

## Prison Abolition and Grounded Justice

Allegra M. McLeod



### ABSTRACT

This Article introduces to legal scholarship the first sustained discussion of prison abolition and what I will call a “prison abolitionist ethic.” Prisons and punitive policing produce tremendous brutality, violence, racial stratification, ideological rigidity, despair, and waste. Meanwhile, incarceration and prison-backed policing neither redress nor repair the very sorts of harms they are supposed to address—interpersonal violence, addiction, mental illness, and sexual abuse, among others. Yet despite persistent and increasing recognition of the deep problems that attend U.S. incarceration and prison-backed policing, criminal law scholarship has largely failed to consider how the goals of criminal law—principally deterrence, incapacitation, rehabilitation, and retributive justice—might be pursued by means entirely apart from criminal law enforcement. Abandoning prison-backed punishment and punitive policing remains generally unfathomable. This Article argues that the general reluctance to engage seriously an abolitionist framework represents a failure of moral, legal, and political imagination. If abolition is understood to entail simply the immediate tearing down of all prison walls, then it is easy to dismiss abolition as unthinkable. But if abolition consists instead of an aspirational ethic and a framework of gradual decarceration, which entails a positive substitution of other regulatory forms for criminal regulation, then the inattention to abolition in criminal law scholarship and reformist discourse comes into focus as a more troubling absence. Although violent crime prevention and proportional punishment of wrongdoing purportedly justify imprisonment, this Article illuminates how the ends of criminal law might be accomplished in large measure through institutions aside from criminal law administration. More specifically, this Article explores a form of grounded preventive justice neglected in existing scholarly, legal, and policy accounts. Grounded preventive justice offers a positive substitutive account of abolition that aims to displace criminal law enforcement through meaningful justice reinvestment to strengthen the social arm of the state and improve human welfare. This positive substitutive abolitionist framework would operate by expanding social projects to prevent the need for carceral responses, decriminalizing less serious infractions, improving the design of spaces and products to reduce opportunities for offending, redeveloping and “greening” urban spaces, proliferating restorative forms of redress, and creating both safe harbors for individuals at risk of or fleeing violence and alternative livelihoods for persons subject to criminal law enforcement. By exploring prison abolition and grounded preventive justice in tandem, this Article offers a positive ethical, legal, and institutional framework for conceptualizing abolition, crime prevention, and grounded justice together.

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**TABLE OF CONTENTS**

INTRODUCTION.....1158  
I. PRISION ABOLITION.....1172  
    A. Violence and Dehumanization.....1173  
    B. Racial Subordination and the Penal State.....1185  
    C. The Question of Efficacy.....1199  
II. ABOLITION VERSUS REFORM.....1207  
III. PREVENTIVE JUSTICE.....1218  
IV. RECONCEPTUALIZING PREVENTION.....1224  
    A. Justice Reinvestment.....1225  
    B. Decriminalization.....1226  
    C. Creating Safe Harbors.....1227  
    D. Alternative Livelihoods.....1228  
    E. Universal Design.....1229  
    F. Urban Redevelopment.....1230  
V. GROUNDING JUSTICE.....1232  
CONCLUSION.....1238

## INTRODUCTION

*At bottom, there is one fundamental question: Why do we take prison for granted? . . . The most difficult and urgent challenge today is that of creatively exploring new terrains of justice, where the prison no longer serves as our major anchor.*

-Angela Davis, *Are Prisons Obsolete?*<sup>1</sup>

*[P]reventive justice is, upon every principle of reason, of humanity, and of sound policy, preferable in all respects to punishing justice . . . .*

-William Blackstone, *Commentaries on the Laws of England*<sup>2</sup>

In 1973, the U.S. Department of Justice sponsored a National Advisory Commission on Criminal Justice Standards and Goals to study the “American Correctional System,” and after extensive research and analysis, the Commission published a report concluding that U.S. prisons, juvenile detention centers, and jails had established a “shocking record of failure.”<sup>3</sup> The Commission recommended a moratorium on prison construction to last ten years.<sup>4</sup> Instead, as a vast and compelling body of scholarship attests, in the years to follow, both prison construction and the U.S. prison population—characterized by stark racial disparities—boomed.<sup>5</sup> Forty years later, one in every thirty-five American adults was under criminal supervision of some form.<sup>6</sup> Penal intervention had become even more alarmingly prevalent among African American men. According to some estimates, one of every three young African American men may expect

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1. ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 15, 21 (2003).
  2. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*251 (emphasis omitted).
  3. NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS & GOALS, U.S. DEP’T OF JUSTICE, *REPORT ON CORRECTIONS* 597 (1973).
  4. *See id.*
  5. *See, e.g.*, DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 168 (2001); NICOLA LACEY, *THE PRISONERS’ DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).
  6. *See* LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013* (Dec. 19, 2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>. As of 2003, one in every one hundred forty U.S. residents was in prison or jail. PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2003*, at 2 (Nov. 2004).

to spend part of his life in prison or jail.<sup>7</sup> In 2009, Senator Jim Webb tried and failed to establish another National Criminal Justice Commission, though numerous experts testified that U.S. prisons and jails were still “broken and ailing,”<sup>8</sup> a “national disgrace,”<sup>9</sup> and reflected rampant “horrors” of sexual abuse and violence<sup>10</sup>—in short, that U.S. prisons and jails were in a state of “crisis.”<sup>11</sup>

Apart from the inhumanity of incarceration, there is good reason to doubt the efficacy of incarceration and prison-backed policing as means of managing the complex social problems they are tasked with addressing, whether interpersonal violence, addiction, mental illness, or sexual abuse.<sup>12</sup> Moreover, beyond

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7. See THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 1 (Aug. 2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf> (reporting that if then-current incarceration rates continued, one in three black men could expect to serve time in prison); BECKY PETTIT, INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS 1 (2012) (same). See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2 (2012) (arguing that old forms of racial subordination have not been entirely eliminated but rather reconfigured in criminal law administration); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) (examining race- and class-based inequities in U.S. criminal law administration).
  8. *Exploring the National Criminal Justice Commission Act of 2009: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 31 (2009) (statement of William J. Bratton, Chief of Police, Los Angeles Police Department).
  9. *Id.* at 7 (quoting George Kelling).
  10. *Id.* at 13 (statement of Pat Nolan, Vice President, Prison Fellowship, Lansdowne, Virginia).
  11. *Id.* at 12.
  12. See, e.g., *States Cut Both Crime and Imprisonment*, PEW CHARITABLE TR. (Dec. 19, 2013), <http://www.pewtrusts.org/en/multimedia/data-visualizations/2013/states-cut-both-crime-and-imprisonment> (revealing that numerous states have reduced crime and incarceration rates at the same time and suggesting that maintaining large prison populations is not necessary from a public safety standpoint); RUSSELL SAGE FOUND., DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM 2 (Steven Raphael & Michael A. Stoll eds., 2009) (noting the growing evidence of the destructive consequences of imprisonment, including vast allocation of public resources to incarceration at the cost of public spending in other areas such as education, diminishing crime-reductive returns associated with increases in incarceration, instability of family and community ties among high prison-sending demographics, depressed labor-market opportunities for persons with criminal convictions and consequent pressures to reoffend, legal disenfranchisement of former prisoners, and the acceleration of communicable diseases such as AIDS among inmates and their non-incarcerated intimates); JOHN SCHMITT ET AL., CTR. FOR ECON. & POL'Y RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION (2010) (demonstrating the exorbitant costs of incarceration and substantial potential savings associated with decarceration that could be devoted to other important governmental and public functions); DON STEMEN, VERA INSTITUTE OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME 2 (Jan. 2007), [http://www.vera.org/sites/default/files/resources/downloads/veraincarc\\_vFW2.pdf](http://www.vera.org/sites/default/files/resources/downloads/veraincarc_vFW2.pdf) (proposing that “effective public safety strategies should move away from an exclusive focus on incarceration to . . . a more comprehensive policy framework for safeguarding citizens,” one that would incorporate reductions in unemployment, increases in real wage rates, and improved educational opportunities); see also Allegra M. McLeod,

prisons and jails, broader reliance on punitive policing to handle myriad social problems leads to routine use of excessive police force and to volatile, often violent, police-citizen relations.<sup>13</sup>

Yet, despite persistent and increasing recognition of the problems that attend incarceration and punitive policing in the United States, criminal law and criminological scholarship almost uniformly stop short of considering how the professed goals of the criminal law—principally deterrence, incapacitation, rehabilitation, and retributive justice—might be approached by means entirely apart from criminal law enforcement.<sup>14</sup> Abandoning carceral punishment and punitive policing remains generally unfathomable.<sup>15</sup>

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*Regulating Sexual Harm: Strangers, Intimates and Social Institutional Reform*, 102 CAL. L. REV. 1553, 1557 (2014) (exploring the various criminogenic effects of U.S. criminal sex offense regulations).

13. See Paul Butler, *Stop and Frisk: Sex, Torture, Control*, in LAW AS PUNISHMENT / LAW AS REGULATION 155, 155 (Austin Sarat et al. eds., 2011) (“[S]tops and frisks cause injuries similar to those of illegal forms of tortures . . .”).
14. See, e.g., MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 239 (2006) (proposing that “the U.S. penal system [be infused] with an ethos of respect and dignity for its millions of prisoners, parolees, probationers, and former prisoners that is sorely lacking”); DAVID M. KENNEDY, *DON’T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA* (2011) (exploring a model for reducing incarceration focused on collaboration between police, prosecutors, and community members to agree upon cessation of criminal activity with provision of social services and under threat of severe criminal enforcement in the event of gang member noncompliance); MARK A.R. KLEIMAN, *WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT* 115 (2009) (proposing a regime of intensive probation supervision backed by flash incarceration as a manner of reducing reliance on imprisonment); FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK’S LESSONS FOR URBAN CRIME AND ITS CONTROL* 131–32, 147–50, 194–95 (2012) (arguing that New York City-style “hot spot” and other associated policing tactics stand to reduce crime and incarceration and contending that no other factor can explain New York City’s concomitant drop in crime and incarceration during a period when other parts of the country experienced increases in incarceration); see also PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 4 (2009) (“‘Criminal justice’ is what happens after a complicated series of events has gone bad. It is the end result of failure—the failure of a group of people that sometimes includes, but is never limited to, the accused person. What I am not saying: prison should be abolished; people should not be held accountable for their actions. I don’t believe that. . . . I will never deny that society needs an official way to punish . . .”); David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 41 (2011) (proposing reduced sentence lengths, direction of resources to address root causes of crime, and expanded empathy, but noting that “incarceration is frequently necessary” for the “half of the incarcerated population [that is] serving time for violent crimes”); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 603 (1996) (“The law can discourage criminality not just by ‘raising the cost’ of such behavior through punishments, but also through instilling aversions to the kinds of behavior that the law prohibits.”); Louis Michael Seidman, *Hyper-Incarceration and Strategies of Disruption: Is There a Way Out?*, 9 OHIO ST. J. CRIM. L. 109 (2011) (exploring various reformist responses to large-scale use of incarceration including criminal procedure liberalism, experimental prison education programs, drug courts, and ideology critique, among other efforts, and finding there “is little

If prison abolition is conceptualized as an immediate and indiscriminate opening of prison doors—that is, the imminent physical elimination of all structures of incarceration—rejection of abolition is perhaps warranted. But abolition may be understood instead as a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement. These institutional alternatives include meaningful justice reinvestment to strengthen the social arm of the state and improve human welfare; decriminalizing less serious infractions; improved design of spaces and products to reduce opportunities for offending; urban redevelopment and “greening” projects; proliferating restorative forms of redress; and creating both safe harbors for individuals at risk of or fleeing violence and alternative livelihoods for persons otherwise subject to criminal law enforcement. When abolition is conceptualized in these terms—as a transformative goal of gradual decarceration and positive regulatory substitution wherein penal regulation is recognized as morally unsustainable—then inattention to abolition in criminal law scholarship and reformist discourses comes into focus as a more troubling absence.<sup>16</sup> Further, the rejection of abolition as a horizon for reform mistakenly assumes that reformist critiques concern only the occasional, peripheral excesses of imprisonment and prison-backed policing rather than more fundamentally impugning the core operations of criminal law enforcement, and therefore requiring a departure from prison-backed criminal regulation to other regulatory frameworks.

This Article thus introduces to legal scholarship the first sustained discussion of what I will call a “prison abolitionist framework” and a “prison abolitionist ethic.” By a “prison abolitionist framework,” I mean a set of principles and positive projects oriented toward substituting a constellation of other regulatory and social projects for criminal law enforcement. By a “prison abolitionist ethic,” I intend to invoke and build upon a moral orientation elaborated in an existing

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reason . . . to be hopeful about the possibilities of change”); Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, in FORGIVENESS, MERCY AND CLEMENCY 16, 31 (Austin Sarat & Nasser Hussain eds., 2007) (“Given the predictability of an ever-upward tending ratchet of punishment . . . we need some counterratchet, some way of checking this tendency and working against it. I contend that the ideal of mercy—taken quite self-consciously from the very religious tradition that contributes to retributivism’s ratchet—is that necessary counterbalance. . . . [M]ercy is [a] virtue that can be cultivated not only by the actors who exercise discretion within the criminal justice system but also by the general public . . .”).

15. See, e.g., DAVIS, *supra* note 1, at 9–10 (“[T]he prison is considered an inevitable and permanent feature of our social lives. . . . In most circles prison abolition is simply unthinkable and implausible. Prison abolitionists are dismissed as utopians and idealists whose ideas are at best unrealistic and impracticable, and, at worst, mystifying and foolish.”).
16. See, e.g., Liat Ben-Moshe, *The Tension Between Abolition and Reform*, in THE END OF PRISONS: REFLECTIONS FROM THE DECARCERATION MOVEMENT 83, 85–87, 92 (Mechthild E. Nagel & Anthony J. Nocella II eds., 2013).

body of abolitionist writings and nascent social movement efforts, which are committed to ending the practice of confining people in cages and eliminating the control of human beings through imminently threatened police use of violent force.<sup>17</sup> I argue that abolition in these terms issues a more compelling moral, legal, and political call than has been recognized to date.

Prison abolition—both as a body of critical social thought and as an emergent social movement—draws on earlier abolitionist ideas, particularly the writings of W.E.B. Du Bois on the abolition of slavery.<sup>18</sup> According to Du Bois, to be meaningful, abolition required more than the simple eradication of slavery; abolition ought to have been a positive project as opposed to a merely negative one.<sup>19</sup> Du Bois wrote that simply declaring an end to a tradition of violent forced labor was insufficient to abolish slavery.<sup>20</sup> Abolition instead required the creation of new democratic forms in which the institutions and ideas previously implicated in slavery would be remade to incorporate those persons formerly enslaved and to enable a different future for all members of the polity.<sup>21</sup> To be meaningful, the abolition of slavery required fundamentally reconstructing social, economic and

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17. See, e.g., Reina Gossett & Dean Spade, *No One Is Disposable: Everyday Practices of Prison Abolition* (2014), available at <http://bcw.barnard.edu/event/no-one-is-disposable-everyday-practices-of-prison-abolition>.

18. Ben-Moshe, *supra* note 16, at 85.

19. See W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (Transaction Publishers 2013) (1935). Du Bois explains: “The South . . . opposed . . . education, opposed land and capital. . . and violently and bitterly opposed any political power. It fought every conception inch by inch: no real emancipation, limited civil rights. . . .” *Id.* at 166. Du Bois concludes: “Slavery was not abolished even after the Thirteenth Amendment. There were four million freedmen and most of them on the same plantation, doing the same work that they did before emancipation . . . .” *Id.* at 169. In response to the question of how freedom was to “be made a fact,” Du Bois wrote: “It could be done in only one way. . . . They must have land; they must have education.” *Id.* “The abolition of slavery meant not simply abolition of legal ownership of the slave; it meant the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States.” *Id.* at 170.

20. See *id.* at 175 (citing with approval Charles Sumner’s exhortation that with emancipation, the work of abolition “is only *half done*”).

21. See *id.* at 194–95 (discussing the potential, and ultimate, abolition of the Freedmen’s Bureau, “the most extraordinary and far-reaching institution of social uplift that America has ever attempted,” the aim of which was to transition refugees and free persons “from a feudal agrarianism to [more equitable and just] modern farming and industry”); see also *id.* at 198 (“For the stupendous work which the Freedmen’s Bureau must attempt, it had every disadvantage . . . . It was so limited in time that it had small chance for efficient and comprehensive planning. It had at first no appropriated funds . . . . Further than this it had to use a rough military machine for administrating delicate social reform.”). “The Freedmen’s Bureau did an extraordinary piece of work but it was but a small and imperfect part of what it might have done if it had been made a permanent institution, given ample funds for operating schools and purchasing land . . . .” *Id.* at 204.

political arrangements.<sup>22</sup> In the aftermath of slavery in the United States, reconstruction fell far short of this mark in many respects, and criminal law administration played a central role in the brutal afterlife of slavery.<sup>23</sup> The work of abolition remained then—and arguably still remains today—to be completed. Confronting criminal law’s continuing violence is an important part of that undertaking.

Along these lines, then, a prison abolitionist framework involves initiatives directed toward positive rather than exclusively negative abolition. A prison abolitionist framework entails, more specifically, developing and implementing other positive substitutive social projects, institutions, and conceptions of regulating our collective social lives and redressing shared problems—interventions that might over the longer term render imprisonment and criminal law enforcement peripheral to ensuring relative peace and security. Efforts of prison abolitionist organizations, such as Critical Resistance and the Prison Moratorium Project, to both oppose imprisonment and enable access to food, shelter, community-based mediation, public safety, and well-being without penal intervention exemplify this orientation towards positive abolition.<sup>24</sup> Conceived of as such, abolition is a matter both of decarceration and substitutive social—not penal—regulation.

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22. *See id.* at 213 (“[Abolition required] civil and political rights, education and land, as the only complete guarantee of freedom, in the face of a dominant South which hoped from the first, to abolish slavery only in name.”).

23. *See id.* at 451 (“The whole criminal system came to be used as a method of keeping Negroes at work and intimidating them. Consequently there began to be a demand for jails and penitentiaries beyond the natural demand due to the rise of crime.”).

24. *See, e.g., About*, CRITICAL RESISTANCE, <http://criticalresistance.org/about> (last visited Apr. 11, 2015). Critical Resistance’s Vision Statement reads as follows:

Critical Resistance’s vision is the creation of genuinely healthy, stable communities that respond to harm without relying on imprisonment and punishment. We call our vision abolition, drawing, in part from the legacy of the abolition of slavery in the 1800’s. As PIC [prison industrial complex] abolitionists we understand that the prison industrial complex is not a broken system to be fixed. The system, rather, works precisely as it is designed to—to contain, control, and kill those people representing the greatest threats to state power. Our goal is not to improve the system even further, but to shrink the system into non-existence. We work to build healthy, self-determined communities and promote alternatives to the current system.

*Id.*

The Prison Moratorium Project also seeks to proliferate responses to interpersonal conflict and forms of community flourishing that do not rely on the penal arm of the state. The Prison Moratorium Project organizes boycotts of further prison and jail construction, but also works to empower community members to resolve disputes through means other than criminal law enforcement, and to expand access to education and social institutions apart from policing and penal interventions. *Prison Moratorium Project*, SOC. JUSTICE MOVEMENTS, [http://socialjustice.ccnmtl.columbia.edu/index.php/Prison\\_Moratorium\\_Project](http://socialjustice.ccnmtl.columbia.edu/index.php/Prison_Moratorium_Project) (last visited Apr. 11, 2015).

In contrast to leading scholarly and policy efforts to reform criminal law, abolition decidedly does not seek merely to replace incarceration with alternatives that are closely related to imprisonment, such as punitive policing, noncustodial criminal supervision, probation, civil institutionalization, and parole.<sup>25</sup> Abolition instead entails a rejection of the moral legitimacy of confining people in cages, whether that caging is deemed “civil” or whether it follows a failure to comply with technical terms of supervised release or a police order.<sup>26</sup> So too the positive project of abolition addressed in this Article is decidedly not an effort to replicate the institutional transfer that occurred in the aftermath of the deinstitutionalization of mental institutions.<sup>27</sup> An abolitionist framework requires positive forms of social integration and collective security that are not organized around criminal law enforcement, confinement, criminal surveillance, punitive policing, or punishment.

This distinction between substitutive nonpenal social regulation and noncustodial (but still criminal) supervision is an important one because the use of quasi-criminal noncustodial supervisory preventive measures dramatically increased alongside (and as an extension of) prison-based punishment during the late twentieth and early twenty-first centuries.<sup>28</sup> These purportedly preventive measures include stop and frisk policing, noncustodial criminal supervision, registration requirements for people convicted of certain crimes (especially sex-related offenses),<sup>29</sup> and preventive detention.<sup>30</sup> These punitive preventive measures—often referred to as “preventive justice” interventions—have

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25. See, e.g., KLEIMAN, *supra* note 14; ZIMRING, *supra* note 14, at 131–32, 147–50; see also Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 614–15 (2014) (exploring how misdemeanor case processing involves a largely noncustodial criminal supervisory regime of “managing people over time through engagement with the criminal justice system”).

26. See generally Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751 (2006) (revealing that the aggregate rate of involuntary institutional confinement over the course of the twentieth century remained more constant than previously recognized, if confinement is taken to include both commitment to mental hospitals, as well as incarceration in prisons and jails).

27. See, e.g., Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1 (2012); Robert Weisberg, *Restorative Justice and the Danger of “Community”*, 2003 UTAH L. REV. 343, 364.

28. See generally Bernard E. Harcourt, *Punitive Preventive Justice: A Critique*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 252 (Andrew Ashworth et al. eds., 2013) (detailing the expanded use of punitive preventive measures, comparing the purported efficacy of such measures with the empirical data, and arguing that the need for such measures is overstated and really a product less of crime reduction and more, as with prisons generally, of control).

29. See, e.g., Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CAL. L. REV. 1553, 1573–80 (2014).

30. See ANDREW ASHWORTH & LUCIA ZEDNER, PREVENTIVE JUSTICE 144–70 (2014).

generated a body of predominantly critical scholarship.<sup>31</sup> This critical scholarship identifies how these contemporary punitive preventive interventions eviscerate important liberty interests and violate basic criminal rule of law principles, primarily by imposing significant adverse consequences before a meaningful, procedurally regular finding of guilt.<sup>32</sup> Much of this work also considers what procedural protections would be required to render such preventive restraints more just.<sup>33</sup>

Yet, just as scholars addressing overincarceration and overcriminalization in the United States tend to not consider abolition as a reformist framework, or to engage reformist strategies that operate entirely separate from criminal law enforcement, so too the preventive justice literature hardly entertains preventive justice's possible manifestations outside the context of criminal and quasi-criminal law enforcement or punitive prevention.<sup>34</sup> Nor does this important body of work, for the most part, consider how the problems associated with punitive prevention (from its procedural laxity to its broader injustice) run from peripheral exercises of punitive preventive measures all the way to criminal law enforcement's core practices.<sup>35</sup>

But preventive justice, in its overlooked iterations—outside the criminal law context—may begin to illuminate how it might be possible to rely radically less on criminal law enforcement to serve the ends of security and collective peace. This neglected version of preventive justice, which focuses on social rather than penal projects, is consistent with (even essential to) an abolitionist framework and may be understood to date back as far as to the late eighteenth and early nineteenth centuries, a period preceding the establishment of professional police forces and large prison and jail systems.<sup>36</sup> During this period, social reformers, including most famously Jeremy Bentham, contemplated how to maintain peace

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31. See, e.g., PREVENTION AND THE LIMITS OF THE CRIMINAL LAW, *supra* note 28.

32. See *id.*

33. See ASHWORTH & ZEDNER, *supra* note 30, at 261 (“The general conclusion is that there should be no deprivation of liberty without the provision of appropriate procedural safeguards.”).

34. See, e.g., *id.* at 2–7 (explaining that those preventive approaches that do not involve criminal regulatory or quasi-criminal regulatory coercion are generally beyond the scope of the relevant extant scholarship).

35. *But see* Frederick Schauer, *The Ubiquity of Prevention*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW, *supra* note 28, at 12, 22.

36. See, e.g., GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 20–21 (1988) (“After intense debate, a permanent municipal public police force was created in London in 1829. . . . Drawing on ideas of the utilitarian philosophers . . . the British police were to be unarmed, uniformed and on duty 24 hours a day throughout the city. . . . Advocates of this system argued that it was more consistent with British traditions of liberty, and more humane and effective, to prevent crime from ever occurring. The alternative was to rely on draconian punishment after the fact. . . .”).

and security without unduly imperiling individual freedom and without involving professional police and security forces, let alone massive networks of criminal detention facilities.<sup>37</sup> Quite separate from Bentham's famous plans for a panoptic prison, this social reform project sought to prevent crime and harm without involving what we now understand as criminal law enforcement.<sup>38</sup> Crime prevention, as early reformers conceptualized it, ought to be realized in large part through social projects that reduced risks of harm and engaged people in common endeavors through infrastructure, education, and social integration, not primarily through punitive policing or prison-backed punishment.<sup>39</sup> Bentham called these efforts "indirect legislation" to capture the concept of governmental interventions that operated "off the beaten track" to shape socially constructive, peaceable interaction at a distance by "triggering . . . remote effects."<sup>40</sup> In contrast, William Blackstone's conception of preventive justice centered on "obliging those persons whom there is a probable ground to suspect of future misbehavior to . . . give full assurance . . . that such offence as is apprehended shall not happen . . ."<sup>41</sup> But preventive justice in this alternative register invoked by Bentham, and focused on a broader regulatory environment separate from criminal law enforcement (and also separate from characterological assessments of criminality of the sort Blackstone imagined), operated little, if at all, with recourse to instruments of the criminal process.<sup>42</sup>

Admittedly, much of Bentham's writings on regulating crime are disturbing, even distinctly bizarre. For instance, he wrote extensively of tattooing all British subjects for identification purposes (and to prevent crime).<sup>43</sup> The purpose of invoking this earlier body of thought, though, is not to defend it in its entirety but to summon an alternative tradition of harm and crime prevention focused on addressing violence and social discord through socially integrative and transform-

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37. See JEREMY BENTHAM, *Of Indirect Means of Preventing Crimes*, in A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Wilfrid Harrison ed., 1760) (1948); see also GARLAND, *supra* note 5, at 31 (examining how the character of crime control has shifted slowly over the past two centuries "from being a generalized responsibility of citizens and civil society to being a specialist undertaking largely monopolized by the state's [criminal] law-enforcement system").

38. See Philip Schofield, *Panopticon*, in BENTHAM: A GUIDE FOR THE PERPLEXED 70 (2009).

39. See BENTHAM, *supra* note 37; GARLAND, *supra* note 5, at 31.

40. Stephen G. Engelmann, "Indirect Legislation": Bentham's Liberal Government, 35 POLITY 369, 377 (2003).

41. BLACKSTONE, *supra* note 2, at \*251.

42. See, e.g., Engelmann, *supra* note 40, at 372 ("For Bentham, the contours of any subject who can be freed or chained are drawn entirely by an existing regulatory environment. He aspires to better arrange what he sees as a field of practices that supplies the very meanings of interference and laissez-faire.").

43. See *id.* at 371.

ative projects aside from criminal law enforcement, projects within which people are able to more equitably and freely govern themselves.<sup>44</sup> At this earlier time, the notion that order would be maintained primarily by punitive policing and prison-based punishment remained highly controversial, too similar to tyranny to obtain much support.<sup>45</sup>

At present, this often-overlooked form of crime prevention is manifest on a small, incipient scale in a range of efforts to shift resources from criminalization to other social and political projects. These efforts simultaneously aim to prevent theft, violence, and other criminalized conduct, through empowerment and movement building among vulnerable groups, urban redevelopment, product design, institutional design, and alternative livelihoods programs.<sup>46</sup> Whereas the interventions typically captured under the rubric of preventive justice generally aim to avert harmful conduct before it occurs by targeting persons believed to be prone to criminal offending, what I will call grounded preventive justice may be understood to operate through this variety of measures not engaged at all with the criminal process. These structural reform measures focus instead on expanding the space in which people are safe from interpersonal harm and are able to forge relationships of greater equality. These measures are less heavily overshadowed by the legacies of racial and other forms of subordination too often perpetuated in the United States through criminal law enforcement. Preventive justice may be reconceptualized in these terms as a crucial component of an abolitionist framework, both in its critical analysis of punitive preventive forms of state intervention and in this overlooked alternative iteration as grounded noncriminal prevention through institutional and structural reforms.

Accordingly, this Article explores these two discourses—prison abolition and preventive justice—seldom considered in tandem, in order to make vivid the promise of abolition as a manner of envisioning meaningful criminal law reform, as well as the related possibilities of crime prevention focused on structural reform rather than individualized criminal targeting. Prison abolition, on this account, is an aspirational ethical, institutional, and political framework that aims to funda-

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44. See, e.g., P. COLQUHOUN, A TREATISE ON THE POLICE OF THE METROPOLIS 594 (7th ed. 1806) (showing that Scottish Magistrate Colquhoun's account of "prevention" of crime and "policing" focused on an array of regulations including lighting, paving, coach stands, and governance of markets). But see Engelmann, *supra* note 40, at 370 n.1; *id.* at 383 (explaining how Bentham envisioned tattooing would improve social trust broadly, wherein any social encounter could be entered with the following assuring words, as Bentham wrote: "Sir, I don't know you, but shew me your mark, and it shall be as you desire") (internal quotation marks omitted).

45. See, e.g., SELECT COMMITTEE ON THE POLICE OF THE METROPOLIS, THIRD REPORT, 1818, H.C. 32 (U.K.); ASHWORTH & ZEDNER, *supra* note 30, at 37.

46. See *infra* Part IV.

mentally reconceptualize security and collective social life, rather than simply a plan to tear down prison walls. As such, abolition seeks to ultimately render “prisons obsolete.”<sup>47</sup>

Before proceeding further, it bears noting that there may be, in the end, some people who are so dangerous to others that they cannot live safely among us, those rare persons referred to in abolitionist writings as “the dangerous few.”<sup>48</sup> Who and how many are the dangerous few? The answer to this question is by no means self-evident but its complete and final resolution ought not to interfere with serious engagement with abolitionist analysis, given that there are many millions of the one in thirty five American adults presently living under criminal supervision who fall outside any such small category that may exist.<sup>49</sup> U.S. jails, and to a lesser extent U.S. prisons, house numerous people who have never committed acts of violence or perpetrated serious harm against others at all.<sup>50</sup> Decarceration as it relates to this population is relatively less controversial, as there are many thousands of people incarcerated in this category that are plainly outside any plausible definition of the dangerous few.<sup>51</sup>

Further, the category of the dangerous few is absolutely not reducible to those individuals who are presently incarcerated in state prisons after being convicted of violent crimes—by some estimates about half of the U.S. prison population.<sup>52</sup> Many persons convicted of violent offenses have not even committed what are commonly understood as acts of violence: Possession of a gun or statutory rape

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47. See DAVIS, *supra* note 1 (introducing a theory of the possible obsolescence of prisons in her path-breaking abolitionist account).

48. See PRISON RESEARCH EDUC. ACTION PROJECT, *INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS* 81, 135 (Mark Morris ed., 1976). I use this terminology—“the dangerous few”—because of its prominence in certain strands of abolitionist discourse and because it captures succinctly the anticipated objection of a critic who resists an abolitionist framework in virtue of a concern for public safety. There is reason, though, to be skeptical of this phrasing in virtue of the amorphous bogeymen it conjures and because of its potential unstated raced, classed, and other assumptions.

49. See GLAZE & KAEBLE, *supra* note 6.

50. See MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 258 (2015) (“[N]umerous people are serving time today for nonviolent offenses, many of them property or petty drug offenses, that would not warrant a sentence in many other countries.”).

51. See, e.g., John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1088 (2013) (explaining that a relatively small proportion of prison growth is attributable to the incarceration of low-level nonviolent drug offenses).

52. See GOTTSCHALK, *supra* note 50, at 169 (“[O]n closer inspection, all ‘violent’ offenders are not necessarily what they first seem.”). As Jonathan Simon has explained, “violence is a much more capacious legal category than most people assume.” Leon Neyfakh, *OK, so Who Gets to Go Free?*, SLATE (Mar. 4, 2015, 3:37 PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/03/prison\\_reform\\_releasing\\_only\\_nonviolent\\_offenders\\_won\\_t\\_get\\_you\\_very\\_far.html](http://www.slate.com/articles/news_and_politics/crime/2015/03/prison_reform_releasing_only_nonviolent_offenders_won_t_get_you_very_far.html).

are often classified as violent crimes.<sup>53</sup> Additionally, homicide in the United States and other crimes properly categorized as violent are often a product of participation in illegal economies where the only means of dispute resolution may involve violence.<sup>54</sup> Enabling other livelihoods outside criminalized markets, and decriminalizing certain narcotics markets, would reduce considerably the dangers those criminalized livelihoods pose.<sup>55</sup> Participants in those markets are thus not properly understood as part of the dangerous few. Their criminal conduct would be displaced by a wider embrace of a positive substitutive abolitionist program.

Others who are convicted of crimes of violence are not especially dangerous and would not perpetrate such violence if they had a means of self-support or means of mental health care or other necessary care that would enable them to avoid criminal process contact in the future.<sup>56</sup> This point is powerfully conveyed by the experience of those who committed heinous, violent crimes as young people—including murders, carjackings, beheadings, and torture—after which these individuals moved on to full, productive, even altruistic lives of service to others through contributions to social justice, culture, business, and the arts.<sup>57</sup>

Moreover, current enforcement patterns disproportionately focus on certain forms of often racialized criminal threat and ignore altogether other forms of grave interpersonal harm. Racially targeted policing and racial disproportionality throughout the criminal process reflect how crime and threat are understood in reference to race in ways that exacerbate racialized police violence and distract attention entirely from actual locations of danger.<sup>58</sup> Many currently dangerous people who perpetrate vast economic harms, or abuse the vulnerable too afraid to seek redress, or wage unjust wars that kill many thousands, will never face

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53. See GOTTSCHALK, *supra* note 50, at 169; Neyfakh, *supra* note 52.

54. See GOTTSCHALK, *supra* note 50, at 276–77 (“[C]rime is distributed in highly unequal ways, and . . . unacceptably high rates of violent crime persist in certain urban neighborhoods. . . . The homicide victimization rate for young black men involved in criminally active groups in a high crime neighborhood on Chicago’s west side is 3,000 per 100,000, or about 600 times the national rate. Put another way, this is three times the risk of stepping on a landmine in Afghanistan, a real war zone.”) (citations omitted).

55. See *id.* at 278–79 (“If the United States is serious about addressing these high levels of concentrated violence, then it has to be serious about addressing the country’s high levels of inequality and concentrated poverty. . . . What we do know conclusively is that states and countries that spend more on social welfare tend to have lower incarceration rates, and high rates of inequality are associated with higher rates of imprisonment and higher rates of crime.”).

56. See *id.* at 169; Neyfakh, *supra* note 52.

57. See Brief of Former Juvenile Offenders Charles S. Dutton, et al. Amici Curiae in Support of Petitioners, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412), 2009 WL 2219302.

58. See, e.g., Devon Carbado, *Legalizing Racial Profiling* (forthcoming 2015) (draft on file with author).

punishment for their wrongdoing in the criminal process.<sup>59</sup> While racially targeted policing of minor offenses is rampant in many jurisdictions, the vast majority of rapes and sexual assaults go unaddressed, and many economic wrongs are not understood as dangerous or as crimes.<sup>60</sup>

But even those egregious forms of economic wrongdoing, like the harms perpetrated by Bernard Madoff and his associates, might well be better managed through other forms of preventive regulation than through incarcerating those individuals after the fact.<sup>61</sup> Similarly, other regulatory and social projects promise to reduce gun violence and other forms of interpersonal harm without invoking the criminal process at all.<sup>62</sup>

In short, there are many who have committed acts of violence but who, under circumstances of social coexistence enabled by positive abolition, would pose no threat of harm to themselves or others. A commitment to any significant decarceration, let alone abolition, entails more than simply eliminating incarceration for nonviolent, nonserious, nonfelony convictions,<sup>63</sup> or less serious felony convictions classified as violent.<sup>64</sup> Even people convicted of serious, violent felonies are not properly understood as the dangerous few and should be able to live their lives outside of cages. A commitment to any significant degree of decarceration requires a willingness to abandon managing perceived risks of vio-

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59. See, e.g., ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS (2013) (examining the dramatic under reporting and under enforcement of violations of criminal laws relating to rape and sexual assault).

60. See, e.g., *id.*; McLeod, *supra* note 29; Carbado, *supra* note 58.

61. See Associated Press, *Madoff Aide Gets 10 Years in Prison for Role in Fraud*, N.Y. TIMES (Dec. 8, 2014), <http://www.nytimes.com/2014/12/09/business/madoff-aide-gets-10-years-in-prison-for-role-in-fraud.html>.

62. See *infra* text accompanying notes 335 and 350–355.

63. See GOTTSCHALK, *supra* note 50, at 169 (“The proportion of people in prison for drug law violations because they were exclusively users amounts to 4 percent of drug offenders in state and federal prisons and just 1 percent of all prisoners.”).

64. See Dana Goldstein, *How to Cut the Prison Population by 50 Percent*, MARSHALL PROJECT (Mar. 4, 2015, 7:15 AM) (“To halve the prison population, sentencing would have to change not only for the so-called ‘non, non, nons’—non-violent, non-serious, and non-sex offender criminals—but also for some offenders convicted of violent crimes. . . . Simple math shows why violent offenders would have to be part of any serious attempt to halve the number of prisoners. Consider the nation’s largest incarcerated population, the 1,315,000 held in state prisons. Only 4 percent are there for drug possession. An additional 12 percent are incarcerated for drug sales, manufacturing, or trafficking. Eleven percent are there for public order offenses such as prostitution or drunk driving, and 19 percent for property crimes such as fraud and car theft, including some property crimes that many consider serious or violent, such as home invasion.”); see also Eric L. Sevigny & Jonathan P. Caulkins, *Kingpins or Mules: An Analysis of Drug Offenders Incarcerated in Federal and State Prisons*, 3 CRIMINOLOGY & PUB. POL’Y 401, 421–22 (2004) (finding that “unambiguously low-level drug offenders” comprise less than 6 percent of state inmates and less than 2 percent of federal inmates); GOTTSCHALK, *supra* note 50, at 259 (stating that “reducing the time served for a wider range of offenders is necessary”).

lence by banishing and relegating to civil death any person convicted of serious crime. Reducing social risk by physically isolating and caging entire populations is not morally defensible, even if abandoning such practices may increase some forms of social disorder.

If there are indeed some small subset of people properly denominated the dangerous few, they are only those who are intent on perpetrating acts of vicious harm against others such that they are an imminent threat to all those around them regardless of their circumstances. An abolitionist framework is not necessarily committed to denying the existence of these dangerous few persons, though the dangerous few are vastly outnumbered by many millions of nondangerous individuals living under criminal supervision and any such dangerousness on the part of those incarcerated currently is exacerbated by features of prison society that a wider embrace of an abolitionist ethic and framework would improve. Because any such dangerous few persons constitute at most only a small minority of the many millions of people under criminal supervision in the United States—the one of every thirty-five American adults under criminal supervision of some form<sup>65</sup>—the question of the danger these few may pose can be deferred for some time as decarceration could by political necessity only proceed gradually. And so the question of the dangerous few ought not to eclipse or overwhelm the urgency of a thorough consideration of abolitionist analyses and reformist projects of displacement of criminal regulation by other regulatory approaches.

In any event, an abolitionist ethic recognizes that even if a person is so awful in her violence that the threat she poses must be forcibly contained, this course of action ought to be undertaken with moral conflict, circumspection, and even shame, as a choice of the lesser of two evils, rather than as an achievement of justice. To respond to victims of violence justly would be to make them whole and to address forms of collective vulnerability so those and other persons are less likely to be harmed again. Even when confronting the dangerous few, on an abolitionist account, justice is not meaningfully achieved by caging, degrading, or even more humanely confining, the person who assaulted the vulnerable among us.

This Article develops these arguments in five parts. Part I aims to motivate the case for a prison abolitionist ethic. Part II argues that an abolitionist ethic promises to address U.S. criminal law administration's most significant problems in ways importantly distinct from (and in certain respects superior to, though not necessarily exclusive of) a reformist framework. Part III addresses the preventive justice literature and reveals how a largely overlooked account of prevention in a structural register serves as an important supplement to the current body of critical

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65. See GLAZE & KAEBLE, *supra* note 6.

work centered on punitive preventive measures, as well as to an abolitionist framework. Part IV examines how prevention in this alternative register functions on the ground in a range of settings as an incipient abolitionist framework. Part V responds preliminarily to an anticipated retributive objection, in part through an account of what I will call “grounded justice.”

## I. PRISON ABOLITION

Criminal punishment organized around incarceration in the United States, as well as incarceration’s corollaries (punitive policing, arrest, probation, civil commitment, parole), subject human beings to extreme violence, dehumanization, racialized degradation and indignity, such that prison abolition ought to register as a more compelling call than it has to date.<sup>66</sup> At the same time, the use of imprisonment as a means of achieving collective peace and security, as well as meaningful retributive justice, ought to be called into serious doubt.<sup>67</sup>

Prison abolition seeks to end the use of punitive policing and imprisonment as the primary means of addressing what are essentially social, economic, and political problems. Abolition aims at dramatically reducing reliance on incarceration and building the social institutions and conceptual frameworks that would render incarceration unnecessary. Abolition is not a simple call for an immediate opening or tearing down of all prison walls, but entails an array of alternative nonpenal regulatory frameworks and an ethic that recognizes the violence, dehumanization, and moral wrong inherent in any act of caging or chaining—or otherwise confining and controlling by penal force—human beings. This holds true even in the case of those few people who may pose a severe, demonstrated danger to others and so, as the lesser of two evils, must be convicted and the threat they pose contained.<sup>68</sup>

This Part explores the entrenched structural problems that recommend abolition, along with its theoretical, legal, and political contours and implications. I will first examine the violence, dehumanization, and racial subordination inherent in the basic structural parameters of imprisonment and punitive policing in the United States that motivate the turn toward an abolitionist framework. One problem with more moderate reformist accounts (of which most criminal legal scholarship consists) is that they fail to identify the basic structural terms of punitive policing and incarceration in the U.S. that render these practices

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66. See COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, CONFRONTING CONFINEMENT 52 (2006).

67. See, e.g., PETTIT, *supra* note 7, at 9; RUSSELL SAGE FOUND., *supra* note 12.

68. See *supra* text accompanying notes 63–64.

fundamentally indefensible, and instead assume that the problematic features of these practices are more peripheral and subject to elimination or thoroughgoing change. As a consequence, moderate reformist accounts are limited to recommending only minor revisions to the fundamental structures of incarceration and punitive policing practices—which are not susceptible to meaningful change without far more fundamental reconstitution.<sup>69</sup>

This Part begins by mapping the structural problems and inherent dynamics of penal practices that create and maintain patterns of dehumanization, violence, and racial subordination. It will then assess an abolitionist ethic with reference to economic and criminological analyses of incarceration’s purported crime-reductive effects.

### A. Violence and Dehumanization

Prisons are places of intense brutality, violence, and dehumanization.<sup>70</sup> In his seminal study of the New Jersey State Prison, *The Society of Captives*, sociologist Gresham M. Sykes carefully exposed how the fundamental structure of the modern U.S. prison degrades the inmate’s basic humanity and sense of self-worth.<sup>71</sup> Caged or confined and stripped of his freedom, the prisoner is forced to submit to an existence without the ability to exercise the basic capacities that define personhood in a liberal society.<sup>72</sup> The inmate’s movement is tightly controlled, sometimes by chains and shackles, and always by orders backed with the threat of force;<sup>73</sup> his body is subject to invasive cavity searches on command;<sup>74</sup> he is denied nearly all personal possessions; his routines of eating, sleeping, and bodily maintenance are minutely managed; he may communicate and interact

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69. See NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 154 (2014) (“Administrative tinkering does not confront the damning features of the American carceral state, its scale and its racial concentration . . . Without a normatively grounded understanding of racial violence, liberal reforms will do the administrative shuffle.”).

70. See COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, *supra* note 66, at 52.

71. See GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 79 (Princeton Univ. Press 2007) (1958).

72. See *id.*

73. See *Maryland General Assembly Status Report 2013*, WASH. POST, <http://apps.washingtonpost.com/g/page/local/maryland-general-assembly-status-report-2013/88> (last updated Apr. 9, 12:01 AM) (reporting Maryland House Bill 829, which would discourage shackling of pregnant inmates during childbirth, died in committee).

74. See *Florence v. Bd. of Chosen Freeholders of Burlington*, 132 S. Ct. 1510, 1525 (2012) (Breyer, J., dissenting) (upholding as reasonable under the Fourth Amendment a search upon admission to jail of a person mistakenly arrested that included “spreading and/or lifting his testicles to expose the area behind them and bending over and/or spreading the cheeks of his buttocks to expose his anus”) (quoting *Dodge v. Cnty. of Orange*, 282 F. Supp. 2d 41, 46 (S.D.N.Y. 2003)).

with others only on limited terms strictly dictated by his jailers; and he is reduced to an identifying number, deprived of all that constitutes his individuality.<sup>75</sup> Sykes's account of "the pains of imprisonment"<sup>76</sup> attends not only to the dehumanizing effects of this basic structure of imprisonment—which remains relatively unchanged from the New Jersey penitentiary of 1958 to the U.S. jails and prisons that abound today<sup>77</sup>—but also to its violent effects on the personhood of the prisoner:

[H]owever painful these frustrations or deprivations may be in the immediate terms of thwarted goals, discomfort, boredom, and loneliness, they carry a more profound hurt as a set of threats or attacks which are directed against the very foundations of the prisoner's being. The individual's picture of himself as a person of value . . . begins to waver and grow dim.<sup>78</sup>

In addition to routines of minute bodily control, thousands of persons are increasingly subject to long-term and near-complete isolation in prison. The Bureau of Justice Statistics has estimated that 80,000 persons are caged in solitary confinement in the United States, many enduring isolation for years.<sup>79</sup>

Solitary confinement routinely entails being locked for twenty-three to twenty-four hours per day in a small cell, between forty-eight and eighty square feet, without natural light or control of the electric light, and no view outside the

75. See SYKES, *supra* note 71, at 78–82.

76. *Id.* at 63–78.

77. In his *Introduction to the Princeton Classic Edition of The Society of Captives*, sociologist Bruce Western explains how Sykes identifies the core structure of imprisonment such that his analysis remains relevant to any assessment of the experience of incarceration today—an insight Western arrived at in part through teaching Sykes's classic study to a group of men incarcerated in the same prison Sykes's work addressed. Western writes:

In the summer of 2003 I taught an undergraduate criminology class to a group of prisoners at New Jersey State Prison—the site of Gresham Sykes' *Society of Captives*. The obvious relevance of the case study, its beautiful writing, and classic status all made *Captives* essential reading. . . . Sykes's survey of the pains of imprisonment resonated with the students' experience of incarceration. . . . Sykes's work captured basic truths about penal confinement, and the field research still rings true. . . . *The Society of Captives* remains a cornerstone of prison sociology and indispensable for those who would understand the current era of mass incarceration. These days, we tend to look in free society for the prison's significance. We study the prison's effects on crime rates, or poverty, or family life. Sykes draws us back inside the institution, delving into the internal logic of the prison society.

Bruce Western, *Introduction to the Princeton Classic Edition of GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF MAXIMUM SECURITY PRISON*, at ix–x (Princeton University Press 2007) (1958).

78. See SYKES, *supra* note 71, at 79.

79. See COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, *supra* note 66, at 52.

cell.<sup>80</sup> Persons so confined may be able to spend one hour per day in a “concrete exercise pen,” which, although partially open to the outdoors, is typically still configured as a cage.<sup>81</sup>

Raymond Luc Levasseur, who was held in solitary confinement at the Federal Correctional Complex at Florence, Colorado, a prison devoted to solitary confinement (also called administrative segregation (ADX)), wrote of the first year of his isolation:

Picture a cage where top, bottom, sides and back are concrete walls. The front is sliced by steel bars. . . . The term “boxcar” is derived from this configuration: a small, enclosed box that [does not] move. . . . The purpose of a boxcar cell is to gouge the prisoner’s senses by suppressing human sound, putting blinders about our eyes and forbidding touch. . . . It seems endless. Each morning I look at the same gray door and hear the same rumbles followed by long silences. It is endless. . . . I see forced feedings, cell extractions . . . . Airborne bags of shit and gobs of spit become the response of the caged. The minds of some prisoners are collapsing in on them. . . . One prisoner subjected to four-point restraints (chains, actually) as shock therapy had been chewing on his own flesh. Every seam and crack is sealed so that not a solitary weed will penetrate this desolation . . . . When they’re done with us, we become someone else’s problem.<sup>82</sup>

Following thirteen years of solitary confinement, Levasseur was released from prison in 2004.<sup>83</sup>

The images that follow are not primarily intended to render more vivid this exploration of incarceration and punitive policing, but instead are incorporated to illustrate an important part of this Article’s argument: We must look at what these practices actually entail, especially because so often the ideology of criminal regulation renders much of the criminal process and its violent consequences opaque or even invisible to us. By removing the violent results of these regulatory approaches from the center of our attention, and often removing them entirely from our view, this same ideology persuades us of the necessity and relative harmlessness of incarceration and punitive policing. An abolitionist ethic, however, requires us to confront what penal regulation actually involves rather than assuming that creating a certain spatial distance—by putting particular persons in

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80. *See id.* at 57.

81. *Id.*

82. Raymond Luc Levasseur, *Trouble Coming Every Day: ADX—The First Year 1996*, in *THE NEW ABOLITIONISTS: (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS* 45, 47–48 (Joy James ed., 2005).

83. *See id.* at 45.

cages, or controlling individuals and communities through prison-backed police surveillance—satisfactorily addresses the social and political problems of violence, mental illness, poverty or joblessness, among others, that those persons and communities have come to represent.

This photograph portrays prisoners who are suffering from mental illness and subject to solitary confinement in an Ohio State Prison, held in cages for a “group therapy” session:



84

These persons’ bodies are revealed in this image as objects locked in isolated small spaces, shackled, rendered plainly less than human.

Cages are also used for booking mentally ill inmates in California prisons, as reflected in the record addressed in the U.S. Supreme Court’s opinion in *Brown v. Plata*:

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84. See *FRONTLINE: The New Asylums* (PBS television broadcast May 10, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/shows/asylums/view>.



85

This is a suicide watch cell, also used for isolation, in a state prison in California, drawn from a related court record:



86

In these cells, feces may be smeared on the walls as those detained mentally decompensate, the odor of rot and acute despair palpable.<sup>87</sup>

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85. See *Brown v. Plata*, 131 S. Ct. 1910, 1949–50 app. B–C (2011); see also Dave Gilson, *Slideshow: California's Jam-Packed Prisons*, MOTHER JONES, <http://www.motherjones.com/slideshows/2011/05/california-prison-overcrowding-photos/holding-cages> (last visited Apr. 11, 2015) (describing and displaying images from the record in *Brown v. Plata* not incorporated in the Court's opinion).

86. See sources cited *supra* note 85.

As incarcerated populations have increased, solitary confinement has emerged as a primary mechanism for internal jail and prison discipline, such that the actual number of individuals confined to a small cell for twenty-three hours per day remains unknown and may be significantly in excess of 80,000.<sup>88</sup> Some people are sentenced to “Super-Max” facilities that only contain solitary cells; other people are placed in solitary confinement as punishment for violating prison rules or for their own protection.

Stays in solitary confinement are often lengthy, even for relatively minor disciplinary rule violations, and may be indefinite. For example, one young prisoner caught with seventeen packs of Newport cigarettes was sentenced to fifteen days solitary confinement for each pack of cigarettes, totaling more than eight months of solitary confinement.<sup>89</sup> Another prisoner in New Jersey spent eighteen years in solitary confinement. Although his solitary confinement status was subject to review every ninety days, this prisoner explained that he eventually stopped participating in the reviews as he felt they were “a sham, with no real investigation,” and lost hope that he would ever be able to leave.<sup>90</sup>

Solitary confinement has become a widely tolerated and “regular part of the rhythm of prison life,”<sup>91</sup> yet this basic structure of prison discipline in the United States entails profound violence and dehumanization; indeed, solitary confinement produces effects similar to physical torture. Psychiatrist Stuart Grassian first introduced to the psychiatric and medical community in the early 1980s that prisoners living in isolation suffered a constellation of symptoms including overwhelming anxiety, confusion, hallucinations, and sudden violent and self-destructive outbursts.<sup>92</sup> This pattern of debilitating symptoms, sufficiently consistent among persons subject to solitary confinement (otherwise known as

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87. See *A Tour of East Mississippi Correctional Center*, ACLU, <https://www.aclu.org/prisoners-rights/tour-east-mississippi-correctional-facility> (last visited Apr. 11, 2015); see also Erica Goode, *Seeing Squalor and Unconcern in a Mississippi Jail*, N.Y. TIMES (June 7, 2014), <http://www.nytimes.com/2014/06/08/us/seeing-squalor-and-unconcern-in-southern-jail.html>

(“Open fires sometimes burn unheeded in the solitary-confinement units of the East Mississippi Correctional Facility, a privately run state prison in Meridian. . . . Inmates spend months in near-total darkness. Illnesses go untreated. Dirt, feces and, occasionally, blood are caked on the walls of cells.”).

88. Solitary confinement is used daily in immigration detention and local jails around the United States. See COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, *supra* note 66, at 53 (“[T]he growth rate in of the number of prisoners housed in segregation far outpaced the growth rate of the overall prison population . . .”).

89. See *id.* at 54.

90. *Id.* at 55.

91. *Id.* at 53.

92. See Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1983).

the Special Housing Unit (SHU)), gave rise to the designation of SHU Syndrome.<sup>93</sup>

Partly on this basis, the United Nations Special Rapporteur on Torture has found that certain U.S. practices of solitary confinement violate the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Punishment.<sup>94</sup> Numerous psychiatric studies likewise corroborate that solitary confinement produces effects tantamount to torture.<sup>95</sup> Bonnie Kerness, Associate Director of the American Friends Service Committee's Prison Watch, testified before the Commission on Safety and Abuse in America's Prisons that while visiting prisoners in solitary confinement, she spoke repeatedly "with people who begin to cut themselves, just so they can feel something."<sup>96</sup> Soldiers who are captured in war and subjected to solitary confinement and severe physical abuse also report the suffering of isolation to be as awful as, and even worse than, physical torture.<sup>97</sup>

But despite its more apparent horrors, solitary 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. Solitary confinement's justification and presumed efficacy flows from the assumed legitimacy of prison confinement in the first instance. Prison or jail confinement

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93. *See id.*

94. *See* Terri Judd, *UN Advisor Says Sending Muslim Cleric Abu Hamza to US Would Equal Torture*, INDEP. (Oct. 3, 2012), <http://www.independent.co.uk/news/uk/home-news/un-advisor-says-sending-muslim-cleric-abu-hamza-to-us-would-equal-torture-8194857.html>.

95. *See, e.g.*, TERRY KUPERS, *PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT* (1999); LORNA A. RHODES, *TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON* (2004); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Super-Max" Confinement*, 49 *CRIME & DELINQ.* 124 (2003); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 *N.Y.U. REV. L. & SOC. CHANGE* 477 (1997); *see also* Commonwealth of Pa. H.R., H. Democratic Policy Comm. Hearing, at 9 (2012) (stating that according to Psychiatrist Terry Kupers "most inmates in solitary confinement are released into society and emerge mentally destroyed and full of rage").

96. *COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS*, *supra* note 66, at 58.

97. Physician and Professor of Public Health Atul Gawande describes in his powerful essay, *Hellhole*, focused on solitary confinement, how Senator John McCain experienced his time in solitary confinement as a prisoner of war in Vietnam as, in McCain's own words, "an awful thing . . . . It crushes your spirit and weakens your resistance more effectively than any other form of mistreatment." Gawande clarifies that this statement of relative suffering "comes from a man who was beaten regularly; denied adequate medical treatment for two broken arms, a broken leg, and chronic dysentery; and tortured to the point of having an arm broken again." A U.S. military study of more than 150 naval aviators imprisoned during the Vietnam War, some of whom endured physical abuses even worse than those suffered by McCain, revealed that these persons too felt solitary confinement to be more or equivalently torturous to any physical agony they endured. Atul Gawande, *Hellhole*, *NEW YORKER*, Mar. 30, 2009, at 36.

isolates the detained individual from the social world he inhabited previously, stripping that person of his capacity to move of his own volition, to interact with others, and to exercise control over the details of his own life. Once that initial form of confinement and deprivation of basic control over one's own life is understood to be legitimate, solitary confinement merely applies the same approach to discipline within prison walls. But the basic physical isolation and confinement is already countenanced by the initial incarceration.

In addition to the dehumanization entailed by the regular and pervasive role of solitary confinement in U.S. jails, prisons, and other detention centers, the environment of prison itself is productive of further violence as prisoners seek to dominate and control each other to improve their relative social position through assault, sexual abuse, and rape. This feature of rampant violence, presaged by Sykes's account, arises from the basic structure of prison society, from the fact that the threat of physical force imposed by prison guards cannot adequately ensure order in an environment in which persons are confined against their will, held captive, and feared by their custodians.<sup>98</sup> Consequently, order is produced through an implicitly sanctioned regime of struggle and control between prisoners.<sup>99</sup>

Rape, in particular, is rampant in U.S. jails and prisons.<sup>100</sup> According to a conservative estimate by the U.S. Department of Justice, 13 percent of prison inmates have been sexually assaulted in prison, with many suffering repeated sexual assaults.<sup>101</sup> While noting that "the prevalence of sexual abuse in America's inmate confinement facilities is a problem of substantial magnitude," the Department of Justice acknowledged that "in all likelihood the institution-reported data significantly undercounts the number of actual sexual abuse victims in prison, due to the phenomenon of underreporting."<sup>102</sup> Although the Department had previously recorded 935 instances of confirmed sexual abuse for 2008, further analysis produced a figure of 216,000 victims that year (victims, not incidents).<sup>103</sup> These figures suggest an endemic problem of sexual violence in U.S. prisons and jails

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98. See SYKES, *supra* note 71, at 42–46.

99. See *id.*

100. See, e.g., Christopher Glazek, *Raise the Crime Rate*, 13 N+1 5 (2012); see also Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 2–3 (2011) (discussing the acute problems for LGBTQ prisoners and others vulnerable to sexual victimization behind bars).

101. See U.S. DEPT OF JUSTICE, Docket No. OAG-131, RIN 1105-AB34, PROPOSED NATIONAL STANDARDS TO PREVENT, DETECT, AND RESPOND TO PRISON RAPE UNDER THE PRISON RAPE ELIMINATION ACT (PREA), at 4 (Jan. 24, 2011) ("The total number of inmates who have been sexually assaulted in the past twenty years likely exceeds 1,000,000.").

102. *Id.* at 4, 6.

103. See Glazek, *supra* note 100, at 5.

produced by the structure of carceral confinement and the dynamics that inhere in prison settings.

In one notable case that makes vivid these underlying dynamics, Roderick Johnson sued seven Texas prison officials for failing to protect him from victimization by prison gang members who raped him hundreds of times and sold him between rival gangs for sex over the course of eighteen months.<sup>104</sup> Johnson, a gay man who had struggled with drug addiction, was incarcerated for probation violations following a burglary conviction.<sup>105</sup> Rape was so prevalent in the facility where Johnson was incarcerated that it had a relatively fixed price: A former prisoner witness explained to the judge and jury at the trial that a purchased rape in that prison cost between \$3 and \$7.<sup>106</sup> When Johnson sought protection from prison officials, he was told he would have to “fight or fuck.”<sup>107</sup>

Seeking to avoid liability at trial, one of the prison official defendants, Jimmy Bowman, explained that prison officials were not responsible for failing to protect Johnson because “an inmate has to defend himself.”<sup>108</sup> Richard E. Wathen, the assistant warden, conceded that “[p]rison . . . is a violent place,” but he testified that prison officials ought not to be held accountable under the Eighth Amendment for repeated gang rapes of prisoners if there was little officials could have done to prevent the abuse: “I believe that we did the right thing then, and I would make the same decision today. . . . There has to be some extreme threat before we put an offender in safekeeping.”<sup>109</sup>

In any event, safekeeping in many detention settings only amounts to solitary confinement. And though prisoners are less likely to be subject to rape if they are held in relative isolation for their own protection, they are likely to suffer other substantial psychological harm, as previously noted.<sup>110</sup> Ultimately, Johnson lost his civil case as the jury found for the prison officials.<sup>111</sup> After his trial, Johnson relapsed in his addiction recovery, reoffended by attempting to steal money

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104. See Adam Liptak, *Inmate Was Considered ‘Property’ of Gang, Witness Tells Jury in Prison Rape Lawsuit*, N.Y. TIMES (Sept. 25, 2005), [http://www.nytimes.com/2005/09/25/national/25rape.html?\\_r=0](http://www.nytimes.com/2005/09/25/national/25rape.html?_r=0).

105. See *id.*

106. See *id.*

107. Glazek, *supra* note 100, at 4.

108. Liptak, *supra* note 104.

109. *Id.* (quoting Richard E. Wathen) (internal quotation marks omitted).

110. See, e.g., Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (March 23, 2013), <http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html> (reporting that detainees, including those in civil immigration detention, are routinely placed in solitary confinement “for protective purposes when the immigrant was gay,” and that “[f]ederal officials confined Delfino Quiroz, a gay immigrant from Mexico, in solitary for four months in 2010, saying it was for his own protection”).

111. See *Johnson v. Texas*, 257 S.W.3d 778 (Tex. App. 2008).

(presumably to buy drugs), and returned to serve out a further nineteen-year prison sentence.<sup>112</sup>

These horrific experiences of incarceration are not simply outlier forms of dehumanization and violence, but are produced by the structure of U.S. imprisonment—by the basic manner in which caging or confining human beings strips individuals of their personhood and humanity, and sets in motion dynamics of domination and subordination. In research widely known as the Stanford Prison Experiment, psychologists Philip Zimbardo and Craig Haney further elucidated these structural dynamics.<sup>113</sup> Notwithstanding subsequent criticism, their experiment revealed how the basic structure of the prison in the United States tends toward dehumanization and violence.<sup>114</sup> At the outset of their now famous (or infamous) experiment, Zimbardo and Haney placed a group of typical college students into a simulated prison environment on Stanford University's campus.<sup>115</sup> Zimbardo and Haney randomly designated certain of the students as mock-prisoners and others as mock-guards.<sup>116</sup> What happened in the course of the six days that followed shocked the researchers, professional colleagues, and the general public.<sup>117</sup> Zimbardo and Haney found that their “institution’ rapidly developed sufficient power to bind and twist human behavior . . . .”<sup>118</sup> Mock-guards engaged with prisoners in a manner that was “negative, hostile, af-

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112. See *id.*; see also Michael Rigby, *Sexually Abused Texas Prisoner Loses Federal Lawsuit, Returns to Prison*, PRISON LEGAL NEWS (Sept. 15, 2006), <https://www.prisonlegalnews.org/news/2006/sep/15/sexually-abused-texas-prisoner-loses-federal-lawsuit-returns-to-prison>.

113. See Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 AM. PSYCHOLOGIST 709, 709 (1998).

114. See *id.*; see also *infra* notes 117–122 and accompanying text (discussing subsequent criticism of the Stanford Prison Experiment).

115. See Haney & Zimbardo, *supra* note 113, at 709.

116. See *id.*

117. The authors reflected on the experiment:

Otherwise emotionally strong college students who were randomly assigned to be mock-prisoners suffered acute psychological trauma and breakdowns. Some of the students begged to be released from the intense pains of less than a week of merely simulated imprisonment, whereas others adapted by becoming blindly obedient to the unjust authority of the guards. The guards, too . . . quickly internalized their randomly assigned role. Many of these seemingly gentle and caring young men, some of whom had described themselves as pacifists or Vietnam War “doves,” soon began mistreating their peers and were indifferent to the obvious suffering that their actions produced. Several of them devised sadistically inventive ways to harass and degrade the prisoners, and none of the less actively cruel mock-guards ever intervened or complained about the abuses they witnessed. . . . [The] planned two-week experiment had to be aborted after only six days because the experience dramatically and painfully transformed most of the participants in ways we did not anticipate, prepare for, or predict.

*Id.*

118. *Id.* at 710.

frontive, and dehumanizing,” despite the fact that the “guards and prisoners were essentially free to engage in any form of interaction.”<sup>119</sup> “[V]erbal interactions were pervaded by threats, insults and deindividuating references . . . . The negative, anti-social reactions observed were not the product of an environment created by combining a collection of deviant personalities, but rather the result of an intrinsically pathological situation which could distort and rechannel the behavior of essentially normal individuals.”<sup>120</sup>

The Stanford Prison Study has been criticized for methodological, ethical, and other shortcomings, but, despite its limitations, it attests to the dehumanizing dynamics that routinely surface in carceral settings.<sup>121</sup> According to some critics, for instance, the Stanford Prison Study reflects the participants’ obedience and conformity to stereotypic behavior associated with prisoners and guards, rather than an effect produced exclusively and directly by the institutional environment of prisons.<sup>122</sup> But even if the study’s critics are correct, it remains true that these same features of conformity and behavioral expectations obtain in actual prison environments. Therefore, whether the Stanford Prison Study measures institutional effects or the tendency of people in such institutional settings to conform to widely understood behavioral expectations associated with such settings, it is still the case that these settings will tend to reproduce powerful dynamics of dominance, subordination, dehumanization, and violence.

Of separate though equal concern, the violence and dehumanization of incarceration not only shapes those who are incarcerated, but produces destructive consequences for entire communities.<sup>123</sup> People leaving prison are marked by the experience of incarceration in ways that makes the world outside prison more violent and insecure; it becomes harder to find employment and to engage

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119. *Id.*

120. *Id.*

121. The primary criticism leveled against the study is that what the principal investigator Zimbardo primarily measured was not, as he claimed, the impact of prisons as an institution in producing cruelty, but rather the already engrained expectations study participants had about how persons in prison behave, as well as their desire to please him and follow his implicit instruction to mimic the comportment of prisoners and prison guards. *See, e.g.,* Ali Banuazizi & Siamak Movahedi, *Interpersonal Dynamics in a Simulated Prison: A Methodological Analysis*, 30 AM. PSYCHOLOGIST 152 (1975); Carlo Prescott, Op-Ed., *The Lie of the Stanford Prison Experiment*, STAN. DAILY, Apr. 28, 2005, at 4.

122. *See, e.g.,* Banuazizi & Movahedi, *supra* note 121.

123. *See* Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 389 (2005) (“The severity of the current sentencing regime has devastating effects on high-crime communities, including reduced employment opportunities, financial hardship, disruption suffered by the offender’s family and children, and the erosion of social capital and organization resulting from the aggregation of these effects over the community.”).

in collective social life because of the stigma of criminal conviction.<sup>124</sup> Further, incarcerating individuals has harmful effects on their families. The children, parents, and neighbors of prisoners suffer while their mothers, fathers, children, and community members are confined.<sup>125</sup> Coming of age with a parent incarcerated generally has a substantial and negative impact on the life chances of young people.<sup>126</sup>

It is insufficient to simply seek to reform the most egregious instances of violence and abuse that occur in prison while retaining a commitment to prison-backed criminal law enforcement as a primary social regulatory framework. Of course, less violence in these places would undoubtedly render prisons more habitable, but the degradation associated with incarceration in the United States is at the heart of the structure of imprisonment elucidated decades ago by Sykes: Imprisonment in its basic structure entails caging or imposed physical constriction, minute control of prisoners' bodies and most intimate experiences, profound de-personalization, and institutional dynamics that tend strongly toward violence. These dehumanizing aspects of incarceration are unlikely to be meaningfully eliminated in the U.S., following decades of failed efforts to that end, while retaining a commitment to the practice of imprisonment. This is especially so in the United States for reasons related to the specific historical and racially subordinating legacies of American incarceration and punitive policing. Two hundred and forty years of slavery and ninety years of legalized segregation, enforced in large measure through criminal law administration, render U.S. carceral and punitive policing practices less amenable to the reforms undertaken, for example, in Scandinavian countries, which have more substantially humanized their prisons.<sup>127</sup>

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124. See Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African-American Communities*, 56 STAN. L. REV. 1271, 1281 (2004) ("There is a social dynamic that aggravates and augments the negative consequences to individual inmates when they come from and return to particular neighborhoods in concentrated numbers.").

125. See *id.* at 1284 ("Separation from imprisoned parents has serious psychological consequences for children, including depression, anxiety, feelings of rejection, shame, anger, and guilt, and problems in school.").

126. See DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* (2004) (examining the stigma, shame, and hardship experienced by children of incarcerated parents).

127. See, e.g., Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109, 122 (2013) (discussing the Scandinavian prisoners' welfare movement, convened in part around a "Parliament of Thieves," which included furloughed prisoners along with criminologists and other experts, and which ultimately organized to substantially transform the conditions in prisons in Norway, Sweden and Denmark).

The following Subpart addresses the racial dynamics associated with incarceration and punitive policing in the United States and the practices of racial dehumanization through which U.S. carceral and policing institutions developed.

## B. Racial Subordination and the Penal State

Alongside imprisonment's general structural brutality, abolition merits further consideration as an ethical framework because of the racial subordination inherent in both historical and contemporary practices of incarceration and punitive policing. Michelle Alexander's *The New Jim Crow* popularized a critique of incarceration as a means of racialized social control in the United States, but Alexander's account was preceded and accompanied by earlier historical, psychological, literary, and sociological studies focused on how maintaining social order through incarceration emerged as a way to preserve the power relationships inherent in slavery and Jim Crow; these studies further demonstrate how punitive policing and imprisonment continue to be haunted at their very core by a dehumanizing inheritance of racialized violence.<sup>128</sup> These various accounts elucidate how in the immediate aftermath of the Civil War the ascription of criminal status—leading to the classification and separation of citizens and the curtailment of their rights of citizenship—served as an instance of the process Reva Siegel has called “preservation through transformation,” defined as the evolution of a mode of status-enforcing state action in response to contestation of the status' earlier manifestations (in this case, chattel slavery and later de jure racial segregation).<sup>129</sup> Because this history of slavery and Jim Crow's afterlife in criminal punishment practices is already addressed elsewhere, here I will only briefly

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128. See ALEXANDER, *supra* note 7, at 20–22.

129. See Reva B. Siegel, “The Rule of Love”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J., 2117, 2118–20 (1996); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997). Preservation through transformation does not entail simply that one status regime persist through time in an identical state; to locate a subordinating institution preserved though transformed is not to identify two absolutely equivalent entities. Disproportionate minority confinement (or hyper-incarceration, to invoke Loïc Wacquant's term) and slavery are not equivalent practices, just as wife battering protections and marital privacy prerogatives are not equivalent. See Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DÆDALUS, Summer 2010, at 74. Instead, the older systems of status privilege are translated and transposed into a new historical period in accord with a less controversial social idiom but in a manner that effectively protects prior subordinating relationships. See COLIN DAYAN, *THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS* (2011) (exploring how the legacies of past forms of violence and subordination create unacknowledged but pervasive effects in the present); SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA* (1997) (same); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (same).

examine the racially subordinating structure of punitive policing and imprisonment insofar as it is relevant to an abolitionist framework and ethic.<sup>130</sup>

The significance of this material from an abolitionist standpoint is that it further underscores the constitutive role of degradation in core U.S. incarceration and punitive policing structures, as they fail to treat targeted persons as fully human and thus deserving of equal dignity and regard. Understanding practices of punitive policing and imprisonment as a legal and political technology developed, in large part, both through and for degradation and racial subordination calls for greater scrutiny of these techniques. In particular, critical analysis must attend to whether the purported ambitions of these techniques are meaningfully achieved and separable so as to disconnect the present applications of punitive policing and incarceration from their brutal racialized pasts. In this Subpart, I argue that the racial legacies of incarceration and punitive policing infect these practices to their core by shaping the tolerated range of violence in criminal law enforcement contexts, as well as by coloring basic perceptions of and ideas about criminality and threat.

The racialized dimensions of punitive policing and incarceration are not, of course, merely historical; they are vividly present in, among other places, the continued killings of African American men by white police officers.<sup>131</sup> As recently

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130. See, e.g., ALEXANDER, *supra* note 7; HARTMAN, *supra* note 129; Wacquant, *supra* note 129.

131. See, e.g., Nusrat Choudhury, *Ferguson Is Everytown U.S.A.*, HUFFINGTON POST (Aug. 18, 2014, 7:41 PM), [http://www.huffingtonpost.com/nusrat-choudhury/ferguson-is-everytown-usa\\_b\\_5689547.html](http://www.huffingtonpost.com/nusrat-choudhury/ferguson-is-everytown-usa_b_5689547.html) (reporting the alarming frequency with which police kill unarmed African American men in the United States and examining a spate of such killings in the summer of 2014); Mark Govaki, *Family of Man Shot at Walmart Wants Answers, Surveillance Video*, DAYTON DAILY NEWS (Aug. 11, 2014, 6:49 PM), <http://www.daytondailynews.com/news/news/crime-law/family-of-man-shot-at-walmart-wants-answers-survei/ngzT4> (reporting on police killing in Beavercreek, Ohio, of John Crawford III, an African American man, in a Walmart who was holding a BB gun he picked up on a store shelf); Scott Martelle, *Why Don't We Know How Often a Michael Brown Is Killed by Police?*, Op-Ed., L.A. TIMES (Aug. 19, 2014, 12:28 PM), <http://www.latimes.com/opinion/opinion-la/la-ol-ferguson-police-killing-african-americans-20140819-story.html> (describing the killing of Michael Brown, an unarmed African American teenager, who was gunned down in the street in broad daylight in Ferguson, Missouri, by a police officer, with multiple shots fired through the young man's body and head); John A. Moreno, et al., *Police Fatally Shoot Man in South L.A.; Family Members Say He Was Lying Down When Shot*, KTLA 5 (Aug. 12, 2014, 5:01 AM), <http://ktla.com/2014/08/12/man-hospitalized-after-being-shot-by-police-in-south-l-a> (describing the police killing of Ezell Ford, an African American man, who was shot by Los Angeles police during an investigative stop, during which, as his mother reported, he was lying on the ground complying with officers' orders when the officer shot him three times in the back); Ken Murray et al., *Staten Island Man Dies After NYPD Cop Puts Him in Chokehold*, N.Y. DAILY NEWS (July 17, 2014, 10:41 PM), <http://www.nydailynews.com/new-york/staten-island-man-dies-puts-choke-hold-article-1.1871486> (reporting on the killing by police of Eric Garner, an African American man, who died because New York police placed him in a chokehold, a prohibited arrest technique, and rammed his head into a sidewalk when taking him into custody for allegedly selling illegal cigarettes); Jeremy Ross & Katie Delong, *Witness*

as the 1990s, some Los Angeles police officers referred to cases involving young African American men as “N.H.I.” cases, standing for “no humans involved.”<sup>132</sup> In 2003, after a Las Vegas police officer shot and killed a black man named Orlando Barlow, who was on his knees, unarmed, and attempting to surrender, an investigative series by the *Las Vegas Review-Journal* revealed that the officers in the unit celebrated the shooting by ordering t-shirts portraying the officer’s gun “and the initials B.D.R.T. (Baby’s Daddy Removal Team)—a racially charged term and reference to Barlow, who was watching his girlfriend’s children before he was shot.”<sup>133</sup> The acronym B.D.R.T. continues to circulate in police culture, as do the associated racially subordinating associations directed at African American men. For example, online stores that sell police-themed clothing continue to market B.D.R.T. t-shirts, and, in 2011, officers with the Panama City, Florida, Police Department adopted the acronym for their kickball police league team.<sup>134</sup> Whereas Alexander argues the legacy and persistence of these dynamics require a social movement to markedly reduce incarceration and disproportionate minority confinement, my analysis entails in addition (or instead) that the structural character of these racial legacies requires a movement committed to the thoroughgoing replacement (and elimination) of these imprisonment and punitive policing practices with other social regulatory frameworks, along with a critique and rejection of many of criminal law administration’s ideological entailments.<sup>135</sup>

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*Account of Officer-Involved Shooting Is Very Different From Police Account*, FOX6NOW.COM (May 5, 2014, 8:50 PM), <http://fox6now.com/2014/05/05/witness-account-of-officer-involved-shooting-is-very-different-from-police-account> (reporting on the fatal police shooting of Dontre Hamilton, a 31-year-old African American man, in Milwaukee, Wisconsin, who, according to an eyewitness working in the area as a Starbucks barista, was killed when the officer stood ten feet away from Hamilton, pulled out a gun, and shot him multiple times in quick succession without any verbal warning).

132. See Sylvia Wynter, *No Humans Involved: An Open Letter to My Colleagues*, 8 VOICES OF THE AFRICAN DIASPORA 13, 13 (1992).
133. See Lawrence Mower, *Troubles Follow Some Officers Who Fire Their Guns on the Job*, LAS VEGAS REV. J. (Nov. 27, 2011, 12:00 AM), <http://www.reviewjournal.com/news/deadly-force/always-justified/troubles-follow-some-officers-who-fire-their-guns-job>.
134. Amber Southard, *Panama City Police Chief Upset Over Initials BDRT*, WJHG.COM (Aug. 9, 2011, 10:07 PM), <http://www.wjhg.com/home/headlines/127341373.html>; Radley Balko, *What Cop T-Shirts Tell Us About Police Culture*, HUFFINGTON POST (June 21, 2013, 3:00 PM), [http://www.huffingtonpost.com/2013/06/21/what-cop-t-shirts-tell-us-\\_n\\_3479017.html](http://www.huffingtonpost.com/2013/06/21/what-cop-t-shirts-tell-us-_n_3479017.html).
135. *But see* Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 24–26 (2011). *See also* Dorothy Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUMBIA HUMAN RIGHTS L. REV. 261, 263 (2007) (exploring this same history and proposing “abolishing criminal justice institutions with direct lineage to slavery and Jim Crow. . . . The only explanation for the endurance of these barbaric practices is their racist function and the only moral remedy is their abolition.”). Although Roberts frames her account as abolitionist it seeks the elimination only of particular practices of carceral punishment tied to slavery and Jim Crow. As she explains, “The goals . . . would be: to drastically reduce the prison

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The racialized constitution of imprisonment and punitive policing began in the South even before the Civil War, though in the pre-Civil War period the relatively small population of Southern prison inmates were primarily white, as most African Americans were held in slavery.<sup>136</sup> Although the legal institution of slavery was abolished with the end of the Civil War, the work necessary to incorporate former slaves as political, economic, and social equals was neglected, and in many instances actively resisted.<sup>137</sup> In particular, criminal law enforcement functioned as the primary mechanism for the continued subordination of African Americans for profit.<sup>138</sup> During Reconstruction, Southern legislatures sought to maintain control of freed slaves by passing criminal laws directed exclusively at African Americans.<sup>139</sup> These laws treated petty crimes as serious offenses and criminalized certain previously permissible activities, but only for the “free negro.”<sup>140</sup> Specific criminalized offenses included “mischief,” “insulting gestures,” “cruel treatment to animals,” “cohabitating with whites,” “keeping firearms,” and the “vending of spirituous or intoxicating liquors.”<sup>141</sup>

These “Black Codes” were adopted by legislatures in Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Texas.<sup>142</sup> These laws quickly expanded Southern inmate populations and transformed them from predominantly white to predominately African American.<sup>143</sup> Convict leasing was exempted from the Thirteenth Amendment’s prohibition on slavery, which outlawed involuntary servitude except in the case of those “duly convicted.”<sup>144</sup>

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population by seeking state and federal moratoriums on new prison constructions, amnesty for most prisoners convicted of nonviolent crimes, and repeal of excessive, mandatory sentences for drug offenses; to abolish capital punishment; and to implement new procedures to identify and punish police abuse.” *See id.* at 284.

136. *See* DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 6, 7 (1996) (explaining how before the Civil War criminal punishment was intended primarily for whites whereas “[s]laves were the property of their master, and the state did not normally intervene” and noting Mississippi’s early convict population “was overwhelmingly white and male, reflecting a society in which slaves were punished by the master and white women were seen as ‘virtuous’ and ‘pure’”).

137. *See* W.E.B. DU BOIS, *supra* note 19 (examining how the “criminal system came to be used as a method” for keeping African Americans “at work and intimidating them”).

138. *See id.*

139. *See* OSHINSKY, *supra* note 136, at 20–21.

140. *See id.* at 21.

141. *See id.*

142. *See id.* For a brief history of racial bias in the drafting of criminal statutes, see District Judge Cahill’s opinion in *United States v. Clary*, 846 F. Supp. 768, 774 (E.D. Mo. 1994).

143. *See* OSHINSKY, *supra* note 136, at 34 (“Almost overnight, the jail-house had become a negro preserve.”).

144. *See* U.S. CONST. amend. XIII, § 1.

Criminal law enforcement was then used to return African Americans to the same plantations on which they had labored as slaves, as well as to condemn thousands to convict leasing operations, chain gangs, and prison plantations.<sup>145</sup>

Even before the Civil War, penitentiaries in the North contained a disproportionate number of African Americans, many of them former slaves.<sup>146</sup> New York legislated the emancipation of slaves and the founding of the state's first prison on the same date in 1796.<sup>147</sup> In Alexis de Tocqueville's and Gustave de Beaumont's classic 1883 account, *On the Penitentiary System in the United States and Its Application in France*, the two wrote: "[I]n those [Northern] states in which there exists one Negro to thirty whites, the prisons contain one Negro to four white persons."<sup>148</sup>

There are many similarities in form between slavery and the early Northern penitentiaries. Both subordinated their subjects to the will of others, and Southern slaves and inmates alike followed a daily routine dictated by white superiors.<sup>149</sup> Both forced their subjects to rely on whites for the fulfillment of their basic needs for food, water, and shelter. Both isolated them in a surveilled environment. The two institutions also frequently forced their subjects to work for longer hours and less compensation than free laborers.<sup>150</sup> Although the basic structure of Northern prisons that purported to rehabilitate through a routine of solitude and discipline may seem at first blush quite removed from the dehumanizing and violent dynamics that characterized the Southern convict experience, one dehumanizing feature remained markedly constant: Even in rehabilitative contexts in the North, the penitentiary aimed to strip and degrade the inmate of his former self so as to reconstitute his being according to the institution's preferred terms. And as commentators, such as Charles Dickens, noted at the time,

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145. See OSHINKSY, *supra* note 136, at 21, 33–34, 37, 40–41.

146. See THOMAS EDDY, AN ACCOUNT OF THE STATE PRISON OR PENITENTIARY HOUSE IN THE CITY OF NEW YORK (1801); JAMES MEASE, OBSERVATIONS ON THE PENITENTIARY SYSTEM AND PENAL CODE OF PENNSYLVANIA 34–36 (1828); PRISON DISCIPLINE SOC'Y, FIRST ANNUAL REPORT OF THE BOARD MANAGERS 35, 36 (1826); PRISON DISCIPLINE SOC'Y, SECOND ANNUAL REPORT OF THE BOARD MANAGERS 43–46, 79–80 (1827); NEGLEY K. TEETERS & JOHN D. SHEARER, THE PRISON AT PHILADELPHIA, CHERRY HILL: THE SEPARATE SYSTEM OF PRISON DISCIPLINE, 1829–1913, at 84 (1957); Thomas R. Dew, *Professor Dew on Slavery*, in THE PRO-SLAVERY ARGUMENT 287, 434–35 (1852).

147. See Scott Christianson, *Our Black Prisons*, 27 CRIME & DELINQ. 364, 373 (1981).

148. GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 61 (Francis Lieber, trans., 1833).

149. See Joy James, *Introduction: Democracy and Captivity*, in THE NEW ABOLITIONISTS, (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS, *supra* note 82, at xxi, xxiii ("Racially fashioned enslavement shares similar features with racially fashioned incarceration.").

150. See *id.*

the “slow and daily tampering with the mysteries of the brain” entailed by this form of incarceration could be “immeasurably worse than any torture of the body.”<sup>151</sup>

In the Reconstruction era South, whether sentences were short or long, convicted persons, especially African Americans, were routinely conscripted into vicious conditions of forced labor.<sup>152</sup> For example, although the sentence for the crime of intermarriage in Mississippi was confinement in the state penitentiary for life, convictions were often punishable by a fine not in excess of fifty dollars.<sup>153</sup> If a person was unable to pay, that person could be hired out to any white man willing to pay the fine.<sup>154</sup> Preference was given to the convict’s former master, who was permitted to withhold the amount used to pay the fine from the convict’s wages.<sup>155</sup> This common practice resulted in situations where freedmen would spend years, even entire lifetimes, working off their debt for a small criminal fine.<sup>156</sup>

By contrast to this sort of peonage and criminal surety operation, the convict lease operated through a bidding system wherein companies would offer a set amount of money per day per convict, and the highest bidder would win custody of the group of convicts and be entitled to their labor.<sup>157</sup> Leased convicts worked on farms, constructed levees, plowed fields, cleared swampland, and built train tracks across the South.<sup>158</sup> They moved from work site to work site, usually in a rolling iron cage, which also served as their living quarters during jobs.<sup>159</sup> Convict lessors justified their use of convict labor because they claimed free labor was prohibitively costly; but as bidding expanded, the daily price of a convict’s labor increased and free labor began to compete.<sup>160</sup> Eventually, it was this trend toward parity in the cost of free and convict labor, more than any outrage at the brutal exploitation of the convict lease, which led to the abolition of the lease and its

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151. CHARLES DICKENS, *AMERICAN NOTES FOR GENERAL CIRCULATION* 43 (Penguin Books 1972) (1842).

152. *See, e.g.*, OSHINSKY, *supra* note 136, at 41–45.

153. WILLIAM C. HARRIS, *PRESIDENTIAL RECONSTRUCTION IN MISSISSIPPI* (1967); JAMES WILFORD GARNER, *RECONSTRUCTION IN MISSISSIPPI* (1901).

154. *See* OSHINSKY, *supra* note 136, at 41.

155. *See id.*

156. *See id.* at 60–61, 73–81.

157. *See id.* at 55–65.

158. *See id.* at 63–81.

159. *See, e.g.*, ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH* xvii (1996) (“[C]onvict labor in the South was steeped in brutality; the rawhide whip, iron shackle, sweat box, convict cage, and bloodhound were its most potent instruments . . .”); OSHINSKY, *supra* note 136, at 59.

160. *See* LICHTENSTEIN, *supra* note 159, at 15.

replacement by the chain gang.<sup>161</sup> Chain gangs, unlike the convict lease, worked on maintaining public roads and performed other hard labor in the public rather than private sector.<sup>162</sup>

State prisons also directly used African Americans for their labor, working prisoners in the fields for profit and holding them at night in wagons that were guarded by white men with rifles and dogs.<sup>163</sup> Some prisons were actually constructed on former plantations, and consisted of vast tracts of land used for farming; white prisoners were appointed to serve as guards or trustees, assistants to the regular prison administrators.<sup>164</sup> The state prison plantations could even generate considerable profit. For instance, in 1917, Parchman Prison farm in Mississippi contributed approximately one million dollars to the state treasury through the sale of cotton and cotton seed, almost half of Mississippi's entire budget for public education that year.<sup>165</sup> By 1917, African Americans still represented some ninety percent of the prison population in Mississippi.<sup>166</sup> The most dehumanizing abuses in these various settings were directed exclusively at African Americans.<sup>167</sup> Southern states enacted statutes to prohibit the confinement of white and African American prisoners in shared quarters. In 1903, Arkansas, for example, passed a law declaring it "unlawful for any white prisoner to be handcuffed or otherwise chained or tied to a negro prisoner."<sup>168</sup> It is thus that the practices of U.S. criminal law administration were forged through the racial dehumanization of African American people.<sup>169</sup>

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161. See HARTMAN, *supra* note 129; LICHTENSTEIN, *supra* note 159, at 15.

162. LICHTENSTEIN, *supra* note 159.

163. See OSHINSKY, *supra* note 136, at 147–55; NICOLE HAHN RAFTER & DEBRA L. STANLEY, PRISONS IN AMERICA 12–13 (1999).

164. See OSHINSKY, *supra* note 136, at 147–55.

165. See *id.* at 155.

166. See *id.* at 137.

167. See, e.g., *id.* at 63 ("A black man brought in . . . was punished much more severely than a white man arrested for the same offense."); *id.* at 124 (relating that even where criminal statutes did not discriminate on the basis of race, "the decision to arrest, prosecute, and sentence depended in large part on a person's skin color, as did the workings of the trial itself"); *id.* at 149 ("Arkansas, Texas, Florida, and Louisiana all used the lash on their convicts . . . [as] part of the regional culture, and most prisoners were black."); *id.* at 155 ("Parchman [Prison Farm] was a powerful link to the past—a place of racial discipline where blacks in striped clothing worked the cotton fields for the enrichment of others.").

168. RICHARD BARDOLPH, THE CIVIL RIGHTS RECORD: BLACK AMERICANS AND THE LAW, 1849–1970, at 137 (1970).

169. See JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003). Although Whitman does not focus on the importance of race in constituting the harshness of U.S. criminal punishments, he does recognize that U.S. criminal law administration adapted U.S. practices of leveling down rather than leveling up in the treatment of convicted persons.

Whereas the connections between slavery and the Northern penitentiary were further removed, the penal state in the South preserved and expanded the African American captive labor force and maintained racial hierarchy through actual incarceration or threat of criminal sanctions, as well as through the conditions of confinement. As recently as 1970, in *Holt v. Sarver*,<sup>170</sup> a District Court in Arkansas upheld the brutal exploitation of working convicts (almost all of whom were African American), concluding that the “[Thirteenth] Amendment’s exemption manifested a Congressional intent not to reach such policies and practices.”<sup>171</sup> The awful mistreatment directed at convicted persons under the convict lease, chain gang, and prison plantations of the South was in these ways inextricably tied to the afterlife of slavery and the failures of abolition as a positive program of the form W.E.B. Du Bois envisioned.

In the Northern and the Western United States, prisons were used for solitary work and sought to reform inmates with a strictly controlled routine of labor and bible study. Prisoners were still usually segregated by race; African Americans were often relegated to substandard locations.<sup>172</sup> Leasing was applied almost exclusively to African Americans convicted of crimes, because the Leasing Acts set aside prison sentences for persons serving ten or more years, and white convicts generally received more significant sentences because the courts rarely punished whites for less serious crimes.<sup>173</sup> Very few whites convicted for petty criminal offenses were sent to prison, and when such sentencing occurred, whites routinely received quick pardons from the governor.<sup>174</sup>

Beyond criminal punishment, criminal law administration was also entwined with practices of racial subordination through lynching. Even in the North, lynch mobs would gather by the thousands outside the jailhouse or courthouse and wait until African Americans were released from pretrial detention.<sup>175</sup> In some cases, criminal law enforcement officials themselves actively participated in the lynch mobs.<sup>176</sup>

Further instances of the direct entwinement of criminal law administration and overt racial violence abound throughout the twentieth century.

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170. 309 F. Supp. 362 (E.D. Ark. 1970).

171. *See id.* at 372.

172. *See, e.g.,* Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95, 110 (2001).

173. *See* OSHINSHKY, *supra* note 136, at 41.

174. *See id.* at 264 & n.24.

175. *See, e.g.,* *Duluth Lynching Online Resource*, MINN. HIST. SOC’Y, <http://collections.mnhs.org/duluthlynchings/html/background.htm> (last visited Apr. 11, 2015).

176. *See* HERBERT APTHEKER, *A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 1945–1951*, at 179–82 (1993).

Notable examples include the Scottsboro Boys Cases of the 1930s.<sup>177</sup> The Scottsboro Cases involved the hurried convictions of nine young African American men, all sentenced to death by white jurors.<sup>178</sup> The limited procedural protections afforded to these young men—the mob-dominated atmosphere surrounding their convictions, the denial of the right to counsel until the eve of trial rendering any assistance necessarily ineffective, and the intentional exclusion of blacks from the grand and petit juries that first indicted and later convicted the young men<sup>179</sup>—and their challenges to the U.S. Supreme Court arguably mark the birth of constitutional criminal procedure.<sup>180</sup>

This entwinement of racialized violence and the criminal process runs from the 1930s through the end of the twentieth century. It is prominently illustrated by, among other similar episodes, the brutal torture perpetrated against countless African American men over two decades, from the 1970s to 1990s, by white Chicago police officer John Burge and his deputies, who used suffocation, racial insults, burning, and electric shocks to coerce confessions, ultimately leading then-Illinois Governor George Ryan to commute all death sentences in the state.<sup>181</sup>

These uses of criminal law administration as a central means of resisting the abolition of slavery, Reconstruction, and desegregation, continue to inform criminal processes and institutions to this day by enabling forms of brutality and disregard that would be unimaginable had they originated in other, more democratic, egalitarian, and racially integrated contexts. As W.E.B. Du Bois predicted, this legacy of managing abolition and reconstruction in large part by invoking criminal law in racially subordinating ways, contrasted sharply with a different abolitionist framework, one that would have incorporated freed-persons into a reconstituted democracy: “If the Reconstruction of the Southern states, from slavery to free labor, and from aristocracy to industrial democracy, had been conceived as a major national program of America, whose accomplishment at any price was well worth the effort, we should be living today in a different world.”<sup>182</sup>

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177. See Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 50–52 (2000).

178. See DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (rev. ed. 1979).

179. See RONALD JAY ALLEN ET AL., *CRIMINAL PROCEDURE: INVESTIGATION AND THE RIGHT TO COUNSEL* 93 (2d ed. 2011).

180. See Alan Blinder, *Alabama Pardons 3 ‘Scottsboro Boys’ After 80 Years*, N.Y. TIMES (Nov. 21, 2013), <http://www.nytimes.com/2013/11/22/us/with-last-3-pardons-alabama-hopes-to-put-infamous-scottsboro-boys-case-to-rest.html>.

181. See Chris Wetterich, *Ryan to Pardon 4 on Death Row*, CHI. SUN TIMES (Jan. 10, 2003), [http://articles.chicagotribune.com/2003-01-10/news/0301100372\\_1\\_death-row-chicago-police-cmdr-pardons](http://articles.chicagotribune.com/2003-01-10/news/0301100372_1_death-row-chicago-police-cmdr-pardons); George Ryan, Ill. Governor, Speech at Northwestern University College of Law (Jan. 11, 2003), available at <http://www.nytimes.com/2003/01/11/national/11CND-RTEX.html>.

182. DU BOIS, *supra* note 19, at 633.

Our historical inheritance and this legacy illuminates the connection between the abolitionist path not taken in the aftermath of slavery and what ought to be an abolitionist ethos in reference to practices of prison-backed criminal regulation today.

Instead, as the American economy underwent a shift from industrial to corporate capitalism in the 1970s, resulting in the erosion of manufacturing jobs occupied by poor and working class people in the inner cities, especially African Americans, a distinct underclass emerged, with few options for survival other than low wage work, welfare dependence, or criminal activity.<sup>183</sup> This transformation in the U.S. economy contributed substantially to the emergence of a population that would be permanently unemployed or underemployed.<sup>184</sup> In turn, federal, state, and local governments invested greater resources in coercive mechanisms of social control,<sup>185</sup> prioritizing criminal law enforcement over other social projects, such as urban revitalization and expanded social welfare and education spending.<sup>186</sup>

In 1972, just before the National Advisory Commission on Criminal Justice Standards and Goals published the 1973 report noted at the beginning of this Article, there were 196,000 inmates in all state and federal prisons in the United States—a population housed in conditions that the Commission believed justified a ten year moratorium on prison construction.<sup>187</sup> By 1997, however, the prison population had surged to 1,159,000<sup>188</sup> and in 2002 there were a record 2,166,260 people housed in U.S. prisons and jails.<sup>189</sup>

This rapidly increasing population was characterized, as we now well know, by glaring racial asymmetries: As of 1989, one in four African American men were in criminal custody of some sort.<sup>190</sup> In certain municipalities, the imprisonment

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183. See GARLAND, *supra* note 5, at 1–3.

184. See Wacquant, *supra* note 172.

185. See *id.* at 81–82; WESTERN, *supra* note 5, at 5, 7.

186. See GARLAND, *supra* note 5, at 7 (“[T]he strong similarities that appear in the recent policies and practices . . . with patterns repeated across the fifty states and the federal system of the USA . . . are evidence of underlying patterns of structural transformation . . . brought about by a process of adaptation to the social conditions that now characterize these (and other) societies.”). This is not an account of a single factor that gave rise to an increase in incarceration but rather an account of the context from which hyper-incarceration emerged.

187. See NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS & GOALS, *supra* note 3 and accompanying text.

188. See MARC MAUER, THE SENTENCING PROJECT, RACE TO INCARCERATE 114 (1999).

189. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2002 (2003), <http://www.bjs.gov/content/pub/pdf/p02.pdf>.

190. See MARC MAUER & TRACEY HÜLING, SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 4 (1995), [http://www.sentencingproject.org/doc/publications/rd\\_youngblack\\_5yrslater.pdf](http://www.sentencingproject.org/doc/publications/rd_youngblack_5yrslater.pdf).

rates for African Americans were even more striking. In 1991 in Washington D.C., 42.5 percent of young African American men were in correctional custody on any given day.<sup>191</sup> In Baltimore during 1990, 56 percent of the city's African American males between ages eighteen and thirty-five were either in criminal justice custody or wanted on warrants.<sup>192</sup> By 2004, more than 12 percent of African American men nationally between the ages of twenty-five to twenty-nine were incarcerated in prison or jail.<sup>193</sup> Although rates of incarceration and disproportionate minority confinement have declined very modestly in recent years because of fiscal crises at both the state and federal level, as well as a global decrease in crime, African American men remain subject to criminal confinement and arrest at rates that far exceed their representation in the population.<sup>194</sup>

Prisoners are generally no longer subjected to chain gangs or hard physical labor for profit, although these practices persisted in certain jurisdictions through the end of the twentieth century.<sup>195</sup> Currently, another form of incarceration and punitive policing has emerged, one that effectuates the mass containment and exercises mass racial discipline, leading to the elimination of large numbers of poor and especially poor African American people from the realm of civil society. A felony conviction, disproportionately meted out to African Americans, Latinos, and indigent whites, results in a permanent loss of voting rights in most states, employment bars in numerous professions, and a lifetime ban on federal student aid, among other damaging consequences.<sup>196</sup> These consequences further exacerbate the physically segregative effects of incarceration post-release, inhibiting opportunities for meaningful integration available to persons and communities most affected by incarceration.<sup>197</sup> These consequences of conviction constitute a basic denial of equal citizenship, and, as such, conviction recreates the civil death associated with enslavement.

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191. See, e.g., JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990*, at 141 n.4 (1993).

192. See Don Terry, *Prison as Usual/ A Special Report.; More Familiar, Life in a Cell Seems Less Terrible*, N.Y. TIMES (Sept. 13, 1992), <http://www.nytimes.com/1992/09/13/us/prison-usual-special-report-more-familiar-life-cell-seems-less-terrible.html>.

193. WESTERN, *supra* note 5, at 3.

194. See, e.g., Cole, *supra* note 14.

195. See, e.g., Lynn M. Burley, *History Repeats Itself in the Resurrection of Prisoner Chain Gangs: Alabama's Experience Raises Eighth Amendment Concerns*, 15 L. & INEQUALITY 127 (1997); Neil R. Peirce, *Don't Judge the Olympic City by the Icons of the Past but in Its Prisons, Georgia Has Reverted to the Bad Old Days*, PHILA. INQUIRER (July 19, 1996), [http://articles.philly.com/1996-07-19/news/25620001\\_1\\_penal-system-prison-georgia](http://articles.philly.com/1996-07-19/news/25620001_1_penal-system-prison-georgia) (discussing the reintroduction of chain gangs in several states); see also DAYAN, *supra* note 129, at 253 ("This book began when I saw chain gangs on the roads and in the prisons of Tucson Arizona in May 1995.").

196. See ALEXANDER, *supra* note 7.

197. See WESTERN, *supra* note 5.

Further, the criminal process still operates on a for-profit model importantly distinct, but not entirely removed from, earlier systems of confinement for profit that were the direct outgrowth of slavery.<sup>198</sup> Prisoners' labor does not itself directly provide a significant source of profit to a lessor or single business as it once did. Instead, large-scale incarceration—marked by prisoners' suffering, dehumanization, and violence—generates a market for the construction of facilities to house approximately two million prisoners and jail inmates; the technology and mechanisms to maintain almost seven million persons under criminal supervision; and the employment of thousands of prison guards, prison staff, probation and parole officers, and other penal professionals.<sup>199</sup> The large sums of money poured into prisons and criminal surveillance have drawn major firms and a variety of Wall Street financiers to prison construction.<sup>200</sup> Underwriting prison construction through private finance and the sale of tax-exempt bonds has served as a lucrative undertaking in itself.<sup>201</sup> Though only used to manage a small portion of detention facilities, private corrections corporations, such as Corrections Corporation of America and Wackenhutt, submit bids to governments to manage different detention systems, especially immigration detention, and guarantee to provide these services at a lower cost than the state is able to deliver.<sup>202</sup> Additionally, vendors of everything from stand alone cells, hand and foot cuffs, razor wire, and shank proof vests make considerable profits from prisons.<sup>203</sup> A single contract to

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198. See, e.g., Diane Cardwell, *Private Businesses Fight Federal Prisons for Contracts*, N.Y. TIMES (Mar. 14, 2012), <http://www.nytimes.com/2012/03/15/business/private-businesses-fight-federal-prisons-for-contracts.html>; Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y. TIMES (May 24, 2014), <http://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html>.
199. See, e.g., Gabriel Dance & Tom Meagher, *U.S. Incarceration: Still Mass*, MARSHALL PROJECT (Dec. 19, 2014, 10:08 AM), <https://www.themarshallproject.org/2014/12/19/u-s-incarceration-still-mass> (noting that in 2013 in the United States there were approximately 731,200 people incarcerated in jails, 1,574,700 incarcerated in prisons, and 6,899,000 people under some form of criminal supervision).
200. Among them are Turner Construction, Brown and Root, and CRSS, along with architectural firms such as DLR Group and KMD Architects. See GREGG BARAK, *BATTLEGROUND: CRIMINAL JUSTICE 525* (2007) (examining the structure of public and private prison finance during the 1990s, particularly the period between 1990 and 1995 when 213 new prisons were constructed); JOEL DYER, *THE PERPETUAL PRISONER MACHINE: HOW AMERICA PROFITS FROM CRIME 13* (2000).
201. See *Finance/New Issues; California is Offering Prison and Water Bonds*, N.Y. TIMES (Apr. 16, 1986), <http://www.nytimes.com/1986/04/16/business/finance-new-issues-california-is-offering-prison-and-water-bonds.html> (“Bonds for prison construction were among the larger deals in the tax-exempt market yesterday when California began offering \$395 million of general obligation bonds for the purpose of financing the construction of new state prisons.”).
202. See, e.g., Jennifer Steinhauer, *Arizona May Put State Prisons in Private Hands*, N.Y. TIMES (Oct. 23, 2009), <http://www.nytimes.com/2009/10/24/us/24prison.html>.
203. See DYER, *supra* note 200, at 14.

provide prisoners in the state of Texas with a soy-based meat substitute, awarded to VitaPro Foods, went for \$34 million per year.<sup>204</sup> The profits for phone service inside prison walls make food contracts seem insignificant.<sup>205</sup>

Meanwhile, prisoners continue to serve as a captive labor force, working for approximately one dollar per hour, and often less.<sup>206</sup> Numerous firms use prisoners as a component of their workforce in the United States, as do government entities that use prison labor to manufacture products that are then sold to other government agencies.<sup>207</sup> Although prisoners are no longer forced to work by or for the state (as they were in the South well into the twentieth century), the perverse profit motive that spurred the convict lease system with all its horror might be understood in historical context as preserved yet transformed in these various other guises.

Criminal fines and fees generate substantial additional revenue for the criminal process itself and for certain municipalities and other jurisdictions.<sup>208</sup> And the grossly disproportionate number of African Americans imprisoned, arrested, criminally fined, and stopped by police further accentuates the associations between earlier forms of racialized penal subordination for profit and the contemporary racial dynamics of criminal law administration.<sup>209</sup>

The deep, structural, and both conscious and unconscious entanglement of racial degradation and criminal law enforcement presents a strong case for aspiring to abandon criminal regulatory frameworks in favor of other social regulatory projects, rather than aiming for more modest criminal law reform. Multiple

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204. *See id.*

205. *See id.*; Andrew Rosenthal et al., *Unfair Phone Charges for Inmates*, N.Y. TIMES (Jan. 6, 2014) (reporting on exorbitant prices charged to inmates and their families for phone calls and efforts of the FCC to regulating unfair pricing).

206. *See* Cardwell, *supra* note 198; NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, WORK IN AMERICAN PRISONS: JOINT VENTURES WITH THE PRIVATE SECTOR (1995), *available at* <https://www.ncjrs.gov/pdffiles/workampr.pdf>.

207. *See* Cardwell, *supra* note 198.

208. *See, e.g.*, Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 281 n.10 (2014) ("The majority of individuals charged with crimes or delinquencies are assessed economic sanctions.").

209. *See, e.g.*, Report of Jeffery Fagan, at 3–4, *Floyd v. City of New York*, 861 F. Supp. 2d 274 (S.D.N.Y. 2012) (No. 08 Civ. 01034 (SAS)) (finding that racial composition of a neighborhood predicts police stop patterns even after controlling for influences of crime, social conditions, and police allocation of resources); JACK MCDEVITT ET AL., RHODE ISLAND TRAFFIC STOP STATISTICS: DATA COLLECTION STUDY iii (Jan. 2014) (finding Rhode Island police are more likely to pull over people of color but less likely to give them a ticket); *see also* FERGUSON POLICE DEP'T, RACIAL PROFILING DATA (2013), <https://web.archive.org/web/20140817074649/http://ago.mo.gov/VehicleStops/2013/reports/161.pdf> (demonstrating that African Americans were stopped out of proportion with their numbers in the general population, even though whites were far more likely to be found with contraband) (accessed by searching Internet Archive index).

studies have confirmed the implicit, often immediate, and at times unconscious associations made between African Americans, criminality, and threat.<sup>210</sup> These associations, borne of this history, continue to be reproduced by these structures and by the development of punitive policing and incarceration practices that treat certain people as not fully human. To provide but a few examples, psychologists Jennifer Eberhardt, Philip Atiba Goff, and their collaborators studied how individuals in various scenarios determine who “looks like a criminal.”<sup>211</sup> Perhaps not surprisingly, controlling for other factors, the study’s subjects chose people who looked African American, particularly those who looked more “stereotypically” African American and those coded as having more “Afro-centric” features.<sup>212</sup> In a similar study, psychologists Brian Lowery and Sandra Graham studied subjects’ responses to juvenile arrestees. When the study’s subjects were primed to understand the youth as African American, the juveniles were judged to be more blameworthy and deserving of harsher and more punitive treatment.<sup>213</sup> Consciously expressed egalitarian racial beliefs did not significantly moderate the effects of implicit bias in these contexts.<sup>214</sup>

Conscious and unconscious biases on the part of police officers often have lethal outcomes. Shooter and weapons biases, for instance, are well-documented. In researching how subjects behave in simulated video game shooting settings, multiple studies have found that the likelihood of shooting a suspect who is armed or possesses a device other than a gun significantly increases when the suspect is African American and decreases when the suspect is white.<sup>215</sup> This is true

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210. See, e.g., Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. LAW SOC. SCI. 149, 160–161 (2014) (discussing the cumulative effect of implicit biases at crucial decisionmaking stages of the criminal process, including a police officer’s decision to arrest, a defense lawyer’s determination to plead guilty, a prosecutor’s charging decision, a jury’s determination to convict, and a judge’s sentencing, and stating that “[e]ach of these decisions involves implicit bias at a key point in the criminal case but also interacts in a structural way with the preceding and subsequent decisions”).
211. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 885–91 (2004) [hereinafter Eberhardt et al., *Seeing Black*]; Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 383–86 (2006); Philip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 292–306 (2008).
212. See Eberhardt et al., *Seeing Black*, *supra* note 211; Goff et al., *supra* note 211.
213. See Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 494 (2004).
214. See *id.*
215. See CHERYL STAATS ET AL., IMPLICIT BIAS REVIEW 37 (2013); Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1020–22 (2007).

both for white and African American shooters.<sup>216</sup> Similarly, psychologist Philip Atiba Goff and his colleagues, in a study examining archival material from actual death penalty cases in Pennsylvania, found that defendants depicted as implicitly “apelike” were more likely to be executed than those who were not; African Americans were more likely to be depicted as implicitly “apelike” than whites.<sup>217</sup> Judges, jurors, and prosecutors in related studies likewise reflect considerable racial bias in their determinations at numerous critical stages of the criminal process.<sup>218</sup>

The landscape of contemporary criminal law enforcement is thus, in significant and fundamental respects, part of the afterlife of slavery and Jim Crow, and this legacy is deeply implicated in criminal law’s persistent practices of racialized degradation. Perceptions of criminality, threat, and the prevalence of violence, informed by these racialized material histories and dehumanizing associations, operate at all levels of criminal law administration, often without the relevant actors’ awareness. This suggests something of how difficult it would be to remove racialized violence from prison-backed policing and imprisonment while retaining these practices as a primary mechanism of maintaining social order. The racialized degradation associated with criminal regulatory practices, then, compels an abolitionist ethical orientation on distinct and additional grounds apart from the general dehumanizing structural dynamics addressed in the preceding Subpart, particularly insofar as there are other available means of accomplishing crime-reductive objectives.

If we are indeed committed to democratic and egalitarian values, the need to scrutinize closely the other purported purposes of the criminal process presses with increasing urgency. So, too does the question of whether there are alternative regulatory frameworks and approaches that might achieve similar ends with less racially encumbered and violent consequences.

### C. The Question of Efficacy

Beyond the violence, dehumanization, and racial subordination associated with incarceration and prison-backed policing, what are the other effects of imprisonment? How should incarceration’s efficacy be assessed relative to these problems? What, after all, is the end of imprisonment and prison-backed policing? And how well does the prison-backed regime of criminal law enforcement fare in accomplishing its purported ends?

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216. See STAATS ET AL., *supra* note 215, at 38.

217. See Goff et al., *supra* note 211, at 304.

218. See STAATS ET AL., *supra* note 215, at 39–45.

To begin, determining the efficacy of imprisonment and prison-backed policing is no simple matter, because the question of criminal regulation's efficacy must follow two prior questions: "Efficacy at what?" and "efficacy compared to what?" The assumption in the relevant economic and criminological literatures is generally that the only or primary relevant association is the relationship between incarceration rates and reported crime, or (less commonly) victimization rates. These comprise only one set of variables, though, among others that ought to be of concern. In particular, the effect of incarceration on other measures of welfare—education, democratic or civic participation, households' ability to meet basic needs—is all too often neglected, as are imprisonment's impact on racial and economic equality and other important social metrics. Further, narrowly framing the question of incarceration's cost-efficiency as a comparison of incarceration rates relative to crime rates, and the effort spent to measure that relationship with ever-increasing specificity largely ignores the complexity of incarceration's myriad significant impacts, the importance of other forms of social welfare, as well as how reformed social arrangements might produce better, more just, and more meaningful welfare-enhancing and crime-reductive effects.<sup>219</sup>

Even apart from this concern with the limited frame within which the efficacy question is generally posed, the existing empirical accounts of the relationship of incarceration to crime vary widely and present decidedly mixed results. Several studies identify no relationship between incarceration rates and crime rates,<sup>220</sup> while other studies have found a crime drop of anywhere between 0.11 percent to 22 percent associated with a 10 percent increase in incarceration, depending on whether national-level, state-level, county-level or other data is used.<sup>221</sup> One study even identified higher crime rates associated with higher incarceration rates in states with relatively high rates of imprisonment.<sup>222</sup> Conse-

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219. Cf. Harcourt, *supra* note 28, at 270–71.

220. See, e.g., Tomislav V. Kovandzic & Lynne M. Vieraitis, *The Effect of County-Level Prison Population Growth on Crime Rates*, 5 CRIME & PUB. POL'Y 213, 213 (2006); Tomislav V. Kovandzic et al., *Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effects of "Three Strikes" in U.S. Cities (1980–1999)*, 1 CRIMINOLOGY & PUB. POL'Y 399 (2002); see also STEMEN, *supra* note 12, at 3.

221. See, e.g., STEMEN, *supra* note 12, at 3; WESTERN, *supra* note 5, at 186–87; Joel A. Devine et al., *Macroeconomic and Social-Control Policy Influences on Crime Rate Changes, 1984–1985*, 53 AM. SOCIOLOGICAL REV. 407, 410, 413 (1988); Thomas B. Marvell & Carlisle E. Moody, *The Impact of Out-of-State Prison Population on State Homicide Rates: Displacement and Free-Rider Effects*, 36 CRIMINOLOGY 513, 513, 525, 529 (1998); Thomas B. Marvell & Carlisle E. Moody, *The Impact of Prison Growth on Homicide*, 1 HOMICIDE STUD. 205, 205, 220 (1997); see also Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSPECTIVES 163, 184 (2004).

222. See Raymond V. Liedka et al., *The Crime-Control Effect of Incarceration: Does Scale Matter?*, 5 CRIMINOLOGY 245, 248–49 (2006).

quently, based on the available research, one could contend that a 10 percent increase in incarceration is associated with (a) no decrease in crime rates, (b) a 22 percent lower index crime rate, (c) a 2 percent to 4 percent decrease in crime rates, or (d) a decrease only in property crime but not violent crime.<sup>223</sup> In short, to measure and weigh the possible crime reductive effects against the criminogenic and other consequences of incarceration has yet to be accomplished in any comprehensive and definitive manner.<sup>224</sup>

Further, even if all of the relevant variables could be properly and definitively accounted for, the political and moral significance of crime reduction as compared to other important social goals—such as equality, education, and poverty alleviation—would remain an open political and ethical question.<sup>225</sup> To the extent crime prevention is entwined with larger goals of equality or education—for example preventing gender or race-based violence while simultaneously advancing gender or racial equality—crime prevention and reduction should not be pursued in a way that is inattentive to these other goals.

In any event, at their best, regression analyses that seek to identify a relationship between crime rates and incarceration provide us with causal inferences about ways the world has behaved in the past. Although an obvious point, it remains an important, often overlooked consideration that these analyses rely on archival data and cannot meaningfully tell us how the world might be reconstituted in the face of significant shifts in social and political organization. In other words, there is nothing in the existing statistical analyses of the crime-incarceration relationship that undermines the interest or urgency of the ethical case for abolition and of other forms of social organization that might result in improved well-being and reduced violence.

Additionally, any compelling account of the crime-reductive effects of incarceration ought to also be able to identify a mechanism through which incarceration functions to deter crime, or rehabilitate or incapacitate criminals.<sup>226</sup> Any such crime-reductive causal mechanism's impact will be affected, of course, by those dimensions of incarceration that are undoubtedly criminogenic, including the difficulty formerly incarcerated persons face in finding lawful

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223. See STEMEN, *supra* note 12, at 3.

224. See John J. Donohue III, *Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin*, in *DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM*, *supra* note 12, at 272.

225. See Harcourt, *supra* note 28, at 271 (writing of cost-benefit analyses focused on the efficiency of various crime-reductive measures that in “choosing a narrow objective and then simply costing alternative policies, we have *shaped* our political value system without ever having explicitly engaged *politics*”).

226. For a discussion of the question of the retributive justification for punishment, see *infra* Part V.

employment after imprisonment and the vast incidence of unreported rape and other forms of violence inside prisons, to name but a few.<sup>227</sup>

Those who support incarceration for its supposed deterrent effect generally ground their account on Gary Becker's writings on the economics of crime.<sup>228</sup> In brief, in Becker's model, raising the costs of criminal activity by imposing a penalty of incarceration will cause a certain number of potential criminals to decide not to pursue criminal activity because they will rationally weigh the costs and benefits of their possible future criminal conduct.<sup>229</sup> This model, however, rests on a set of assumptions that apply poorly to many people who are inclined to criminally offend even if the model succeeds in capturing the deterrence of others who avoid criminal activity following cost-benefit calculations. The model assumes (a) that those who break the criminal law rationally calculate the costs and benefits of their intended course of conduct; (b) that they possess information and beliefs that allow them to assume a high likelihood of apprehension and sentencing; and (c) that criminal punishment will render those subject to it no more likely to commit future crimes than they would be otherwise. In fact, each of these assumptions is subject to substantial doubt, especially when considering the class of people prison sentences purport to deter most immediately rather than those who are likely to be law-abiding because of reputational interests, secure employment, family obligations or otherwise.<sup>230</sup> Many people who break the criminal laws do so in a condition of severe mental illness, alcohol or drug addiction, or in a state of rage. In these cases, Becker's assumptions of rational risk calculation are

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227. See, e.g., WESTERN, *supra* note 5, at 5 (reporting adverse criminogenic impacts of incarceration associated with difficulty in finding employment opportunities and disruption of family life); see also Amy E. Lerman, *The People Prisons Make: Effects of Incarceration on Criminal Psychology*, in DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM, *supra* note 12, at 151, 152 (examining the "significant and criminogenic effect of placement in a higher-security prison").

228. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); see also Daniel S. Nagin, *Deterrence: A Review of the Evidence by a Criminologist for Economists*, 5 ANN. REV. ECON. 83, 83–105 (2013) (reviewing the literature on the deterrent effects of policing and incarceration and reporting generally some deterrent effects associated with policing, minimal deterrence associated with increased sentences of incarceration after a certain point, and little useful information on the deterrent effects of capital punishment).

229. See Becker, *supra* note 228, at 176, 203.

230. See, e.g., DEIRDRE GOLASH, *THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW* 25 (2005) ("Most people have other reasons—such as reasons of conscience and effects on reputation—to refrain from committing serious crimes. People who lack such reasons—who instead expect criminal behavior to enhance their reputations, or who are not deterred by pangs of conscience—may well be less responsive to punitive measures as well . . . . [Y]oung men who were not deterred from such killings by the immediate threat of deadly retaliation by the friends of the victim would hardly be deterred by the comparatively remote threat of imprisonment or even death at the hands of the criminal justice system.").

questionable, and hence the deterrent qualities of incarceration will have uncertain, if any, effect on them.<sup>231</sup> Other people who break the criminal law surely believe (and often rightly so) that they are unlikely to be apprehended and sentenced. Most cases of child sexual abuse, for instance, go unreported, as do many cases of rape of adults; similarly, people in positions of power who engage in deceptive economic transactions and even many who physically harm others routinely evade any adverse consequence.<sup>232</sup> What is more, criminal punishment may make those who are imprisoned more, rather than less, likely to reoffend. As discussed above, incarceration produces a set of destructive consequences for both the incarcerated and their communities, consequences that may tend to increase rather than decrease crime.<sup>233</sup> This is not to say that incarceration has no deterrent impact,<sup>234</sup> but that the assumptions of deterrence theory fail to apply to the large class of persons at whom criminal sanctions are directed, even if deterrence is effective in other cases. And any deterrent potential of punitive policing and imprisonment should be assessed bearing in mind the dehumanizing, racially degrading, violent, and otherwise destructive dimensions of these practices.<sup>235</sup>

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231. *See id.* at 24–29 (debunking philosophically much of the deterrence rationale for the crime-preventive effects of punishment); *see also* Neal Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385 (1997) (discussing various factors that complicate and undermine the standard assumption that criminal punishment will create deterrence); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315 (1984) (exploring vulnerabilities of a utilitarian model of crime control). There is also decidedly mixed evidence on the deterrent effects of order-maintenance policing. *See, e.g.*, Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1629 (2012) (analyzing extensively the empirical literature on “zero-tolerance” or “broken windows” policing and concluding that “[o]n the available evidence, a sensible conclusion is that the probability of generating a beneficial self-fulfilling prophecy with broken windows policing is uncertain, low or confined in important ways”); *see also* John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in *THE CRIME DROP IN AMERICA* 207, 228 (Alfred Blumstein & Joel Wallman eds., 2000) (“Overall, the evidence is mixed on the efficacy of generic zero-tolerance strategies in driving down rates of violent crime, though serious questions have been raised about their effects on police-community relations.”); BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001) (analyzing the empirical evidence in support of broken windows policing and concluding the claims made in support of the theory on the basis of this evidence are false); Levitt, *supra* note 221, at 184 (explaining that zero tolerance policing practices probably do not explain much of the drop in crime in the 1990s because crime went down everywhere, even in places where police departments did not implement new policing strategies; rather, the decline in crime was caused by some combination of legalized abortion, the ebbing of the crack epidemic, increased imprisonment, and increases in the number of police).
232. *See, e.g.*, CORRIGAN, *supra* note 59 (examining the dramatic under reporting and under enforcement of violations of criminal laws relating to rape and sexual assault).
233. *See, e.g.*, WESTERN, *supra* note 5, at 5 (“The employment problems and disrupted family life of former inmates suggests that incarceration may be a self-defeating strategy for crime control.”).
234. *See* Nagin, *supra* note 228.
235. *See, e.g., supra* text accompanying notes 123–126.

Further questions apply to incarceration's purportedly incapacitating effects. By removing people from their home communities and transferring them into prison, incarceration generally prevents prisoners from committing crimes outside prison. But prison itself is a place where interpersonal violence, theft, and abuse are rampant and largely unreported.<sup>236</sup> Therefore, incarceration does not necessarily reduce or incapacitate the commission of crime, but rather changes its location.

In this respect, the argument for incapacitation reveals the disregard for the humanity of incarcerated persons that is inherent in the basic structure of U.S. penal discourse: This discourse only (or primarily) counts crime as significant if it occurs outside prison. Yet approximately 216,000 sexual assaults occurred in U.S. prisons in 2008, making prisons perhaps the most sexually violent place in the country, a site of serial rape.<sup>237</sup> A further complicating factor for any account of incarceration's incapacitating effects is that, insofar as imprisonment is criminogenic, it may reduce crime outside prison during the time a person is incarcerated, but it may likewise exacerbate that person's likelihood of committing a criminal offense post-release.<sup>238</sup>

Although there is some evidence that rehabilitative programming in prison reduces recidivism relative to incarceration in harsher, more punitive conditions, this does not demonstrate that imprisonment is more rehabilitative than other modes of social response outside of the prison setting.<sup>239</sup> In fact, there is good reason to think that interventions that address addiction or provide educational opportunities would more likely enable different patterns of behavior upon release if they occurred in a context more closely parallel to one that persons would live within over the longer term rather than solely within the context of incarceration.<sup>240</sup> This is not to deny the relative benefits of minimum security confinement with opportunities for education and addiction recovery programming over, for instance, long-term solitary confinement (a reform not inconsistent with abolitionist aims), but instead to suggest that there is no persuasive evidence that rehabilitative incarceration is more likely to produce desired results than an alternative array of interventions not organized around imprisonment.

Accordingly, although various studies have attempted to demonstrate the crime-reductive effects of carceral sentencing through analysis of large datasets of

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236. See *supra* text accompanying notes 123–126.

237. See David Kaiser & Lovisa Stannow, *Prison Rape and the Government*, N.Y. REV. BOOKS (Mar. 24, 2011), <http://www.nybooks.com/articles/archives/2011/mar/24/prison-rape-and-government>.

238. Cf. WESTERN, *supra* note 5, at 5.

239. See, e.g., Lerman, *supra* note 227, at 152 (explaining that “there is a significant and criminogenic effect of placement in a higher-security prison”).

240. See, e.g., WESTERN, *supra* note 5, at 5, 7.

reported crime and incarceration rates, as well as by using theoretical models of incarceration's crime-reductive mechanisms, it remains the case, as economist John Donohue explains, that "the empirical literature has not yet generated clear and unequivocal answers to these key questions."<sup>241</sup> In particular, it is unclear whether "a reallocation of resources to alternative crime-fighting strategies would achieve the same benefits [of incarceration] at lower social costs . . . ."<sup>242</sup> In economic terms, these analyses do not capture the potential opportunity costs of achieving order maintenance through prison-backed criminal law enforcement and incarceration, rather than through other means.<sup>243</sup>

There is compelling evidence that the opportunity costs of allocating public resources to incarceration are immense. Nobel Prize-winning economist James Heckman has found, for example, spending on early childhood education for disadvantaged children produces much higher returns than criminal law enforcement expenditures.<sup>244</sup> To properly assess the desirability of incarceration relative to alternatives such as Heckman's, one must also consider the enormity of the economic resources allocated to imprisonment and punitive policing. In 2008, U.S. federal, state, and local governments spent approximately \$75 billion on corrections, primarily on incarceration.<sup>245</sup> Expenditures on incarceration are particularly concentrated on disadvantaged populations from narrowly confined geographic areas. In certain blocks in Brooklyn, New York, for instance, the state has spent multiple millions of dollars per block per year to confine people in prison.<sup>246</sup> Similarly, Pennsylvania taxpayers have spent over \$40 million per year to imprison residents from a single zip code in a Philadelphia neighborhood, where

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241. Donohue, *supra* note 224, at 272; see also John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUD. 1, 1 (1998) ("[I]f a broadly implemented preschool program (more enriched than the current Head Start program) could generate half the crime-reduction benefits achieved in the pilot studies, then cutting spending on prisons and using the savings to fund intensive preschool education would reduce crime . . . ."); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794, 841 (2005) (analyzing statistical studies of the deterrent effect of the death penalty and concluding there is not just "reasonable doubt" but "profound uncertainty" as to whether the death penalty has any deterrent effect).

242. Donohue, *supra* note 224, at 272.

243. See, e.g., John J. Donohue, *Fighting Crime: An Economist's View*, 73 MILLIKEN INST. REV., Mar. 2005, at 46.

244. See, e.g., James J. Heckman & Dimitriy V. Masterov, *The Productivity Argument for Investing in Young Children*, 29 REV. OF AGRIC. ECON. 446, 447 (2007); James Heckman et al., *Understanding the Mechanisms Through Which an Influential Early Childhood Program Boosted Adult Outcomes*, 103 AM. ECON. REV. 2052 (2013).

245. See JOHN SCHMITT ET AL., *supra* note 12.

246. See *Justice Mapping Center Launches First National Atlas of Criminal Justice Data*, JUSTICE MAPPING CTR. (Oct. 5, 2010), <http://www.justicemapping.org/archive/26/multi-%E2%80%98million-dollar%E2%80%99-blocks-of-brownville>.

38 percent of households have annual incomes under \$25,000.<sup>247</sup> Likewise, in one neighborhood in New Haven, Connecticut, the state spent \$6 million per year to return people to prison for technical parole and probation violations.<sup>248</sup> According to one recent study, reducing the incarcerated population convicted only of nonviolent offenses by half would result in cost savings of approximately \$16.9 billion annually, without any significant associated decrease in public safety.<sup>249</sup>

It also bears noting that much crime goes unreported, unmentioned, hidden by the shame associated with victimization or as a result of other fears, including the fear of sending loved ones to prison.<sup>250</sup> These forms of violence are not meaningfully accounted for in the existing analyses of incarceration's efficacy. Indeed, much of the violence police inflict on young African American men during police searches and seizures is not even understood as criminal.<sup>251</sup> The same could be said of myriad forms of harm inflicted upon the relatively powerless and dispossessed by those who escape entirely censure or redress. A poem attributed to an anonymous poet of the 1700s, and circulated variously in prison writing since, captures this final point well:

The law will punish a man or woman who steals the goose from  
the hillside, but lets the greater robber loose who steals the hillside  
from the goose.<sup>252</sup>

In a speech to inmates in Cook County Jail in 1902, Clarence Darrow conveyed a similar abolitionist insight in these terms:

The only way in the world to abolish crime and criminals is to abolish  
the big ones and the little ones together. Make fair conditions of life.  
Give men a chance to live. . . . There should be no jails. They do not  
accomplish what they pretend to accomplish. . . . They are a blot upon  
any civilization, and a jail is an evidence of the lack of charity of the  
people on the outside who make jails and fill them with the victims of  
their greed.<sup>253</sup>

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247. *See id.*

248. *See* Diane Orson, 'Million Dollar Blocks' Maps Incarceration's Costs, NPR (Oct. 2, 2012), <http://www.npr.org/2012/10/02/162149431/million-dollar-blocks-map-incarcerations-costs>.

249. *See* SCHMITT ET AL., *supra* note 12, at 1.

250. *See, e.g.*, CORRIGAN, *supra* note 59, at 78.

251. *But see* Butler, *supra* note 13, at 155.

252. Jalil Muntaqim, *The Criminalization of Poverty in Capitalist America (Abridged)*, in THE NEW ABOLITIONISTS: (NEO)SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS, *supra* note 82, at 29, 29.

253. Clarence Darrow, *An Address to the Prisoners in the Cook County Jail, Chicago, Illinois—1902*, in INSTEAD OF PRISONS, *supra* note 48, at 13.

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In sum, the evidence as to whether incarceration and prison-backed policing meaningfully make us more secure is mixed at best, at least when the broader harmful effects of incarceration are accounted for, along with crime that occurs in areas, forms, and among populations where it currently goes unreported, unnoticed, and unaddressed. Unless the only important social goal is to reduce reported crime outside of prison at all costs, questioning the efficacy of incarceration requires considering any crime-reductive effects of incarceration relative to ethical concerns, social consequences, welfare measures, aspirations, and opportunities incarceration forecloses to govern ourselves in other more humane and just ways. At a minimum, the available evidence on imprisonment's efficacy does not diminish the importance of the critical abolitionist ethical demand.

The next Part explores how a critical abolitionist ethic differs from a more moderate reformist framework, before turning to consider abolitionist aims in a positive register—in line with W.E.B. Du Bois' account of abolition as a positive project—as well as with reference to an overlooked variant of grounded preventive justice.

## II. ABOLITION VERSUS REFORM

Abolition promises to reorient both criminal law and politics in important and distinct respects. There are five primary ways in which an abolitionist ethic is distinguishable from a more moderate reformist orientation. First, an abolitionist ethic identifies more completely the dehumanization, violence, and racial degradation of incarceration and punitive policing in the basic structure and dynamics of penal practices in the United States. Rather than understanding these features as more superficial flaws that might be repaired while holding constant the role of criminal law administration relative to other social regulatory projects, a critical abolitionist ethic centers on how caging or confining human beings in a hierarchically structured, depersonalizing environment developed through historical practices of overt racial subordination tends inherently toward violence and degradation. In this, an abolitionist ethic more accurately identifies the wrong entailed in holding people in cages or policing them with the threat of imprisonment, as well as more fully recognizes the transformative work that would be required to meaningfully alter these dynamics and practices.

Second, an abolitionist ethic, in virtue of its structural critique of penal practices, is oriented toward displacing criminal law as a primary regulatory framework and replacing it with other social regulatory forms, rather than only or primarily moderating criminal punishment or limiting its scope or focus.

Displacing criminal regulation and replacing it with other regulatory forms entails a primary orientation toward proliferating substitutive approaches to address social problems, root causes, and interpersonal harm through institutions, forms of empowerment, and regulatory approaches separate and apart from the criminal law. By contrast, a more moderate reformist framework typically aims at reducing the costs and impositions of incarceration by granting people convicted of less serious offenses options for supervised, monitored release (typically backed by the threat of imprisonment for noncompliance with the more lenient terms).<sup>254</sup> Abolition's critical project opens the space, in other words, for a positive project of proliferating social and regulatory alternatives to take the place of criminal law enforcement, and in this regard, abolition, as opposed to more moderate reform, enacts its profound skepticism of the legitimacy of prison-backed criminal regulatory interventions through its ongoing transformative efforts.

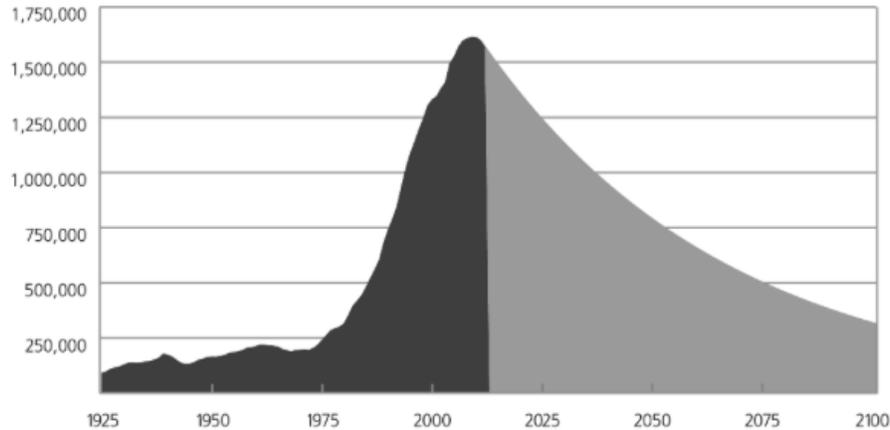
Third, abolition in its radical call for change appropriately captures the intensity that ought to be directed to transforming the regulation of myriad social problems through punitive policing and incarceration. More modest reform, in tolerating with relative comfort imprisonment and punitive policing, does not register the need for change with as much urgency. The following figure projects the time that would be required to return incarceration levels in the United States to where they were in 1980, assuming a rate of decline in incarceration equivalent to that which occurred in 2012. The product of a perfect storm for prison reformists—fiscal crises in numerous states, relatively low rates of reported crime, and a growing political commitment in both more conservative and liberal states to reduce the harshness and cost of criminal sentencing approaches—2012 marked a considerable decline in rates of imprisonment.<sup>255</sup>

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254. See, e.g., KENNEDY, *supra* note 14; KLEIMAN, *supra* note 14; Kohler-Hausmann, *supra* note 25; McLeod, *supra* note 127.

255. See Charlie Savage, *Trend to Lighten Harsh Sentences Catches on in Conservative States*, N.Y. TIMES (Aug. 12, 2011), <http://www.nytimes.com/2011/08/13/us/13penal.html> (noting increasing support in traditionally conservative states for reduced incarceration, including on the part of prominent conservatives such as Edwin R. Meese III, Grover Norquist, and Asa Hutchinson).

Historical and Projected U.S. Federal and State Prison Populations, Based on 2012 Rate of Decline



Source: Bureau of Justice Statistics, Prisoners Series (Sentencing Project 2013).

A reformist trajectory would likely under the best of circumstances yield decreases in incarceration roughly consistent with this course. Whereas expanding diversionary noncarceral criminal supervisory mechanisms may be expected to accelerate rates and avenues of decarceration, reform would in time, of course, face challenges during periods when, for one reason or another, public opinion tended in a more punitive direction than it did in 2012. Even under these most optimal conditions, however, with consistent, marked incarceration-reductive reforms such as those in 2012, it would take almost one hundred years to return to 1980 levels of imprisonment. Yet, already, in 2013, this downward trend reversed course as incarceration increased slightly at the state and federal levels.<sup>256</sup>

Although a significant achievement, the commitment by the bi-partisan #Cut50 prison reform coalition to reduce incarceration levels by half in the United States over ten years, would still leave the United States an outlier in the expanse and harshness of its criminal processes.<sup>257</sup> This bi-partisan coalition primarily is able to achieve consensus on reducing incarceration primarily for nonviolent, nonserious, nonfelony convictions.<sup>258</sup> And even if bi-partisan reform

256. See Erick Eckholm, *Report Finds Slight Growth in Population of Inmates*, N.Y. TIMES (Sept. 16, 2014), <http://www.nytimes.com/2014/09/17/us/number-of-prisoners-in-us-grew-slightly-in-2013-report-finds.html>.

257. See, e.g., #Cut50, <http://www.cut50.org>.

258. See, e.g., Pat Nolan, *Conservative and Liberals Join Together for Criminal Justice Reforms*, HUFF. POST, Apr. 16, 2015, <http://www.huffingtonpost.com/pat-nolan/conservative-and->

efforts were able actually to reduce the number of nonviolent offenders in prison and jail by half, the United States would still have by far the highest incarceration rate in the OECD.<sup>259</sup>

But abolition makes a bolder critical demand, which requires more thoroughgoing transformation, recognizing the importance of a substitutive regulatory logic, rather than a shift from imprisonment to prison-backed noncarceral alternatives. And even if abolition fails in its call for more marked change in criminal law enforcement, it renders moderate reform a more palatable option, potentially advancing a more moderate reformist program by articulating a critical and radically transformative project in the same legal and policy space.

Fourth, an abolitionist ethic in its critical dimensions and moral resonance—by exposing the dehumanization and illegitimate brutality of the core prison-backed projects of the criminal process—stands to produce greater discomfort and shame in carrying out criminal punishment. Even in those instances where imposing punishment remains perhaps necessary, as the lesser of two evils, when someone has committed and continues to pose a great threat of violence to others, an abolitionist ethic does not allow us to remain complacent in the rationalization of criminal law enforcement's violence and neglect. In this, an abolitionist ethic does not necessarily deny that in some instances there may be people so violent that they cannot be permitted to live among others. (These individuals are referred to in abolitionist writings as “the dangerous few” in order to underscore how very rare they are relative to the vast population of the incarcerated (and how much rarer they might be if we chose to live in ways less productive of such violence)).<sup>260</sup> But the associated discomfort and shame with which an abolitionist critique imbues such punishment promises to reshape the experience of punishing even these dangerous few by rendering criminal politics and jurisprudence more conflicted and ambivalent, and thereby improved, both at the highest level of abstraction and in the most concrete doctrinal and statutory details. This conflict, shame, discomfort, and ambivalence, in significant measure produced by an abolitionist critique of the ideology that rationalizes prison-backed punishment, simultaneously promises to make available broader imaginative horizons within which we are able to govern ourselves.

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liberals\_b\_7057184.html?utm\_hp\_ref=tw (celebrating Texas and South Carolina's criminal law reforms to increase penalties for violent offenses and expand alternatives to incarceration for non-violent offenses).

259. See JOHN SCHMITT ET AL., *supra* note 12, at 10–11.

260. See Ben-Moshe, *supra* note 16, at 90 (examining abolitionist analyses of the problem of the dangerous few). See also *supra* notes 49–64 and accompanying text.

Jonathan Simon, in *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*, exposes how political and social thought in the United States have come to focus on crime control to the exclusion of other frames of reference for governance.<sup>261</sup> Simon explains that “[w]hen we govern through crime, we make crime and the forms of knowledge historically associated with it—criminal law, popular crime narrative, and criminology—available outside their limited original . . . domains as powerful tools with which to . . . frame all forms of social action as a problem for governance.”<sup>262</sup> An important part of this ideological capture is, as Angela Davis reveals, the “simultaneous presence and absence” of incarceration and criminal law enforcement.<sup>263</sup> Crime governance thrives when we are able to imagine we have addressed interpersonal violence, theft, and other problems by depositing certain people in prison. But when we are forced to confront what prisons do, we are compelled to consider the ideological work prison performs. We come to recognize prison, then, as more than “an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers.”<sup>264</sup> An abolitionist ethic, by unmasking the hidden violence inherent in this ideological capture and by encouraging conflict about its perpetuation rather than unknowing acquiescence, promises to loosen the capture’s hold and renders us—citizens and legislators alike—better able to imagine other frameworks for governance and collective social life. This is a product both of abolition’s fundamental moral condemnation of prison-backed criminal law enforcement’s legitimacy as a means of managing complex social problems, and of the awareness an abolitionist ethic facilitates about the choice—rather than the necessity—of addressing complex social problems through incarceration and punitive policing.

At the level of judicial decision making and legislatively enacted criminal law, related forms of ideological capture confine the courts’ and legislatures’ capacities to address gross injustice in the criminal process. Here too, then, an abolitionist ethic promises an escape, or at least a substantial challenge to, acquiescence in these legal commitments—especially to the primacy of finality of a criminal conviction, what I will call the “fetish of finality.”

If we understand law in the powerful and evocative terms proposed by Robert Cover as part of a normative universe or “nomos,” we then appropriately

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261. See SIMON, *supra* note 5.

262. *Id.* at 17.

263. DAVIS, *supra* note 1, at 15.

264. *Id.* at 16.

recognize that “law and narrative are inseparably related.” Law, Cover explains, is “constituted by a system of tension between reality and vision,” between law as it is and our aspirations as to what it might become.<sup>265</sup> As Cover writes: “[L]aw is not merely a system of rules to be observed, but a world in which we live.”<sup>266</sup> He reveals how the normative and interpretive “commitments—of officials and of others— . . . determine what law means and what law shall be.”<sup>267</sup> As judges carry out their interpretive work, they must attempt to resolve these competing normative claims; judges themselves are variously aligned and torn between warring narratives and values as they steer law’s potential for violence or peace.<sup>268</sup>

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. More precisely, an abolitionist ethic contributes an unapologetic insistence on the brutal and morally illegitimate violence of criminal punishment—whether imprisonment or incarceration followed by state-inflicted death—to the nomos of constitutional criminal jurisprudence. This ethic throws down a gauntlet to the general jurisprudential comfort with the inevitability and moral unassailability of criminal conviction’s finality and lessens, perhaps, the dread of grinding the wheels of justice to a halt.<sup>269</sup> In other words, an abolitionist ethic decenters the primacy of finality and the smooth operation of the criminal process such that it becomes less comfortable to rest at ease with the unimpeded operations of criminal punishment institutions, especially the imposition of imprisonment or a sentence of death.

In *Herrera v. Collins*,<sup>270</sup> for example, the U.S. Supreme Court held that claims of actual innocence based on newly discovered evidence do not state an independent ground for federal habeas relief absent identification of an independent constitutional violation, even in a case where a defendant is sentenced to die

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265. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 5, 9 (1983).

266. *Id.* at 5.

267. *Id.* at 7.

268. *See id.* at 53, 67.

269. *See Herrera v. Collins*, 506 U.S. 390, 417 (1993) (“[B]ecause of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.”); *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987) (“[I]f we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.”).

270. *See* 506 U.S. 390.

and may be innocent.<sup>271</sup> Although Justice Blackmun cautions in dissent that the “execution of a person who can show that he is innocent comes perilously close to simple murder,”<sup>272</sup> Justice Rehnquist, writing for the majority, nonetheless concludes that the important principle of finality trumps, given “the very disruptive effect that entertaining claims of actual innocence would have on the need for finality . . . .”<sup>273</sup> This fetish of finality is grounded in a narrative and background norms—a *nomos*—that complacently treats the conventional criminal process followed by conviction and prison-based punishment (or killing by the state) as basically moral and just. The majority opinion relates these ideas thus:

In any system of criminal justice, “innocence” or “guilt” must be determined in some sort of judicial proceeding. . . . A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt. Other constitutional provisions have the effect of ensuring against the risk of convicting an innocent . . . . Once a defendant has been afforded a fair trial and convicted of the offense, the presumption of innocence disappears . . . . The existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.<sup>274</sup>

This narrative telling naturalizes conviction as the point at which moral (or at least constitutional) concern ends, unless there has been a new and independent ground of constitutional error identified at trial. This is true, on the Court’s account, even for a person who would be killed despite his possible innocence.

An abolitionist ethic, by starkly calling into question the marker of conviction as one that properly puts an end to moral (and constitutional) concern and instead exposes the dehumanization at the core of that legal marking practice, holds the potential to impose greater shame and discomfort, or at least ambivalence and conflict, at this point of decision. 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.

Death penalty abolition, by comparison, in proposing the substitution of life imprisonment without parole for state killing, reinforces the same account of the

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271. *Id.* at 400 (“Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”).

272. *Id.* at 446 (Blackmun, J., dissenting).

273. *Id.* at 417 (majority opinion).

274. *Id.* at 398–400 (citation omitted).

legitimacy of a conviction's finality as does the Court's majority, even if death penalty abolitionists prefer a non-death sentence.<sup>275</sup> It is for this reason, perhaps, as Robin West pointedly and provocatively observes of the dissent in *Herrera*, that Justice Blackmun stops short of understanding the killing of a possibly innocent person as homicidal and instead characterizes the Court's chosen course as "perilously close to simple murder."<sup>276</sup> West writes: "That extraordinary remark, I believe, suggests two questions of relevance here: First, why 'perilously close'? . . . [S]econd, is Blackmun suggesting that the Justices that did this are 'perilously close' to being murderers? . . . Or was he speaking metaphorically . . . ?"<sup>277</sup> Perhaps instead, Justice Blackmun (who, famously, eventually himself became a death penalty abolitionist), similarly understands the imposition of conviction to lessen the moral concern for any act upon the convict that follows, even if that act entails killing a possibly innocent person, thereby transforming that conduct from simple murder into something instead "perilously close" to it.<sup>278</sup>

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) has codified this fetish of finality into a statutory framework that often causes constitutional challenges to criminal convictions in federal court to be altogether disregarded. AEDPA purports to strip federal courts of jurisdiction to consider in habeas "a determination of a factual issue made by a State court,"<sup>279</sup> and limits disturbing a state conviction in habeas to cases where "the facts underlying the claim [are] . . . sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."<sup>280</sup> As a consequence, under AEDPA, even in cases with gutting evidence of possible innocence, courts have deferred to the

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275. See, e.g., DAVIS, *supra* note 1, at 106 ("As important as it may be to abolish the death penalty, we should be conscious of the way the contemporary campaign against capital punishment has a propensity to recapitulate the very historical patterns that led to the emergence of the prison as a dominant form of punishment. The death penalty has coexisted with the prison, though imprisonment was supposed to serve as an alternative to corporal and capital punishment."); see also Judith Butler, *On Cruelty: The Death Penalty*, 36 LONDON REV. BOOKS 31, 33 (2014) ("[T]he opposition to the death penalty has to be linked with an opposition to forms of induced precarity both inside and outside the prison, in order to expose the various different mechanisms for destroying life, and to find ways, however conflicted and ambivalent, of preserving lives that would otherwise be lost.")

276. See Robin West, *The Lawless Adjudicator*, 26 CARDOZO L. REV. 2253, 2256 (2005) (quoting *Herrera*, 506 U.S. at 444 (Blackmun, J., dissenting)).

277. *Id.*

278. *Herrera*, 506 U.S. at 446.

279. 28 U.S.C. § 2254(e)(1) (2012) ("[A] determination of a factual issue made by a State court shall be presumed to be correct.")

280. *Id.* § 2244(b)(2)(B)(ii) (2012).

state's right to kill possibly innocent persons on the ground that finality of a conviction must take priority over other moral and constitutional considerations.

For example, in *Cooper v. Brown*, the Ninth Circuit ordered the denial of a Petition for Rehearing and Petition for Rehearing En Banc to which Judge William Fletcher wrote a more than one hundred page dissent.<sup>281</sup> Judge William Fletcher began his dissent as follows:

The State of California may be about to execute an innocent man. From the time of his initial arrest [in 1983] until today, Kevin Cooper has consistently maintained his innocence of the murders for which he was convicted . . . . There is substantial evidence that three white men, rather than Cooper [who is African American] were the killers. . . Some of the evidence, even though exculpatory, was deliberately destroyed [by the police] . . . . Some of the evidence, even though exculpatory, was concealed from Cooper . . . . [T]he only survivor of the attack, first communicated . . . that the murderers were three white men.<sup>282</sup>

An earlier opinion in this case is also noteworthy for its discussion of the glaring evidence of law enforcement misconduct in the investigation of Kevin Cooper:

Significant evidence bearing on Cooper's culpability has been lost, destroyed or left unpursued, including, for example, blood-covered coveralls belonging to a potential suspect who was a convicted murderer, and a bloody t-shirt, discovered alongside the road near the crime scene. The managing criminologist in charge of the evidence used to establish Cooper's guilt at trial was, as it turns out, a heroin addict, and was fired for stealing drugs seized by the police. Countless other alleged problems with the handling and disclosure of evidence and the integrity of forensic testing and investigation undermine confidence in the evidence.<sup>283</sup>

Judge Fletcher concludes his impassioned dissent with this admonition:

Doug, Peggy and Jessica Ryan, and Chris Hughes, were horribly killed. Josh Ryan, the surviving victim, has been traumatized for life. . . . The criminal justice system has made their nightmare even worse. . . . Kevin Cooper has now been on death row for nearly half his life. In my opinion, he is probably innocent of the crimes for which the State of California is about to execute him. If he is innocent, the real

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281. *Cooper v. Brown*, 510 F.3d 870 (9th Cir. 2007), *reh'g denied*, 565 F.3d 581 (9th Cir. 2009) (Fletcher, J., dissenting).

282. 565 F.3d 581, 581–85 (Fletcher, J., dissenting).

283. 510 F.3d at 1004 (McKeown, J., concurring).

killers have escaped. They may kill again. They may already have done so. We owe it to the victims of this horrible crime, to Kevin Cooper, and to ourselves to get this one right. We should have taken this case en banc and ordered the district judge to give Cooper the fair hearing he has never had.<sup>284</sup>

But Judge Rymer, by way of response, presumably representing the position of the majority of judges of the Ninth Circuit who voted to deny rehearing, primarily relied on AEDPA's codification of the fetish of finality, definitively concluding of Judge Fletcher (and Kevin Cooper's) claims, quite simply, that "AEDPA mandates their dismissal."<sup>285</sup>

Wider circulation of an abolitionist ethic, in calling the lie on the point of conviction as the end of moral (and constitutional) concern as codified by AEDPA, might facilitate an extension of Judge Fletcher's outrage into further reaches of the judiciary and into legislatures and civil society, or at least an ever deeper moral unease at viewing conviction as making it less than simple murder to execute a quite possibly innocent man. An abolitionist ethic promises, too, to increase all of our discomfort, shame, and conflict over ignoring the claim to humanity of those who stand convicted, whether or not they are innocent or sentenced to die.<sup>286</sup>

Constitutional jurisprudence concerning racial bias in the criminal process similarly stands to be improved by the wider circulation of an abolitionist (as opposed to a reformist) ethic. The Supreme Court's opinion in *McCleskey v. Kemp*,<sup>287</sup> for instance, dismissed the overwhelming evidence presented by Warren McCleskey of racial bias affecting Georgia's capital-sentencing process. The holding rested in large measure on a concern that "if we accepted McCleskey's claim . . . we could soon be faced with similar claims as to other types of penalty."<sup>288</sup> This narrative—effectively about the intolerable threat posed by grinding the wheels of justice to a halt—leads the Court to tolerate a death-sentencing regime that impacts African Americans and white defendants differ-

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284. 565 F.3d at 634–35 (Fletcher, J., dissenting).

285. *Id.* at 636 (Rymer, J., concurring).

286. See J. PATRICK O'CONNOR, SCAPEGOAT: THE CHINO HILLS MURDERS AND THE FRAMING OF KEVIN COOPER 11 (2012) (investigating Kevin Cooper's experience leading to his conviction and over the course of his lengthy incarceration on death row, where he has spent more than half his life); Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315, 324, 329 (2010) (exploring the dangers posed by a focus on actual innocence in reducing concern about more pervasive forms of injustice and brutality in the criminal process, particularly in the treatment of "guilty" persons).

287. *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987).

288. *Id.* at 315.

ently on the basis of their race.<sup>289</sup> So here, too, an abolitionist ethic, particularly in its attention to the racial violence that inheres at the core of the criminal process, makes available a response to racially infected moral wrongs in criminal sentencing that is less defensive, less sure of the desirability of avoiding “similar claims as to other types of penalty,” and perhaps even willing to extend moral and constitutional concern to less obvious and deliberate sites of racial bias, as well as to persons who stand convicted of serious crimes.<sup>290</sup> Along these lines, then, the shame, discomfort, ambivalence, and conflict with which an abolitionist ethic imbues criminal punishment may help us to begin to escape these confines, both in our politics more broadly and in the doctrines and legalist assumptions that make a fetish of criminal law’s finality.

Fifth and finally, an abolitionist framework opens the space for a transformational politics involving different individual actors, groups, and communities to address the problems that haunt criminal law administration. Rather than rely on correctional experts—and their increasingly fine-tuned plans to reinvent probation or parole supervision to reduce crime or to render prisons more humane—an abolitionist ethic creates space within which community members may organize themselves to empower vulnerable individuals and to address crime prevention by other means. One example of such an organization is the Brooklyn-based “Sistas Liberated Ground” (SLG).<sup>291</sup> SLG is a group of women of color residents of Bushwick, Brooklyn, who have committed themselves to holding community members accountable for domestic violence and empowering vulnerable individuals to keep themselves safe, to locate safe spaces, to access mediation, and to address their needs for security without involving the criminal process unless they choose to do so.<sup>292</sup> This sort of work is encouraged by an abolitionist ethic because abolition inspires forms of social organization to address interpersonal harm apart from criminal law enforcement, where otherwise recourse to criminal law’s intervention would be more reflexive because it would be less subject to question and critique. This positive project of abolition

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289. *Cf.* at 303, 315.

290. *See* RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 92 (2008) (“As racial politics increasingly focuses on trivial slights, innocent slips of the tongue, and even well-intentioned if controversial decisions, the most severe injustices—such as the isolation of a largely black underclass in hopeless ghettos or even more hopeless prisons—receive comparatively little attention because we can’t find a bigot to paste to the dartboard.”).

291. *See Prison Moratorium Project, supra* note 24.

292. *See id.* A further example of grassroots organizing along these lines, though not necessarily to abolitionist ends, is the work of formerly incarcerated people to organize themselves and to work together for change to the U.S. criminal process. *See, for example, the work of Just Leadership. See JUSTLEADERSHIPUSA, <https://www.justleadershipusa.org>.*

and prevention in an often overlooked register, which the remainder of this Article explores, also promises to lessen the dread that accompanies the thought that judges and legislators (and others) might “soon be faced with similar claims as to other types of penalty”—that is, the terror of the idea that the wheels of the criminal legal process might slow.

The problem remains, of course, of how to envision in more complete terms a manner of preventing interpersonal harm consistent with this critical abolitionist ethic. The remainder of this Article engages the preventive justice and related literatures toward this end, developing an overlooked and structurally focused form of grounded preventive justice not centered on individualized criminal law enforcement targeting.

### III. PREVENTIVE JUSTICE

Preventive justice designates a range of measures aimed at reducing the incidence of harmful behavior, typically by targeting the risks posed by specific individuals and less often by addressing the potential harm posed by given social situations. Preventive measures run the gamut from preventively detaining people deemed dangerous to increased spending on social programs that may serve to decrease crime.<sup>293</sup> In some respects, in its most general sense the term preventive justice designates a field of regulatory activity not meaningfully distinguishable from general crime prevention apart from its reference to justice.

The scholarly literature focused on preventive justice is overwhelmingly engaged with critically considering the injustice of particular (recent) punitive preventive measures, like sex offense registries or terrorism watch lists, and with underscoring the threats to vulnerable populations and to the liberal, libertarian, and rule of law values imperiled by individualized preventive targeting in criminal law administration.<sup>294</sup> This scholarly work is primarily and remedially focused on

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293. See, e.g., ASHWORTH & ZEDNER, *supra* note 30, at 2 (“Preventive measures taken by the state in order to reduce risks to harm are legion. Many of them, such as those involving situational crime prevention, social crime prevention, and even the most common forms of surveillance, do not involve (direct) coercion and therefore lie beyond the scope of the present study.”).

294. See, e.g., *id.*, at 22–23; R.A. Duff, *Pre-Trial Detention and the Presumption of Innocence*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW, *supra* note 28, at 115; Harcourt, *supra* note 28, at 256; see also David Cole, *The Difference Prevention Makes: Regulating Preventive Justice*, CRIM. L. & PHIL. (2014) (examining the abuses of prevention where it involves coercion, and the constitutional and other constraints implicated by preventive measures, and arguing that informal constraints like cost and legitimacy may play a more significant role in checking abuses of prevention).

addressing how procedural protections might limit the excesses of coercive, punitive preventive measures.<sup>295</sup>

By contrast, this Part explores a distinct and largely neglected structural and institutional conception of preventive justice that promises to minimize criminal law's injustice and reduce crime. This alternative conception is aimed at prevention of interpersonal harm, along with other social problems, that might operate without enlisting criminal law enforcement. Although the current organization of an idea of security around punitive policing and prison-backed punishment has gradually come to seem natural and inevitable, this alternative conception of preventive justice serves as a corrective to the false sense of necessity that so often accompanies punitive preventive policing and punishment. Additionally, this alternative conception of preventive justice offers a manner of constraining punitive preventive measures other than through procedural mechanisms—namely, by substantively conceptualizing prevention in other terms and proliferating noncoercive modes of facilitating collective security.

This neglected framework of prevention may operate without involvement of the conventional criminal process, without targeting individual persons for heightened surveillance, and without jeopardizing core principles of justice and fairness. Prevention so configured attends to the problems posed by interpersonal violence and other criminalized conduct by decreasing opportunities to offend and confronting criminalized conduct without first resorting to policing, prosecution, and conventional criminal punishment. This move away from preventive policing, prosecution, and punishment—away from the sort of interventions that Professor Bernard Harcourt has critically coined “punitive preventive measures”—and toward situational, structural, and institutional prevention entails an alternative form of preventive crime regulation consistent with an abolitionist project in that it does not rely on strategies of intervention that instigate criminal law's institutions, violence, or surveillance.<sup>296</sup> Prevention in this alternative register may, for these reasons, function as a constructive supplement to a prison abolitionist ethic.

This Part explores how this alternative conception of prevention is consistent with an earlier vision of ensuring social order and collective peace, one that arguably dates to the late eighteenth and early nineteenth centuries, but has

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295. See, e.g., ASHWORTH & ZEDNER, *supra* note 30, at 19–20; Carol S. Steiker, *Proportionality as a Limit on Preventive Justice*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW, *supra* note 28, at 194.

296. Harcourt, *supra* note 28, at 252. For this reason, prevention in this alternative structural register does not provoke worries of a Foucaultian sort focused on pervasive surveillance and discipline, because it does not markedly expand discipline or surveillance. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 127–29 (Alen Sheridan trans., 1975).

been largely abandoned or merely glossed over in contemporary criminal law scholarship.

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Preventive justice first surfaced as a relevant concept in Anglo-American legal discourse before there were established police forces, at a time when it remained uncertain how rapidly industrializing societies would seek to limit interpersonal harm while maintaining a commitment to liberty and privacy.<sup>297</sup> Although Blackstone conceived of preventive justice as tied to directly policing probable criminals through an assessment of their character rather than other actuarial means,<sup>298</sup> later social reformers were committed to a different approach to maintaining social order quite apart from what we would today conceive of as criminal law enforcement.<sup>299</sup> The most famous of these reformers was Jeremy Bentham, who went as far in his unfinished *Constitutional Code* to explore the convening of a “Preventive Services Ministry,” the function of which would be to prevent “delinquency and calamity.”<sup>300</sup> This conception of prevention was organized not so much around crime as around uncertainty, insecurity, and risk.<sup>301</sup> Its purpose was to ensure the “security of [future] expectations” to the greatest extent possible.<sup>302</sup> This involved an expanded conception of security, according to which individual criminal deviance was not any more of concern than the safety of mines and factories, precautions against fire and floods, and other “calamities” of nineteenth century life.<sup>303</sup> Quite apart from his famous (or infamous) plans for panoptic prison reform, Bentham conceptualized security more broadly as a project of environmental design and risk reduction. As Martin Dubber has explained, “[Bentham’s] idea was to prevent the exigency. And so the possibility of an exigency became the justification for police power actions, rather than the

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297. See GARLAND, *supra* note 5, at 31; ASHWORTH & ZEDNER, *supra* note 30, at 38.

298. See BLACKSTONE, *supra* note 2, at \*252 (“[I]f we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes than to expiate the past.”); see also ASHWORTH & ZEDNER, *supra* note 30, at 30 (“Reading Blackstone’s analysis of preventive justice, it is evident that crime prevention rested on the assumption that it was possible to identify potential wrongdoers not so much by their choices or actions but rather by who they were or appeared to be.”).

299. See ASHWORTH & ZEDNER, *supra* note 30, at 30.

300. JEREMY BENTHAM, CONSTITUTIONAL CODE 213 (1830).

301. See GARLAND, *supra* note 5, at 31.

302. BENTHAM, THE WORKS OF JEREMY BENTHAM, PRINCIPLES OF THE CIVIL CODE pt. 1, ch. 7 (1789).

303. BENTHAM, *supra* note 300, at 321. I am not invoking Bentham’s work here to endorse his projects in their entirety, or even to ground abolition in a utilitarian conception of justice, but because of the particular usefulness of Bentham’s analysis of prevention to an account of grounded abolitionist justice.

exigency itself.”<sup>304</sup> A professional punitive police power backed by the threat of imprisonment was thus not understood by Bentham and his contemporaries to be an inevitable force for preserving security, even as it is now an entirely taken for granted component of the modern state. Indeed, there was widespread suspicion of and resistance to the establishment of a punitive preventive police force centered on crime interdiction, and this deep suspicion of punitive policing persisted for years. As David Garland explores in his celebrated study, *The Culture of Control: Crime and Social Order in Contemporary Society*:

[E]ven the idea of “police” referred not to the specialist agency that emerged in the nineteenth century but to a much more general programme of detailed regulation. . . . The aim of this kind of “police” regulation was to promote public tranquility, and security, to ensure efficient trade and communications in the city, and to enhance the wealth, health, and prosperity of the population. To this end, city authorities promulgated detailed by-laws calling for . . . programmes of street lighting [and] the regulation of roads and buildings . . .<sup>305</sup>

Even though the police force that began to take shape during the nineteenth century focused more directly on crime control, the original purpose of prevention was “not to pursue and punish individuals but to focus upon the prevention of criminal opportunities and the policing of vulnerable situations.”<sup>306</sup>

During this time period, the idea that punitive policing would take up the work of limiting interpersonal harm was dismissed for decades as illiberal, prone to tyrannical abuse, and dangerous. For example, a Select Committee in the British House of Commons convened for three years to consider the introduction of a formal police force, concluding in 1818:

[T]hough their property may occasionally be invaded, or their lives endangered by the hands of wicked and desperate individuals, yet the institutions of the country being sound, its laws well administered, and justice executed against offenders, no greater safeguards can be obtained, without sacrificing all those rights which society was instituted to preserve.<sup>307</sup>

The Committee thus recognized that risk of harm was an inevitable threat associated with social life. Consequently, the Committee could not conceive that

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304. MARTIN D. DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 118 (2005).

305. GARLAND, *supra* note 5, at 31.

306. *Id.*

307. ASHWORTH & ZEDNER, *supra* note 30, at 37 (quoting SELECT COMMITTEE ON THE POLICE OF THE METROPOLIS, THIRD REPORT, 1818, H.C. 32 (U.K.)).

extraordinary measures could be taken to avert crime and the risk thereof beyond institutional and structural efforts to limit risk and isolated responses against those individuals who committed offensive wrongs. Instead, by and large, these reformers thought that society ought to organize itself to minimize crime without unnecessary individual targeting, both by empowering people to care for themselves and by organizing collective social life to minimize opportunities for victimization and harm. This premise is at the core of the potential confluence of an abolitionist framework and this earlier form of prevention focused on structural measures of risk reduction rather than individualized targeting.

Along these lines, the Select Committee of the House of Commons acknowledged:

It is no doubt true, that to prevent crime is better than to punish it: but the difficulty is not in the end but the means, and though your committee could imagine a system of police that might arrive at the object sought for, yet in a free country, or even in one where any unrestrained intercourse of society is admitted, such a system would of necessity be odious and repulsive, and one which no government would be able to carry into execution. . . . [T]he very proposal would be rejected with abhorrence; it would be a plan which would make every servant of every house a spy upon the actions of his master, and all classes spies upon each other.<sup>308</sup>

Again in 1822, the House of Commons Select Committee Fourth Report concluded:

It is difficult to reconcile an effective system of police, with that perfect freedom of action and exemption from interference, which are the great privileges and blessings of society in this country; and your Committee think that the forfeiture or curtailment of such advantages would be too great a sacrifice for improvements in police, or facilities in detection of crime, however desirable in themselves if abstractly considered.<sup>309</sup>

Only in 1828 did a Select Committee finally recommend the convening of a centralized criminal police force, but the force's purpose was to prevent crime through diversified regulation, not to serve as an adjunct to punishment. As the Committee explained, "[the force's] main object ought to be the prevention of crime, and not the punishment of it."<sup>310</sup> When a Scottish magistrate, Patrick

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308. *Id.* at 38 (quoting SELECT COMMITTEE ON THE POLICE OF THE METROPOLIS, THIRD REPORT, 1818, H.C. 32 (U.K.)).

309. *Id.*

310. Remarks of Mr. Alderman Waithman, EUR. PARL. DEB. (28) 813 (Feb. 28, 1828).

Colquhoun, sought to centralize the police by creating an organization with fulltime police officers, officers were to address indigence, not just crime.<sup>311</sup> To the extent officers sought to prevent crime directly, policing was to be organized to prevent criminal opportunities and vulnerable situations.<sup>312</sup> Colquhoun's *Treatise on the Police of the Metropolis* conceptualizes preventive policing to include regulations involving "markets, hackney-coach stands, paving, cleansing, lighting, watching, marking streets, and numbering houses."<sup>313</sup> It was apparent to these social reformers that any program of policing or crime regulation should consider education, employment, social integration, and engagement as indispensable and central components of their mandate. Even to proponents of policing, the advent of an organized police was understood to be part of a diversified form of governance, primarily social rather than punitive in orientation, and one in which citizens and society were principally responsible for crime prevention.<sup>314</sup>

In the intervening centuries, an idea of security organized around punitive policing and prison-backed punishment gradually has come to seem natural and inevitable, but this earlier conception of prevention may offer a corrective to that false sense of necessity and to the scholarship and reformist efforts centered on containing punitive preventive measures solely through procedural reform (rather than substantively reconceptualizing prevention in other terms and proliferating noncoercive modes of prevention).<sup>315</sup> Much of the work of prevention in this alternative register is situation-specific, incremental, and unglamorous, but it promises the most urgently needed change in practices of overcriminalization and to criminal law enforcement's violence.

A further factor commending prevention in this alternative register, and an abolitionist ethic more broadly, is that the violence and dehumanization that haunts criminal law administration, and the needed reduction in overcriminalization and overpunishment, requires a much more radical shift than merely an at-

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311. See GARLAND, *supra* note 5, at 31.

312. See *id.*

313. COLQUHOUN, *supra* note 44, at 594.

314. See GARLAND, *supra* note 5, at 31–34 (examining this earlier conception of "police" as "the path not taken").

315. Interestingly, in his genealogical analysis of the substitution of what Garland calls "penal-welfare" for this earlier broad social conception of "police," Garland suggests that although penal institutions in the mid-twentieth century began to assume credit for controlling crime, it was more likely the case that crime control was meaningfully ensured by "the resilience of social controls in working-class communities," "work discipline," "religious revivals," the "moral campaigns of churches and reform organizations," "charities and settlements," "trade unions," "working men's associations, and boys clubs," "family," and "neighbourhood," which "provided a vigorous, organic underpinning to the more reactive, intermittent action of policeman state." See GARLAND, *supra* note 5, at 33.

tack on coercive preventive measures like sex offense registries or terrorism watchlists and a concomitant expansion of procedural protections. Different approaches are needed within which prevention may be conceptualized apart from individualized targeting and coercion, both before and after the fact of a criminal conviction. Preventive ambitions, as Fred Schauer has illuminated, are of course ubiquitous throughout the criminal law: “[U]sing the criminal law in order to achieve preventive goals is a pervasive dimension of our long-standing practices of punishment . . . .”<sup>316</sup> Although critics of punitive preventive measures decry the procedural informality—or even irregularity—that routinely accompanies such measures (and importantly and rightly so), these critics overlook how eviscerated procedural protections are characteristic not just of the preventive periphery of precrime enforcement, but of most of the adjudications at criminal law’s core.<sup>317</sup> As political theorist Stephen G. Engelmann provocatively put it, “[I]n the criminal law . . . elaborate procedures . . . are routinely suspended in ongoing orgies of plea-bargaining.”<sup>318</sup> These “orgies of plea-bargaining” are produced by the often almost exclusive reliance on criminal law administration to manage social risk rather than proliferating other noncriminal forms of prevention and justice.

More far-reaching emphasis on this framework of prevention would beneficially focus conventional criminal law’s properly reactive processes on those relatively rare instances where some form of collective sanction—subject to procedural protections—is most called for. Such circumstances might include those relatively limited situations of interpersonal harm—instances of rape and murder, chief among them—where the rituals of the criminal process may perform important and desirable societal work, or at least for which we can conceive presently of no other appropriate response.

The following Part continues to reconceptualize criminal law’s necessary ambit and the prevention of harm outside the institutions that form the penal arm of the state.

#### IV. RECONCEPTUALIZING PREVENTION

This Part surveys an array of preventive projects that operate in this alternative social institutional and structural register. In so doing, the analysis that fol-

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316. See Frederick Schauer, *The Ubiquity of Prevention*, in PREVENTION AND THE LIMITS OF THE CRIMINAL LAW, *supra* note 28, at 12.

317. See Kohler-Hausmann, *supra* note 25, at 685.

318. Engelmann, *supra* note 40, at 388.

lows begins to illustrate what an abolitionist framework would entail for crime prevention, justice, and security.

### A. Justice Reinvestment

Justice reinvestment has become a catchphrase in criminal law reformist discourse to describe various efforts to reduce spending on imprisonment, some of which include substituting shock incarceration-backed probation monitoring for longer prison sentences.<sup>319</sup> But justice reinvestment in line with an abolitionist framework means something different, more specific, and more thoroughgoing: It involves reconceptualizing justice and prevention in ways that independently strengthen valuable social projects that would simultaneously stand to reduce crime. This entails reinvesting criminal law administrative resources in other sectors and also reinvesting the concepts of justice and prevention with more expansive meaning.

In the broadest terms, justice reinvestment along these lines would refocus collective energy on strengthening the social (rather than the criminal) arm of the state out of concern for justice and in virtue of a commitment to security, and, as this Article has argued, as a project of criminal law reform consistent with an abolitionist ethic. Preventive justice in its overlooked structural variant provides a conceptual ground for understanding security anew in terms much deeper and more vast than mere crime prevention through probationary supervision.<sup>320</sup> Security is more meaningfully furthered in these terms by social solidarity, flourishing neighborhoods, dignified work, education, labor unions, empowerment of vulnerable persons, community organizations, and basic social infrastructure.<sup>321</sup>

In more specific terms, recall the economist Heckman's research on the social importance of early childhood education relative to other criminal law administrative interventions to address crime.<sup>322</sup> The early childhood educational organizations that are the subject of Heckman's ongoing work include an array of well-established and pilot programs centered on education, health care, and expanding social opportunities for very young disadvantaged children.<sup>323</sup> These

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319. See, e.g., JAMES AUSTIN ET AL., ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT 15 (2013); Mark A.R. Kleiman, *Justice Reinvestment in Community Supervision*, 10 CRIMINOLOGY & PUB. POLY 651, 654–56 (2011).

320. But see Mark A.R. Kleiman, *Jail Break: How Smarter Parole and Probation Can Cut the Nation's Incarceration Rate*, WASH. MONTHLY, <http://www.washingtonmonthly.com/features/2009/0907.kleiman.html> (last updated Apr. 11, 2015).

321. See GARLAND, *supra* note 5, at 31–34; WESTERN, *supra* note 5, at 5, 7.

322. See *supra* text accompanying note 244.

323. See, e.g., Heckman & Masterov, *supra* note 244, at 488; Heckman et al., *supra* note 244, at 2053.

institutions serve as models of preventive justice and justice reinvestment in these terms—promoting social flourishing and security, as well as preventing harm and allocating resources to more just ends, in accord with a broader, more meaningful conception of justice than reactive criminal punishment serves.<sup>324</sup> This is not to claim that these social projects are exclusively positioned to take up the work of justice reinvestment within an abolitionist framework, but to identify the shapes that reinvestment and just prevention consistent with an abolitionist ethic could take in terms resonant with W.E.B. Du Bois' vision of positive abolition.

## B. Decriminalization

De jure and de facto decriminalization are similarly an important component of prevention and justice in a structural register and consonant with an abolitionist ethic—both preventing crime and acting in service of a fuller conception of justice than punishment of minor offenses achieves. Decriminalization may assume any number of forms. Numerous U.S. jurisdictions have decriminalized marijuana, which stands to reduce the harms of punitive policing of marijuana users and to prevent all marijuana offenses currently criminalized.<sup>325</sup> Although marijuana convictions constitute only a very small part of the problems associated with U.S. criminal law administration, punitive policing of marijuana users enables the racial harassment of thousands of young men of color, including many of the 50,000 persons arrested in 2011 in New York City for minor possession of marijuana.<sup>326</sup> Some jurisdictions have gone considerably further, such as Portugal, which in 2001 became the first European country to abolish criminal sanctions for personal possession of narcotics, including heroin, cocaine, and methamphetamine.<sup>327</sup> Although persons involved in possession of these narcotics may be referred through a civil order for treatment, there is no threat of imprisonment that accompanies noncompliance with such a referral. Notably, in the aftermath of complete decriminalization of drug possession in Portugal, the number of HIV infections transmitted by sharing needles decreased and the percentage of adolescents using narcotics declined, while the numbers of people pursuing addiction treatment increased substantially.<sup>328</sup>

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324. See, e.g., Heckman & Masterov, *supra* note 244, at 458; Heckman et al., *supra* note 244, at 2070.

325. See *States That Have Decriminalized*, NORML, <http://norml.org/aboutmarijuana/item/states-that-have-decriminalized> (last visited Apr. 11, 2015).

326. See, e.g., *The Marijuana Arrest Problem, Continued*, N.Y. TIMES, July 5, 2012, at A18.

327. GLENN GREENWALD, CATO INST., DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES 2 (2009), [http://object.cato.org/sites/cato.org/files/pubs/pdf/greenwald\\_whitepaper.pdf](http://object.cato.org/sites/cato.org/files/pubs/pdf/greenwald_whitepaper.pdf).

328. See *id.* at 11–16.

De facto decriminalization, or at least reduced sentencing, may involve exercises of police or prosecutorial discretion to simply not pursue, arrest, or prosecute particular categories of cases while retaining a legal norm of criminalization. For example, in 2013 Attorney General Eric Holder instructed assistant U.S. attorneys not to charge particular criminal cases in a way so as to trigger certain stiff criminal sentences.<sup>329</sup>

Importantly and additionally, efforts to confront the “school-to-prison pipeline” by eliminating zero-tolerance policies in schools that turn children who misbehave in school over to police are another significant measure to eliminate criminalization. Reform along these lines stands to address some of criminal law’s violence in a readily achievable manner consistent with an abolitionist ethic.<sup>330</sup>

Although the precise scope of desirable de jure and de facto decriminalization remains uncertain, and though there is surely some violent conduct that the law ought to plainly condemn, decriminalization deserves a more prominent place than it currently occupies in criminal law reformist discourse, both in the narcotics context and elsewhere.<sup>331</sup>

### C. Creating Safe Harbors

Another crucial component of an abolitionist approach to prevention is a form of social organization that enables vulnerable persons and communities to care for themselves, rather than having to rely exclusively on the criminal law administrative apparatus to serve basic needs for personal and community security. The Brooklyn-based “Sistas Liberated Ground” (SLG) is again illustrative—an instance of both facilitating forms of restorative justice and mediation as well as creating a safe harbor for those vulnerable to domestic violence.<sup>332</sup> Similarly, Violence Interrupters, a program pioneered by epidemiologist Gary Slutkin, consists of a task force of community mediators, many of whom are formerly gang-involved community members, who may be called upon to help deescalate situations of mounting community conflict, whether gang-related or otherwise.<sup>333</sup>

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329. See, e.g., Charlie Savage, *U.S. Orders More Steps to Curb Stiff Drug Sentences*, N.Y. TIMES, Sept. 20, 2013, at A18.

330. Tona M. Boyd, *Confronting Racial Disparity: Legislative Responses to the School-to-Prison Pipeline*, 44 HARV. C.R.-C.L. REV. 571, 573–75 (2009).

331. The analysis in this Part draws in part on my previous work on criminal law reformist alternatives and the theory of the “unfinished” developed by Scandinavian social theorist Thomas Mathiesen. See, e.g., McLeod, *supra* note 127, at 120–23.

332. See *supra* text accompanying notes 291–292.

333. See, e.g., Gary Slutkin, *Re-Understanding Violence as We Had to Re-Understand Plague..to Cure It*, HUFFINGTON POST (Apr. 19, 2012, 11:05 AM), <http://www.huffingtonpost.com/gary->

Studies of Violence Interrupters' work in Chicago and Baltimore, conducted by researchers at Northwestern and Johns Hopkins Universities, found that homicide rates decreased with the implementation of these programs.<sup>334</sup> In one neighborhood, the rates decreased by over 50 percent.<sup>335</sup> These are interventions that borrow from restorative models of dispute resolution but ground those practices in specific community-based projects.

This model of community self-care occupied a central place in the Black Panther Party's philosophy as a means of enabling people to avoid reliance on criminal law enforcement to solve legal and social problems. The Black Panthers, for instance, convened "People's Free Medical Clinics" in cities around the country in the 1970s, after the Civil Rights Acts were passed.<sup>336</sup> Though the Black Panther Party is not often remembered in these terms today, their public health initiatives sought to foster liberatory politics organized around creating safe spaces and community well-being. Freedom and justice, in these terms, following W.E.B. Du Bois, are understood in terms of an end of racial subordination as a positive project of human flourishing, rather than merely freedom from discrimination or as a punitive response in the wake of wrongdoing.

Prevention in a structural register might also be understood, then, more generally to encompass the creation of additional spaces of liberatory security separate from the criminal arm of the state—spaces in which harm is prevented and just conditions are manifest at a small scale, as well as alternative forms of dispute resolution, restorative interventions of the sort implemented by SLG and similar organizations.

#### D. Alternative Livelihoods

Alternative livelihoods programs also rely upon institutions separate from criminal law enforcement to prevent conduct otherwise frequently addressed through criminal law administration. Alternative Development Programming, for example, undertaken by the United Nations in the criminal law and development context, subsidizes narcocultivators to shift to nonnarcotic crops, and then assists growers in accessing national and international markets until they are able

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slutkin/reunderstanding-violence-\_1\_b\_1431360.html; *see also* THE INTERRUPTERS (Kartemquin Films 2011) (documentary film examining the Violence Interrupters' work).

334. *See* McLeod, *supra* note 127, at 131; Daniel W. Webster et al., *Effects of Baltimore's Safe Streets Program on Gun Violence: A Replication of Chicago's CeaseFire Program*, 90 J. URB. HEALTH 27 (2012).

335. *See* Webster et al., *supra* note 334, at 33.

336. *See* ALONDRA NELSON, BODY AND SOUL: THE BLACK PANTHER PARTY AND THE FIGHT AGAINST MEDICAL DISCRIMINATION 75–85 (2011).

to make the financial transition to the alternative crop by themselves.<sup>337</sup> In certain programs, participation is voluntary and unaccompanied by the threat of criminal or other penalties. Over time, many narcocultivators switch to the legal alternative if it becomes equivalently lucrative. Transition to alternative crops is associated with a significant reduction in threats of violence due to the insecurity that accompanies narcotics trafficking.<sup>338</sup> Relatedly, certain Latin American countries have sought to purchase cocoa crops from growers, which may be used in manufacturing products like toothpaste and soap.<sup>339</sup> More generally, these alternative development programs offer a manner of conceptualizing how crime prevention might be attempted through employment programs and small business development assistance, such as for those involved in narcotics sales in the United States, as well as for those involved in other forms of for-profit criminal activity.<sup>340</sup> These initiatives thus prevent harm and enable more sustainable conditions of social life.

### E. Universal Design

Improved security may also be enabled by simple design innovations that leave public spaces better lit to reduce the likelihood of assault in public at night, as well as by making products less susceptible to theft.<sup>341</sup> The regulation of theft and shoplifting provides one illustration of how design innovations may actually more effectively and cheaply prevent the offending conduct, simultaneously promoting the ends of justice by avoiding unnecessary criminal law enforcement. Shoplifting may be regulated either through policing, prosecution, and punishment, or through using infrastructural and design-focused preventive interventions. On a criminal regulatory model that targets individual thieves, in-store security and registers of suspected offenders identify shoplifters (these are examples of individualized precrime preventive targeting). In instances of identified

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337. See, e.g., U.N. OFFICE ON DRUGS & CRIME, ALTERNATIVE DEVELOPMENT: A GLOBAL THEMATIC EVALUATION: FINAL SYNTHESIS REPORT, at v–vi, 12–13 (2005).

338. See *id.* at 9–10.

339. See, e.g., Allegra M. McLeod, *Exporting U.S. Criminal Justice*, 29 YALE L. & POL'Y REV. 83, 161 (2010); *Evo Morales Launches 'Coca Colla'*, TELEGRAPH (Jan. 10, 2010), <http://www.telegraph.co.uk/news/worldnews/southamerica/bolivia/6962746/Evo-Morales-launches-Coca-Colla.html>; Jean Friedman-Rudovsky, *Bolivian Buzz: Coca Farmers Switch to Coffee Beans*, TIME (Feb. 29, 2012), <http://content.time.com/time/printout/0,8816,2107750,00.html>.

340. See, e.g., McLeod, *supra* note 127, at 127.

341. See *id.* at 127–28; Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1056–57 (2002); Erika D. Smith, *Streetlights Must Be Part of Crime-Fighting Plan*, INDY STAR (Mar. 28, 2014, 2:31 PM), <http://www.indystar.com/story/opinion/columnists/erika-smith/2014/03/28/erika-d-smith-streetlights-must-part-crime-fighting-plan/7016621>.

violations, accused individuals may be subject to arrest, charge, prosecution, and punishment (with both post-offense responsive ambitions and preventive deterrent ambitions). But shoplifting may also be preventively addressed, and arguably more effectively so, by using design interventions, which do not entail the individual liberty intrusions associated with either punitive preventive or conventional criminal law enforcement responses. Local business groups or city regulations could instead require store owners to implement store policies, such as packaging and display practices, that make it virtually impossible to steal.<sup>342</sup> Thus, shoplifting need not be a prosecutorial priority in order to reduce its incidence very considerably; by contrast, the available evidence suggests that police arrest less than one percent of shoplifters, so the design-based, noncriminal regulatory regime may actually be more effective.<sup>343</sup> Auto theft likewise may be prevented through straightforward changes by auto manufacturers to vehicles so as to make it either impossible to access the car to steal it or to inhibit the mobility of a car in the case of intrusion.<sup>344</sup> This simple form of prevention promises not only less individualized targeting by police through reduced criminal law enforcement involvement, but also potentially, at least in the case of theft, improved effectiveness.

#### F. Urban Redevelopment

Urban redevelopment is a further way to promote security, even from violent crime. Redevelopment can engage community members in common projects and populate urban areas that might otherwise be desolate, particularly those plagued by violence. More generally, these projects also promise to enhance community well-being. For example, one recent study of urban “greening” projects, conducted by epidemiologists at the University of Pennsylvania School of Medicine, found that “greening was associated with reductions in certain gun crimes and improvements in residents’ perceptions of safety.”<sup>345</sup> The study randomly selected two groups of vacant lots in Philadelphia: One set was greened through an urban gardening initiative and the other, which was not, served as the control. Assault in the general area, both with and without guns,

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342. It bears noting that these requirements might produce disparate burdens if efforts at crime prevention target certain neighborhoods (and certain people) differently than others. In creating any such regulatory regime, however, policymakers ought to devise the relevant preventive mechanisms so that they apply equally to all demographics rather than burdening particular groups, businesses, or individuals.

343. McLeod, *supra* note 30, at 1628.

344. See Ronald V. Clarke & Patricia M. Harris, *Auto Theft and Its Prevention*, 16 CRIME & JUST. 1, 37 (1992); McLeod, *supra* note 127, at 127–29.

345. Eugenia C. Garvin et al., *Greening Vacant Lots to Reduce Violent Crime: A Randomised Controlled Trial*, 19 INJ. PREVENTION 198, 198 (2013).

declined after the greening began and residents' general sense of safety and security near their homes improved.<sup>346</sup> The study's authors attribute these associations to a greater sense of unity fostered in the neighborhood as a result of the common project, as well as the greater difficulty in hiding guns and criminal activity in a green space as opposed to a trash-filled lot.<sup>347</sup>

This research builds upon University of Pennsylvania epidemiologist Charles Branas's work comparing outcomes associated with thousands of greened and non-greened vacant lots over the course of nine years.<sup>348</sup> Branas found that greening could be associated with reduced gun assaults, vandalism, stress, and increased physical exercise.<sup>349</sup>

In 2010, there were 40,000 vacant lots in Philadelphia, many in neighborhoods suffering from considerable violence and neglect.<sup>350</sup> Detroit—another city with high rates of criminalization, arrest, incarceration, and gun violence—has approximately forty square miles of vacant lots and is considering whether to convert some of these lots to greened uses.<sup>351</sup> Cleveland, partly in response to this body of research, has created a program to supply grants to community groups to manage parcels of vacant land.<sup>352</sup> Proposals have included community gardens and orchards, as well as permeable parking structures.<sup>353</sup>

Greening surely cannot eliminate all violence in urban spaces, but it is an instance of a preventive measure consistent with an abolitionist ethic that may, at a minimum, improve residents' impressions of safety and thereby improve community well-being.<sup>354</sup> Regardless of whether the "broken windows" theory of policing is empirically valid, greening and other urban redevelopment projects are ways to promote "orderliness" that do not involve punitive policing interventions with all their known costs and exemplify an approach that promises other demonstrated benefits, including the empowerment of impacted communities to seek security and justice in other terms than through criminalization and incarceration.<sup>355</sup>

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346. *Id.* at 200.

347. *See id.* at 201.

348. *See* Charles C. Branas et al., *A Difference-in-Differences Analysis of Health, Safety, and Greening Vacant Urban Space*, 174 AM. J. EPIDEMIOLOGY 1296, 1296 (2011).

349. *Id.* at 1301.

350. *See* Michaela Krauser, *The Urban Garden as Crime Fighter*, NEXT CITY (Aug. 22, 2012), <http://nextcity.org/daily/entry/the-urban-garden-as-crime-fighter>.

351. *Id.*

352. *Id.*

353. *Id.*

354. A similar study in Houston found no significant effect in crime after greening, but significant change in residents' perception of their own safety and reduced fear of crime. *See id.*

355. *See, e.g.,* Branas et al., *supra* note 348; HARCOURT, *supra* note 231, at 213–14.

The following Part considers further whether and how justice may be achieved within an abolitionist framework focused generally on structural prevention rather than punishment of crime.

## V. GROUNDING JUSTICE

Thus far, this Article has argued that a broader framework of grounded justice—concerned with human welfare as well as legacies of racial subordination and practices of dehumanization—demands a rejection of much of the work currently performed by the criminal legal process in the United States, as well as compelling a central place for an overlooked variant of structural prevention, and a departure from continued reliance on primarily retributive, individual, punitive, criminal legal responses to interpersonal violence and other forms of socially harmful conduct. To the extent that more just outcomes may be achieved by prioritizing structural forms of prevention over individual criminal response, this broader conception of grounded justice requires allocation of energy and resources to social structural responses over criminal prosecution and punishment. Doing so does not require immediately eliminating the ability to invoke the rituals of the criminal process in certain instances of grave interpersonal harm. Yet, the determination in cases of significant individual wrongdoing of whether to rely on criminal punishment and how much should always be a difficult one. There is no easy manner of determining how or when this should be done, though any such imperfect determination ought to seek to condemn violence, promote security, and protect the human dignity, freedom, and equality of the accused and accuser alike. An abolitionist ethic entails, in any case, that we should strive to eliminate the need to invoke such punitive responses and approach their invocation with deep conflict and ambivalence, even shame.

This account of grounded justice, of course, is in deep tension with a retributivist account of criminal punishment. A retributivist objection to this account of abolition and prevention—of grounded justice—might run as follows: Retributive justice requires that any wrongful and illegal act be followed by state-imposed punishment, subject to fair procedural constraints, in order to counteract the harm done by the offender to the victim, honor the moral agency of both the victim and the perpetrator, and to recognize the threat posed to the democratically endorsed rule of law.<sup>356</sup> Any punishment should proportionally match the

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356. RICHARD L. LIPKE, *RETHINKING IMPRISONMENT* (2007) (offering a retributivist justification of imprisonment, grounded in what Lipke calls “censuring equalization retributivism,” which holds we should punish criminals proportionately to the seriousness of their crimes).

wrong of the crime, considering both the offender's culpability and the harm suffered by the victim.<sup>357</sup> Only fitting criminal punishment, in this view, respects the free moral agency of the defendant and the victim alike.<sup>358</sup> Imprisonment is the primary institution for imposing just punishment because it avoids overt brutality that eliminates human agency or makes a spectacle of violence, such as the imposition of a death penalty or flogging, and because of a democratic consensus around incarceration as a criminal sanction.<sup>359</sup> The retributivist objection might posit, therefore, that an abolitionist ethic and its instantiation of prevention in a noncoercive register is contrary to these principles because it ignores the demands of justice (and of retributive justice in particular) by addressing wrongdoing through interventions focused institutionally, structurally, and socially, rather than by fitting punishment to legally and morally condemn criminalized acts and recognize the moral agency of the criminal perpetrator and the victim alike. Although a retributivist would likely be receptive to the critique of the U.S. criminal process for its disproportionality and other excesses, so too is the abolitionist turn to grounded preventive justice in tension with retributivism's commitment to proportional agency-respecting punishment.

An abolitionist response to this retributivist account centers not only on the above sketch of justice in a broader social frame, but also on what I am calling grounded justice—an account of justice that is concerned with how ethical analysis fares in light of the operations of criminal and other processes in the world. On this account, 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. Justice should be centrally concerned with those empirical facts and the possibilities that actually inhere within ongoing situations of punishment. Especially relevant are the known facts about the furthest horizons of possibility for transforming those settings, their fundamental structures and dynamics, and the most concerning forms of interpersonal harm that transpire within them. The brutal violence, dehumanization and racially subordinating organization of the institutions in the United States

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357. See, e.g., *id.*; Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VIRGINIA J. CRIM. L. 1 (2012).

358. See, e.g., R.A. Duff, *Perversions and Subversions of Criminal Law*, in THE BOUNDARIES OF THE CRIMINAL LAW 88, 112 (2010) (“[W]e should not subvert [criminal law] by subjecting those who commit or might commit such public wrongs to non-criminal modes of regulation or control that fail to address them as responsible citizens.”).

359. See, e.g., Jeffrey Reiman, *Should We Reform Punishment or Discard It?*, 11 PUNISHMENT & SOC’Y 395, 403 (2009) (“That people deserve punishment will then justify the State’s right to impose the legally stipulated punishment for illegal behavior.”).

that administer criminal law are not merely incidental facts but ought to meaningfully inform the terms that any aspirational account of justice should adopt.

Grounded justice and an abolitionist ethic participate in what political theorist Raymond Geuss has argued political philosophy ought to engage: A theoretical project of ethical reflection that is deeply concerned with sociological, historical, and political situations and possibilities rather than primarily with deductive moral reasoning from first premises.<sup>360</sup> In this respect, Geuss writes critically of political philosophy in what he describes as a dominant “Rawlsian” vein, which is concerned generally with identifying abstract conditions of justice separate from a critique and analysis of existing social and political circumstances. Geuss suggests tendentiously that:

“[N]ormative” moral and political theory of the Rawlsian type [focused in large part on inequality] has nothing, literally nothing, to say about the real increase in inequality [that coincided with the ascendance of this mode of political philosophy in the academy], except perhaps “so much the worse for the facts...” This is not a criticism to the effect that theoreticians should *act* rather than merely thinking, but a criticism to the effect that they are not thinking about relevant issues in a serious way.<sup>361</sup>

Reading Geuss charitably, his point is not to hold political philosophy responsible for any broader structural changes in the world that occurred during a period of one political theoretical school’s ascendance; rather, he presents a provocative critique of the choice on the part of certain political theorists of inequality to elect a mode of analysis largely disengaged from the sociological and political economic conditions within which inequality persists in the world.

Geuss continues with a positive account of what this mode of theoretical analysis would entail (and the account of grounded justice elaborated here extends this to the realm of criminal law and philosophy and legal theory). Geuss proposes a form of political philosophical reflection that grapples with theoretical questions and with history, social, and economic institutions, and the real world of politics in a reflective way. This is not incompatible with

“doing philosophy;” rather, in this area, it is the only sensible way to proceed. After all, a major danger in using highly abstractive methods in political philosophy is that one will succeed merely in generalizing one’s own local prejudices and repackaging them as demands of reason.<sup>362</sup>

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360. See RAYMOND GEUSS, *OUTSIDE ETHICS* 38 (2005).

361. *Id.*

362. *Id.* at 38–39.

Although its full elaboration is beyond the scope of this Article and will be reserved for future work, the account of grounded justice here begins to apply to criminal law theory this more general account of empirically engaged political theoretical work proposed by Geuss, and seeks to theorize alternatives to punishment through prison abolition and grounded prevention with attention to the social contexts in which criminal law in the United States operates in virtue of its historical inheritance and basic structures. This is not merely a distinction between ideal and nonideal theory, but an account of how and to what extent theoretical analysis and critique ought to take stock of, engage with, and respond to ongoing conditions in the world. An abolitionist framework sets as an aspirational goal the elimination of prison-based punishment and prison-backed policing in the United States because of an engaged analysis of present and past U.S. practices of punishment. Ultimately, the dehumanizing nature and racially subordinating legacy of criminal punishment in American society compel the conclusion that, all things considered, an abolitionist orientation is preferable to a retributivist one, arguably even to advance certain retributivist ends concerned with respecting the moral agency of persons.

So a further response to the retributivist objection in reference to grounded justice would continue like this: Despite the intuitive appeal of certain premises of retributivism, the retributivist account does not offer a vision of criminal punishment that is anywhere close to just in a society that even partially resembles our own.<sup>363</sup> Even if we grant that the relevant ideal justification of punishment is retributive, we should consider what actual retribution will be, rather than some idealized, seemingly unachievable version of it. If we insist that retribution is required in a particular instance and should take a particular form, we should advocate as vigorously for retribution taking that form in reality (rather than the brutal form it currently takes) as we do for retribution in principle. This is what the principles of retribution themselves demand—the abolition of much of our current regime of agency-disrespecting criminal law and punishment. If agency-respective prison-based punishment is infeasible for the reasons this Article explores, then even on retributivist grounds, an abolitionist ethic registers a compelling claim.

Further concerns about even the retributivist ideal, apart from its unattainability in a society constituted as ours is, arise when attending to the question of what justice requires in its full, grounded complexity. Consider, for example, the

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363. See DAVID BOONIN, *THE PROBLEM OF PUNISHMENT* 94–103 (2008) (arguing that legal punishment is unjustified because no philosophical justifications of legal punishment, including retributivist justifications, are valid).

case of rape. It is unclear why justice requires primarily that for a rape one should spend a period of years in prison. Why does imprisonment justly “fit” the crime of rape or respect the agency of the rapist and the dignity and harm suffered by the survivor of rape? These facts ought to have some bearing on the answer to these questions: That many rapes are unreported in part because of how poorly criminal law responds to the harms of rape, that survivors whose rapes are prosecuted are on some accounts significantly less well off than those who do not seek redress through the criminal process, that rape is especially pervasive in prison, and that there are other means of preventing and perhaps even redressing rape that more effectively address the risk and harm of sexual violence.<sup>364</sup> At a minimum, on an account of grounded justice, responding to the problem of rape requires a much broader framework for conceptualizing a just response than retributive punishment focused on carceral responses affords. This is not to say criminal law ought to play no part in responding to sexual violence, but that the alternative registers of prevention and justice explored here ought to take primacy of place in addressing the conditions that render so many persons, including prisoners themselves, vulnerable to sexual violation, and in responding to those violations.<sup>365</sup>

Additional questions responsive to the retributive objection that sound in terms of grounded justice are as follows: By what figures or metric should specific sentences be anchored in order to be proportionate and agency-respecting given the actual contexts of punishment or the possible contexts of punishment in the United States? How should we measure harm and culpability so as to meaningfully match carceral punishment in the United States to crime given what we now know about the inherent dynamics, structural violence, and dehumanization associated with imprisonment? Although some retributive theorists distinguish between what retributivism would require with regard to imprisonment in a reasonably just society as compared to an unjust society,<sup>366</sup> and between minimum conditions of confinement and extreme conditions of confinement,<sup>367</sup> these modifications, while important corrections to other retributivist accounts, fail to consider broadly, imaginatively, and with sensitivity to present and historical contexts what justice might entail in more expansive terms. For example, how does a criminal sentence of a period of years confirm the moral agency of the person sentenced and that of the victim when it requires nothing beyond “doing time” from the offender and fails to work to prevent directly similar harms from befalling

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364. See Allegra M. McLeod, *supra* note 29, at 1575.

365. See *id.* at 1615.

366. See, e.g., LIPPKE, *supra* note 356, at 80–98.

367. See, e.g., *id.* at 104; see also Thom Brooks, Book Review, 118 ETHICS 562 (2008) (reviewing LIPPKE, RETHINKING IMPRISONMENT (2007)).

similar victims? Would it not be more just for all concerned to engage the perpetrator of violence and others in collective projects that would make victims whole and tend to prevent future harm? Why is justice cabined by the terms of retributivism rather than considering what is just with reference to the broader contexts in which human beings either flourish or suffer violence, poverty, and despair?

My argument is not that the retributivist cannot respond to these questions. Nor is the problem that a retributivist lacks the theoretical resources to respond to these points from within a retributivist framework. Rather, my claim is that the main scholarly legal literature of a retributivist bent has simply failed to engage with these questions. To meaningfully respond to these concerns, a retributivist must do more than point out that incarceration and other punitive responses are required by a respect for moral agency. Moreover, any account committed to a concern for the moral agency of persons must be able to explain why alternative, less violent, less degrading schemes of social coexistence are less responsive to moral agency than punitive schemes organized around the criminal legal process.

For these reasons, retributivist commitments should not retain such powerful force without an account of how retributivism stands to respond to and improve existing conditions. The hollowness of retributivist justice in this regard is suggested by the ready invocation of retributivist precepts by sentencing judges and harsh punishment's supporters when actual punishment regimes so little conform to retributivist principles; yet, the malleability of a retributive framework that purports to match the harm and culpability of crimes to sentences, even if it is a misapplication of that framework, is routinely used to justify existing punishment practices that extinguish the moral agency and diminished life chances of millions of persons in criminal custody or under criminal supervision in the United States. What this elucidates is that matching punishments to crimes can rest hopelessly in the subjective eye of the sentencer and that of the detached retributivist observer, failing to account for the ultimate incommensurability of punishment and crime when considered from the standpoint of the grounded victim or defendant, let alone the broader social setting in which both victim and defendant coexist. By grounded justice's lights, popular invocations of retributive justice are narrow and pale allusions to justice, inattentive to human needs in their fuller, grounded complexity.

An abolitionist ethic nonetheless confronts a second, separate potential problem with respect to which retributive justice fares better. An abolitionist ethic and framework require a fundamental reorientation in how we think and act, one far beyond the sorts of aspirational demands entailed by retributive justice. To be oriented toward the abolition of criminal punishment and to conceptualize

justice in a broader framework of social equality and prevention of harm is to suspend at least much of the time what are now basic, instinctual reactions to particular sorts of wrongdoing, reactions of vengeance and anger that have become core to social thought and practice. A shift toward abolition would involve transforming ourselves and some of our most deeply held ideas and practices about blame, responsibility, and desert. The challenge, then, of an abolitionist ethic and of prevention in a structural mode is that both require reconstructing how we conceptualize crime, punishment, justice, and ultimately how we understand ourselves. The contention at the heart of this Article, though, is that we could change our social and criminal regulatory frameworks in quite significant measure, without losing too much that we cherish of ourselves. Indeed, this transformative work—the ethical, conceptual, institutional, regulatory, social, and structural shift it would entail—is consonant with other important shared ideas and values.

### CONCLUSION

[T]here has never been a major social transformation in the history of mankind that has not been looked upon as unrealistic, idiotic, or utopian by the large majority of experts even a few years before the unthinkable became reality.<sup>368</sup>

In significant part, this Article's aim has been to situate prison abolition—a critical project and nascent social movement effort often construed as off the wall—alongside and in conversation with core scholarly accounts in criminal law scholarship, criminology, and criminal law reformist discourse.<sup>369</sup> Abolition, as explored in this Article, ought to occupy a more central place in criminal law scholarship, policy discourse, criminological analysis, and political philosophy than it has to date. Prevention and grounded justice, reconceptualized as social and structural noncoercive undertakings, may offer means of articulating abolitionist aspirations in tandem with a commitment to crime prevention and repair of harm. In the face of the suffering wrought by overincarceration, overcriminalization, and the racialized violence that haunts punitive policing and

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368. Sebastian Scheerer, *Towards Abolitionism*, 10 CONTEMP. CRISES 5, 7 (1986).

369. JACK M. Balkin, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 189–83 (2011) (discussing the concepts of “on the wall” and “off the wall”); *See also* Jack M. Balkin, *The Framework Model and Constitutional Interpretation*, in PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONALISM (David Dyzenhaus and Malcolm Thorburn, eds., forthcoming 2016) (“[T]he point of the distinction between what is ‘off the wall’ and ‘on the wall’ . . . is to emphasize that what is plausible and reasonable . . . is produced over time through intellectual and political work.”).

imprisonment, a radical shift in our social and legal regulatory landscape is both necessary and possible. This Article has argued that the regulation of interpersonal harm could begin to be fundamentally reimagined without undue negative repercussions by attending to a neglected conception of prevention and to grounded justice. Ultimately, grounded justice's promise is a world with less violence, both within and without the criminal law; more just, limited, and increasingly diminishing use of the criminal process; and enlistment of an array of other institutions and social projects in working to promote collective peace.

Abolition as an ethical and institutional framework—as an aspirational horizon for reform—is not unduly or merely utopian, but orients critical thought and reformist efforts toward meaningful and just legal, ethical, and institutional transformation to which we might commit ourselves.<sup>370</sup> Nor is abolition through gradual decarceration and the incremental investment in other substitutive social projects apart from criminal law enforcement utterly implausible. Faced with fiscal crises, many jurisdictions are actively rethinking their dependence on incarceration as a means of responding to criminalized conduct, including through de facto and de jure decriminalization.<sup>371</sup> Although the elimination of the penal state in its current forms is difficult to imagine, as the German abolitionist criminologist Sebastian Scheerer suggested decades ago, so too were many other transformative events, right up until the time they came to pass. Among those once unfathomable historical transformations, one might recall the abolition of slavery, the end of the British Empire, the end of the Cold War, and the embrace of gay marriage around the world. Rather than setting criminal law reformist ambitions exclusively on noncustodial criminal monitoring or punitive preventive measures with procedural constraints, and funding a “reentry industry” overseen by probation and parole departments (a currently ascendant punitive preventive regime), further elaboration of an abolitionist preventive framework may make available an array of less violent, less racialized, less coercive, and more just modes of reducing risks of interpersonal harm and promoting human flourishing.

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370. See Cover, *supra* note 265, at 44.

371. See GREENWALD, *supra* note 327, at 2; McLeod, *supra* note 29, at 1631; *States That Have Decriminalized*, *supra* note 325.