section I.C.1.

<sup>26</sup> McLeod, *Prison Abolition*, *supra* note 6, at 1161. It may be helpful to distinguish ethics from morals. As Ronald Dworkin puts it, ethics “includes convictions about which kinds of lives are good or bad for a person to lead,” while morals “includes principles about how a person should treat other people.” RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 485 n. 1 (2000); see also, e.g., GILLES DELEUZE, *NEGOTIATIONS, 1972–1990* 100 (Martin Joughin trans., 1995) (“morality presents us with a set of constraining rules of a special sort, ones that judge actions and intentions by considering them in relation to transcendent values (this is good, that’s bad. . .); ethics is a set of optional rules that assess what we do, what we say, in relation to the ways of existing involved”). This means that “the ethical might subsume the moral. It might be best to lead a life in which you treat others as they should be treated.” KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 278 n. 4 (2007). Under this light, McLeod seems to articulate an ethical orientation for the life of a political collective, which leaves the moral details open to experimentation.

<sup>27</sup> McLeod, *Prison Abolition*, *supra* note 6, at 1172.

<sup>28</sup> See, e.g., Davis & Rodriguez, *supra* note 8, at 217.

McLeod's rejection of retributivism due to its detached emphasis on proportionality: "It is unclear why justice requires primarily that for a rape one should spend a period of years in prison."<sup>29</sup> Indeed, but this amounts to no more than an argument against *retribution as realized by incarceration*.<sup>30</sup> Mirroring the perverted hegemonic association between prisons and social ills, abolitionist writings present no strong view with respect to the retributive end in the event of a divorce from the carceral means, or analogous ones (for reasons explored below, an inference that every use of force is by definition analogous to incarceration would be erroneous).<sup>31</sup>

Dissociating retribution from incarceration would encourage abolitionists to refine their arguments and to strike a conversation that is not currently held: between abolition and punishment, above and beyond the mediation of social conditions.<sup>32</sup> Such an enterprise is neither possible nor desirable, abolitionists might reply, since their project "is deeply concerned with sociological, historical, and political situations and possibilities rather than primarily with deductive moral reasoning from

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<sup>29</sup> McLeod, *Prison Abolition*, *supra* note 6, at 1236.

<sup>30</sup> See also CHIAO, *supra* note 22, at 100–01, 227–51 (arguing that the choice we face is between "schools, now" or "prisons, later").

<sup>31</sup> See *infra* section I.C.2. Indeed, not even every form of confinement is analogous to incarceration. See, e.g., David Scott, *Unequaled in Pain*, in *WHY PRISONS?*, *supra* note 5, 301, 301 ("the danger is that prison can become conceptually indistinguishable from other forms of confinement. We must be careful not to 'obfuscate or ignore' the ideological and institutional differences between the separate sites of incarceration, for each have their own unique *raison d'être*" (citations omitted)); Sherry F. Colb, *Freedom from Incarceration: Why is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 839 (1994) ("Some individuals might feel confined, for example, when they are forced to sit and figure out how much tax they owe the federal government. Others might feel confined when they must stop for a few moments at a red light or a stop sign before driving into an intersection.").

<sup>32</sup> In this context, punishment denotes the authoritative infliction of hard treatment as having intrinsic value, independent of a consequent occurrence or lack thereof and independent of the form it takes. See Raff Donelson, *Cruel and Unusual What? Toward a Unified Definition of Punishment*, 9 WASH. U. JURIS. REV. 1, 33 (2016) (defining punishment, for constitutional purposes, as "any sufficiently serious harm imposed by someone acting under the color of law with a retributive purpose"). This leads to a close conceptual proximity between punishment and retribution. Leo Zaibert, *The Instruments of Abolition, or Why Retributivism is the Only Real Justification of Punishment*, 32 L. & PHIL. 33, 56–57 (2013) ("retributivism is the only thick justification of punishment on offer," construing punishment as "actually the right thing to do, period – regardless of the alternatives").

first premises.”<sup>33</sup> But this is a misleading dichotomy.<sup>34</sup> The leftist emphases on material conditions, our contingent political situation, and the carceral state they have generated that demands urgent redress,<sup>35</sup> are in place. Notwithstanding, an underlying moral philosophy exists; an ideal political situation imagined; and a jurisprudence looming, *nomis* in one sense or another.<sup>36</sup> The question is only: what is the content of these normative schemes? It must be uncovered and shared in order to flesh out and better prison abolition’s normative appeal as the positive project that it emphatically professes to be.<sup>37</sup>

I argue that the kind of criminal justice abolitionism desires does not stand in tension with retribution. Rhetorical moves to the contrary are made but are not supported by the arguments provided. Aside from confusing carceral practices for retribution, abolitionists argue against individual punishment as a potential impediment, under certain circumstances, to social justice. This is a sort of “legitimation critique.”<sup>38</sup>

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<sup>33</sup> McLeod, *Prison Abolition*, *supra* note 6, at 1234; *see* Rodríguez, *supra* note 10, at 1577; *see generally* Wendy Brown & Janet Halley, *Introduction*, in *LEFT LEGALISM / LEFT CRITIQUE* (Wendy Brown & Janet Halley eds., 2002).

<sup>34</sup> I do not deny the important differences between these two scholarly methods for articulating normative claims. I do resist the insinuation that building off of material contingencies means that abstracting from this stance a set of coherent normative claims is futile. *See* Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 *HARV. L. REV.* 1485, 1487 (2016) (“[T]he role of philosophy is not chiefly to define and defend some set of abstract or a priori ideals, which are then applied to the world to dictate how it should be ordered, but to rationally reconstruct the normative order already at work in the world in order to see that normative order more clearly and critique it.” The same would arguably apply not only to the normative order embodied in state practice, but also to that of oppositional practice.)

<sup>35</sup> *See, e.g.*, Mariame Kaba & Kelly Hayes, *A Jailbreak of the Imagination: Seeing Prisons for What They Are and Demanding Transformation*, *TRUTHOUT* (May 3, 2018), <https://truthout.org/articles/a-jailbreak-of-the-imagination-seeing-prisons-for-what-they-are-and-demanding-transformation> (“[O]ur current historical moment demands a radical re-imagining of how we address various harms.”) (emphasis added); The Movement for Black Lives, *Platform: End the War on Black People*, <https://policy.m4bl.org/end-war-on-black-people/> (last visited Dec. 20, 2019) [hereinafter *MBL Platform: Abolition*] (“[A]n end to all jails, prisons and juvenile detention facilities *as we know them*.”) (emphasis added).

<sup>36</sup> *See* Brown & Halley, *supra* note 33 (discussing left legalism); *infra* note 123 and accompanying text (discussing Robert Cover’s idea of *nomos*).

<sup>37</sup> *See* Rodríguez, *supra* note 10, at 1576; Akbar, *supra* note 10, at 479; McLeod, *Prison Abolition*, *supra* note 6, at 1162, 1207–12; Ben-Moshe, *supra* note 5, at 85.

<sup>38</sup> *See generally*, as part of the critique of rights, Mark Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363, 1364 (1984) (“The use of rights in contemporary discourse impedes advances by progressive social forces . . .”).

by focusing our attention on supposed “bad apples,” we fail to address the bigger systemic faults that produce, enable and perpetuate them. But the idea that punishment may still have social and moral value is not thereby refuted.<sup>39</sup> Whether punishment can be justified is simply not the question being asked.

That rejecting prisons and embracing punishment are compatible is starkly apparent in the realm of activist action. MBL is a coalition of organizations promoting a progressive vision of social justice via activism and advocacy of reforms in criminal and other spheres. One of their goals is to bring about “an end to all jails, prisons and juvenile detention facilities as we know them.”<sup>40</sup> MBL formed against the backdrop of multiple incidents across the United States in which (1) police officers or other law enforcement representatives fatally shot persons of color, particularly Black male youth, without justification; and, no less importantly, (2) they were not subsequently held accountable for their actions by the state.

The accumulation of striking incidents of this kind, spurred by the technological ability to spread their documentation as well as corresponding indignation, served as a breaking point for the Black community and the nation as a whole. The slogan “Black Lives Matter” came into use following the acquittal of George Zimmerman, a neighborhood watchman in Florida, from charges pressed after he had fatally shot the African-American teenager Trayvon Martin, in 2013. Large-scale protests emerged after the killing of another African-American teenager, Mike Brown, in Ferguson, Missouri in 2014, at the hands of a police officer, Darren Wilson. These protests grew into a city-wide uprising after a grand jury decided against indicting Wilson.<sup>41</sup> Note

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<sup>39</sup> To illustrate, McLeod claims that “justice would still not be meaningfully served even if all those police officers guilty of these acts were prosecuted, convicted, and sentenced to prison.” McLeod, *Abolition Democracy*, *supra* note 4, at 1639. First, punishment and imprisonment are not distinguished. Second, the reasoning offered is not that punishment is not justified, but rather that it does not also do other things, external to punishment. *See id.* at 1639–40; McLeod, *Prison Abolition*, *supra* note 6, at 1171; KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 161–68 (2016). Third, exactly the failures to prosecute, convict and sentence those police officers served as crucial causal factors in the “emergent social movement” (*supra* text accompanying note 7) on which McLeod builds. *See infra* notes 42–44 and accompanying text.

<sup>40</sup> MBL Platform: Abolition, *supra* note 35; *see* McLeod, *Beyond the Carceral State*, *supra* note 7, at 703.

<sup>41</sup> On the evolution of the uprising, *see* WHOSE STREETS (Sabaah Folyan dir., 2017);

the timings: it was state responses to these killings, no less than the acts themselves, that fueled collective outrage, propelled the protest movement, and prompted crowds of people to join it.<sup>42</sup>

To further illustrate, the statement of a prominent activist Black youth organization's agenda opens thus: "A collective moment of trauma in the wake of a not-guilty verdict in the killing of Trayvon Martin's pushed 100 young Black activists into creating [the organization, BYP100]."<sup>43</sup> If Zimmerman, Wilson and other perpetrators had been indicted, convicted and properly sentenced, there would be no #BLM as we know it.<sup>44</sup> Indeed, in listing the causes for its emergence,

TAYLOR, *supra* note 39, at 153–58; *see also* Bernard E. Harcourt, *A Dialectic of Theory and Practice*, 12 CARCERAL NOTEBOOKS 19, 24–26 (2016), available at [http://www.thecarceral.org/cn12/3\\_Dialectic\\_of\\_Theory.pdf](http://www.thecarceral.org/cn12/3_Dialectic_of_Theory.pdf) (discussing the public misconception of the grand jury decision in the Wilson case as a jury verdict on the evidence).

<sup>42</sup> *See also* Akbar, *supra* note 10, at 417–18.

<sup>43</sup> Charlene A. Carruthers, *Letter from the BYP100 National Coordinator*, in BLACK YOUTH PROJECT 100 (BYP100), AGENDA TO KEEP US SAFE 4, 4 (2014), <http://agendatobuildblackfutures.org/wp-content/uploads/2016/01/BYP100-Agenda-to-Keep-Us-Safe-AKTUS.pdf>. BYP100 is a member of the Movement for Black Lives. *See* The Movement for Black Lives, *About Us*, <https://policy.m4bl.org/about> (last visited Dec. 20, 2019). McLeod considers these two agendas, MBL's and BYP100's, to be the prominent abolitionist agendas that have been put forth. McLeod, *Abolition Democracy*, *supra* note 4, at 1621–22.

<sup>44</sup> *See* Margalynne J. Armstrong, *Are We Nearing the End of Impunity for Taking Black Lives?*, 56 SANTA CLARA L. REV. 721, 759 (2016) ("The killing of unarmed black youth and men has generated insistent demands for police accountability, led by the Black Lives Matter movement."); Alicia Garza, *A Herstory of the #BlackLivesMatter Movement*, FEMINIST WIRE (Oct. 7, 2014), <https://www.thefeministwire.com/2014/10/blacklivesmatter-2> ("I created #BlackLivesMatter [. . .] after 17-year-old Trayvon Martin was post-humously placed on trial for his own murder and the killer, George Zimmerman, was not held accountable for the crime he committed."). Granted, there are variations within activist communities about how best to handle such incidents. *Compare* Mitch Smith & Julie Bosman, *Jason Van Dyke Sentenced to Nearly 7 Years for Murdering Laquan McDonald*, N.Y. TIMES (Jan. 18, 2019), <https://www.nytimes.com/2019/01/18/us/jason-van-dyke-sentencing.html>, with McLeod, *Abolition Democracy*, *supra* note 4, at 1620. However, even those who oppose state mechanisms base their arguments on how these are being exercised today by the carceral state, not on the principle of state-imposed accountability as such. *See* Kate Levine, *Police Prosecutions and Punitive Instincts*, Presentation at CrimFest Conference, Brooklyn Law School (July 2019); Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, BUFF. L. REV. (forthcoming), available at <https://ssrn.com/abstract=3404276>. Prominent abolitionist activist Mariame Kaba warns against rejoicing in prosecutions of such police officers, only for strategic and pragmatic reasons, not because they are wrong:

abolitionism's articulators lump together "brutality and impunity,"<sup>45</sup> the latter granted to "exploiters and oppressors" who are "the real criminals."<sup>46</sup> Two things are wrong: (1) that powerless persons are penalized and disciplined for being who they are; and (2) that powerful persons are not punished for performing morally bad acts (upon the former groups).

What does it mean that the trauma was catalyzed when impunity protected Zimmerman from a guilty verdict and rather than when Martin was killed? That the ratios between killings, trials, and verdicts are meaningful and heartbreaking means that decisions rendered by state-run adjudicating mechanisms, and the coercive outcomes of these decisions, are part of the measuring tools for the worth of Black lives, in the activists' eyes too.<sup>47</sup> More broadly, the way the state responds to crimes frames collective attitudes towards the victims of these crimes. The concept of crime is not rejected as a benchmark for collective condemnation of immoral, harmful, intolerable acts—if only just criteria were to sort which acts are considered as such. Additionally, it means that such mechanisms are in aspiration accorded trust, for like parents, they inflict trauma if they fail and they shield from it if they manage.<sup>48</sup> With Black lives, the failure is spectacular; what engenders it is a parental, or rather, paternal legal infrastructure—dating back to the Founding Fathers: "While our Constitution professed freedom, it practiced slavery. It is difficult to

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"Celebrating charges is like celebrating crumbs." Presumably the whole cake would be a deliverance of adjudicatory justice to all such police officers. Mariame Kaba, *Prosecuting Cops Does Not Equal Justice*, TRUTHOUT (May 6, 2015), <https://truthout.org/articles/prosecuting-cops-does-not-equal-justice>; see also Mariame Kaba, *Four Years Since a Chicago Police Officer Killed Rekia Boyd, Justice Still Hasn't Been Served*, IN THESE TIMES (Mar. 21, 2016), <http://inthesetimes.com/article/18989/four-years-since-the-shooting-of-rekia-boyd>.

<sup>45</sup> Akbar, *supra* note 10, at 435; see also *id.* at 467.

<sup>46</sup> Tiyo Attallah Salah-El, *Thoughts from an Elder Abolitionist*, in THE END OF PRISONS, *supra* note 5, 169, at 170.

<sup>47</sup> Some are self-conscious about this irony: "[I]t feels terrible to have to depend on a system that you know is illegitimate to adjudicate your 'worth,'" Kaba, *Prosecuting Cops*, *supra* note 44; see also Akbar *supra* note 10, at 467; LISA MARIE CACHO, SOCIAL DEATH: RACIALIZED RIGHTLESSNESS AND THE CRIMINALIZATION OF THE UNPROTECTED (2012).

<sup>48</sup> See Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, 14 LEGAL THEORY 113, 123–25 (2008) (presenting an analogy between the indispensability of the state to the infliction of criminal punishment and that of parents to the infliction of parental punishment).

imagine anything more hypocritical.”<sup>49</sup> Hypocrisy arguments scrutinize the gap between ideal and reality, but do not challenge the ideal. Cancel the contradiction and freedom shall emerge, for it is arguably still encapsulated in the Constitution.

If abolitionists rose to power today, a regime governing the rectification of public wrongs would still be in place. Penal priorities would surely be redefined, but crime would be not done away with.<sup>50</sup> How to respond to crime and treat the criminal are still different questions. Yet current U.S. abolitionist rhetoric paves the way for a rejection of a necessary association between abolitionism and opposition either to the principle of just desert or to the process of judicial sanctioning. For it is not merely the number of fatalities that drives protest movements like Black Lives Matter, it is the insult of being second-class citizens. To remedy this insult, I will argue, requires substituting control with responsibility, and hence retribution.

### B. Prison Abolition and the Liberal State

Of course, abolitionism’s approach to the U.S. constitutional order is far from blind faith. Critical race, feminist and LGBT/Q scholarships have been since their inceptions ambivalent regarding constitutional protections.<sup>51</sup> In tandem, prison abolitionism confounds a wish to criticize in order to perfect liberal constitutionalism with a desire to fundamentally upset it building on neo-Marxist, post-colonial or other critical orientations.<sup>52</sup> It is true that the policy changes advocated are in themselves a radical departure from the status quo. That is immaterial, however, when assessing the positive political vision presented vis-à-vis the most charitable possible construction of the one put forth by the Founding Fathers.<sup>53</sup>

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<sup>49</sup> Justin Hansford, *The Whole System is Guilty as Hell*, 21 HARV. J. AFR. AM. PUB. POL’Y 13, 14 (2015).

<sup>50</sup> See Salah-El, *supra* note 46, at 170.

<sup>51</sup> See, e.g., GARY MINDA, POSTMODERN LEGAL MOVEMENTS 128–48, 173–78, 196 (1995); Robin L. West, *Constitutional Scepticism*, 72 B.U. L. REV. 765 (1992).

<sup>52</sup> Rhetorically, abolitionism and liberalism are sometimes portrayed as opposites. Rodríguez, *supra* note 10, at 1576–77. But the underlying understanding of liberalism therein is of political centrism rather than a family of philosophical theories centered around the idea of individual flourishing. Thus, Rodríguez conflates liberal/radical with reform/abolition. *Id.* at 1595–96. However, it is possible to argue for abolition from a liberal standpoint.

<sup>53</sup> On the merits of interpreting a legal system “in its best light,” see RONALD DWORKIN, LAW’S EMPIRE 90 (1986). See also Cornel West, *CLS and a Liberal Critique*, 97 YALE

Consider under this light McLeod's view of prisons as places of "violence and dehumanization" because caging people strips them of the freedom and ability "to exercise the basic capacities that define personhood in a liberal society."<sup>54</sup> This setting of individual human flourishing as the desired outcome of the penal struggle has attracted criticism from the left. Thus, Benjamin Ewing concedes that "[b]y over-policing and under-protecting black Americans in particular, we fail to meet the basic liberal-democratic demand that all citizens be equally accountable to one another before the law," but he adds: "That such equal accountability appears to be a central aim of [MBL] confirms the radical *moderation* at its core."<sup>55</sup> To contrast sharply with the current system that practices ostracism and exile, Ewing suggests that "socialist politics of punishment" should offer an ethos of solidarity that would collectivize responsibility and thus resist "feel[ing] cathartic to scapegoat individual criminals for the deeper social ills of which their crimes are symptoms."<sup>56</sup> Hence, he argues that punishment should be distributed equally among everyone, instead of safeguarding our rights on the criminals' backs. This is the meaning of choosing "socialist solidarity over liberal individualism."<sup>57</sup> It is safe to assume that most abolitionists would reject this view. Instead, they strive to create new institutions through which to advance justice.<sup>58</sup> These would necessarily be *public* institutions, not only in that they would reclaim the public space,<sup>59</sup> but also in that they would embody a comprehensive normative political vision, which addresses public wrongs in a just, structured manner. Now let me explain why I think they would also be *state* institutions.

Amna Akbar describes MBL's platform as "a radical imagination of law."<sup>60</sup> She sees MBL as holding a "skeptical orientation toward the state"<sup>61</sup> because "violence [is] endemic to the state, and tolerance for it

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L.J. 757, 759 (1988).

<sup>54</sup> McLeod, *Prison Abolition*, *supra* note 6, at 1173.

<sup>55</sup> Ewing, *Socializing Punishment*, *supra* note 14, at 78 (emphasis in original).

<sup>56</sup> *Id.* at 79; *see also infra* note 293 and accompanying text (discussing scapegoating).

<sup>57</sup> *Id.* at 82.

<sup>58</sup> *See* Ben-Moshe, *supra* note 5, at 85; Rachel Herzing, *Big Dreams and Bold Steps: Toward a Police-Free Future*, in WHO DO YOU SERVE, WHO DO YOU PROTECT? POLICE VIOLENCE AND RESISTANCE IN THE UNITED STATES 111, 113 (Maya Schenwar et al. eds., 2016).

<sup>59</sup> *See* Andrea J. Ritchie, *Say Her Name: What it Means to Center Black Women's Experiences of Police Violence*, in WHO DO YOU SERVE, *supra* note 58, 79, 86–89.

<sup>60</sup> Akbar, *supra* note 10.

<sup>61</sup> *Id.* at 435.

[is] a long-standing aspect of American law.”<sup>62</sup> It seems to me that Akbar overstates her case inasmuch as it is forward-looking, and would still overstate it even if she restricted MBL’s skepticism to coercive state functions like policing and sanctioning. Contrary to Akbar’s conclusion,<sup>63</sup> in MBL’s platform policing is ideally not eliminated. Rather, it is controlled: the demand is to have “direct democratic community control of local, state, and federal law enforcement agencies.”<sup>64</sup> Decarceration, according to MBL, encompasses efforts to reduce the harms caused by imprisonment as well as the redirecting of resources to improving welfare and security within communities (“invest-divest”).<sup>65</sup> In agreement with Ewing that “America’s fascination with punishment has not been equitably distributed across all demographic groups,”<sup>66</sup> the normative solution proposed is *ex ante* redistribution, tying physical security with social security, which is conceived as a human right.<sup>67</sup>

Conflicting inclinations toward socialism and libertarianism are ultimately balanced by the MBL platform into a vision very similar to a liberal welfare state, and the political frameworks navigated are very familiar to the American democratic tradition: reliance on the language of rights coupled with a predication of political legitimacy on the will of the governed. Liberal mechanisms are not discarded, but rather loaded with the historical experience of those who have been underrepresented from the founding onward.<sup>68</sup> Thus, race consciousness translates, *inter alia*, into a demand to “full and free access for all Black people” to education, as a form of reparations, and “Black self-determination in all areas of society,” which mostly means adequate political representation.<sup>69</sup> Human

<sup>62</sup> *Id.* at 417; *see also* Nagel & Nocella, *supra* note 21, at 2 (describing state violence as “the *raison d’être* of the establishment of the policing apparatus).

<sup>63</sup> Akbar, *supra* note 10, at 460.

<sup>64</sup> The Movement for Black Lives, *Platform: Community Control*, <https://policy.m4bl.org/community-control/> (last visited Dec. 20, 2019).

<sup>65</sup> MBL Platform: Abolition, *supra* note 35; The Movement for Black Lives, *Platform: Invest-Divest*, <https://policy.m4bl.org/invest-divest> (last visited Dec. 20, 2019).

<sup>66</sup> MBL Platform: Abolition, *supra* note 35.

<sup>67</sup> *See* McLeod, *Beyond the Carceral State*, *supra* note 7, at 704; *see also* WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 98–102 (2010) (discussing the conceptualization of freedom as security throughout modern American progressive movements).

<sup>68</sup> *See* Akbar, *supra* note 10, at 477–78.

<sup>69</sup> The Movement for Black Lives, *Platform: Reparations*, <https://policy.m4bl.org/reparations/> (last visited Dec. 20, 2019) [hereinafter MBL Platform: Reparations]; The Movement for Black Lives, *Platform: Political Power*, <https://policy.m4bl.org/political-power/> (last visited Dec. 20, 2019). *See also* Patrisse

flourishing is at times filtered through the prism of social identity, due to the need to repair collective historical wrongs, but the end goal remains the same: “Freedom, yet to be realized in the accounts of Black Lives Matter and Du Bois, is envisioned simultaneously as positive and negative freedom—it is a freedom to be left alone but in conditions adequate for human flourishing.”<sup>70</sup>

In their desire to transcend the tensions between individual and collective, formal and material freedoms, abolitionists follow in the footsteps of W.E.B. Du Bois and others who have framed struggles of marginalized groups as targeted against forms of exclusion and alienation.<sup>71</sup> Rights and self-determination, two ideas MBL utilizes in its platform, have both liberating and subordinating elements. On the one hand, the critique of rights has subsided in part owing to minority scholars who stressed rights’ positive effects on the life experiences of vulnerable people, building equality;<sup>72</sup> on the other hand, particularly as the idea has been implemented in 20<sup>th</sup> century United States, rights artificially individualize people’s interactions with the world and disconnect them from their fellows, building hierarchy.<sup>73</sup> Correspondingly, communal self-determination strengthens ties among those who are in and are comfortable being in a community, producing fraternity; but simultaneously burdens those who are out or feel left out, producing alienation. These two tensions converge when the state fails to provide public goods and needs like security and education,<sup>74</sup> which drives communities to resort to self-help.

Abolitionism has taken these social-intellectual developments in. Although they do not frame such resorts in the language of rights, some abolitionists are ardent adherents to what Robin West terms “rights to

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Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, in *Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1684 (2019) (discussing the abolitionist emphasis on reparations).

<sup>70</sup> McLeod, *Beyond the Carceral State*, *supra* note 7, at 704.

<sup>71</sup> See ROBERT GOODING-WILLIAMS, *IN THE SHADOW OF DU BOIS: AFRO-MODERN POLITICAL THOUGHT IN AMERICA* 4 (2009).

<sup>72</sup> See Akbar, *supra* note 10, at 445; Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 717 (2011); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

<sup>73</sup> Robin West, *Tragic Rights*, *supra* note 72, at 742; see also Dean Spade, *Intersectional Resistance and Law Reform*, 38 SIGNS 1031 (2013) (rejecting the language of rights as subordinating).

<sup>74</sup> See Akbar, *supra* note 10, at 446 n. 190.

exit,” i.e. breaking away from the social compact and taking matters once considered public into their own hands.<sup>75</sup> Perhaps better termed “exit to welfare,” they strive to build intra-community mechanisms for conflict resolution without involving law enforcement, since experience has clarified that state intervention only exacerbates hardships for all those involved.<sup>76</sup> “Today’s defensive rights to withdraw,” writes West, “imply a state that is either incapacitated, and thus incapable of performing the minimal duties of statehood, or malignant, and thus not to be trusted to do so.”<sup>77</sup> Yet abolitionism is concerned with root causes. Namely, it believes in a “reorganization of the state through the redistribution of power and resources.”<sup>78</sup> Abolitionism is only contingently skeptical of the liberal state.<sup>79</sup>

The ambivalent approach toward national political frameworks is further exemplified in prison abolition’s view of the Constitution. It is part of the problem but also part of the solution. The prison industrial complex is facilitated by two constitutional provisions that expressly reduce the incarcerated to a status lower than equal citizenship.<sup>80</sup> One is the Punishment Clause of the Thirteenth Amendment, enabling “involuntary servitude [. . .] as a punishment for crime.” The other is Section 2 of the Fourteenth Amendment, allowing the state to deny the vote from those who participate in crime.<sup>81</sup> Both are, ironically, reconstruction era

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<sup>75</sup> Robin West, *Tragic Rights*, *supra* note 72, at 727–36. *See also* ROBIN L. WEST, CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION ch. 5 (2019) (providing a more complete account of rights to exit).

<sup>76</sup> *See, e.g.*, Ejeris Dixon, *Building Community Safety: Practical Steps Toward Liberatory Transformation*, in WHO DO YOU SERVE, *supra* note 58, 161, 169 (“When people who’ve experienced life-threatening injuries or people witnessing violence decide to call an ambulance, we must acknowledge that we have yet to build an alternative to 911.”); *see also* McLeod, *Abolition Democracy*, *supra* note 4, at 1620–37; *infra* section I.C.1. (discussing transformative justice’s distrust of state mechanisms).

<sup>77</sup> Robin West, *Tragic Rights*, *supra* note 72, at 744.

<sup>78</sup> Akbar, *supra* note 10, at 469.

<sup>79</sup> *See also* McLeod, *Beyond the Carceral State*, *supra* note 7, at 69 (framing civil disobedience as “resistance not to being governed, but ‘to being governed in this way’”) (emphasis in original) (quoting Bernard Harcourt, *Political Disobedience*, in OCCUPY: THREE INQUIRIES IN DISOBEDIENCE 45, 47 (W.J.T. Mitchell et al. eds., 2013)).

<sup>80</sup> As opposed to criticism of current racialized interpretations of constitutional provisions. *See, e.g.*, Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

<sup>81</sup> U.S. CONST. amend. XIII; U.S. CONST. amend. XIV, § 2. On the ways in which these provisions bolster the prison industrial complex, *see, e.g.*, Oparah, *supra* note 5, at 283–85, 298; MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 20–58 (2010); DAVIS, PRISONS, *supra* note 16, at 28–37; ALEX

amendments. Whether interpreted in or out of line with their purpose,<sup>82</sup> these provisions still do not require any of the policies abolitionists oppose. These policies are all statutory or regulatory—lawful, but not constitutionally mandated. Hence, the constitutional door is ostensibly open to a “third reconstruction” whereby society would, in Paul Butler’s words, “stop addressing violence and crime in African-American and Latino communities primarily through criminal justice, and instead treat those issues as they would if they were primarily associated with white people.”<sup>83</sup>

The path there is constitutional through and through. Thus, prominent scholars who empathize with abolition advocate resistance by way of utilizing and collectivizing measures that are well within the confines of constitutional law, like mass assertion of the right to trial (Michelle Alexander) and racially based jury nullifications (Paul Butler).<sup>84</sup> These are examples of how resisting excessive or misused state power is a fight that the constitutional framework itself, wary of tyranny, entitles citizens to lead.<sup>85</sup> The abolitionist struggle is one for a more democratic system. A system that listens to those most affected by its policies both by inclusive participation in decision-making, and by encouraging contestation external to entrenched state mechanisms. Jocelyn Simonson writes that contra-official engagements in democratic

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LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH 17–36 (1996).

<sup>82</sup> See, e.g., James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist View*, 94 N.Y.U. L. REV. 1465 (2019) (arguing that the Punishment Clause of the Thirteenth Amendment is misinterpreted).

<sup>83</sup> Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1476 (2016).

<sup>84</sup> Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2203–04 (2013) (discussing Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html>; Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995)). For these scholars’ abolitionist views, see Brentin Mock, *Life after ‘The New Jim Crow,’* CITYLAB (Sep. 30, 2016), <https://www.citylab.com/equity/2016/09/life-after-the-new-jim-crow/502472/> (Alexander); Butler, *The System is Working*, *supra* note 83, at 1476–78 (Butler).

<sup>85</sup> See Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1613 (2017). For classic accounts of the possibility of constitutional civil disobedience, see Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 46–48 (1983); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184–215 (1977).

activities like “copwatching” and “courtwatching,” “shift power and build agency among individuals previously delegated to [o]bjects, not [su]bjects, of the state. This agency, in turn, can lead to robust engagement with legal and constitutional meanings.”<sup>86</sup> As Akbar and Simonson underline, social movements have shaped American law and government in various political intersections, e.g. the movements for women’s rights and for civil rights.<sup>87</sup> They make clear that the construction of constitutional meanings is not confined to the four walls of officialdom. Oppositional social movements are not only part and parcel of the process by which the law works itself pure,<sup>88</sup> but also—to perhaps ease some of West’s concerns—typically enter the public stage and transform into written law with the help of the civic republican tradition.<sup>89</sup>

Reconstruction can be imagined as what follows abolition, so that one has to first abolish and then rebuild.<sup>90</sup> Alternatively, abolition can be imagined as already reconstructive. The latter view is more consistent with the desire to elevate social movements’ interpretations of the law.<sup>91</sup> Specifically, prison abolition keeps alive the promise of the “second reconstruction”—the civil rights legislation of the 1960s. Following the abolition of Jim Crow, such “rights to enter” attempted to actualize the values of community and fraternity, of collectively sharing an inclusive self-made fate.<sup>92</sup> Akbar is wrong to characterize MBL as “altogether skeptical about rights,”<sup>93</sup> since in certain areas MBL has a positive outlook on rights. Regarding the social sphere and democratic

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<sup>86</sup> Simonson, *Democratizing Criminal Justice*, *supra* note 85, at 1618 (subject and object switched in original). *But cf.* John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. (forthcoming 2020) (expressing a contrary view of democratization’s effect on criminal justice).

<sup>87</sup> Akbar, *supra* note 10, at 473–75; Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 622–31 (2017).

<sup>88</sup> DWORKIN, *LAW’S EMPIRE*, *supra* note 53, at 400–07.

<sup>89</sup> ESKRIDGE & FEREJOHN, *supra* note 67, at 99–102; *but cf.* Derrick Bell & Preeta Bansal, *The Republican Revival and Radical Politics*, 97 YALE L.J. 1609 (1988) (expressing skepticism about the republican revival in jurisprudence’s potential to alleviate Black alienation).

<sup>90</sup> Butler, *The System is Working*, *supra* note 83, at 1475–78.

<sup>91</sup> This is somewhat Dworkinian in the sense that it assumes not only the existence of legal truth and legal justice, but also their dependence on interpretation and reinterpretation, acts which institutional authorities have no monopoly over. *See* Robin West, *Constitutional Scepticism*, *supra* note 51, at 792–98.

<sup>92</sup> Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 905–09 (2014); *see also* WEST, *supra* note 75, ch. 5 (providing a more complete account of rights to enter).

<sup>93</sup> Akbar, *supra* note 10, at 446.

participation, rights are seen as a gateway to meaningful engagement with societal structures and a guarantee for the execution of justice for each and every person.<sup>94</sup>

The preceding analysis suggests that prison abolition jurisprudence might be more liberal, republican, and constitutional than its rhetoric.<sup>95</sup> But the more crucial takeaway is the following. Unlike fringe abolitionists who wish to move “beyond good and evil, and beyond the categories of guilt and innocence upon which penal systems are founded,”<sup>96</sup> the MBL vision and prison abolition as an overall project, are not nihilist or post-humanist,<sup>97</sup> nor are they in the business of critique for critique’s sake. These activists believe there are moral truths, including natural rights,<sup>98</sup> civic responsibility, political equality, and concrete pathways to social justice. The fight is for the political realization of these ideals via the establishment of just institutions (including, I will argue next, adjudicating ones that determine culpability and the proper sanction to follow for those who deserve it). In sum, they see power as means for justice.

The last words of Eric Garner, who died at the hands of the NYPD in 2014, were “I can’t breathe.” These words have become a metaphor for the contemporary African-American condition writ large: “[A] summation of an entire community’s state of being.”<sup>99</sup> This condition is

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<sup>94</sup> See DAVIS, *ABOLITION DEMOCRACY*, *supra* note 10, at 103 (“[I]t seems to me that we need to insist on different criteria for democracy: substantive as well as formal rights, the right to be free of violence, the right to employment, housing, healthcare, and quality education.”).

<sup>95</sup> For a similar contention with regard to the Critical Legal Studies movement, which introduced the contemporary critique of rights, see Cornel West, *supra* note 53, at 770 (“My kind of left oppositional thought and practice builds on and goes beyond liberalism as a kind of *Aufhebung* of liberalism. And, I believe, deep down in the CLS project there is the notion that the most desirable society will look liberal in some crucial ways.”).

<sup>96</sup> Lisa Guenther, *Beyond Guilt and Innocence: The Creaturely Politics of Prisoner Resistance Movements*, in *ACTIVE INTOLERANCE: MICHEL FOUCAULT, THE PRISONS INFORMATION GROUP, AND THE FUTURE OF ABOLITION* 225, 235 (Perry Zurn & Andrew Dilts eds., 2016).

<sup>97</sup> See also Berger et al., *supra* note 8 (characterizing abolitionism as operating within a “radical humanist tradition”); *but cf.* Rodríguez, *supra* note 10, at 1611 (“[T]he signature historical moments of ‘successful’ abolitionist struggle produce utterly human historical outcomes in the most antihumanist, counter-Civilizational sense of ‘human’ (contradictory, imperfect, flawed).”).

<sup>98</sup> However abolitionism’s approach to rights is understood, the critique of rights was never about the philosophical concept, but about its specific political realization in a certain period of U.S. history. Robin West, *Tragic Rights*, *supra* note 72, at 737–39.

<sup>99</sup> Hansford, *supra* note 49, at 14. See McLeod, *Abolition Democracy*, *supra* note 4, at

the target at which prison abolition arrows are directed: a racially-charged system of social control.<sup>100</sup> For “[t]hreats don’t have rights, and they don’t get punished; they get policed.”<sup>101</sup> Asserting their status as rights-bearers—in a robust sense, unexhausted by mere constitutional protections—includes the right to be punished rather than controlled. This is a vital component in the humanization of those currently being dehumanized. Abolitionists do not argue otherwise when they strive to “eliminate the use of coercion and punishment *as mechanism of state control*.”<sup>102</sup> State does not equal control, just as retribution does not equal incarceration. Abolitionism displays an understanding of both propositions, but has yet to come to terms with either.

### C. Prison Abolition and Good Retribution

#### 1. *Accountability Without Punishment?*

Two particularly salient approaches to coping with interpersonal violence have been offered by abolitionists: preventive justice and transformative justice. Situating these innovations within the terrain of punishment theory, I will argue that as a general rule these methods are inadequate, or at least insufficient. Morally, because they understand crimes as mere harms, eschewing their moral significance as wrongs, and thereby presenting a purely utilitarian view of the good which ought to be rejected. And politically, because their idea of community is private rather than public, dismissive of the idea of a political collective expressing and upholding its values through law. I will argue further that these methods in fact stand in tension with important abolitionist commitments, and that coming out of the retributive closet will make the abolitionist movement more compelling and drive its redemptive potential home.

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1613; TAYLOR, *supra* note 39, at 173.

<sup>100</sup> Webb, *supra* note 5, at 152.

<sup>101</sup> MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 179 (2005). See Raff Donelson, *Blacks, Cops, and the State of Nature*, 15 OHIO ST. J. CRIM. L. 183 (2017); DAVIS, *ABOLITION DEMOCRACY*, *supra* note 10, at 37 (“[W]hen the black person is sentenced to death, he/she comes under the authority of law as the abstract juridical subject, as a rights-bearing individual, not as a member of a racialized community that has been subjected to conditions that make him/her a prime candidate for legal repression.”).

<sup>102</sup> Ben-Moshe, *supra* note 5, at 85 (emphasis added); see also Spade, *supra* note 73, at 1035–37 (discussing critical race scholarship using the term “population control” to speak of systemic racism instead of the language of antidiscrimination that is focused on individual incidents and intentions).

Preventive justice, as its name suggests, applies *ex ante*. While far from being a new idea,<sup>103</sup> Allegra McLeod has sought to make prison abolition a workable legal framework by breathing new life into the concept of preventive justice. According to McLeod, our efforts should be concentrated on decreasing opportunities to offend and eliminating the very conditions that yield criminal behavior.<sup>104</sup> This is done via steps like decriminalization, urban redevelopment, strengthening local communities, and creating dignifying educational and vocational opportunities.<sup>105</sup> The normative aspiration and the practical working assumption is that such investments would obviate the need to assign culpability, because the vast majority of crimes would not be committed if the social conditions on which they thrive are eliminated.

Unfortunately, when people live together, they sometimes do bad things to one another—whatever the social structures. Attending to “the problems posed by interpersonal violence [. . .] without first resorting to policing, prosecution, and conventional criminal punishment”<sup>106</sup> is very well, but what comes second? What of criminalized acts that are justly criminal? Preventive justice provides no standards of political morality by which to conduct collective moral censure.

Inasmuch as abolitionists articulate a normative stance on how wrongs should be addressed *ex post*, they generally advocate either some form of the relatively familiar and established framework of restorative justice,<sup>107</sup> or what is termed “transformative justice.” In lieu of resorting

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<sup>103</sup> See generally ANDREW ASHWORTH & LUCIA ZENDER, PREVENTIVE JUSTICE (2015).

<sup>104</sup> McLeod, *Prison Abolition*, *supra* note 6, at 1219.

<sup>105</sup> *Id.* at 1224–31.

<sup>106</sup> *Id.* at 1219.

<sup>107</sup> Restorative justice is a method focused on mediation between perpetrator and victim, aiming to bring healing, reconciliation, and reparation. See, e.g., DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE (5th ed., 2014). For critiques, see, e.g., William R. Wood, *Why Restorative Justice Will Not Reduce Incarceration*, 55 BRIT. J. CRIMINOLOGY 883 (2015) (using an empirical, comparative emphasis); Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH. L. REV. 303 (using a conceptual emphasis). Involvement of state actors is one of the reasons that restorative justice as it is currently practiced is rejected by many transformative justice advocates. GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE AND OTHER FORMS OF INTIMATE AND COMMUNITY VIOLENCE 20–21 (2007), [http://www.usprisonculture.com/blog/wp-content/uploads/2012/03/G5\\_Toward\\_Transformative\\_Justice.pdf](http://www.usprisonculture.com/blog/wp-content/uploads/2012/03/G5_Toward_Transformative_Justice.pdf) [hereinafter G5, TRANSFORMATIVE JUSTICE]. A middle ground is offered by McLeod, who is cautiously optimistic regarding restorative efforts, acknowledging their limitations in bringing about

to coercive state mechanisms, transformative justice is a framework for conflict resolution and harm reduction within the community. It is an ongoing decentralized experiment,<sup>108</sup> practiced by organizations around the country trying to make communities safer and bring healing and repair to people who have been victimized and traumatized. As defined by a group of activists working with various organizations,<sup>109</sup> transformative justice aims at bringing “safety, healing and agency” to survivors and “accountability and transformation” to offenders and communities, as well as transforming the social conditions that cause violent behavior.<sup>110</sup> In other words, transformative justice is really a compound of preventive justice (root causes); restorative justice (healing); and traditional punishment (accountability<sup>111</sup>), sans coercion. Respecting the humanity

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wholesale transformation while still underscoring their potential to “reorient public discourse surrounding crime, punishment, and the role of the state.” McLeod, *Beyond the Carceral State*, *supra* note 7, at 677–80.

<sup>108</sup> Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not ‘Transformative Justice.’ Here’s Why*, APPEAL (Feb. 5, 2018), <https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645>.

<sup>109</sup> G5, TRANSFORMATIVE JUSTICE, *supra* note 107, at 3–4 (“We developed our Transformative Justice analysis in partnership with others seeking justice alternatives that could truly transform power relations [. . .] activists and organizers from radical anti-violence and prison abolitionist organizations . . .”).

<sup>110</sup> *Id.* at 26; *see also* McLeod, *Abolition Democracy*, *supra* note 4, at 1630–33 (discussing the goals of transformative justice).

<sup>111</sup> A perhaps more accurate term here would be attributability, as construed by Gary Watson. According to Watson, attributability tracks personal identity by expressing the agent’s individual values and commitments, a disclosure of her “real self” as a “practical identity.” Attributability is thus an “appraisal of the individual as an adopter of ends”—an ethical self which can be influenced in a non-judgmental way. Gary Watson, *Two Faces of Responsibility*, 24 PHIL. TOPICS 227, 229–34 (1996). In contrast, accountability is a matter not of ethics but of morals (on the distinction, *see supra* note 26): performance of wrongful acts for which persons can be held accountable, i.e. blamed and liable to sanction by others who have standing to make demands of them. Applying Watson’s philosophical framework to the criminal law, R. A. Duff highlights that accountability is a triadic project: “I am held accountable for  $\Phi$  by, and to, some person or body whose proper business  $\Phi$  is – someone who has the standing to call me to account.” This leads to a legitimation of the institutional nature of the condemnation process, undertaken by the representative of the entire community. R. A. Duff, *Moral and Criminal Responsibility: Answering and Refusing to Answer*, in 5 OXFORD STUDIES IN AGENCY AND RESPONSIBILITY: THEMES FROM THE PHILOSOPHY OF GARY WATSON 165, 166–67 (D. Justin Coates & Neal A. Tognazzini eds., 2019). *See also* Susan Wolf, *Responsibility, Moral and Otherwise*, 58 INQUIRY 127 (2015) (building on Watson’s account to broaden our understanding of responsibility); Benjamin C. Zipursky, *Two Dimensions of Responsibility in Crime, Tort, and Moral Luck*, 9 THEORETICAL INQ. L. 97, 127 (2008) (discussing different notions of blameworthiness).

of offenders and contributing to their liberation, per transformative justice, is not exercising force upon them.<sup>112</sup>

Transformative justice challenges our thinking about punishment in three major ways. First, drawing on restorative justice, it asks us to pause in between crime and punishment, recognizing and beneficially handling the former without imposing the latter. Second, it unequivocally equates state action with state violence, and hence “pursu[es] reforms that shrink the state’s capacity for violence.”<sup>113</sup> Third, it believes background power relations must be present in the process of assigning responsibility for perpetration of harm. This applies on big scales (compensations are framed in certain instances as reparations for slavery<sup>114</sup>) as well as on smaller ones (assigning “community accountability”<sup>115</sup>).

Whether individual, collective, or institutional, the transformative justice conception of accountability encompasses standard utilitarian punishment goals, just framed as volitional and benevolent: “[A]ccountability includes stopping immediate abuse [i.e. incapacitation], making a commitment to not engage in future abuse [i.e. deterrence], and offering reparations for past abuse [i.e. restitution].”<sup>116</sup> However, although emanating from the assignment of blame, accountability is portrayed as the opposite of retribution: “Our current responses to violence cannot lead us to liberation [ . . . ] They are focused on retribution

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<sup>112</sup> Cf. G5, TRANSFORMATIVE JUSTICE, *supra* note 107, at 7 (noting that force may be acceptable when absolutely necessary to stop imminent infliction of harm).

<sup>113</sup> Berger et al., *supra* note 8; see, e.g., Dixon, *supra* note 76; G5, TRANSFORMATIVE JUSTICE, *supra* note 107, at 9.

<sup>114</sup> McLeod, *Abolition Democracy*, *supra* note 4, at 1626.

<sup>115</sup> California Coalition Against Sexual Assault, *What Does Transformative Justice Look Like? Survivor-Focused, Trauma-Informed, & Community Accountability to Ending Sexual Violence* (Apr. 13, 2017), <http://www.calcasa.org/2017/04/what-does-transformative-justice-look-like-survivor-focused-trauma-informed-community-accountability-to-ending-sexual-violence>; Oparah, *supra* note 5, at 300; INCITE! WOMEN OF COLOR AGAINST VIOLENCE, GENDER OPPRESSION, ABUSE, VIOLENCE: COMMUNITY ACCOUNTABILITY WITHIN THE PEOPLE OF COLOR PROGRESSIVE MOVEMENT 13 (2005), available at <http://www.usprisonculture.com/blog/wp-content/uploads/2012/03/community-accountability-in-POC-progressive-mvmt.pdf> [hereinafter INCITE!]; See Tracy L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 194–98 (1998).

<sup>116</sup> G5, TRANSFORMATIVE JUSTICE, *supra* note 107, at 26, 29. At times, accountability simply means incapacitation: “The abolitionists I know understand that as a society we will always need to ensure accountability for people who repeatedly cause harm.” Mariame Kaba, *How to Repair the Criminal Justice System: Take No Prisoners*, VICE (Oct. 5, 2015), [https://www.vice.com/en\\_us/article/vdxxpp4/mending-our-ways-0000775-v22n10](https://www.vice.com/en_us/article/vdxxpp4/mending-our-ways-0000775-v22n10).

and punishment rather than accountability and transformation.”<sup>117</sup>

Transformative justice is strictly forward-looking, voluntary, and utilitarian. Its framers’ primary concern is the efficacy of the process in bringing about physical and psychological welfare to all those involved (“healing and safety”<sup>118</sup>), in order to resolve conflict and reduce harm.<sup>119</sup> Coming to terms with the past is an instrumental feature in this scheme, necessary for making material amends. Completely absent are deontological considerations and any tolerance for paternalism, particularly when it comes from entities lacking moral and political legitimacy such as the state. In traditional punishment terms, transformative justice complains that the current criminal justice system is (1) bad utilitarianism and (2) retributive, period. While good utilitarianism is contemplated, good retribution is considered oxymoronic.

With regard to the state, transformative justice differs from the MBL platform. The state’s legitimacy is rejected categorically, and relatedly, the political makeup of the state is accepted as a given with no ambition to work with it or hope to change it. However, the state still ought to support communities and provide infrastructure for their own transformations, once again using the magic, catchall word: accountability.<sup>120</sup> The communal attitude toward criminal justice is, in transformative justice as opposed to MBL, a tribal, DIY one. It narrows the limits of the relevant political community by designing them according to express consent and active participation.<sup>121</sup>

Consigning the moral conversation around criminal justice to boundaries narrower than the state’s is problematic from an abolitionist

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<sup>117</sup> G5, TRANSFORMATIVE JUSTICE, *supra* note 107, at 6.

<sup>118</sup> *Id.* at 5.

<sup>119</sup> CRITICAL RESISTANCE, A WORLD WITHOUT WALLS: THE CR ABOLITION ORGANIZING TOOLKIT 51–53 (2004), available at <http://criticalresistance.org/wp-content/uploads/2012/06/CR-Abolitionist-Toolkit-online.pdf>.

<sup>120</sup> G5, TRANSFORMATIVE JUSTICE, *supra* note 107, at 9–10 (“[I]t is essential that we continue to hold the State accountable for its failure to provide adequate services and funding to support families and communities in dealing with violence. The State must also be held accountable for the ways in which its policies create the conditions that allow violence to continue.” Nevertheless, due to its colonial, patriarchal, etc. baggage, it “cannot provide the individual and social justice that we seek,” period.)

<sup>121</sup> *Id.* at 2 n. 1 (defining “community” as “group of people in relationships based on common experience, identity, geography, values, beliefs, and/or politics”). An implicit condition is willingness to participate, as vigilantism is rejected, and so is coercion more generally. *Id.* at 7.

perspective. Abolitionists have invoked Robert Cover's seminal description of the law as a violent imposition of a dominant social narrative over minor narratives that challenge it, while inherently inviting visionary, transformative alternatives.<sup>122</sup> Cover distinguishes two general avenues of contestation: insular and redemptive. The latter aspires not to communal autonomy and segregation, but to transformation of the hegemony's interpretation of the law and thereby its monopoly on violence. In other words, to shape, via committed defiance, the common constitutional script we share as our *nomos*.<sup>123</sup> Abolitionism must opt for the redemptive route, and indeed it does. This conclusion arises from analyses of abolitionist agendas,<sup>124</sup> and, more pertinently, from the agendas themselves. For instance, it is noteworthy that MBL is race-conscious in the policy revisions it articulates regarding political representation, social rights, and resource allocation, but the ideal prison abolition situation it envisages is universal. Namely, MBL believes Black people specifically are entitled to education, but it believes all people should be freed from incarceration.<sup>125</sup>

*a. Punishment between Autonomy and Status I*

The era of mass incarceration has made it clearer than ever that punishment is as much a political matter as it is a moral one, and that societal response to crime is hardly predicated on a view of individual actors as merely "choosing selves."<sup>126</sup> There is no denying that criminal behavior stems to some extent from the social conditions in which the

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<sup>122</sup> McLeod, *Prison Abolition*, *supra* note 6, at 1211–12; Akbar, *supra* note 10, at 412 n. 23, 437 n. 143.

<sup>123</sup> Cover, *supra* note 85, at 33–35.

<sup>124</sup> See, e.g., McLeod, *Abolition Democracy*, *supra* note 4, at 1619 ("Although there are differences between contemporary abolitionists' visions of abolition democracy [. . . they] hold in common a commitment to transforming criminal legal processes in connection with expanding equitable social-democratic forms of collective governance."); see also *infra* notes 214–225 and accompanying text.

<sup>125</sup> Compare MBL Platform: Reparations, *supra* note 69, with MBL Platform: Abolition, *supra* note 35. In the latter, unlike most other demands in the platform, the proposed policy solutions do not mention race nor single out any specific social groups, except to explain, separately from the desired policy, that these problems disproportionately impact disadvantaged groups.

<sup>126</sup> See Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 614–18 (2018); V. F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1695–96 (2003); Brown & Halley, *supra* note 33, at 17.

criminal is situated,<sup>127</sup> and that penal codes are not formulated, interpreted, and implemented behind a veil of ignorance regarding which people in which social conditions tend to perform which criminal(ized) acts. These truths speak to why the discourse surrounding punishment, as a component of criminal law at large, must recognize and engage its reciprocal relationships with public regimes like institutional design and resource allocation schemes.<sup>128</sup> Social response to crime needs to be sensitive both to the political conditions from which it arises and to those it seeks to cultivate. Punishment is therefore political at the receiving end and at the giving end, and prison abolition works at both ends (albeit neglecting the core they revolve around). Abolitionism highlights that criminalized behavior is a consequence of myriad factors such as personal and collective history, social background, and over-criminalization. Even more vigorously, abolitionism criticizes the carceral state for using its penal apparatus to marginalize vulnerable social groups and refine the mechanisms through which the hegemony controls and disappears persons who are perceived as threats. That being said, it does not follow that free choice plays no role in the criminal process, nor do abolitionists believe that is the case.

Unequivocal faith in individual autonomy that refuses to reduce persons to the sum total of their circumstances (thus rejecting the idea that eliminating bad circumstances would eliminate bad acts) does not equal giving up on an anti-carceral view of criminal justice. This raises questions of fairness. As Ewing puts it, it is not “that particular social disadvantages somehow mysteriously override people’s agency and force them to resort to crime but rather that they affect people’s options.”<sup>129</sup>

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<sup>127</sup> See Benjamin Ewing, *Recent Work on Punishment and Criminogenic Disadvantage*, 37 L. & PHIL. 29, 29–30 (2018) [hereinafter Ewing, *Criminogenics*]; Meares, *supra* note 115.

<sup>128</sup> The examination of criminal as public law, viz. a method of organizing a polity that is tied in a gordian knot with political philosophy and political contingencies, is only now taking shape in analytical legal philosophy, but has been a matter of course in critical theory and sociolegal scholarship for decades. See, e.g., MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Seridan trans., 2d ed. 1995); MINDA, *supra* note 51, at 106–48, 167–85 (discussing critical legal theories); Angela Y. Davis, *Racialized Punishment and Prison Abolition*, in *THE ANGELA Y. DAVIS READER* 96 (Joy James ed., 1998) (analysis combining Foucault and critical legal theories); GOTTSCHALK, *supra* note 7 (discussing the link between criminal law and politics from a sociolegal perspective); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007) (same).

<sup>129</sup> Ewing, *Criminogenics*, *supra* note 127, at 30.

Rather than completely dismissing culpability on account of social disadvantages, we may strive to incorporate difficulties surrounding fairness into the assignment of individual responsibility. Such incorporation must be committed to political equality between those subject to law enforcement as deserving equal concern and respect.<sup>130</sup>

Punishment practices have no explicit presence in West's account of the contemporary polarization of rights, described above—to exit or to enter—and their critique.<sup>131</sup> Just like other legal areas, the criminal law is susceptible to allowing the focus on individual rights to obstruct recognition of societal power relations.<sup>132</sup> However, it is more resilient to the critique of rights, since there is near universal agreement on fundamentals like the presumption of innocence.<sup>133</sup> At the same time, the criminal law is more open to absorbing radical notions of justice, since individual cases allow for various procedural mechanisms that improve the plight of subordinated people.<sup>134</sup> What would criminal rights to enter look like? Rights “grounded in our nature, but which we are owed by virtue of our membership in society,” whose enforcement depends on a protective, inclusive state?<sup>135</sup> It is what is missing from the alternative accounts: a response to crime understood as a public wrong. I will start with *wrong*, and then move to *public*.

Let me stress at the outset that my intention is not to advocate a specific theory of retribution, much less to develop an original one. My ambition in this section is modest: merely to illustrate that some basic retributive tenets—under a capacious understanding of retributivism, which purposefully sidesteps internal disputes—are compatible with, and bring to fruition, basic abolitionist tenets.

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<sup>130</sup> See Peter Ramsay, *A Democratic Theory of Imprisonment*, in DEMOCRATIC THEORY AND MASS INCARCERATION 84–85 (Albert W. Dzur et al. eds., 2016); Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1044–52 (2004).

<sup>131</sup> *Supra* notes 75–77, 92 and accompanying texts.

<sup>132</sup> See, e.g., Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1606–13 (2019).

<sup>133</sup> Cf. James Q. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice*, 94 TEX. L. REV. 933 (2016) (challenging this consensus); see also Anthony Duff, *Who Must Presume Whom to be Innocent of What?*, 42 NETH. J. LEGAL PHIL. 170, 185–92 (2013) (discussing the tension between collateral consequences and the presumption of innocence).

<sup>134</sup> Paul Butler, *Should Radicals Be Judges?*, 32 HOFSTRA L. REV. 1203, 1207 (2004).

<sup>135</sup> Robin West, *Tale of Two Rights*, *supra* note 92, at 908.

## 2. *Public Wrong: Wrong*

The abolitionist imagination does not extend to, yet craves, non-carceral punitiveness. Take the case of a lifelong prison sentence given to a serial child molester, described by abolitionists as a “test of faith” urging their peers to resist the instinct to praise it.<sup>136</sup> Aside from revealing the strength of retributive intuitions even among abolitionists,<sup>137</sup> the text is indicative of the stark opposition constructed between state punishment and social justice, and the inability to imagine a bridge that would reconcile them. “Our punishment system, which is grounded in genocide and slavery, and which has continued to replicate the functions and themes of those atrocities, can never be made just.”<sup>138</sup> I wholeheartedly agree that sentencing an offender to 100+ years of imprisonment—even a sexual predator who assaulted dozens of young girls who trusted him and depended on him, like the one in question (Larry Nassar)<sup>139</sup>—warrants no praise. Nevertheless, I want to suggest that retributive inclinations be seen as opportunities for developing more refined and nuanced frameworks that have a greater potential to deliver justice, rather than tests of faith that ought to be resisted (i.e. intellectual challenges that ought to be shunned). These frameworks should leverage emotional resentment, as well as hope and care, into effective moral indignation and rectification. A motivation to right a wrong, which is different from repairing harm.<sup>140</sup>

<sup>136</sup> Hayes & Kaba, *supra* note 108.

<sup>137</sup> Punishment theorists recognize the ubiquity of retributive intuitions but also caution against giving significant moral weight to them as such, i.e. deriving an ‘ought’ from an ‘is.’ See, e.g., Leora Dahan Katz, *Response Retributivism: Defending the Duty to Punish* (Nov. 2, 2018), 5, available at <https://ssrn.com/abstract=3264139>; R. A. Duff, *Responsibility, Restoration, and Retribution*, in *RETRIBUTION HAS A PAST: HAS IT A FUTURE?* 63, 65 (Michael Tonry ed., 2011) [hereinafter Duff, *Responsibility*]; Matt Matravers, *Is Twenty-First Century Punishment Post-Desert?*, in *RETRIBUTION HAS A PAST*, *supra*, 30, 33. See generally Kwame Anthony Appiah, *The Case Against Intuition*, in *EXPERIMENTS IN ETHICS* 73 (2008) (questioning the philosophical value of intuition).

<sup>138</sup> Hayes & Kaba, *supra* note 108; see also Akbar, *supra* note 10, at 469 (“[T]he police do more harm than good in Black communities, not only doing violence to Black communities but failing to protect them; they never have, and they never will. That is not their function.”).

<sup>139</sup> See Christine Hauser, *Larry Nassar is Sentenced to Another 40 to 125 Years in Prison*, *N.Y. TIMES* (Feb. 5, 2018), <https://www.nytimes.com/2018/02/05/sports/larry-nassar-sentencing-hearing.html> (The sentence mentioned in the headline is the result of a state procedure, and will be served consecutively to a federal court sentence of 60 years imprisonment.).

<sup>140</sup> See Zac Cogley, *Basic Desert of Reactive Emotions*, 16 *PHIL. EXPLORATIONS* 165, 167–72 (2013); Duff, *Responsibility*, *supra* note 137, at 77–79; JEFFRIE G. MURPHY,

The faith being tested is that crime is best categorized as a tort, and the purpose of its condemnation is satisfied by material restoration,<sup>141</sup> such that peace subsumes justice.<sup>142</sup> Thus, for Angela Davis, response to crime necessarily depicts the wrongdoer in one of two ways: either a debtor or “evil-minded.” Because the latter deserves “retribution” and “social exile,” she chooses the former.<sup>143</sup> We have already seen, however,

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GETTING EVEN: FORGIVENESS AND ITS LIMITS 17–26 (2003). *See also*, on emotional responses to crime, *infra* section II.B.2.

<sup>141</sup> Zaibert, *supra* note 32, at 54 (“What the abolitionist [of punishment] envisions as eventually superseding the criminal law is, in essence a matter of restitutory schemes: if I wrong you, I must make it up to you.”). Abolishing punishment, as opposed to prisons, requires an abandonment of “the very concept of crime, as wrongdoing to which the community should respond with condemnation,” substituting it with a private conflict between members of the community that is a mere civil matter. R. A. Duff & David Garland, *Preface: H. Bianchi, ‘Abolition: Assensus and Sanctuary,’ in A READER ON PUNISHMENT* 333, 335 (R. A. Duff & David Garland eds., 1994); *see also* Duff, *Responsibility*, *supra* note 137, at 67–69 (differentiating abolition of the idea of criminal law from abolition of the idea of responsible agency). On restitutory schemes, *see generally* DAVID BOONIN, *THE PROBLEM OF PUNISHMENT* (2008); Barnett, *supra* note 11.

<sup>142</sup> I contrast peace and justice, the two goals which international criminal justice regimes struggle to balance, in response to abolitionist inspiration drawn from transitional justice mechanisms, specifically the truth and reconciliation process in South Africa, and abolitionist proposals to understand intra-U.S. violence related to racial justice as international crimes that warrant international fact-finding and adjudication. *See* Michael A. Lawrence, *Racial Justice Demands Truth & Reconciliation*, 80 U. PITT. L. REV. 69 (2018); Asha Rosa et al., *We Charge Genocide: The Emergence of a Movement*, in *WHO DO YOU SERVE*, *supra* note 58, 119; *cf.* Olwyn Conway, “How Can I Reconcile with You When Your Foot is on My Neck?”: *The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 MICH. ST. L. REV. 1349. In my opinion, transitional justice can indeed be a fruitful framework in this context. However, its conceptualization and application comprise myriad complexities, including the following. First, a central tenet of the international effort to advance world peace is the establishment of an international *criminal law* regime, which exercises *punishment*. *See generally* Patrick J. Keenan, *The Problem of Purpose in International Criminal Law*, 37 MICH. J. INT’L L. 421 (2016); Adil Ahmad Haque, *Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law*, 9 BUFF. CRIM. L. REV. 273 (2005). Second, the sanction of choice in the international community for large-scale “preventive justice”—the effective outlawry of war, or *Jus contra Bellum*—is exactly the one abolition rejects: ostracism, or “outcasting.” OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* 371–95 (2017). And third, transitional justice is a project of nation-building, targeted at political collectives, rather than private problem-solving. *See* DAVIS, *PRISONS*, *supra* note 16, at 114–15. *See also* McLeod, *Abolition Democracy*, *supra* note 4, at 1628–33 (exemplifying the abolitionist emphasis on the concept of peace); *but cf.* Rodríguez, *supra* note 10, at 1578 (defining abolitionism as “counterwar”).

<sup>143</sup> DAVIS, *PRISONS*, *supra* note 16, at 113–14; Davis & Rodríguez, *supra* note 8, at 217–

that justice is cherished by abolitionists alongside peace, and rightly so.<sup>144</sup> Now let us recognize that retribution—in contrast to existing U.S. penal practice—is not about labeling criminals evil-minded, nor is it about exiling them.<sup>145</sup>

Abolitionism values human agency. To treat offenders humanely—to respond to their wrongdoing while respecting their humanity—is a quest shared by retribution and abolition. Each challenges the other to think again about who this human is, what her autonomy consists of, and what empowering her entails.

The challenge posed by “non-punishment” frameworks like preventive/restorative/transformatory justice is really a utilitarian one: decarceration is favored for consequential reasons, specifically the increase in pleasure and fulfillment of individual preferences.<sup>146</sup> Retribution, while not necessarily inconsistent with consequentialism,<sup>147</sup> is concerned with the reasons for which acts are performed irrespective of outcomes. Hence, it predicates the moral legitimacy of punishment on responsibility for crime, gauged by the offender’s culpability and the harm his offense caused. Retributivism’s answer to the question *why do we punish?* is: *because a blameworthy offender deserves it*. In contrast, alternative, non-punishment methods guided by utilitarian considerations

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<sup>144</sup> See *supra* sections I.A.–B.

<sup>145</sup> See generally, on how these themes manifest in current U.S. criminal justice regimes, Ristroph, *Farewell*, *supra* note 126; Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933 (2016).

<sup>146</sup> Utilitarian theory generally uses one of three criteria for measuring utility, i.e. the good: pleasure, preference, and objective wellbeing. See TIM MULGAN, UNDERSTANDING UTILITARIANISM 62 (2014); Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 J. PHIL. 169, 187–92 (1985); Robin West, *Bartleby’s Consensual Dysphoria*, in POWER, PROSE, AND PURSE: LAW, LITERATURE, AND ECONOMIC TRANSFORMATIONS 191, 206–12 (Alison LaCroix et al. eds., 2019). Abolitionist writings also include hints of a more robust utilitarianism, incorporating objective elements as well as deontological undertones. See, e.g., McLeod, *Beyond the Carceral State*, *supra* note 7, at 704 (discussing “human flourishing”). However, the punishment alternatives they endorse seem incapable of responding to these objective moral threads, due to their utter rejection of paternalism and coercion.

<sup>147</sup> See, e.g., Hadar Dancig-Rosenberg & Netanel Dagan, *Retributarianism: A New Individualization of Punishment*, 13 CRIM. L. & PHIL. 129 (2019); Michael T. Cahill, *Punishment Pluralism*, in RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 25 (Mark D. White ed., 2011); MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 92–102 (1997); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. L. REV. 453 (1997); Jean Hampton, *Correcting Harms versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1659 n. 2, 1701 n. 65 (1992).

reach a different conclusion than both retributivist and traditional utilitarian accounts of punishment:<sup>148</sup> that *no one deserves it*. While their case against the prevailing forms of punishment is strong, this section argues that their case against *desert* is weak, and as a general rule such methods should not be adopted. Abolitionists should not be satisfied with a categorical rejection of coercion and of interpersonal moral duties; for this view suggests that good is exhausted by maximization of the subjective values of preference and pleasure.<sup>149</sup>

With regard to the maximization of pleasure, it is no coincidence that McLeod draws on Jeremy Bentham, who championed hedonic utilitarianism. There is reason to doubt McLeod's insistence that Bentham's preventive justice ideas are "quite apart" from his normative views that persons, particularly prisoners, may be instrumentalized for social welfare purposes.<sup>150</sup> Restricting the normative weight of response to crime to preventing future crimes and to promoting safety and security is conceptually tied to reducing humans to numbers in a cost-benefit calculus. Both moves strip blame for wrongdoing of its moral significance, conceptually advancing a "criminology of control."<sup>151</sup> In fact, this is the very philosophy that yielded collateral consequences

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<sup>148</sup> McLeod casts doubt on the efficacy of utilitarian purposes of punishment but not on the underlying moral infrastructure. McLeod, *Prison Abolition*, *supra* note 6, at 1199–206. Similarly, with regard to collateral consequences pertaining to sex offenders, McLeod contends that they are "unjust and counterproductive," but only the latter is articulated and explained. Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CAL. L. REV. 1553, 1558 (2014). Nothing in that article would bar publicizing, monitoring, banishing sex offenders in the case that such actions could be shown to be productive and effective, except a general stipulation that some measures are "inhuman." *Id.* at 1583–86. Retributive abolitionism may be situated at this mismatch between deontological concerns expressed by abolitionists, and their materialist articulations.

<sup>149</sup> See also Robin West, *Bartleby*, *supra* note 146, at 215 (In discussing the Occupy movement as centered around hedonic Benthamic utilitarianism—as opposed to choice-centered utilitarianism—West states that: "It's not greedy or criminal or psychotic or even cynical or morally compromised Wall Street brokers or lawyers that we need to watch out for. It is, rather, what we value and how. And one of the costs [. . .] may be our own alienation from our hedonic selves: the selves that experience the world not as one that we make and remake through our autonomous choices, but rather as one that is pleasing or painful."). On MBL building on the Occupy movement, see *supra* note 21 and accompanying text.

<sup>150</sup> McLeod, *Prison Abolition*, *supra* note 6, at 1220.

<sup>151</sup> DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 182–83 (2001).

(CCs), which will be discussed below.<sup>152</sup> Like restorative and transformative justice, CCs' blurring of the criminal/civil line stems from their ostensible commitment to future safety and welfare maximization.<sup>153</sup> When the primary goals are security and prevention unrestricted by ex ante personal responsibility, CCs thrive.<sup>154</sup> When peace subsumes justice, agency yields to safety.

To be clear, utilitarianism, just like retribution, does not mandate in and of itself any particular mode of punishment, and can advance decarceration and overall leniency.<sup>155</sup> But the moral standards it sets, at least in the hedonic strand, have nothing to say against objectification and preconditioning of people for social benefit,<sup>156</sup> or normalizing their social existence,<sup>157</sup> because they view dignity as exhausted by welfare. To favor

<sup>152</sup> See Brian M. Murray, *Are Collateral Sanctions Deserved?*, 95 NOTRE DAME L. REV. (forthcoming 2020), 25–29, available at <https://ssrn.com/abstract=3324807> [hereinafter Murray, CCs].

<sup>153</sup> *Id.* at 5–6.

<sup>154</sup> *Id.* at 6, 37 (“[W]hen the primary goals of punishment are safety, security, and minimizing future crime (or predicting dangerousness), the temptation to enact collateral consequences is harder to resist and more difficult to critique [. . .] it is always the *next* collateral consequence that will prevent future harm.”) (emphasis in original).

<sup>155</sup> See, e.g., Murat C. Mungan, *Positive Sanctions versus Imprisonment*, George Mason University Law and Economics Research Paper Series 19-03 (Jan. 17, 2019), available at <https://ssrn.com/abstract=3317552>; Peter N. Salib, *Why Prison?: An Economic Critique*, 22 BERKELEY J. CRIM. L. 111 (2017). It can also be argued that the hedonic-utilitarian view when coupled with enlightenment ideas of individual worth, logically leads to a categorical rejection of punishment as the infliction of pain, and hence that the abolitionist stance is a genuine perfection of the ideas of Bentham and Beccaria, which realizes the moral supremacy of human bodily integrity and independence. See Kleinfeld, *Reconstructivism*, *supra* note 34, at 1519–21; Zaibert, *supra* note 32, at 51–58; Binder, *supra* note 22, at 334–49. See also PETER MOSKOS, IN DEFENSE OF FLOGGING (2013) (arguing that physical punishment should be offered to offenders alongside incarceration, so that they could choose which is less painful—preference and pleasure maximization brought *ad absurdum*). Retributive theories generally view bodily integrity as a necessary but not as a sufficient condition for dignified personhood and equal membership in society.

<sup>156</sup> See, e.g., Kimberly Kessler Ferzan, *Rethinking The Ends of Harm*, 32 L. & PHIL. 177 (2013); Duff, *Responsibility*, *supra* note 137, at 64; Markus Dirk Dubber, *Rediscovering Hegel's Theory of Crime and Punishment*, 92 MICH. L. REV. 1577, 1618–19 (1994) (reviewing MARK TUNICK, *HEGEL'S POLITICAL PHILOSOPHY: INTERPRETING THE PRACTICE OF LEGAL PUNISHMENT* (1992)); Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 220–22 (1973).

<sup>157</sup> From a Foucauldian perspective, prison abolition is concerned not only with judicial, coercive power but with human scientific, normalizing power as well. The latter renders the deviant from various social norms, as set by political and scientific authorities, a legitimate object of discipline, or “correction.” See FOUCAULT, *supra* note 128, at 177–

carrots over sticks, and to provide the carrots before instead of after the fact, does little to distance abolitionists from this diluted view of personhood—that is, as objects of regulation rather than subjects of the law.<sup>158</sup>

Abolitionists' commitment to view persons as rooted in their community would in turn render difficult an espousal of maximization of preference. This criterion for gauging utility produces alienation by disconnecting the person from any social setting and the ends she adopts from any communal project and shared values. As already argued by CLS, bare consent may proffer value inadequately and shield societal structures from criticism.<sup>159</sup> Like pleasure, preference is susceptible to manipulation by disciplinary power performed by the strong via social engineering of

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84; Marcelo Hoffman, *Disciplinary Power*, in MICHEL FOUCAULT: KEY CONCEPTS 27 (Dianna Taylor ed., 2010). For abolitionist allusions to this framework, see Natalie Cisneros, *Resisting "Massive Elimination": Foucault, Immigration, and the GIP*, in ACTIVE INTOLERANCE, *supra* note 96, 241, 244–47; Ben-Moshe, *supra* note 5, at 91. Despite their rejection of paternalism, such reconditioning of people's agency is in fact encouraged by the view of the good underlying the abolitionist preferred methods for dealing with crime, as is the delegation of human-ethical questions to positive sciences. See Nancy Fraser, *Michel Foucault: A "Young Conservative"?*, 96 ETHICS 165, 176 (1985) ("[W]hat the argument of *Discipline and Punish* discredits is not a proper humanism at all but, rather, some hybrid form resembling utilitarianism. (Nor should this surprise given that the arch-villain of the book is Jeremy Bentham, inventor of the Panopticon.) Thus, it does not follow that a nonutilitarian, Kantian, or quasi-Kantian humanism lacks critical force against the psychological conditioning and mind manipulation that are the real targets of Foucault's critique of disciplinary power.").

<sup>158</sup> See Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 322–23 (2015) ("[R]egulatory governance [. . .] aspires to maximize the welfare of the state as a whole. The ideal of 'law,' meanwhile, emerged as a reaction against the ideal of the police state, and aspires to implement a liberal conception of individuals as autonomous, rights-bearing persons [. . .] law enables and requires states to engage in 'respectful coercion.' The threat of punishment for willful wrongdoing operates through respectful coercion. Predictive incapacitation does not."); *but cf.* CHIAO, *supra* note 22, at 224–30 ("[M]any of the policies characteristic of the welfare state, starting with the earliest initiatives in social security and unemployment insurance, are obviously meant to prevent foreseeable social ills and are, in that respect, accurately described as forms of 'preventive justice.' [. . .] a focus on ex ante prevention should be sharply distinguished from the idea that people are not responsible agents.").

<sup>159</sup> See Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 641, 650–57 (David Kairys ed., 1998); see also Kleinfeld, *Reconstructivism*, *supra* note 34, at 1494–96 (arguing that criminal law has an important role in creating solidarity, but that retributivism's individual focus hinders that and instead contributes to alienation). There are, however, articulations of inclusive retribution, to which this article turns.

the weak.<sup>160</sup> When the mere act of blaming for doing wrong is taken as an impediment to emotional and psychological safety and hence should not be done, as transformative justice believes,<sup>161</sup> human agency amounts to little more than dollhood.<sup>162</sup> It is exactly this kind of non-agency which abolition and retribution both oppose.

Ex ante prevention, ex post restoration and enduring transformation should not be abandoned, but they must be combined with some version of retribution that recognizes and responds to blameworthiness and desert. Desert is not only a just and humanizing principle, but also an important one for the curtailment of policy aimed at utility maximization.

The moral standards set by retribution, in contrast to utilitarianism, are grounded in a morally egalitarian view of human worth that sees every person as an end-in-himself and deserving as such of equal respect.<sup>163</sup> It is logically prior to power relations. Ergo, contrary to Davis, retribution counters the categorization of certain people as evil, and it does so with unparalleled philosophical force. Jean Hampton's retributive theory illustrates the counter of this categorization, resting exactly on the premise that "we are obliged to respect our fellow human beings *equally*, no matter what the state of their moral character."<sup>164</sup> Under Hampton's moralist, victim-driven approach, every person possesses inalienable

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<sup>160</sup> This is true even if utility is aggregated in an egalitarian way and informs public policy accordingly. See, e.g., ROBERT E. GOODIN, *UTILITARIANISM AS A PUBLIC PHILOSOPHY* 23 (1995). For even so, utilitarianism is still indifferent to the use of persons as mere means to external ends. See Kleinfeld, *Two Cultures*, *supra* note 145, at 1014–15; Christopher Kutz, *Responsibility*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 548, 569 (Jules L. Coleman et al. eds., 2004).

<sup>161</sup> See G5, *TRANSFORMATIVE JUSTICE*, *supra* note 107, at 42.

<sup>162</sup> *But cf.* CHIAO, *supra* note 22, at 221, 229 ("Blame and punishment may indeed be central to our sense of ourselves as responsible agents, but they are far from the exclusive manner in which moral engagement manifests. [. . .] Responsible wrongdoing can be addressed through a variety of non-retributive responses – disappointment, sadness, sympathy, or compassion, for instance – that do not amount to taking an objectivizing, condescending, or otherwise non-agential attitude toward the wrongdoer."). A non-absolutist, rich understanding of retribution does not necessarily dispute these claims and aspires to integrate reactive attitudes within a retributive scheme. *Supra* note 140, *infra* notes 327–332 and accompanying texts. The trouble with transformative justice is that it takes blaming to be mutually exclusive with such genuine emotional responses, and hence assigns no role to blame in responding to wrongdoing. Similarly, Chiao advocates an "opting out of blame." *Id.* at 229.

<sup>163</sup> Hampton, *Correcting Harms*, *supra* note 147, at 1666–68.

<sup>164</sup> *Id.* at 1668 (emphasis in original); see, e.g., Matravers, *supra* note 137, at 38.

human dignity just by virtue of being a person, yet this value may be diminished and our worth degraded at the culpable hands of another. Forceful condemnation “vindicate[s] the value of the victim denied by the wrongdoer’s action through the construction of an event that not only repudiates the action’s message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.”<sup>165</sup> It is incumbent on us to respond to a wrongful action with a corresponding action, in order to “remake the world in a way that denies what the wrongdoer’s events have attempted to establish.”<sup>166</sup> Restoration and amends are thus constitutive elements of retribution, but it is not only the subjective feeling or material condition of the victim which need to be restored and amended. It is also an objective moral status,<sup>167</sup> which sits at a higher level of abstraction and allows for a flexible response. Failure to respond to a wrong, provided there is moral and political standing to do so, would constitute an independent act of wrongdoing<sup>168</sup> and perpetuate a false message.<sup>169</sup>

Just as the victim is entitled to respect as an autonomous moral agent, so is the perpetrator. Fulfilling the duty to punish would in turn reaffirm a common bond between the punisher and the punished. Both belong in the same human community that shares rational capacities and freedom of will necessary to engage in conversation about why certain acts are wrong and must not be willfully performed.<sup>170</sup> Indeed, Hampton’s

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<sup>165</sup> Hampton, *Correcting Harms*, *supra* note 147, at 1686; see Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS* 1, 6–11, 17–20 (Wesley Cragg ed., 1992).

<sup>166</sup> Hampton, *Correcting Harms*, *supra* note 147, at 1686–87. See also Dubber, *Rediscovering Hegel*, *supra* note 156, at 1607 (“[T]he offender, as rational, is treated as having acted according to the maxim that one should violate another’s external freedom. Punishment merely applies this law to the offender.”).

<sup>167</sup> Hampton, *Correcting Harms*, *supra* note 147, at 1697; Jean Hampton, *The Moral Education Theory of Punishment*, 13 *PHIL. & PUB. AFF.* 208, 217 (1984).

<sup>168</sup> Dahan Katz, *supra* note 137, at 13. This assertion raises enforcement questions: does the state wrong each time it fails to prosecute a crime? The answer is that both decriminalization and resource allocation considerations, as well as some issues of fairness, should be read into the phrase “political standing.” *Id.* at 43–45. One possibility is that the balance would hinge on the severity of the crime: when not serious, the duty to punish dwindles. Michael T. Cahill, *Retributive Justice in the Real World*, 85 *WASH. U. L. REV.* 815, 830–33, 858–61 (2007).

<sup>169</sup> Hampton, *Expressive Theory*, *supra* note 165, at 8.

<sup>170</sup> Duff, *Responsibility*, *supra* note 137, at 78; Yankah, *Good Guys*, *supra* note 130, at 1060–61; Philippe Nonet, *Sanction*, 25 *CUMB. L. REV.* 489, 490 (1995) (According to Hegel, sanction “is precisely the overcoming of and return from estrangement.”).

theory builds on another premise as well, which connotes the MBL indignation at the acquittals/non-indictments of the Zimmermans and the Wilsons:<sup>171</sup> the expressive nature of human actions. It is the message conveyed in these acts, both the killings and the failures to recognize them as wrongs, that sparked outrage and demanded refutation.<sup>172</sup> If criminal justice is exhausted by material restitution then it does not entail backward-looking moral condemnation and hence is unable to provide a counter message.<sup>173</sup> MBL recognizes not only that our punishment practices articulate who we are, but that not punishing at all is not who we want to be.<sup>174</sup> Jeffrie Murphy explains why:

One reason we so deeply resent moral injuries done to us is not simply that they hurt us in some tangible or sensible way; it is because such injuries are also *messages* – symbolic communications. They are ways a wrongdoer has of saying to us, “I count but you do not,” “I can use you for my purposes,” or “I am here up high and you are there down below.” Intentional wrongdoing *insults* us and attempts (sometimes successfully) to *degrade* us – and thus it involves a kind of injury that is not merely tangible and sensible. It is moral injury, and we care about such injuries.<sup>175</sup>

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<sup>171</sup> *Supra* notes 41–44 and accompanying text.

<sup>172</sup> Hampton, *Expressive Theory*, *supra* note 165, at 13.

<sup>173</sup> The term “backward-looking” must not be understood as a metaphysical, non-constructive element. In the current context, voicing a message although stemming from duty, nonetheless inherently serves the purpose of making it heard and understood, perhaps initiating a conversation, and hence expressive in terms of justification, but communicative in terms of form. See Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 26 n. 65 (2012).

<sup>174</sup> See also Kleinfeld, *Reconstructivism*, *supra* note 34, at 1513–18 (discussing the expression of public values as a purpose of punishment); Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965) (same). The expressive and communicative elements of retribution allow for the espousal, for present purposes, of what Chiao calls an “anodyne” retributivism, i.e. “that censuring and punishing people for their wrongdoing is not entirely without value.” CHIAO, *supra* note 22, at 234. Hence, while prosecution is not an absolute imperative, there is a social necessity for an effective institution of formal censure. See *id.* at 240 (“There is something that ex post punishment does that ex ante prevention does not. It vindicates our desire to ensure that people do not commit crimes with impunity.”).

<sup>175</sup> Jeffrie G. Murphy, *Forgiveness and Resentment*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 14, 25 (1988) (emphases in original). See also, e.g.,

Even if one rejects the moral philosophy underpinning retribution,<sup>176</sup> one cannot escape recognizing that utilitarianism—in any form—is incompatible with our human and social needs to assign blame. If we strip blameworthiness of legitimacy, as Louis Michael Seidman argues, we turn criminals into either soldiers or martyrs.<sup>177</sup> Our ideal criminal justice vision should consist instead of fellow citizens, ones that have good reasons to accept the consequences of blame.<sup>178</sup> The burden is on the state and it has become almost absurdly hefty, but discrediting the underlying normative ideal will doubtfully be followed by a change in people's moral intuitions and convictions.<sup>179</sup>

More to the point though, if being a moral agent encompasses more than a desire for welfare and if performance of a crime entails a failure of an agent to respect the equal moral worth of another member of her community, then punishment must address moral values beyond utility, such as justice, dignity, and liberty.<sup>180</sup> Furthermore, if crime is morally impermissible, sanctioning for it inexorably has intrinsic value.<sup>181</sup>

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Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 109 (2004) (“If you are mugged or your car is broken into, you are distressed not just because you lose the money in your wallet or must pay to replace your radio. You likely feel violated and belittled by the perpetrator and his act [. . .] crime also carries a symbolic message from the wrongdoer that the community’s norms do not apply to him and that he is superior to the victim and others like him.”).

<sup>176</sup> In most cases, this philosophy is Kantian deontology. See, e.g., Hampton, *Correcting Harms*, *supra* note 147. In other cases, Hegelian philosophy of right. See, e.g., Dubber, *Rediscovering Hegel*, *supra* note 156. Or, it may be a combination of the two. See, e.g., Murphy, *Marxism*, *supra* note 156. In still other cases, pre-Kantian Christian thought. See, e.g., John Finnis, *Retribution: Punishment’s Formative Aim*, 44 AM. J. JURIS. 91 (1999). It may also be a less established approach to punishment that is not retributive proper but overlaps with some of its principles. See, e.g., MILLER, *supra* note 24, at 91 (exploring a theory of Nietzschean resentment); LINDA ROSS MEYER, *THE JUSTICE OF MERCY* (2010) (using a Heideggerian being-in-the-world frame).

<sup>177</sup> Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 346–49 (1984).

<sup>178</sup> See further discussion at *infra* section I.C.3.

<sup>179</sup> Cahill, *Retributive Justice*, *supra* note 168, at 823.

<sup>180</sup> Punishment is importantly distinguished from criminalization, such that retributivism is compatible with the harm principle. See, e.g., Duff, *Responsibility*, *supra* note 137, at 70; Jean Hampton, *How You Can be Both a Liberal and a Retributivist: Comments on Legal Moralism and Liberalism by Jeffrie Murphy*, 37 ARIZ. L. REV. 105, 105–6, 113–15 (1995). *But cf.* Patrick Tomlin, *Retributivists! The Harm Principle is Not for You!*, 124 ETHICS 272, 272–73 (2014) (arguing retributivism and the harm principle “do not make good bedfellows”). My discussion nonetheless supports, perhaps necessitates, massive decriminalization.

<sup>181</sup> Leora Dahan Katz frames retributive punishment as “the right thing to do,” as

The value of sanction is a corollary of the inherent value of every human being. Recognizing this value enables effective condemnation of interpersonal moral injury without constituting an enterprise of social control over persons reduced to actuarial proxies, uncontrolled circumstances, and categories of identity. It is not the desire to make offenders suffer that drives punishment—not material restoration-retaliation,<sup>182</sup> like tort law arguably does. Rather, it is the determination to hold them to account and answer for the degradation of the equal moral worth of the victim as a moral, autonomous, creative agent,<sup>183</sup> as well as the common values by virtue of which the community enforces and reaffirms every individual's equal worth. Such worth is irreducible to material conditions and cannot be achieved by wielding power.

Responsible agency is realized when one is sanctioned for performing wrongs, rather than used as means for the advancement of social ends—this is the gist of retribution, and it says nothing of the proper means for punishment. It follows that guilt and its relation to consequent

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opposed to generating a good state of affairs. Dahan Katz, *supra* note 137, at 27 (“The retributivist, however, need not and ought not proceed down this route, which allows human suffering to be conceived of as good [. . .] while generally, we should not intentionally generate bad states of affairs, in the case of culpable wrongdoing, though the suffering of the wrongdoer remains bad, engaging in the course of action that generates this suffering is the right thing to do.”); *cf.* Hampton, *Moral Education*, *supra* note 167, at 237 (justifying punishment “as a good for those who experience it, as something done *for* them, not to them”) (emphasis in original).

<sup>182</sup> These two ideas have a close proximity, epitomized in the idea of *lex talionis*—an eye for an eye, attempting to do “corrective justice” and make a victim who has been wronged whole again via a literal, material evening of the scales. *See* MILLER, *supra* note 24, at 4, 20, *passim*. Retribution, on the other hand, is distinct from *lex talionis* due to its public, institutional nature divorcing it from the victim's desires, and related objective principles of just desert and proportionality. *See, e.g.*, Mitchell N. Berman, *Two Kinds of Retributivism*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 433 (R. A. Duff & Stuart P. Green eds., 2011); Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 *HARV. C.R.-C.L. L. REV.* 407, 412–13, 475–76 (2005) [hereinafter Markel, *State*]; MURPHY, *supra* note 140, at 17; Hampton, *Correcting Harms*, *supra* note 147, at 1690; Dubber, *Rediscovering Hegel*, *supra* note 156, at 1582. *But cf.* Jeremy Waldron, *Lex Talionis*, 34 *ARIZ. L. REV.* 25, 25 (1992) (arguing that *lex talionis* “cannot be thought to require that the very same action that constituted the offense should be visited as punishment upon the offender. Rather, the requirement must be that the act of punishment be *similar* to the offense in certain respects”) (emphases in original).

<sup>183</sup> On responsibility and personhood, *see, e.g.*, LINDSAY FARMER, *MAKING THE MODERN CRIMINAL LAW: CRIMINALIZATION AND CIVIL ORDER* 164–97 (2016); NICOLA LACEY, *IN SEARCH OF CRIMINAL RESPONSIBILITY: IDEAS, INTERESTS, AND INSTITUTIONS* 25–78 (2016); *supra* note 111; *infra* section II.B.2.

harm play a major role, since the sanction is to be proportional to blameworthiness, i.e. restricted by the principle of just desert.<sup>184</sup> How much a person is punished cannot exceed how much they deserve it. Therefore, policies that impose burdens disproportionately to the crime that gives rise to them, for public order purposes—for example, “three strikes laws”—are morally impermissible.<sup>185</sup> It does not follow that culpability exhausts personhood, nor, consequently, that just desert is the only proper consideration in punishment.<sup>186</sup> Within the contours of justified punishment, practices that aim at achieving social gains, primarily crime reduction, have a place. It also does not follow that responsibility cannot be shared.

Fortunately, respecting moral responsibility is not mutually exclusive with prison abolition. Hints of retributivism already exist in various abolitionist works that highlight the positive value of accountability and the negative value of impunity. It needs only to come out of the closet.<sup>187</sup> Addressing the contingency of the limits set by

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<sup>184</sup> The quantification of desert makes proportionality inevitably contingent on social conventions, which some see as a problem that requires fixing, in the form of an objective test. *See, e.g.*, RICHARD L. LIPPKE, *RETHINKING IMPRISONMENT* 58 (2007) (“Sanctions should impose losses or restrictions on offenders that are commensurate in their impact with the harms the victims of crime suffer (setting culpability aside for the moment). If social conventions demand more or less than this, especially much more or less than this, then they should be ignored.”). Others believe this renders retribution an inadequate guiding principle for a punishment scheme. *See, e.g.*, Jalila Jefferson-Bullock, *How Much Punishment is Enough? Embracing Uncertainty in Modern Sentencing Reform*, 24 J.L. & POL’Y 345, 397 (2016) (“Any improved sentencing model that embraces uncertainty cannot rely on retribution as its guiding punishment principle.”); Barnett, *supra* note 11, at 286 (“The appeal to proportionality was [. . .] doomed to failure, for there is no objective standard by which punishments can be proportioned to fit the crime.”). Still others strive to accommodate contingencies within retributive regimes. *See, e.g.*, Markel, *Retributive Justice*, *supra* note 173; Cahill, *Retributive Justice*, *supra* note 168; Yoram Shachar, *Sentencing as Art*, 25 ISR. L. REV. 638 (1991).

<sup>185</sup> *See* Matravers, *supra* note 137, at 37; Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 425–32 (1997); *but cf.* Vincent Chiao, *Mass Incarceration and the Theory of Punishment*, 11 CRIM. L. & PHIL. 431, 450 (2017) (arguing that determining the moral legitimacy of punishment practices without regard to aggregate costs and benefits, as retribution does, legitimates “three strikes” laws, which are perceived as just regardless of their social impact).

<sup>186</sup> *See also* Matravers, *supra* note 137 (arguing that fairness and proportionality animate modern retributivism more than desert).

<sup>187</sup> The idea of “closet retributivism” is borrowed from MOORE, *supra* note 147, at 83 (“What I mean by ‘closet’ retributivism is a retributive theory held by those who have not thought through a theory of punishment, but who show themselves to be retributivists in the judgments they make and the reasons for which they make them.”).

proportionality, McLeod notes that “what counts as a just response to criminalized conduct turns crucially on the sociological, historical, and institutional settings in which punishment actually unfolds and has historically unfolded.”<sup>188</sup> This is taken to be an argument against retribution, but it can also be read as a plea for a sociologically, historically, and institutionally conscious retribution. The principle of proportionality, whether between crime and punishment or between punishments imposed at different instances,<sup>189</sup> does not demand otherwise.

In a similar vein, James Whitman writes that “talking about proportionality in contemporary America is so much philosophical whistling in the wind [. . .] we need to ask whether the philosophy of blame, however philosophically compelling it may seem, is not the wrong philosophy for our time and place.”<sup>190</sup> It is true that retributive principles in the abstract are one thing and their translation into policy another. Whitman complains both that the principles of retributivism are not heeded to, and that when they are, the result is their manipulation toward vindictiveness.<sup>191</sup> He thus clarifies that despite historical proximity, the link between “tough on crime” policies and retribution is a distortion. Indeed, such policies are bad retribution in a deeper way than they are bad utilitarianism,<sup>192</sup> because they offend rather than simply misapply

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<sup>188</sup> McLeod, *Prison Abolition*, *supra* note 6, at 1233.

<sup>189</sup> The former has been termed “cardinal proportionality” and the latter “ordinal proportionality.” Ramsay, *supra* note 130, at 87.

<sup>190</sup> James Q. Whitman, *A Plea against Retributivism*, 7 *BUFF. CRIM. L. REV.* 85, 89 (2003).

<sup>191</sup> *Id.* at 93; see Jefferson-Bullock, *supra* note 184, at 393–97; GARLAND, *supra* note 151, at 8–9; Paul Butler, *Retribution, for Liberals*, 46 *UCLA L. REV.* 1873 (1999) [hereinafter Butler, *Retribution*]. Jeffrie Murphy presents a more fundamental difficulty in applying retribution to our reality. From a Marxist perspective, what is criminalized as social abnormality is really not only normal but encouraged, because as a capitalist society, we enshrine greed and selfishness while distributing opportunities to achieve these goals unfairly. Hence, certain people—the poor—are left with very limited options at succeeding in our culture. The empirical conditions for retributivism therefore do not exist, because it presupposes a hypothetical consensus on penal values, which those crushed by the system, not only in terms of coercion, have no reason to join: “There is something perverse in applying principles that presuppose a sense of community in a society which is structured to destroy genuine community.” Murphy, *Marxism*, *supra* note 156, at 239.

<sup>192</sup> In Paul Butler’s words, “utilitarianism of the most fearful kind.” Butler, *Retribution*, *supra* note 191, at 1893). See also SIMON, *supra* note 128 (describing how “tough on crime” policies are animated by fear).

retributive principles. Successfully centering punishment around retribution would fundamentally alter penal practice and end its phase as a system of control guised by retributive rhetoric; in other words, ending our current system of vengeful “incapacitation” in which incarcerated persons are pitted against each other out of our sight.<sup>193</sup>

According to Hampton, “large-scale diminishment of certain classes of people [. . .] is a reason] to create a world that is distributively just [. . .] to ensure the mutual respect for value that I have argued is always the goal of retribution.”<sup>194</sup> The fundamental problem with the current system is not that it makes people hurt, but that it treats them as less than people. It banishes them and disappears them from their local communities and our political community;<sup>195</sup> it uses their lives and futures as disposable objects for the benefit of other classes of people. Incarceration emblemizes this problem: we practice “warehousing” of people.<sup>196</sup> It is a problem that is both moral and political. This section has been focused on the former aspect, arguing that retribution provides a moral infrastructure for abolitionism’s just demand of the state to desist from managing people as mere threats to be contained. The next section moves to the political domain—from agency to citizenship and from wrong to public.

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<sup>193</sup> In practice, incapacitation often means not the elimination of violence, but rather its relocation to behind closed prison doors. See Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 44–46 (2017); McLeod, *Prison Abolition*, *supra* note 6, at 1204. For a discussion of the coupling of incapacitating practice with retributive rhetoric, see Sharon Dolovich, *Creating the Permanent Prisoner*, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY 100 (Charles J. Ogletree, Jr. & Austin Sarat, eds., 2012); Murray, *CCs*, *supra* note 152, at 7 n. 20.

<sup>194</sup> Hampton, *Correcting Harms*, *supra* note 147, at 1699. For other accounts of the relationship between retributive and distributive justice, see Larry Alexander, *Retributive Justice*, in THE OXFORD HANDBOOK OF DISTRIBUTIVE JUSTICE 177 (Serena Olsaretti ed., 2018); Chad Flanders, *Criminals Behind the Veil: Political Philosophy of Punishment*, 31 BYU J. PUB. L. 83 (2016).

<sup>195</sup> See, e.g., KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA (2010); Agnes Czajka, *Inclusive Exclusion: Citizenship and the American Prisoner and Prison*, 76 STUD. POL. ECON. 111, 137–38 (2005); SIMON, *supra* note 128, at 172–75. See also *infra* notes 226–240 and accompanying text discussing social death.

<sup>196</sup> Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457, 467 (2015); see also Czajka, *supra* note 195, at 114 (Prison population is “stored away, out of sight, out of mind.”); MOSKOS, *supra* note 155, at 90 (Prisons “effectively created a disposable class of people to be locked away and discarded.”).

### 3. *Public Wrong: Public*

People who cause harms that diminish the moral value of others deserve to be punished, and it is just for them to receive such punishment from those who are in a position to legitimately inflict it. Abolitionists' main problem with this retributive scheme, I believe, lies in the latter element: finding a political authority with moral legitimacy to carry punishment out. Abolitionists find the United States unworthy of their trust. Perhaps it is. Nevertheless, it is the way state power is currently employed, not its existence, which is under fire. I have highlighted above that important abolitionist endeavors express a belief that there is value in engaging with the state and contest the meaning of the public good.<sup>197</sup> If those who have been excluded from processes of generating legal meanings invest in reinterpreting democratic mechanisms, institutions could be transformed and trust might be regained.

A key idea in the endeavor of imagining a trustworthy polity is responsibility. Since the 1970s, "tough on crime" policies have been accompanied by a right-wing claim to the value of responsibility, which has correspondingly lost traction in liberal writings of that time.<sup>198</sup> Responsibility has since been reclaimed by the left, coming back without vengeance. Persons, communities, and institutions are called upon to take responsibility for wrongs committed in the past and shared fate awaiting in the future.<sup>199</sup> Often rebranded as accountability, it is invoked in both political and criminal contexts, because, in Joshua Kleinfeld's words, punishment is "about social membership."<sup>200</sup> One previously or potentially delegated to the status of object cannot assert their subjectivity as a civic and social actor unless all branches of public law—criminal law included—respect their agency. This respect must not evaporate once an

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<sup>197</sup> See *Supra* section I.B. *But cf.* Donelson, *Blacks, supra* note 101, at 192 (arguing that mutual mistrust between blacks and cops is inescapable "so long as cities and states rely on cops to make them revenue with which to operate").

<sup>198</sup> Samuel Scheffler, *Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics*, 21 *PHIL. & PUB. AFF.* 299, 300–01 (1992).

<sup>199</sup> See McLeod, *Abolition Democracy, supra* note 4, at 1618 (discussing the definition of abolition as a "set of political responsibilities"). *Cf.* CHIAO, *supra* note 22, at 222 (In highlighting the importance of responsibility for retributivism, Chiao notes that "[a]lthough retributive theories differ amongst themselves as to what punishment consists in (censure, suffering, community sentiment, and so forth), and although they differ as to why we should impose it (vindicating rights, upholding law, communicating social disapproval, and so forth) they are unified by a basic intuition about responsibility.").

<sup>200</sup> Kleinfeld, *Two Cultures, supra* note 145, at 941; *see* Ramsay, *supra* note 130, at 106–07.

agent makes a bad choice.

Abolition-democratic efforts are grounded in the idea of a community, in which members are mutually obligated to work toward a just, peaceful, and prosperous shared life. Traces of this ideal are apparent in transformative justice, which assigns an active and invested role to the perpetrator in the communal process following a violent interpersonal act.<sup>201</sup> The same idea shows up in justifications of punishment grounded in the civic republican tradition. Anthony Duff and Sandra Marshall describe such an ideal republican vision of punishment, which they emphasize can only be realized in a tolerably just criminal justice system, unlike our own. According to this vision, the person being punished sees herself as playing an “active role in the formal legal response to her crime, and undertakes the role as a civic duty.”<sup>202</sup> In a republic, citizens respect the law because they share in its making and operation, and they do so critically for the same reason.<sup>203</sup> As an active participant, Duff and Marshall argue, every member of the polity is concerned with criminal law as a joint enterprise by which public wrongs receive a “formal public recognition, and require a formal, public response.”<sup>204</sup> The ethos constructed is an inclusionary one, which aims to foster solidarity and underscores citizens’ rights and responsibilities alike.

The republican framework allows to see more clearly why racial disparities surrounding the prison industrial complex are so egregious. Abolitionist activists and commentators correctly identify that the heart of the matter lies outside of infringement on individual constitutional protections. From a republican perspective, the focus on individual rights in our criminal justice climate inhibits a proper recognition of racial injustices as a breach of civic bonds among the citizenry as well as of civic trust between the citizenry and their government. In this spirit, Ekow Yankah laments that “[k]nowing that one is open to contempt by virtue of simply being who you are—that, without action and without relief, one is considered inferior and prone to criminality—is a particular insult to one’s

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<sup>201</sup> See Hayes & Kaba, *supra* note 108; INCITE!, *supra* note 115, at 14.

<sup>202</sup> R. A. Duff & S. E. Marshall, *Civic Punishment*, in *DEMOCRATIC THEORY*, *supra* note 130, at 33, 34.

<sup>203</sup> *Id.* at 35.

<sup>204</sup> *Id.* at 37. Retributivists as well as many skeptics of retribution generally agree that such a response needs to be coercive. See, e.g., Dahan Katz, *supra* note 137, at 20–25; Kleinfeld, *Reconstructivism*, *supra* note 34, at 1519–24; Ekow N. Yankah, *The Force of the Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1215–20 (2008); Waldron, *supra* note 182, at 30.

status as an equal citizen.”<sup>205</sup>

The emerging picture is of a sharp contrast: citizenry on one side, felony on the other. The latter applies by proxy prior to entanglement with the law,<sup>206</sup> and by label afterward.<sup>207</sup> Under this system, becoming a felon does not result exclusively from committing a serious wrong. Rather, it is the result of a network of decisions made by state officials, primarily police and prosecution, driven by a complex and often arbitrary (at worst, overtly racist or malignant) set of considerations.<sup>208</sup> Expanding far beyond core crimes, “the law on the books makes everyone a felon,” and often the central question remaining is who gets charged.<sup>209</sup> This feeds into the state’s attitude toward members of vulnerable groups, primarily African-Americans, as always already guilty,<sup>210</sup> viz. threats whose exclusion is consequently justified as “damage control.”<sup>211</sup> This

<sup>205</sup> Yankah, *Pretext and Justification*, *supra* note 132, at 1620.

<sup>206</sup> See, e.g., Frank Rudy Cooper, *Always Already Suspect: Revisiting Vulnerability Theory*, 93 N.C. L. REV. 1339 (2015).

<sup>207</sup> This label is nonetheless a rich cultural category, unexhausted by the negative stigma attached to it in various circles. Consider for example the following fictional description of a new snack cake product titled *Felonies!*, by David Foster Wallace: “The name’s association matrix included as well the suggestion of adulthood and adult autonomy [. . . the product] was designed and tested primarily for its appeal to the 18–39 Male demographic [. . .] with its milder penal and thus renegade associations designed to offend absolutely no one [as opposed to the alternative title considered, *Devils!*] except maybe anticrime wackos and prison-reform fringes.” *Mister Squishy*, in OBLIVION: STORIES 3, 5–6, 51 (2004). From a different perspective, hip hop culture has reclaimed crime-associated stigmas as a way of expressing respect for African American and Latino men. See, e.g., PAUL BUTLER, LET’S GET FREE: A HIP HOP THEORY OF JUSTICE 131 (2009).

<sup>208</sup> See Ristroph, *Farewell*, *supra* note 126, at 582–604; see also, on policing, Yankah, *Pretext and Justification*, *supra* note 132; Akbar, *supra* note 10; on prosecutorial discretion, EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019); JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017).

<sup>209</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511 (2001) (the breadth of criminal law is explored at 512–19). See also Javier Wilenmann, *Framing Meaning through Criminalization: A Test for the Theory of Criminalization*, 22 NEW CRIM. L. REV. 3, 6–13 (2019) (discussing criminalization functioning as a communicative tool for cultural control).

<sup>210</sup> This attitude is, of course, not restricted to the state; private citizens act on such beliefs as well and are often institutionally encouraged to do so. See, e.g., Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931 (2019); Lisa Guenther, *Seeing Like a Cop: A Critical Phenomenology of Whiteness as Property*, in RACE AS PHENOMENA: BETWEEN PHENOMENOLOGY AND PHILOSOPHY OF RACE 189 (Emily S. Lee ed., 2019).

<sup>211</sup> BECKETT & HERBERT, *supra* note 195, at 145; see also Murray, *CCs*, *supra* note 152,

state of affairs frustrates Du Bois' dream, quoted by various abolitionists, about "the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States."<sup>212</sup> The success of such uplift and incorporation is more than a formality. It would translate equal respect bestowed by the law into equal membership that is felt by subjects of all social groups. Such a reality would mark a fulfilled republican promise in which moral regulation is legitimate. In this reality, as Duff and Marshall argue, to recognize one's own act as criminally wrong would mean "to recognize it as something for which [one] should answer, to those whose business it is."<sup>213</sup>

So whose business is it? Recall that Simonson has offered us a way, not only consistent with but promoting abolitionist goals, to work toward "turn[ing] the tables on the traditional control that state officials possess to dictate the terms of public participation, and, by extension, to define the public to whom the system is accountable."<sup>214</sup> Rather than a description of a criminal system with fully realized rights to enter, this is a discussion of how to assertively exercise such rights of inclusion, participation, and belonging,<sup>215</sup> right now. Under this interpretation, Simonson's approach runs against the abolitionist thread according to which policing and other law enforcement activities maintain, by definition, "social control and cultural hegemony," owing to their being "armed protection of state interests."<sup>216</sup> For some do not end the inquiry here. Instead, they challenge the inference by asking: *who is the state?* And answering, *it is us.*<sup>217</sup> That the punishment ought to be inflicted by

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at 36–37.

<sup>212</sup> Akbar, *supra* note 10, at 461 n. 267; McLeod, *Prison Abolition*, *supra* note 6, at 1162 n. 19.

<sup>213</sup> Duff & Marshall, *supra* note 202, at 41.

<sup>214</sup> Simonson, *Democratizing Criminal Justice*, *supra* note 85, at 1619. Simonson mentions that collective resistance of the kind she advocates also echoes in neo-republican theory. *Id.* at 1614. See also McLeod, *Prison Abolition*, *supra* note 6, at 1212 (McLeod expresses a similar democratic orientation in an emphatically abolitionist account: "An abolitionist ethic resists the circumscription of the nomos of criminal jurisprudence, inviting (even demanding) new perspectives within and against those which judges, legislators, and citizens might make law.").

<sup>215</sup> Robin West, *Tale of Two Rights*, *supra* note 92, at 905.

<sup>216</sup> Herzing, *supra* note 58, at 111.

<sup>217</sup> Yankah, *Pretext and Justification*, *supra* note 132, at 1619; Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1483–86 (2017). Note that for Simonson, a "complete blueprint for democratic criminal justice requires embracing adversarial, contestatory forms of participation and resistance that go beyond the decorum of calm deliberation to build power and push for transformation." Simonson,

the collective rather than the victim is not disputed; instead, it is vindicated.

The other end of spectrum from a critical-republican, rights to enter vision in which subjects accept the legitimacy of blame is a vision of a state/individual dichotomy, whereby the only just way for the individual to contest state actions is by asserting an inalienable right to resist coercion.<sup>218</sup> Such martyrdom provides for a fight against the very social order, with no end in sight.<sup>219</sup> Moreover, it legitimates the state relieving itself of responsibility by banishing those who supposedly fail to adhere to the social contract.<sup>220</sup> By contrast, the prison abolition movement is true to the American tradition in its wish to combine liberty *from* laws with liberty *by* laws.<sup>221</sup> This is exemplified in the portrayal of the liberated Black person as a well-informed lawmaker.<sup>222</sup> To render legal rights in the criminal realm as indispensable for individual flourishing yet instrumental to equal, meaningful membership in a law-making community,<sup>223</sup> does not fit the martyr, insularist route.

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*Democratizing Criminal Justice*, *supra* note 85, at 1612. For restorative justice, by contrast, adversarial and contestatory mechanisms are exactly what needs to be discarded. See Albert W. Dzur & Susan M. Olson, *The Value of Community Participation in Restorative Justice*, 35 J. SOC. PHIL. 91 (2004).

<sup>218</sup> Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CAL. L. REV. 601 (2009). Ristroph claims such a right, as conjured from Thomas Hobbes, reconciles utilitarianism and retributivism, because to acknowledge a person's unconditional right to self-preservation and consequently to resist is to truly respect their agency, while at the same time retaining the sovereign's right to punish for public order reasons. Duff & Marshall respond to Ristroph's "dramatically dystopian" story by claiming that "[t]he state' should not be understood, from the outset, as an inevitably alien power set against the citizens whose state it is supposed to be; rather, it should be understood (in aspiration) as the set of institutional mechanisms through which we can govern ourselves efficiently." Duff & Marshall, *supra* note 202, at 44.

<sup>219</sup> Seidman, *supra* note 177, at 347.

<sup>220</sup> Kleinfeld, *Two Cultures*, *supra* note 145, at 975.

<sup>221</sup> On generally compatible interpretations of civic republicanism and liberalism within the American tradition, see, e.g., Robin West, *Liberal Responsibilities*, 49 TULSA L. REV. 393 (2013) (book review); ESKRIDGE & FEREJOHN, *supra* note 67, at 92–95; Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1566–71 (1988). See also Markus D. Dubber, "An Extraordinarily Beautiful Document": *Jefferson's Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment*, in MODERN HISTORIES OF CRIME AND PUNISHMENT 115 (Markus D. Dubber & Lindsay Farmer eds., 2007) (discussing the absence of a republican vision of punishment in the wake of the American Revolution, owing to an apolitical view of criminal law held by the Founding Fathers).

<sup>222</sup> See *supra* note 69 and accompanying text.

<sup>223</sup> See Yankah, *Pretext and Justification*, *supra* note 132, at 161 (reconciling a

Abolitionism seeks to collectivize our understanding of criminal activity and ensuing responses, and regain ownership of this cycle.<sup>224</sup> The underlying conception of personhood is that who we are is inseparable from the purposes and functions we undertake as members of intertwined communities. This includes the political community. Abolitionism assigns meaningful responsibility to social structures like the state as well as to their representatives. The idea of a community instilled with normative content<sup>225</sup> further underscores why abolitionists insist that a space exclusionary in essence—prisons—cannot form the crux of a just criminal justice system, even in an otherwise egalitarian society. Yet within a retributive, non-carceral regime, abolitionism can thrive.

The premise of every republican account is that for humans to lead their lives as members of a political community is natural, good, and necessary for the exercise of freedom.<sup>226</sup> To live outside of a free human fellowship is to fulfill one's humanity only partially, and hence its imposition is *prima facie* wrong for non-consequential reasons. Prisons take steps in this direction, and at their worst go the whole nine yards, secluding persons from their fellow human beings entirely. Phenomena like maximum security prisons and solitary confinement have been criticized, *inter alia*, for stripping persons of the basic human entitlement to meaningfully engage with others. For instance, inmates in supermax facilities are positioned by Agnes Czajka at the theoretical intersection of superfluity, abjection, and dangerousness.<sup>227</sup> Their social utility depends on their expulsion to the margins, not entirely on the outside, since the perpetual management of the threat they pose fortifies social cohesion on the inside. It keeps 'us' from being tainted by 'them,' "undesirable citizens who cannot be expelled beyond the borders of their state [. . .] yet must be cast out or set aside in the interest of preserving an ever-elusive

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republican vision of criminal law with inalienable individual rights).

<sup>224</sup> Robert Weisberg, *Restorative Justice and the Danger of "Community,"* 2003 UTAH L. REV. 343, 353 (referring to restorative justice).

<sup>225</sup> *Id.* at 343–47.

<sup>226</sup> Republican theories as applied to criminal law take different forms, not all of which are consistent with the simplified account I present here. Thus, some posit that republicanism is an approach opposite to the liberal-retributive one. See Yankah, *Republican Responsibility*, *supra* note 196; Philip Pettit & John Braithwaite, *Not Just Deserts, Even in Sentencing*, 4 CURRENT ISSUES CRIM. JUST. 225 (1993). Others understand a republican criminal law to be anti-retributive yet have liberalism on its side. See CHIAO, *supra* note 22, at 253–58.

<sup>227</sup> Czajka, *supra* note 195, at 112 (analysis based on ideas of Hannah Arendt, Julia Kristeva and Giorgio Agamben).

purity of citizenship.”<sup>228</sup> Such prisoners cannot participate in the operation of the polity, since they are “entirely removed from the realm of citizenship, stripped of both rights and responsibilities.”<sup>229</sup> A similar affinity between imprisonment, statelessness and lesser humanity as well as racialization characterizes solitary confinement, claims Lisa Guenther, in a manner that constitutes ‘social death.’<sup>230</sup> To be completely separated from other people unhinges us from the reality of our lives, including its most basic sensory and carnal aspects.<sup>231</sup> Yet solitary confinement is only the culmination of an intricate trajectory of isolation from one’s kin and heritage, opportunities to develop a web of meaningful, mutual connections with others, and ability to uphold civic obligations.<sup>232</sup> It also hinders one’s capacities to become one’s best self, since, to use McLeod’s words, imprisonment is an “intrinsically pathological situation which could distort and rechannel the behavior of essentially normal individuals [. . .] to reproduce powerful dynamics of dominance, subordination, dehumanization, and violence.”<sup>233</sup>

There is reason for skepticism regarding Duff and Marshall’s conviction that despite the exclusionary nature of the prison, it can still be “actively undertaken” as a prisoner’s “own self-respecting project.”<sup>234</sup>

<sup>228</sup> *Id.* at 113. *See also* Markus D. Dubber, *Citizenship and Penal Law*, 13 *NEW CRIM. L. REV.* 190 (2010) (warning against the understanding of citizenship as “insiderhood” in the context of criminal justice).

<sup>229</sup> Czajka, *supra* note 195, at 131; *see, e.g.*, GOTTSCHALK, *supra* note 7, at 2.

<sup>230</sup> LISA GUENTHER, *SOLITARY CONFINEMENT: SOCIAL DEATH AND ITS AFTERLIVES* xxiv, 55–58 (2013).

<sup>231</sup> *Id.* at 145. *See also* JOSHUA M. PRICE, *PRISON AND SOCIAL DEATH* (2015) (extending the concept of social death to prison more generally); Ben Crewe, *Depth, Weight, Tightness: Revisiting the Pains of Imprisonment*, 13 *PUNISHMENT & SOC’Y* 509 (2011) (discussing the felt experience of imprisonment). Similar ideas were expressed, pertaining to American carceral mechanisms, already centuries ago, and pertaining to political life generally, already millennia ago. *See* MOSKOS, *supra* note 155, at 42 (“Beaumont and de Tocqueville were well aware of the horrible effect of idle solitary confinement. They called such punishment ‘beyond the strength of man; it destroys the criminal without intermission and without pity; it kills.’”); HANNAH ARENDT, *THE HUMAN CONDITION* 20 (2d ed., 1998) (For Greek philosophers, “to die is the same as ‘to cease to be among men.’”).

<sup>232</sup> GUENTHER, *supra* note 230, at xxi–xxvii, 48–52. *See also* McLeod, *Prison Abolition*, *supra* note 6, at 1179 (“[S]olitary confinement is simply an extension of the logic and basic structure of prison-backed punishment – punitive isolation and surveillance – to the disciplinary regime of the prison itself.”).

<sup>233</sup> McLeod, *Prison Abolition*, *supra* note 6, at 1183.

<sup>234</sup> Duff & Marshall, *supra* note 202, at 49–50. The authors nonetheless concede that imprisonment should be a sanction of last resort. *Id.* at 49; *see also* Martha Grace Duncan,

Incarceration has devastating realities and past reforms have only cemented its oppressive functions.<sup>235</sup> But even with these facts aside, prisons are still formal facilitators of social death, regarding the criminal as an enemy.<sup>236</sup> Exile and banishment have always been an especially severe form of punishment, a question of life and death, in history and in myth.<sup>237</sup> Prisons have taken over the forced relocation of threats, attaching psychic to physical banishment and maintaining the divide between the citizenry and the felonry.<sup>238</sup> The internal exclusion of prisons thus goes hand in hand with the internal exclusion of political non-belonging.<sup>239</sup> Indeed, as Alice Ristroph has argued, the criminal law is used to “manag[e] a political community by subdividing it.”<sup>240</sup>

Social death is one of two avenues maintaining members of the

“*Cradled on the Sea*”: *Positive Images of Prison and Theories of Punishment*, 76 CAL. L. REV. 1201, 1230–35 (1988) (analyzing incarcerated persons’ writings expressing the view that prisons facilitate positive liberty).

<sup>235</sup> See, e.g., Rodríguez, *supra* note 10, at 1601; GOTTSCHALK, *supra* note 7; ROBERT A. FERGUSON, *INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT* (2014); Sowle, *supra* note 10, at 539–40.

<sup>236</sup> Bernard E. Harcourt, *The Invisibility of the Prison in Democratic Theory: A Problem of “Virtual Democracy,”* 23 GOOD SOC’Y 6, 8 (2014); Ramsay, *supra* note 130, at 92, 105–06.

<sup>237</sup> See, e.g., Haque, *supra* note 142, at 291–92 (“The founding myth of criminal justice – indeed of law itself – begins with familial and tribal conflict. [. . .] Punishment was both a right and a duty of community membership, which not only shielded its members from abuse but also played an expressive and constitutive role in marking the contours of the group and the relations of its members. These functions of retribution were performed not only through punishment but also through its denial. Indeed, exile was counted among the most severe punishments due in large part to the refusal to avenge wrongs subsequently committed against former group members.”); Ristroph, *Farewell*, *supra* note 126, at 577–81 (discussing British penal transportations to America and Australia); Sowle, *supra* note 10, at 516 (same); Shai Lavi, *Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel*, 13 NEW CRIM. L. REV. 404 (2010) (discussing the modern-day equivalent of revocation of citizenship); Kleinfeld, *Two Cultures*, *supra* note 145, at 948–84 (on punishment as banishment practices in the U.S. today); see also *HIGH LIFE* (Claire Denis dir., 2018) (presenting a fictional account of banishing convicts to outer space in the imagined future); ROBERT SHECKLEY, *THE STATUS CIVILIZATION* (1960) (same).

<sup>238</sup> Ristroph, *Farewell*, *supra* note 126, at 574–77; MOSKOS, *supra* note 155, at 91; Sowle, *supra* note 10, at 534.

<sup>239</sup> See Simonson, *Democratizing Criminal Justice*, *supra* note 85, at 1611 (discussing internal exclusion as relating to democratic decision-making); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 55 (2000) (same).

<sup>240</sup> Ristroph, *Farewell*, *supra* note 126, at 568; see also Elizabeth Anderson, *Outlaws*, 23 GOOD SOC’Y 103 (2014) (arguing that the criminal justice system serves to exclude members of disfavored groups from the civic community).

felony “as lifelong threats rather than rights-bearing, autonomous persons.”<sup>241</sup> A companion regime—similarly situated at the intersections of autonomy/status, rights/community, and punishment/regulation—is equally important for understanding, and ending, the felony as a caste: civil death. Put poignantly by Guenther, “the civil and social dead are excluded from full participation in life, like ghosts who can still speak and act but whose speech and actions no longer make an impact on the world.”<sup>242</sup> I turn now to civil death and a retributive path toward the abolition of both lethal regimes.

## II. DE-CARCERATION AND DE-COLLATERALIZATION

### A. The Separation of Punishments

There are two separate sets of legal burdens awaiting defendants upon being convicted of a crime. One set is pronounced at the closing of the criminal trial and constitutes the sentence. The other set is more elusive. It is generally not part of the criminal process or even criminal law, nor is it imposed by judges, yet it can be no less coercive, intrusive, and demanding of the individual. This is the set of collateral consequences (CCs).

Under the banner of CCs, a vast variety of legal measures and mechanisms crowd together. What they all share is that they impose limitations on rights and freedoms of certain categories of offenders following their criminal convictions, as mandated by civil legislation. Recent decades have seen a great proliferation of such measures as well as an increase in their severity, in tandem with other manifestations of the “tough on crime” approach.<sup>243</sup> Coupled with the jarring number of people to whom they apply in an age of over-criminalization, excessive charging, and mass conviction, and the difficulties in mitigating their effects, CCs have become a crucial element in the lives of persons convicted of crimes, sometimes even more so than penalties imposed by criminal courts.<sup>244</sup>

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<sup>241</sup> Alec C. Ewald, *Collateral Consequences and the Perils of Categorical Ambiguity*, in *LAW AS PUNISHMENT / LAW AS REGULATION* 79, 102 (Austin Sarat et al. eds., 2011).

<sup>242</sup> GUENTHER, *supra* note 230, at xxvii.

<sup>243</sup> Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Modal Penal Code*, 2015 WIS. L. REV. 247, 252; Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1103–04 (2013); ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATIONS OF CONVICTED PERSONS 8 (3d ed. 2004) [hereinafter ABA STANDARDS].

<sup>244</sup> Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953,

Accordingly, CCs have become a topic of lively theoretical discussion in recent years.<sup>245</sup>

CCs comprise tens of thousands of regulations and private prerogatives<sup>246</sup> that vary across jurisdictions and depend on factors like the type and severity of the crime and various attributes of the offender. Some apply automatically just by virtue of conviction while others require a judicial or administrative decision subsequent to the criminal process (but in practice are often imposed categorically).<sup>247</sup> Examples of CCs are disenfranchisement,<sup>248</sup> exclusion from jury service;<sup>249</sup> prohibitions on holding public office and serving in the military;<sup>250</sup> inability to legally obtain firearm;<sup>251</sup> occupational restrictions;<sup>252</sup> limitations on parental rights;<sup>253</sup> withholding of welfare benefits;<sup>254</sup> mandated regular registration with authorities, exclusion from certain living areas, and further restrictions for sex offenders;<sup>255</sup> deportation for non-citizen

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963–64 (2018); Love, *supra* note 243, at 250–52; Logan, *supra* note 243, at 1104–05.

<sup>245</sup> Paul T. Crane, *Incorporating Collateral Consequences into Criminal Procedure*, 54 WAKE FOREST L. REV. 1, 3 (2019); Mayson, *supra* note 158, at 308–09.

<sup>246</sup> The boundary between these categories can be blurry. See Zachary Hoskins, *Ex-Offender Restrictions*, 31 J. APPLIED PHIL. 33, 34 (2014); Kleinfeld, *Two Cultures*, *supra* note 145, at 968; Logan, *supra* note 243.

<sup>247</sup> ABA STANDARDS, *supra* note 243, at 16–18 (distinguishing sanctions from disqualifications). Different terminologies are in use to describe the same basic distinction. See Crane, *supra* note 245, at 33 (using “guaranteed sanctions” for sanctions and “potential sanctions” for disqualifications).

<sup>248</sup> See, e.g., Christopher Bennett, *Penal Disenfranchisement*, 10 CRIM. L. & PHIL. 411 (2016); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004); Alec C. Ewald, *“Civil Death”: The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045.

<sup>249</sup> See, e.g., Brain C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003).

<sup>250</sup> See Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 268 (2009).

<sup>251</sup> Crane, *supra* note 245, at 15; ABA STANDARDS, *supra* note 243, at 24.

<sup>252</sup> See Alec C. Ewald, *Barbers, Caregivers, and the “Disciplinary Subject”*: Occupational Licensure for People with Criminal Justice Backgrounds in the United States, 46 FORDHAM URB. L.J. 719 (2019).

<sup>253</sup> Lyles-Chockley, *supra* note 250, at 267.

<sup>254</sup> See, e.g., *United States v. Nesbeth*, 188 F. Supp. 3d 179 (E.D.N.Y. 2016).

<sup>255</sup> See, e.g., McLeod, *Regulating Sexual Harm*, *supra* note 148; WAYNE LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA (2009); see also Jacob Hutt, *Offline: Challenging Internet and Social Media Bans for Individuals on Supervision for Sex Offenses*, 43 N.Y.U. REV. L. & SOC.

offenders;<sup>256</sup> restrictions on name-changing, which may have grave implications for some people such as transgender individuals;<sup>257</sup> monitoring and surveillance,<sup>258</sup> and more.<sup>259</sup>

Two general puzzles permeate scholarly analyses of CCs as a whole. The first relates to their nature: how to properly classify them within the glossary of workable legal categories. The second is concerned with their effects: how to best tackle their overwhelming infringement on liberties and alleviate some of the hardships they entail.

### 1. *What are CCs For?*

The scholarly consensus is that CCs should be understood as punishment.<sup>260</sup> Their sweeping and indiscriminate nature permits punishment for wrongdoing in ways that go beyond the sentencing process and are subject to fewer checks. For this reason CC regimes have been described as “secret” or “hidden” sentences,<sup>261</sup> an “invisible punishment”<sup>262</sup> that creates “shadow citizens,”<sup>263</sup> and most pointedly:

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CHANGE 663 (2019).

<sup>256</sup> See, e.g., Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C.D. L. REV. 2067 (2017); Andrés Dae Keun Kwon, *Defending Criminal(ized) Aliens after Padilla: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1034 (2016).

<sup>257</sup> See, e.g., Lark Mulligan, *Dismantling Collateral Consequences: The Case for Abolishing Illinois' Criminal Name-Change Restrictions*, 66 DEPAUL L. REV. 647 (2017).

<sup>258</sup> See, e.g., Avlana K. Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123 (2017). Monitoring also functions as a substitution for imprisonment and as such is projected to continue to grow and supplement mass incarceration with mass monitoring and surveillance. See, e.g., Michelle Alexander, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html>; Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform may Lead to a For-Profit Nightmare*, 20 U. PA. J.L. & SOC. CHANGE 125 (2017).

<sup>259</sup> For an overview, see Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to “Collateral” Punishment Policy*, 10 HARV. L. & POL’Y REV. 123, 130–44 (2016). For a catalogue, see MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* (2013). For updated information, see THE COLLATERAL CONSEQUENCES RESOURCE CENTER, <http://ccresourcecenter.org/>.

<sup>260</sup> Murray, *CCs*, *supra* note 152, at 11; Mayson, *supra* note 158, at 303.

<sup>261</sup> Kaiser, *supra* note 259; Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002).

<sup>262</sup> INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002).

<sup>263</sup> Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization*

“new civil death.”<sup>264</sup> Once considered a legitimate punishment but no longer, civil death excludes a convicted felon from the law’s protection, barring them from participation in society.<sup>265</sup> The Supreme Court has ruled analogous mechanisms like denationalization or “perpetual absolute disqualification” as cruel and unusual and therefore impermissible under the Eighth Amendment.<sup>266</sup> Unfortunately, as Gabriel Chin and others maintain, CCs created a similar regime through the back door. Their imposition amounts to a loss of the status of equal citizenship, reminiscent of historical outlawries of persons, due to the vast scope of the network of CCs and its concentration on sites of collective action.<sup>267</sup>

The scholarly consensus views CCs as tools of ostracism and banishment, creating “circuits of exclusion.”<sup>268</sup> Yet some scholars insist that a proper understanding of CCs must break down each “circuit” and carve out a space for legitimate measures of public protection and harm prevention.<sup>269</sup> So does the Supreme Court when it presumes true a legislative claim that a measure is civil, unless the “clearest proof” to the contrary presents itself.<sup>270</sup> The Court has recognized that the distinction between civil and criminal remedies is not sharp. The infiltration is mutual: prevention is often a purpose of punishment,<sup>271</sup> while a CC may

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*of Debt*, 117 PENN. ST. L. REV. 349 (2012).

<sup>264</sup> Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012); see also Murray, *CCs*, *supra* note 152, at 12–13 (tracing the history of CCs); Kleinfeld, *Two Cultures*, *supra* note 145, at 965–66 (exploring CCs as analogous to civil death).

<sup>265</sup> See COLIN DAYAN, *THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS* 69–70 (2011).

<sup>266</sup> Chin, *supra* note 264, at 1818–21 (discussing *Weems v. United States*, 217 U.S. 349 (1910); *Trop v. Dulles*, 356 U.S. 86 (1958)). Cf. *Lavi*, *supra* note 237, at 414–17 (claiming that later Supreme Court decisions cast doubt on the unequivocal conclusion that denationalization is a constitutionally prohibited punishment).

<sup>267</sup> For accounts of CCs’ role in constructing the felony as the opposite of the citizenry, see Kleinfeld, *Two Cultures*, *supra* note 145, at 965–68; *United States v. Nesbeth*, 188 F. Supp. 3d 179, 180–83 (E.D.N.Y. 2016); Love, *supra* note 243, at 255; Chin, *supra* note 264, at 1790–92. See generally Ristroph, *Farewell*, *supra* note 126.

<sup>268</sup> MARGARET FITZGERALD O’REILLY, *USES AND CONSEQUENCES OF A CRIMINAL CONVICTION: GOING ON THE RECORD OF AN OFFENDER* ch. 8 (2018) (focusing on the UK and Ireland).

<sup>269</sup> The former approach focuses on function, while the latter on purpose. For a discussion of the distinction between the two, see ROGER COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* 72–73 (2d ed., 1992).

<sup>270</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963); Murray, *CCs*, *supra* note 152, at 3, 16–20; Chin, *supra* note 264, at 1807–08.

<sup>271</sup> See Chin, *supra* note 264, at 1808 (discussing *United States v. Brown*, 381 U.S. 437

become the most important part of a penalty.<sup>272</sup> Nevertheless, Sandra Mayson holds that the oscillation between punitive and preventive is pivotal. She too acknowledges a certain collapse of the distinction between judgments of culpability attached to a personal choice, and prevention of risk based on social categories.<sup>273</sup> Yet, Mayson contends that situating CCs along this spectrum clarifies that most CCs should be situated nearer the preventive end.<sup>274</sup> The classification as regulation of risk rather than punishment for culpable acts marks “the critical difference between today’s CCs and the civil death of old.”<sup>275</sup>

## 2. *What to Do with CCs?*

Mayson’s analytical insights have strategic implications: “[T]o categorize CCs as punishment is to bestow a presumption of permissibility.”<sup>276</sup> A post-sentencing civil measure that is found to be punitive would be ruled unconstitutional, but courts typically accept a defense of a given statute as regulatory. The measure only faces, and likely passes, rational basis review.<sup>277</sup> Hence, Mayson defines CCs as “constitutionally immune,”<sup>278</sup> and advocates instead taking a civil route. Predictive, regulatory CCs should be subjected to rigorous civil oversight,

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(1965)).

<sup>272</sup> See *Padilla v. Kentucky*, 559 U.S. 356, 364–66 (2010).

<sup>273</sup> Mayson, *supra* note 158, at 317–24, 330–32.

<sup>274</sup> *Id.* at 333–36; see also Murray, *CCs*, *supra* note 152, at 21–23 (discussing punitive and preventive purposes of CCs); Colleen F. Shanahan, *Significant Entanglements: A Framework for the Civil Consequences of Criminal Convictions*, 49 AM. CRIM. L. REV. 1387 (2012) (suggesting a “significant entanglement” framework for CCs as lying between civil and criminal law); Hugh LaFollette, *Collateral Consequences of Punishment: Civil Penalties Accompanying Formal Punishment*, 22 J. APPLIED PHIL. 241, 243 (2005) (presenting three views of CCs).

<sup>275</sup> Mayson, *supra* note 158, at 339.

<sup>276</sup> *Id.* at 340.

<sup>277</sup> See *id.* at 311–13 (discussing *Smith v. Doe*, 538 U.S. 84 (2003), in which the Supreme Court held that sex offender registries are not punishment); Ristroph, *Farewell*, *supra* note 126, at 606 (same).

<sup>278</sup> Mayson, *supra* note 158, at 314; see also Brian M. Murray, *Retributivist Reform of Collateral Consequences*, 52 CONN. L. REV. (forthcoming 2020), 27–33, available at <https://ssrn.com/abstract=3426056> [hereinafter Murray, *Retributivist Reform*] (determining that challenges to CCs based on the Eighth Amendment are unlikely to succeed). Efforts concentrated on constitutional procedural protections have been more successful. For instance, in *Padilla v. Kentucky*, the Court extended the Sixth Amendment right to counsel to a CC, holding that lawyers must advise their noncitizen clients considering a guilty plea that they are likely to be deported as a result. 559 U.S. 356, 374–75 (2010).

once ex-offenders are recognized as a discrete minority—a caste—which warrants strict scrutiny of offending legislation.<sup>279</sup>

Mayson’s proposal runs the risk of legitimating the felony by fortifying how it is conceptualized as a caste. Can courts otherwise take stock of CCs, within the sentencing process? Ostensibly, a determination that a CC is only a civil liability would mean that it has “no place in the punishment calculus.”<sup>280</sup> Nevertheless, that a conviction opens the floodgates of CCs has not gone unnoticed. There is currently a circuit split on the question of whether a sentencing court should consider CCs when determining the proper sentence.<sup>281</sup> Some Federal Courts of Appeals provide a negative answer. They have ruled that CCs are impermissible factors because they are external to a just and proportional relation between offense and punishment, topped by a concern for the formation of a “middle class sentencing discount,” since taking CCs into account would alleviate hardships for those who have “more to lose.”<sup>282</sup> Other Courts answer affirmatively. They thus facilitate sentence mitigation because CCs “bear[] upon the concept of ‘just punishment,’”<sup>283</sup> particularly when applied to “poor, underprivileged defendant[s].”<sup>284</sup>

Still other proposals for reform that have been put forward focus on the legislative rather than adjudicatory realm. Some efforts seek to make legally meaningful the fact that CCs are experienced as punitive.<sup>285</sup> More straightforward challenges call for the eradication or limitation of CCs as a matter of political morality, contending that CCs are unjust, unfair or inefficient.<sup>286</sup>

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<sup>279</sup> Mayson, *supra* note 158, at 348–57.

<sup>280</sup> Love, *supra* note 243, at 259.

<sup>281</sup> See Crane, *supra* note 245, at 20; John B. Riordan, Note, *Why Do Bad Things Happen to Good People? An Examination of Collateral Consequences and Their Role in Sentencing*, 12 LIBERTY U. L. REV. 467, 467–68 (2018).

<sup>282</sup> *United States v. Morgan*, 635 Fed. App’x 423, 445 (10th Cir. 2015) (citations and internal quotation marks omitted); see *United States v. Musgrave*, 761 F.3d 602, 608 (6th Cir. 2014); see also Riordan, *supra* note 281, at 476–80 (discussing Morgan); Mayson, *supra* note 158, at 342 n. 206 (discussing Musgrave).

<sup>283</sup> *United States v. Nesbeth*, 188 F. Supp. 3d 179, 187 (E.D.N.Y.) (quoting *United States v. Thavaraja*, 740 F.3d 253 (2d Cir. 2014)).

<sup>284</sup> *Id.* at 188; see also Riordan, *supra* note 281, at 480–83 (discussing the views of the Second, Fourth, and Eighth Circuits).

<sup>285</sup> See, e.g., NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (2010); ABA STANDARDS, *supra* note 243, at 2–6.

<sup>286</sup> See, e.g., Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1704 (2017); Genevieve J. Miller, *Collateral Consequences of*

Crucially however, “the terrain for assessing collateral consequences remains fundamentally utilitarian”: the goal is perfecting social control.<sup>287</sup> Relatedly, the common denominator is a motivation to ameliorate the harms of CCs, out of skepticism toward their potential to do good. In what follows, by contrast, I will offer an assertion of such potential. CCs, when no longer amounting to civil death, can satisfy the moral imperative and the societal need for retribution in a non-carceral way.

*a. Punishment between Autonomy and Status II*

Regulating felons through CCs treats them as a class of people who are ostensibly prone to continue on the harmful path for which they have demonstrated a predilection. “[C]lassification by past-conviction status for public safety ends has a perverse, self-fulfilling effect,” stresses Mayson, and it additionally abridges the right to be treated as an equal moral agent.<sup>288</sup> This is the work of preventive logic: a “logic of managing contagion and dangerous non-agents”—a reliance on “exclusion and control” to render “a verdict of lesser personhood.”<sup>289</sup> There are two contrasting views of the relation between offense and offender at play: one views criminal acts as bad choices for which a person is bound to be held accountable; the other views criminal behavior as a mere manifestation of bad character or an unfortunate social status, and asserts that these features are really what needs to be contained. We must not

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*Criminal Convictions: A Cost-Benefit Analysis*, 9 J.L. ECON. & POL’Y 119, 140–44 (2012); LaFollette, *supra* note 274, at 254–58.

<sup>287</sup> Murray, *Retributivist Reform*, *supra* note 278, at 12–15. More ‘radical’ proposals often follow the same lines. *See, e.g., supra* note 148. The few reform proposals on offer which attempt to respect retributivist principles are inadequate as well. They attempt the paradoxical feat of reconciling blanket CCs with retributive principles of individual attributes, without resolving the fundamental mismatch between blame and population control. Murray, *supra*, at 12–15. The Model Penal Code (MPC) suggests temporally stretching the sentencing court’s authority to include control over CCs application, ostensibly taking CCs to be “as much a part of the court’s sentencing function as a fine or prison term [. . . evaluated with] the same considerations of proportionality and fairness as those that govern the sanctions the court itself imposes.” Love, *supra* note 243, at 272 (analyzing the MPC sentencing draft, Appendix A to the article, at 281); *see also* Mayson, *supra* note 158, at 347 n. 225 (discussing MPC revisions). However, the MPC understands proper penal consideration to include actuarial risk assessments from the get-go. Murray, *supra*, at 5 n. 15.

<sup>288</sup> Mayson, *supra* note 158, at 356–59.

<sup>289</sup> *Id.* at 338–39.

collapse the former into the latter, as U.S. penal practice does.<sup>290</sup> The tension between punishing for crime and regulating populations echoes in critiques of both social and civil deaths, both abolition and CCs. Thus, McLeod contrasts preventive justice with “policing probable criminals through an assessment of their character” or using “actuarial means,”<sup>291</sup> while Mayson similarly decries the targeting of identity.<sup>292</sup> Both warn against this slippery slope to scapegoating: using personal punishment as symbolic for collective faults, real or speculated.<sup>293</sup> Indeed, “punishment asserts that the law-breaker could have acted differently in the past. This implies the mirror principle: he can act differently in the future.”<sup>294</sup>

There is a tight link between resisting criminality as a matter of status and abolishing prisons. It is the link between civil death and social death: two legally constructed wedges inserted between human beings and their vital surroundings. It is the contention of this article—together with abolitionism<sup>295</sup>—that salvaging CCs from constituting civil death, and salvaging prisons from constituting social death, are one and the same. Transforming CCs so as to take over sentencing accomplishes both goals by assuring that we punish for acts, and that we do so without ostracizing the person responsible for the act. Such a regime of punishment would vindicate the criminal law’s moral presumption to censure wrongdoing in a just and fair manner.

## B. Integrating Punishment

“Nothing about the retributivist answer to *why* we punish,” observed Dan Markel, “requires that the death penalty be one of the

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<sup>290</sup> See Ristroph, *Farewell*, *supra* note 126, at 565; Kleinfeld, *Two Cultures*, *supra* note 145, at 1008.

<sup>291</sup> McLeod, *Prison Abolition*, *supra* note 6, at 1220; *see also, e.g.*, Erin Collins, *Punishing Risk*, 107 GEO. L.J. 108 (2018) (discussing actuarial sentencing); Bernard E. Harcourt, *From the Ne’er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 L. & CONTEMP. PROBS. 99 (2003) (discussing actuarial influences on twentieth century criminal law).

<sup>292</sup> Mayson, *supra* note 158, at 357.

<sup>293</sup> *Id.* at 356; McLeod, *Regulating Sexual Harm*, *supra* note 148, at 1560.

<sup>294</sup> Mayson, *supra* note 158, at 320.

<sup>295</sup> *See, e.g.*, Rodríguez, *supra* note 10, at 1587 (suggesting that CCs extend “a logic and method of dominance” beyond physical incarceration); MBL Platform: Abolition, *supra* note 35 (“[C]ontact with the criminal legal system triggers a set of formal and informal legal and social restrictions, often referred to as ‘collateral consequences,’ which bar people with records from basic life necessities [. . .]. All people with prior convictions should regain these rights and privileges.”).

options in *how much* we punish.”<sup>296</sup> The same holds true for incarceration. Unlike the life/death binary, however, incarceration is a bundle of spectra, and hence provides a broader theoretical scope.<sup>297</sup> In this final substantive section of the article, I present a rough sketch—by no means a complete account, nor the only possible one—for a punishment regime that is designed to be both retributive and inclusive, both socially sensitive and morally upright.<sup>298</sup> In doctrinal terms, my proposal aims to kill two birds with one stone. It reconfigures CCs such that they cease being collateral, but do not cease to be; instead, they ought to be imposed as punishment in lieu of incarceration. My proposal eliminates both the civil death potentially entailed in CCs by breaking the link between criminality and status, as well as the social death potentially entailed in prisons by breaking the link between punishment and banishment. At the same time, the following proposal realizes the intrinsic value of sanction. The abolitionist trajectory, as Julia Oparah frames it, consists of three steps: ending prison expansion; shrinking prison population; and building alternatives for accountability.<sup>299</sup> All three would be fulfilled if CCs are explicitly rendered punishment and become fully commensurable with sanctions currently imposed by courts.

To center the criminal law around inclusive punishment is a daunting task. It requires substantial broadening of the punitive vocabulary without confusing alternatives to incarceration with alternatives to punishment, or more broadly, alternative sanctions with alternatives to sanctioning.<sup>300</sup> Sanctioning a person for committing a public wrong burdens them one way or another, and it is not clear that the

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<sup>296</sup> Markel, *State*, *supra* note 182, at 475 (emphases in original).

<sup>297</sup> Cf. McLeod, *Prison Abolition*, *supra* note 6, at 1213 (“A prison abolitionist ethic holds this promise of unsettlement more powerfully than a death penalty abolitionist demand because prison abolition calls into question the legitimacy of the finality of conviction as an end of moral concern in a more thoroughgoing and structural form.”).

<sup>298</sup> See also Kleinfeld et al., *supra* note 286, at 1702–03 (advocating “prosocial punishment”).

<sup>299</sup> Oparah, *supra* note 5, at 298–300; see also McLeod, *Abolition Democracy*, *supra* note 4, at 1616 (noting that abolition seeks to “eliminate existing punitive institutions while identifying meaningful forms of accountability and prevention to respond to actual violence and wrongdoing”).

<sup>300</sup> See Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 237–39 (2009) (conflating “alternatives to incarceration” and “intermediate sanctions” with restorative and therapeutic measures); R. A. Duff, *Alternatives to Punishment – or Alternative Punishments?*, in RETRIBUTIVISM AND ITS CRITICS, *supra* note 165, 43 (discussing the distinction).

weight of the burden is greater in imprisonment than in other forms of punishment (if such a burden is quantifiable at all).<sup>301</sup> The cardinal thing is the *meaning* of the burden, in the eyes of involved or implicated individuals, communities, and institutions. The challenge is to load punitive, non-carceral measures with the same condemning message that imprisonment conveys,<sup>302</sup> and their fulfillment with the same satisfaction of desert as serving time. It takes a collective process to come to terms with non-carceral punishment. Establishing rational connections between particular crimes, offenders, and sanctions—which existing law does not do, and this proposal hopes to facilitate (an aspiration it shares with transformative justice programs)—may lead the way to such a process.

Before prisons, Peter Moskos writes, “those who violated laws were generally subject to pain, exile, shame, or death.”<sup>303</sup> All arguably encapsulated in carceral confinement, none very appealing as an independent undertaking. Ironically, the penitentiary was originally designed, *contra* all of the above, as a kind of medicine, to cure individuals of their criminal ailment: “[M]any people hoped that we could purge criminality from a person’s system. The mantra of reformers became ‘treat not the crime, but the criminal.’”<sup>304</sup> Retributive abolitionism would maintain that the purpose of punishment is not to alter people’s psyche nor to solve social problems, but that it is incumbent on punishment to not exacerbate either one. An artificial separation of the person from the act may bring to mind a formalistic punishment calculus that ignores the personal and social circumstances surrounding criminal activity.<sup>305</sup> Yet such a punishment orientation may also cultivate the double insistence on effectively condemning criminal acts and simultaneously on continuing to care for the perpetrator as a person and therefore refraining from banishing them from society.<sup>306</sup> Such a difficult task necessitates a

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<sup>301</sup> See LIPPKE, *supra* note 184, at 54.

<sup>302</sup> Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 592–93 (1996).

<sup>303</sup> MOSKOS, *supra* note 155, at 24.

<sup>304</sup> *Id.* at 27.

<sup>305</sup> See William W. Berry III, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13, 50–52 (2019); Richard A. Bierschbach & Stephanos Bibas, *What’s Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1469–72 (2016).

<sup>306</sup> See Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 722 (1992) (“[I]n punishing we do not – or should not – condemn the offender as a person. Even while punishing the offender’s action, we should value the offender as a person.”); see also Kleinfeld, *Reconstructivism*, *supra* note 34, at 1492 (arguing that solidarity is the “lodestar normative concept” of

flexible decision-maker who possesses a developed moral conscience, social sensitivities, emotional capacities, and good guidelines: a Herculean judge.<sup>307</sup> To get as close as possible, the penal arsenal needs to include an array of tools, and the judge should have sufficient leeway to choose among them and load them with meaning.<sup>308</sup>

Proactively “criminalizing” CCs—taking down the “doctrinal wall” separating them from punishment and making the two categories commensurable<sup>309</sup>—would achieve these goals. Construing CCs as a good rather than the lesser evil departs from the various proposals for CCs reform, briefly outlined above,<sup>310</sup> which seek to formally recognize these measures as punitive. None is satisfactory because all are essentially reactive—they work around the edges of existing CCs regimes, without abolishing the placing of regulation and control at the core of the criminal apparatus. To do so successfully would rebut three major trends of U.S. criminal law over the last decades: increasing politicization of penal codes, enlisting civil law measures for the treatment of wrongdoing, and imposing overly severe punishments.<sup>311</sup> It would positively assign moral value to treating CCs as punishment, removing them out of the realm of disciplinary power and into the realm of respectful coercion.<sup>312</sup>

Are all CCs welcome? What standards guide which ones to impose?

### 1. Which CCs?

Four general comments are due here, painted for the moment with a broad brush. *First*, some form of confinement must remain part of the

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criminal law).

<sup>307</sup> See DWORKIN, *LAW’S EMPIRE*, *supra* note 53, at 313–17, 337–47 (discussing Herculean adjudication generally); see also S. E. Marshall, *Commentary: Harm and Punishment in the Community*, in *RETRIBUTIVISM AND ITS CRITICS*, *supra* note 165, 75 (discussing its application to sentencing).

<sup>308</sup> There are already existing instances to draw on. See, e.g., ABA STANDARDS, *supra* note 243, at 16 (“[W]here a sentencing court is authorized and acts to suspend a driver’s license or impose a registration requirement, this is not a ‘collateral’ sanction, since it takes effect only because it is expressly included as part of the sentence imposed by the judge.”).

<sup>309</sup> This “doctrinal wall” is not insurmountable, as the context of procedural protections illustrates. Crane, *supra* note 245, at 24–25.

<sup>310</sup> *Supra* section II.A.2.

<sup>311</sup> See Douglas A. Berman, *The Model Penal Code Second: Might “Film Schools” Be in Need of a Remake?*, 1 OHIO ST. J. CRIM. L. 163, 164–65 (2003).

<sup>312</sup> See *supra* notes 157 (on disciplinary power), 158 (on respectful coercion).

arsenal. No fundamental abolitionist commitment would be stifled by this move. Abolitionists do not advocate that prison doors be opened today and incarcerated people let out just like that, nor that confinement is a-priori out of bounds. They practice aspirational politics while keeping both feet on the ground. And safety remains a top priority: the existence of a “dangerous few,” those individuals who must be forcefully controlled in order to keep them from harming others, is acknowledged.<sup>313</sup> Yet abolitionists insist that the dangerous few are much fewer than you think, particularly in comparison to the number of incarcerated people who are not inherently dangerous, or the number of dangerous people not incarcerated; and that consequently we must not let the dangerous few become a conversation stopper. As the justification for retaining confinement is primarily consequential, it is but a necessary evil from a retributivist-communal perspective.<sup>314</sup> An alternative, retributive justification would be that confinement is a form of punishment that can be legitimately inflicted when it rationally tracks some key features of the crime to which it corresponds, other than dangerousness, according to the criteria outlined below. But the grave reasons for opposing confinement ought to render it an extreme measure.

*Second*, some CCs must be abolished. There are certain aspects of social life whose revocation is cruel and tantamount to internal exile and possibly actual loss of life, such as having a roof over one’s head or access to medical assistance. The criterion for a complete removal of a measure from the arsenal should thus be whether it severely and categorically impedes the ability of the offender to maintain membership in a

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<sup>313</sup> McLeod, *Prison Abolition*, *supra* note 6, at 1171 (“An abolitionist framework is not necessarily committed to denying the existence of these dangerous few persons . . . .”); Ben-Moshe, *supra* note 5, at 91 (“[S]ome advocate for transformative justice and healing practices in which no one will be restrained or segregated, while others believe that there will always be a small percentage of those whose behavior is so unacceptable or harmful that they will need to be exiled or restrained, when done humanely and not in a prison-like setting.”); Scott, *supra* note 31, at 322 (“The vast majority of people who break the criminal law are not dangerous and should not be considered as such. There are some people who may, however, benefit from a change of context and environment. One idea would be to develop ‘intentional communities’ where wrongdoers – and perhaps their families if they so wished – could be relocated to small villages in sparsely populated areas.”); *but cf.* McLeod, *Abolition Democracy*, *supra* note 4, at 1642 (mistaking punishment for imprisonment) (“Punishment, even in sanitized prisons [. . .] would still treat the perpetrators as disposable even if the place where they were deposited was relatively comfortable.”).

<sup>314</sup> See *supra* note 234.

meaningful community and lead a prosperous life among their peers. An example of a CC that should be abolished is denial of access to medical benefit programs.<sup>315</sup>

*Third*, some CCs must be retained as civil preventive measures, for utilitarian reasons that lie outside of punishment. Their number should be small. Zachary Hoskins holds that CCs should be presumed punitive, unless the following considerations apply: there is a compelling moral interest, empirical research shows the measure is effective, the benefits it produces outweigh the harm, there are no less burdensome means, and it is not overinclusive.<sup>316</sup> An example of a CC that should remain in force is banning persons convicted of violent crimes from possessing a firearm. Deprivation of the ability to possess a firearm can be burdensome, yet the level of inherent dangerousness is so high that it can be justifiable even for an offender who does not deserve it. Still, it need not be categorical. Even CCs that are retained as strictly preventive, outside of the sentencing process, ought not to be imposed absent an individualized, discretionary decision.

*Fourth*, original sanctions that are not currently codified in either penal or civil laws, should also be available to judges,<sup>317</sup> so long as they are not inherently degrading.<sup>318</sup> CCs are the default simply because they are there. The fact that they *are* there, however, is very significant, and has justificatory force in assembling a default punitive arsenal with CCs, for at least three reasons. One reason is that in their current form, CCs “undercut retribution’s inherently restorative nature by re-disrupting what

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<sup>315</sup> See Crane, *supra* note 245, at 17.

<sup>316</sup> Hoskins, *supra* note 246, at 42–45; see generally ZACHARY HOSKINS, BEYOND PUNISHMENT? A NORMATIVE ACCOUNT OF THE COLLATERAL LEGAL CONSEQUENCES OF CONVICTION (2019) (providing a more complete account).

<sup>317</sup> See Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications of the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2229 (2001).

<sup>318</sup> *Id.* (referring to shaming); Jacob Bronsther, *Torture and Respect*, 109 J. CRIM. L. & CRIMINOLOGY 423, 484–89 (2019) (referring to long-term incarceration); Kahan, *supra* note 302, at 607–17 (referring to physical punishment); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE ch. 5 (2003) (referring to slavery); Markel, *State*, *supra* note 182 (referring to death). However, punishment is not degrading by definition: we must “distinguish between subjugation and degradation [. . .] a successful retributive punishment is one that simultaneously inflicts suffering so as to deny lordship but avoids degrading the wrongdoer [. . .] any non-painful method, so long as it was still a method of defeating the wrong-doer, can still count as retributive punishment.” Hampton, *Expressive Theory*, *supra* note 165, at 14, 16 (emphases removed).

had been restored.”<sup>319</sup> The co-existence of a retributive regime and the now-existing CCs regime entails inherent tensions. As such, the retributivization of U.S. punishment demands the dramatic restructuring of CCs. Another reason is that prima facie CCs enjoy democratic legitimacy as proper mechanisms for dealing with crime. Representatives of the people have chosen them, in a “punitive impulse,”<sup>320</sup> as repercussions offenders should suffer following the commitment of crimes. Since this legitimacy lies in the critical mass of CCs rather than any specific one, it is more open to various forms of contestation. Finally, their sheer number renders CCs adequate for the task, because once they are no longer applied categorically, the vast array facilitates nuanced and individualized tailoring of punishment to crime within our social reality.

## 2. *How to Decide?*

As a preliminary matter, it is a no-brainer that the bar for adequate punishment must be dramatically lowered. This is due to considerations of both desert and fairness as the U.S. penal system is unduly harsh (to put it mildly), and it fuels disparities among different social groups.<sup>321</sup> It exploits status and perpetuates it. However, when punishment is executed properly, it can act as a form of coerced re-inclusion: by committing a crime the offender distances herself from our moral community, whereas punishment can bring her back into it, and hence must be reasonably temporary.<sup>322</sup> If divided among different individually tailored measures,

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<sup>319</sup> Murray, *CCs*, *supra* note 152, at 8; see Murray, *Retributivist Reform*, *supra* note 278, at 21; Duff & Marshall, *supra* note 202, at 54; Hoskins, *supra* note 246, at 36–37; Duff, *Who Must Presume*, *supra* note 133, at 188–89.

<sup>320</sup> Love, *supra* note 243, at 249.

<sup>321</sup> Such issues have led some scholars to launch constitutional arguments against excessive imprisonment. See, e.g., Berry, *supra* note 305; Youngjae Lee, *The Constitutional Right against Excessive Punishment*, 91 VA. L. REV. 677 (2005); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571 (2005); Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995); Colb, *supra* note 31.

<sup>322</sup> It is not necessary that the amount of time be determined in advance and remain fixed. Indeed, calls to jettison the “fetish of finality” in sentencing are growing in the literature. See McLeod, *Prison Abolition*, *supra* note 6, at 1213; Jefferson-Bullock, *supra* note 184, at 351. Although indeterminate sentencing has been traditionally understood as a utilitarian mechanism, numerous non-consequential reasons to support it have also been offered. For example, Mihailis Diamantis has recently drawn attention to criminal law theory’s neglect of the question of diachronic identity, i.e. the nature of a thing or a person with respect to the passage of time. If criminal law is to “adhere to the identity principle

it can also express genuine care.

Both desert and fairness are pivotal for retributive abolitionism and can be navigated via the key idea of responsibility, which applies differently when determining culpability for a wrongful act and when determining the proper sanction for the person who committed it. The traditional understanding of criminal liability is focused on desert and on culpability. It tracks moral responsibility as a binary question—the agent is guilty if she performed a crime despite having the capability and the opportunity to avoid it, and not guilty otherwise.<sup>323</sup> Questions of fairness arise with particular force at the sentencing stage, and it too should be couched in terms of responsibility. At sentencing if not before, utilitarianism discards responsibility,<sup>324</sup> but retribution and abolitionism hold on to it.<sup>325</sup> The meaning given to responsible agency within a retribution-abolition synthesis should be a robust one, insisting that people are not the sum total of their circumstances—hence disciplining social identities is wrong—while recognizing that they face limited options that may hinder their potential to flourish, before or after punishment. Because retributive restoration “must be understood in both *individual* and *social* terms,”<sup>326</sup> responsibility should encompass a response to personhood above and beyond rational self-control. One particularly promising avenue for filling this claim with content is the emotional realm.<sup>327</sup> According to Samuel Pillsbury, emotion is the

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and punish only those who commit crime, it must confront the possibility that bodily continuity is an unreliable guide to personal identity.” Mihailis E. Diamantis, *Limiting Identity in Criminal Law*, 61 B.C. L. REV. 2011, 2042–43 (2019). Hence, periodical reconsiderations of the punishment a certain person receives vis-à-vis changes to their identity, as well as “criminal law’s normative interest in the crime at issue,” may be due for deontological rather than rehabilitative reasons. *Id.* at 2046. Additional upshots of the recognition that identity is not fixed are that CCs as they currently stand as well as life sentences are highly suspect, and that the possibility of parole must always remain available. *Id.* at 2086–93. *See also* Dancig-Rosenberg & Dagan, *supra* note 147, at 136 (providing a survey of non-consequential justifications for traditionally-understood utilitarian penal mechanisms).

<sup>323</sup> Criminal responsibility generally aims to track moral responsibility. *See, e.g.*, Kutz, *supra* note 160, at 564–80; *but cf.* ERIN I. KELLY, *THE LIMITS OF BLAME* 25–44 (2018).

<sup>324</sup> Although, utilitarianism often retains rhetorical connections to responsibility. *See* GARLAND, *supra* note 151, at 124–27 (discussing the neo-liberal utilization of certain conceptions of responsibility for the redistribution of crime control to private actors); *supra* note 198 and accompanying text.

<sup>325</sup> *Supra* note 199 and accompanying text.

<sup>326</sup> Murray, *CCs*, *supra* note 152, at 53 (emphases in original).

<sup>327</sup> Accounts of the links between responsibility and emotions generally draw on Peter’s

animator of responsibility because it “provides the essential connection between the individual’s internal existence and the stimuli of the outside world,” and facilitates responsibility as “a more creative, human-centered process than it is often considered.”<sup>328</sup> Our commitment to the uniqueness of every human being coupled with the validation of reciprocal emotional responses, fuel a communal search for meaning that ties criminal and democratic responsibilities together.<sup>329</sup> Punishing is defending this framework: that we have shared moral values that transcend circumstances, and that we articulate them together, through mutual respect, understanding and empathy, which can only take shape within concrete circumstances.

Punishing entangles the narratives of person and community, and legitimates judicial emotion toward defendants, in search for justice.<sup>330</sup> Martha Nussbaum calls it judging *with* the agent, namely to see things from their point of view.<sup>331</sup> This is an intrinsic, non-utilitarian demand of justice, alongside the proportionality between a wrongful act and the punishment it warrants. A just, rational response to wrong cannot be

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Strawson classic discussion of “reactive attitudes,” which are emotional reactions like resentment, love, contempt, or gratitude, emerging between persons “involved in transactions with each other.” Peter Strawson, *Freedom and Resentment*, xlvi PROC. BRIT. ACAD. 1 (1962), *reprinted in* FREE WILL 59, 62 (Gary Watson ed., 1982). Reactive attitudes stand in contrast to objective attitudes, which do not presume the possibility of an interpersonal relationship. While reactive attitudes presume a subject of equal human worth and entitlement at the receiving end, objective attitudes presume an object of public policy. The two kinds of responses are not mutually exclusive yet they are still “opposed,” because the recipient of objective attitudes cannot be reasoned with and cannot reciprocate interpersonal feelings. *Id.* at 66. A potential relationship is thus for Strawson a matter of moral demand. To be potentially accountable toward another person and to be a moral agent are one and the same: this expression of reactive attitudes is what constitutes a moral community. *Id.* at 77–80. From here the road is short to tying moral blameworthiness with public punishment.

<sup>328</sup> Pillsbury, *supra* note 306, at 736–38; *see also* Wolf, *supra* note 111 (arguing for a richer account of responsibility); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotions in Criminal Law*, 96 COLUM. L. REV. 269, 288 (1996) (discussing the relationship between emotion and action).

<sup>329</sup> Pillsbury, *supra* note 306, at 735–42. *See* Christopher Bennett, *What is the Core Normative Argument for Greater Democracy in Criminal Justice?*, 23 GOOD SOC’Y 41, 48–49 (2014) [hereinafter Bennett, *Democracy*]; Marshall, *supra* note 307, at 79–81.

<sup>330</sup> Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CAL. L. REV. 1485, 1490–94 (2011).

<sup>331</sup> Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 94 (1993) (emphasis in original). Nussbaum contrasts this type of justice with retribution, but only because the latter is taken to indicate a formalistic symmetry of pains. *See id. passim*.

constituted absent “a prior stance of being with others.”<sup>332</sup> It is still authoritative adjudication, but it nonetheless challenges hierarchies and power structures in its understanding of justice as participation and sharing. The underlying understanding of equal respect, in its turn, is the direct opposite of the prevailing “new penological,”<sup>333</sup> ultra-positivist understanding of equality as “a sort of mathematics.”<sup>334</sup>

The synthesis of an empathetic, equality-committed, responsible adjudication with a de-collateralized, de-carcerated punishing regime—to condemn wrongful acts and to care for their perpetrators—can make good use of penal array and discretion in roughly the following twofold way. First, in order for the punitive imposition of a de-collateralized CC to be effective in its condemnation of the act, it needs to be conversant with the character of the crime. Second, in order for it to be caring toward the offender, it needs to keep this effectiveness from taking advantage of her statuses in life.

For example, in the first stage, a crime that disrespects entire communal efforts, such as tax evasion, could correlate with restrictions centered around communal participation, like disenfranchisement.<sup>335</sup> A crime that diminishes another individual’s personal identity, akin to a hate crime, could be met with prohibitions focused on name changes or use of firearms. A crime that expresses disregard for another individual’s personal space and possessions, e.g. burglary, could warrant punitive measures that primarily express the community’s values in these regards, such as monitoring and registration. The link between the offense and the right deprived of the offender creatively satisfies the retributive demand for a just proportion between guilt and burden,<sup>336</sup> in a manner that

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<sup>332</sup> MEYER, *supra* note 176, at 3. Both Nussbaum and Meyer refer in these contexts to the principle of mercy, but other responses of the emotional realm may also be fitting, such as empathy. *See, e.g.*, Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145, 153–57 (2013).

<sup>333</sup> Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992).

<sup>334</sup> Bierschbach & Bibas, *What’s Wrong*, *supra* note 305, at 1455–60.

<sup>335</sup> Despite the difficulties surrounding disenfranchisement, it seems that under proactive ‘criminalization’ of CCs, conceived as severe and temporary punishment rather than a matter-of-course side-effect, it would be a legitimate sanction. *See* Murray, *Retributivist Reform*, *supra* note 278, at 48–49. *But cf.* Yankah, *Pretext and Justification*, *supra* note 132, at 1618–24 (arguing against disenfranchisement on republican grounds).

<sup>336</sup> *See, e.g.*, Duff, *Alternatives to Punishment*, *supra* note 300, at 46 (“[I]f we are to make sure that punishment is proportionate to desert and that equally guilty offenders receive at least roughly equal punishment, the penalties available to the courts must be

responds to the offender's volitional choice rather than their personhood. The moral message conveyed in the offense meets refutation which is logically and socially relevant yet divorced from personal status. More serious crimes that have concrete victims warrant, in addition, personalized processes of the restorative mold, in order to accommodate the emotional range of involved parties; but this is not mutually exclusive with effective, publicly imposed burdens.

In the second stage, the judge must make sure that this tailoring of the punishment to the condemned act does not overburden a person due to their personal circumstances or relegate them from collective life—and if it does, the judge must mitigate accordingly. Nussbaum explains why mitigation is a doctrinally distinct judicial action: aggravation is still a component of justice as proportionality, and so it “serves to place the offense in the class to which mitigation is relevant.”<sup>337</sup> Afterward, the judge must “treat[] the inner world of the defendant as a deep and complex place, and [. . .] investigate that depth.”<sup>338</sup> To take responsibility seriously is to elevate mitigation into a sentencing stage of its own, thus considering the offender's cognitive, emotive, and dispositional factors within the assessment of blame.

In closing, note that this theoretical sketch for a sentencing scheme, while fully committed to individual moral rights, bridges a gap that exists in both abolitionist and liberal thought with regard to legal rights. This gap lies between isolationist inclinations in the criminal realm and inclusive ones in the social realm. This article also joins the criticism that a legalistic rights discourse induces alienation, and that the outlook on legal rights is as a means to an end, the end being the public good. This is in line with recent calls in the realms of criminal law and procedure to forgo an absolutist approach to legal entitlements, which conflates the right and the good and encourages different authoritative actors to make the mistake that whatever is permissible is also publicly desirable.<sup>339</sup> To

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such that they can be readily ranked and compared in term of their severity . . . .”); *supra* note 184.

<sup>337</sup> Nussbaum, *supra* note 331, at 118.

<sup>338</sup> *Id.* at 111. This stage thus aims to address concerns about retribution failing to account for offenders' motivations in placing blame. KELLY, *supra* note 323, at 102.

<sup>339</sup> See Yankah, *Pretext and Justification*, *supra* note 132 (advocating a civic republican, public good-based rather than liberal, rights-based approach to policing); Jamal Greene, *The Supreme Court, 2017 Term – Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 44 (2018) (Greene analyzes the Supreme Court's rejection of statistical evidence of racial bias in capital sentencing, because it would result in “similar claims as to other types of penalty.” Greene regretfully points out that the “assumption that such claims are [. . .]

illustrate, in the context of the current discussion, the balance between effectively onerous punishment and respecting persons as ends in themselves, is difficult. For one person, a restriction on using firearms may be meaningless, while prohibiting another from sitting on juries may be taken for a prize. Incarceration makes this easier as it provides a uniformly appreciated currency: “[I]mprisonment expressed what citizens of a republic shared—their liberty—rather than what set the punisher and the punished apart.”<sup>340</sup> For this reason it has been suggested that ranking the burden imposed by CCs, for the purpose of allocating procedural protections, should take an objective form by analogizing prison time, “based on the degree to which [a CC] infringes on a constitutional right.”<sup>341</sup> In lieu of this “rights as trumps” approach, the current proposal aims to view the situation from the offender’s vantage point. Hence, it sees the criminal law as infrastructure for just individual-community relations—without purporting to exhaust them—via the imposition of active duties of care amongst the citizenry, whether holding public office or not. “[R]esponsibility, not as a critique of liberal rights, but rather, as an essential feature of them.”<sup>342</sup>

## CONCLUSION

Criminal law scholars have been described as “the last natural law theorists,” an identification some find regrettable because it “impede[s] reform.”<sup>343</sup> This article has aimed to illustrate that criminal law theorists are not the only ones who insist on retaining a core connection to natural moral truths. Criminal law’s subjects do so too, including the fiercest

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judicially unmanageable reflects a predisposition against balancing and in favor of rights as trumps.”); Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 420 (2013) (“[J]udicial attention to rights-based doctrines can go only so far to remedy the structural imbalances at the root of the problem. What is called for is [. . .] a more sustained focus on the roles of various actors and on empowering those actors to check and balance one another throughout sentencing.”); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1678–87 (2010) (detailing strands of prosecutorial equitable discretion).

<sup>340</sup> Kahan, *supra* note 302, at 613.

<sup>341</sup> Crane, *supra* note 245, at 38–40.

<sup>342</sup> Robin West, *Liberal Responsibilities*, *supra* note 221, at 395; see Bennett, *Democracy*, *supra* note 329.

<sup>343</sup> Ristroph, *Farewell*, *supra* note 126, at 617; see also Benjamin Levin, *De-Naturalizing Criminal Law: Of Public Perceptions and Procedural Protections*, 76 ALB. L. REV. 1777 (2012) (arguing that our criminological culture is a product of a misguided view of criminal law as natural law).

critics among them. Furthermore, holding on to the moral ambitions of punishment may fuel rather than impede reform—and abolition<sup>344</sup>—because legal punishment has moral meanings, including political morality, which we do not wish to jettison. Many abolitionists are not irreparably disheartened by the managerial role that the criminal law has come to fulfill,<sup>345</sup> but see this as a problem that needs fixing—however radical the solution may be. The continuous failure to fix this problem induces a disappointment that is not only daily experienced but deeply felt as well. The latter should not be surprising, for criminal justice, as Joshua Kleinfeld clarifies, “is not just a form of policy to be instrumentally perfected like any other form of policy.”<sup>346</sup> Rather, it is a site of cultural negotiations “of issues connected to wrongdoing and community, social order and violence, identity, the power of the state, and the terms of collective ethical life.”<sup>347</sup> Hence, it is insufficient that “an abolitionist ethic [. . .] is oriented toward displacing criminal law as a primary regulatory framework and replacing it with other social regulatory forms,”<sup>348</sup> as Allegra McLeod wishes. This does not fix the problem of the criminal justice system being morally skewed. As it currently stands, abolitionism cannot provide the paradigmatic shift that the U.S. penal system undoubtedly needs. This article has argued that retributive abolitionism can.

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<sup>344</sup> Abolitionists are careful to distinguish abolition from reform. See McLeod, *Prison Abolition*, *supra* note 6, at 1207–18; Ben-Moshe, *supra* note 5, at 86–88.

<sup>345</sup> Ristroph, *Farewell*, *supra* note 126, at 596 (“American criminal law has grown more managerial across the board—more concerned with sorting, tracking, and regulating populations over time.”).

<sup>346</sup> Kleinfeld, *Two Cultures*, *supra* note 145, at 940.

<sup>347</sup> *Id.*

<sup>348</sup> McLeod, *Prison Abolition*, *supra* note 6, at 1207.