Criminal Oppression: A Non-Ideal Theory of Criminal Law and Punishment

Amelia Marie Wirts

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Amelia Marie Wirts

Advisor: Professor David M. Rasmussen, Ph.D.

This dissertation defines and defends the concept of 'criminal oppression.' Criminal oppression occurs when people are excluded from full participation in important social and political institutions because they are perceived to have violated certain community norms. Oppression is primarily a structural phenomenon, in which practices of formal and informal institutions unjustly harm people based on group membership. In structural oppression, there is rarely an individual who can be said to be responsible for the oppression, but I argue that at times, individuals may also be agents of oppression when they create, perpetuate, or exacerbate structural oppression. Applying this theory of oppression, the criminal justice system in the United States is an oppressive structure that unjustly harms those considered to be 'criminals' through a variety of practices. There are three categories of unjust practices: policing, adjudication and punishment, and collateral effects of arrest and conviction.

These three categories of practices *create* the social group 'criminals' by subjecting certain people to these kinds of treatments. I use the word 'criminal' to describe those who are treated as criminals by police, the courts, and even private individuals like employers. To be a 'criminal,' it is not necessary that one has committed a crime or been convicted of a crime. Racial and criminal oppression deeply related historically and conceptually. Nevertheless, they are distinct kinds of oppression. In the United States, those who are not racially oppressed but are

'criminals' face many of the same unjust obstacles as those who are racially oppressed in addition to being 'criminals.'

Some may argue that 'criminals' duly convicted of crimes deserve to be socially and politically excluded. But, I argue that the criminal justice system is not properly conceived of as an apolitical institution that can assess moral blameworthiness. Nor should it be able to offer punishments that amount to social and political exclusion. Instead, the criminal justice system is one political institution amongst many, and it ought to be governed by the same principles of liberty and equality that govern other political institutions. Criminal law's proper function is to facilitate government as a system social cooperation. Therefore, it ought to respond to criminal acts with actions designed to promote inclusion rather than exclusion. Moreover, even if someone has committed a crime, that does not mean that they ought to be subject to violence or permanent second-class status.

Finally, I address specific, feminism-driven arguments for using the criminal justice system to fight violence against women. Some feminists argue that the expressivist function of punishment—the ability of punishment to express disapproval and disavowal—makes it a perfect tool for fighting the normalization of violence against women. The problem, they contend, is that this violence is under-punished in the United States, and the solution to ending violence against women is to increase prosecutions and advocate for harsher punishments because punishment will change the social norms and make violence against women rarer. To this, I argue that those who create laws or mete out punishments do not have control over the social meaning of punishment with precision. The historical and present-day oppressive features of criminal law and punishment interfere with the ability of prosecution and punishment to condemn certain types of acts without also condemning people. Thus, feminists who try to use the criminal justice

system to fight gender-based violence will find it to be ineffective and potentially harmful to the already oppressed group of 'criminals."

Chapter 1argues that 'criminals' are oppressed using a structural model of oppression that focuses on how collections of institutional policies and practices can create and maintain unjust power relations between groups of people. I will also use an externalist theory of group identity to argue that being arrested or convicted of a crime is not necessary or sufficient for membership in the social group 'criminal.' Chapter 2 explains the relationship between racial oppression and the oppression of 'criminals,' noting the historical development of the modern prison system. Chapter 3 argues that the proper role of criminal law is to support systems of social cooperation, not to punish pre-political wrongs. I will suggest that criminal law is in essence part of the social contract, not a separate sphere of justice to which distinctive, retributive principles apply. Instead, the criminal law cannot determine moral blameworthiness and is only justified in sanctioning rule violations for the sake of supporting social cooperation in a society whose institutions are worth supporting. In Chapter 4, I propose a feminist, expressivist defense of the use of prosecution and harsh punishment as a response to rape and domestic violence that takes the structural nature of violence against women into account. Chapter 5, however, demonstrates why even this theory cannot justify incarceration in the non-ideal sphere because of the oppressive history and practice of the American criminal justice system.

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Introduction

In this dissertation, I defend the claim that 'criminals' are an oppressed class of people. When I say 'criminals,' I am referring to those who occupy a particular social location, and they may or may not have actually committed crimes or have been convicted of crimes. The reason for this unnatural use of language is to draw attention to a collection of social and institutional practices that are held together by a common theme: some people do not belong in our social and political community because they are morally unfit to be members. But membership in the political community is the basis of securing equal treatment and protection from violence as well as a whole host of other social goods. To be kept out of the community is deeply harmful and leaves one vulnerable to all kinds of violence and disregard.

It should be absolutely clear today that this category is intimately tied up with race in the United States. Black people in the United States are most especially subject to being treated as 'criminals.' I could cite endless examples of this fact, and unfortunately less than one week ago, George Floyd was killed by a police officer for allegedly passing a counterfeit twenty-dollar bill. On March 13, Breonna Taylor was killed when police indiscriminately opened fire while serving a no knock warrant on her boyfriend's apartment. The person the police had the warrant for did not actually live there. And Tony McDade, a black trans man, was killed by police in Tallahassee Florida on May 27.

I argue that criminal oppression is not simply a type of anti-black racism, however. I analyze it as its own distinct form of oppression for several reasons. First, criminal oppression is also used against other oppressed groups, including, but not limited to: the poor, LGTBQ people, Indigenous people, Latinx people, other racial minorities, non-citizens, and disabled people.

Second, criminal oppression has a distinct justification: the social and political exclusion is justified by making a claim (explicitly or implicitly) that the 'criminal' is morally deserving of exclusion because they[1] have committed a crime. For the most part, this use of criminal oppression is a way of picking out people who are already members oppressed groups for further oppression with the appearance of a moral justification. Third, the reason that I still refer to criminal oppression as a distinct kind of oppression rather than a way that other groups are oppressed is that no one ought to be excluded from social and political life because of what they have done, and even criminals who are otherwise not oppressed and have in fact committed serious crimes must be treated with a minimum of inclusion in society. There is a difference between appropriate state sanctions and blame on an interpersonal level on the one hand, and, on the other, structural exclusion from the basic institutions that make it possible to live a safe and meaningful life. Finally, in society, it is too easy for the institutions that perpetuate criminal oppression to be justified publicly by reference to otherwise non-oppressed people who have in fact committed serious crimes. These institutions then go on to primarily target people like George Floyd, Breonna Taylor, and Tony McDade.

Another primary goal that I have in writing this dissertation is to challenge the idea that criminal law and punishment can be used as progressive tools for fighting other kinds of oppression. I focus in this dissertation on gender-oppression because I have found that a common response to my articulation of the idea that 'criminals' are oppressed is to ask if that includes Brock Turner. Brock Turner infamously was sentenced to six months in county jail after being found guilty of sexually assaulting Chanel Miller while she was unconscious in an alley outside a

[1] Throughout this dissertation, I use "they," "their," and "theirs" in the singular as well as plural forms. I have tried to rephrase where such usage could be confusing. I have done so in an attempt to avoid using masculine pronouns to stand in as universals for all genders of people. Where using "they" would be too confusing, I opted to use a mixture of masculine and feminine pronouns.

Stanford fraternity party. He plays a recurring role in this dissertation because he seems to perfectly represent the 'criminal' who is not otherwise oppressed (he is at least middle class, white, and seems to be cis, heterosexual, non-disabled, and a man). There is fairly uncontested evidence that he committed rape, and he was convicted by a jury of this crime. And, not just any crime. Rape is a particularly serious crime, and it is a tool of another kind of oppression: gender-based oppression. Turner is the exemplar of the type of person that people appeal to in order to justify the maintenance of the criminal justice system despite the fact that he is a clear outlier. He plays an outsized role in this dissertation because he and people like him (Harvey Weinstein, Larry Nasser, Kevin Spacey) play an outsized role in the justification of the criminal justice system. Because he appears so often, I felt the need to clarify that this dissertation is not primarily meant to argue that Turner is oppressed, but to suggest that justifying the criminal justice system in order to punish people like Turner has its problems.

Part of the reason that Turner is often invoked is that it is very common for criminal law to be the main tool for feminist anti-violence activists, a term I use to refer to people who advocate for policies or other social and political responses aimed at ending violence against women, particularly rape and domestic violence. Most feminists agree that rape and domestic violence are part of a system of gender oppression, so in addition to being individual acts of violence between two or more people, they are part of a structure that subordinates women to men. Although the typical logic of the criminal justice system is to treat crime as an individual moral failing rather than a result of social failures, many feminist anti-violence advocates still see criminal law as a tool for changing sexist structures. Thus, they advocate for more prosecutions of rapists and domestic abusers, which typically has required providing police and

prosecutors with more power and discretion at the expense of criminal defendants.[2] They also push for longer sentences for these crimes.

I argue that it is misguided for feminist anti-violence advocates to argue for such policies and practices. But it is understandable why this would be such a popular and appealing tool. The criminal justice system has monopolized our idea of what kinds of solutions are available for social and political problems. It has also monopolized our access to justice. For most of us, the idea of justice for a serious wrong means prison time, and prison time is the mark of how seriously we as a society take the crime, the victim, and the person who committed the crime. The fact that we have such strong punitive intuitions as a country, and we have a criminal justice system uniquely bound up with racism and class oppression, suggests that our intuitions about proper punitive responses are not reliable. Also, because criminal justice responses tend to work to exclude violators from the social and political community in the long term (although these same people still live in our societies), I argue that criminal responses will not work to change the social norms that allow for gender-based violence to be so common. At most they will keep some perpetrators literally excluded from society in prisons for a time. They cannot bring structural change.

This project is an attempt to conceptualize the American criminal justice system from several perspectives. Overall, I think that classical approaches to evaluate crime and punishment in philosophy have ignored features of the criminal justice system that are essential to a full understanding of it. This is why, in addition to philosophy of punishment, I engage with feminist and critical race theory tools for theorizing oppression. I also reframe philosophy of crime and

[2] Just one example of this is the rape shield laws which revised rules of evidence limit the kinds of questions can be asked of witness/victims of sexual assault only. There are certainly strong rationales for such laws, but it is also important to acknowledge that they take rights away from criminal defendants and give tools to prosecutors in the zero-sum game that makes up the adversarial process of criminal adjudication in the United States.

punishment as a part of social and political philosophy. Because this project is broad, taking on the tools of several sub-disciplines of philosophy, each engagement is necessarily limited. For example, while I take on feminist tools of structural oppression, I do not have the space to fully engage criticisms of a structural approach to oppression. But the goal of this project is to look at the criminal justice system from new vantages to expand our tools for critical analysis of an institution that has immeasurable influence on American life.

In Chapter 1, I define and begin to defend the concept of criminal oppression. I draw on Sally Haslanger's work to define structural oppression and to argue that structural oppression can actually create new social groups. I argue that the social group 'criminal' is created by a cluster of institutional practices around policing, adjudicating and punishing crime, and social repercussions of criminal status such as felon disenfranchisement. I draw on Ásta's theory of social construction to explain how these institutions construct the social category 'criminal.' I also explain how some groups of people who are already oppressed are treated as 'criminals.'

In Chapter 2, I focus on the relationship between criminal oppression and anti-black oppression in the United States. I ground this analysis in a short historical overview of how slavery was continued after the 13th Amendment through policies and practices like Black Codes and convict leasing, and how the connection between the criminal justice system and systemic racism persists today. I then map out the concept of secondary oppression from Haslanger as a model for how to think about the relationship between criminal oppression and racial oppression, especially anti-black racism. I use Kimberlé Crenshaw's early work on intersectionality to explain that when a person is a member of multiple oppressed groups, the oppressions mutually inflect one another. It is not just that one is doubly oppressed, but they are also oppressed in different ways. This helps explain why criminal oppression of black people shows up in police

brutality, but the criminal oppression of poor white people might be less violent though it also includes overpolicing of poor white neighborhoods. Finally, I argue that though thinking about criminality and anti-black racism as distinct systems that intersect cannot capture the experience of being treated as a black person and a criminal, it is useful for some kinds of analysis. Complementary intersectional analysis from the perspective of members of oppressed groups will show that in the experience of oppression, there is no way to actually distinguish types of oppression. Just as black women do not experience oppression as women and then oppression as black people, but oppression as black women, black people will not experience oppression as criminal as distinct from being oppressed as black. Kristie Dotson's discussion of different types of intersectional analysis helps illuminate the value of both an intersecting systems approach like mine and a 'holistic' experience-based approach that takes the view of the marginalized person as its starting place.

Chapter 3 argues for the claim that it is always unjust for criminal law or punishment to result in the social and political exclusion of a person. In this chapter I draw on the work of Vincent Chiao and Erin Kelly to argue that the criminal justice system ought to be seen as a part of the social contract. That means that it is a political institution, and it only has the capacity to adjudicate violations of criminal statutes. It cannot determine moral blameworthiness, and it cannot deliver retributive justice. A properly restrained criminal justice system will fairly distribute the benefits and burdens of crime prevention and punishment, and it might be proper for those who are duly convicted of violating criminal laws to bear more of those burdens. Still, the criminal justice system must be politically justified by the same principles that justify the rest of the political community, and those principles will be violated if treatment of suspects or convicted criminals amounts to social and political exclusion.

In Chapter 4, I make the case for what I consider to be the best argument for using the criminal justice system to fight gender-based oppression. Drawing on Jean Hampton's expressivist theory of punishment, I present a view that criminal punishment expresses a society's condemnation of certain acts. The most compelling part of this argument is that when a state does not punish those who deeply harm a certain subset of the population, like women or people of color, it is because that society does not really care what happens to these kinds of victims. On this argument, if the state would punish rape and domestic violence more consistently and harshly, this punishment would demonstrate that the state is on the side of the victim, and the state would communicate that it takes violence against women to be a serious violation. In so doing, punishment could also morally educate the wrongdoer and the community about the equality of women. So, rather than only treating violence against women as an individual crime against a person, it is possible through a communicative theory of punishment to argue that punishment also treats violence against women as a systemic problem with a structural-level solution.

One of the strongest features of this argument is that it offers a particularly powerful diagnosis of both the historical lack of punishment of rape and domestic violence as well as the failure of many states to punish police officers and vigilantes who kill black people in the United States. I think that this diagnosis is basically correct. But, in Chapter 5, I make the case that the failure to take these crimes seriously is a symptom of existing sexism and racism, and ultimately advocating for more prosecutions and more severe punishment for these crimes would be treating symptoms rather than causes of the violence. Moreover, such a use of the criminal justice system threatens not only to extend the oppressive exclusion to more people, but also to further justify and entrench the whole system. I argue that Hampton's failure to comprehend this

problem arose out of her idealization of the criminal justice system as a primarily just system (albeit one that might have some peripheral problems with racial discrimination). On her view, the criminal justice system could send a message of moral condemnation without oppressing wrongdoers. A non-ideal theory approach to criminal law, one that this dissertation has laid out, shows that criminal punishments too often express society's exclusion and lack of concern for the wrongdoer. The overall impact of the system is to create a group of people who are basically second-class citizens. Thus, the ability of such a system to condemn bad acts without condemning the actor to oppression is not possible. This has the effect of undermining the moral education of the wrongdoer and the community. The message is that some people are not worthy of being part of the community at all.

I focus in Chapters 4 and 5 on gender-based oppression, but I note that there is a similar kind of claim about using prosecution and punishment to fight anti-black racism by prosecuting and punishing police and vigilantes who murder black people. This is the goal of many but not all of the people and groups who are part of the Black Lives Matter (BLM) movement.[3] Because there are many differences in the contexts of fighting anti-black policing and fighting gender oppression, I do not think that all the claims I make about fighting gender-based oppression are exactly straightforwardly applicable to calling for the prosecution and punishment of police and vigilantes who murder black people. One of the biggest differences is that in the case of BLM, the some of the people who are being criminally oppressed are also calling for the use of the criminal justice system. Basically, this means that they have more standing to be able to call for this kind of response because they are more likely to be the ones who are oppressed by the criminal justice system. Most of the feminist anti-violence movements are made up of white

[3] I use "Black Lives Matter Movement," "BLM" and "Movement for Black Lives" interchangeably throughout this dissertation.

women, and many black women have been critical of and left such movements as they became more connected with the law and order movement in the 1980s.[4] In many ways then, the feminist anti-violence advocates who advocate for the use of criminal justice tools will not be the ones adversely affected by the criminal justice system. Other contextual differences include the history of police brutality toward black social movements and concurrent political advocacy for limiting and shrinking police power and the criminal justice system.

Importantly, I note that my dissertation should not be taken to suggest that it is wrong for individual women to seek protection through criminal justice tools. Neither are they blameworthy for seeking justice through these means because, given their options, it is reasonable for them to seek justice in this way. There is a difference between seeking safety and justice as an individual and seeking structural change as an activist. One incurs more duties when they advocate for structural and policy change, and those duties include some due diligence in making sure that the policy changes do not harm other oppressed people. While some of these feminist anti-violence advocates may be morally blameworthy, as a structural analysis, the main goal of this dissertation is not to allocate blame. Instead, I want to invite anti-violence advocates to be more circumspect about the possibilities of criminal law and punishment and to invest in building other institutions to address violence against women that do not have the same oppressive structure as criminal law.

[4] Richie, *Arrested Justice,* 1–3, 74–86.

Chapter 1: Criminal Oppression
How Civic and Political Exclusion Constructs Criminality

0. Introduction

This paper aims to introduce the concept of 'criminal' to identify a social group within the contemporary United States. I argue that this group is socially constructed by a collection of interrelated policies and practices that center on the criminal justice system in the United States[5], including police, courts, and prisons. But the policies and practices also take place outside this official system in civil society and the private sphere (that is, policies carried out by people acting as employers, landlords, teachers, but also as private individuals). In some ways it seems trivial to note that there is a social group 'criminal' — there are many social identities that exist because of social relationships. We might identify 'baristas,' 'students,' 'city council members,' 'soccer moms,' etc. My point in arguing that 'criminal' is a social group, that is, socially constructed, is to point to the fact that being a member of this social group has a wide variety of highly salient consequences that are linked together through institutions that cover all aspects of one's life. Specifically, I argue, being a member of this class subjects the member to oppression. So, in short, in this paper I will defend the claim that there exists a social group 'criminal,' and the members of that group are oppressed as criminals. When I say that they are oppressed as

[5] I use the term "criminal justice system in the United States" to include several related, interconnected, systems. First, as author John Pfaff has emphasized, in the United States, there is no single criminal justice system because of federalism. Pfaff, *Locked In*, 13–16. It would be more accurate to speak of the several thousand county systems, which hold many more people than the federal system, as well as the different practices across states. Pfaff, *Locked In*, 13–16. I acknowledge this empirical reality, but continue to talk of one system because at the level of this philosophical theory, enough is shared across these systems to abstract from them. Mainly, I want to contrast this system with less punitive European models of punishment. Second, I want to include practices of policing (such as stop-and-frisk and other less sensational policing practices which include getting "consent" for otherwise unconstitutional searches), the criminal court system (including practices such as plea bargaining, lack of resources for criminal defense, and abuse of prosecutor discretion), actual punishments (including lack of privacy, proper health care, bodily integrity, and sanitation in prisons but also conditions of release, including physical monitoring and the expenses that are often pushed onto the convicted person), and collateral consequences of convictions (ranging from deportation, disenfranchisement, and ineligibility for public assistance to discrimination from private individuals in housing, employment, public accommodations, etc.).

criminals, I mean that the policies and practices that confer the status of criminal on them at the same time oppress them. What's more, these policies and practices add up to a particular kind of oppression that I call social and political exclusion. This kind of exclusion marks criminals as not belonging to 'mainstream' society, and thus leaves them vulnerable to all kinds of unjust treatment.

This dissertation utilizes non-ideal theory, so the claims that I make are about the present-day United States and its history, but there may be ways that these claims are relevant for other times and places in so far as they share similar histories, institutions, and policies and practices.

This chapter proceeds in four sections. The first discusses some key definitions of oppression and draws from those to explain my theory of oppression. The second section discusses how oppression can create new social groups. The third explains how people are assigned to the group 'criminal,' how the group is socially constructed, and how this group is related to other oppressed groups. Finally, I will explain why the same policies and practices that construct this group also oppress this group.

1. What is Oppression?

Like many philosophers, I think of oppression as a structural phenomenon in which a group of people face similar, unjust obstacles in a variety of aspects of their lives. One of the most well known articulations of this concept of oppression comes from Marilyn Frye's analogy of oppression as a bird cage.[6] She argues that if one looks at just one wire of a birdcage, no matter how thoroughly, it will seem impossible that such a small wire could impede a bird's flight. It would be so easy for the bird to get around it. And a close examination of each wire would yield the same conclusion. But, once one steps back and sees the network of wires,

[6] Frye, "Oppression," 4–5.

specifically arranged in the proper shape, then one can understand why the bird is stuck in the cage. "It is perfectly *obvious* that the bird is surrounded by a network of systematically related barriers, no one of which would be the least hinderance to its flight, but which, by their relations to each other, are as confining as the solid walls of a dungeon."[7] This is like oppression, she argues, because there will be many small practices or policies that, examined very closely, do not really pose much of a hinderance to the oppressed person. But, a group of institutional policies and practices taken together have the effect of vastly limiting an oppressed person's options.[8]

From this simple metaphor, we already have the beginnings of a theory of oppression. First, the oppressed person has obstacles to their freedom or development on all sides. Second, these obstacles are put in a kind of structure that makes the limitation possible. Third, if one focuses on one obstacle, it is possible to fail to see why the oppressed person is so limited.

A similar picture emerges from Iris Marion Young's articulation of the concept of oppression. She links the small everyday actions of well meaning people with the result of certain groups of people facing "some inhibition of their ability to develop and exercise their capacities and express their needs, thoughts, and feelings."[9] Essential to her articulation of oppression is the fact that everyday practices are involved in oppression, and there is not necessarily a clear cut, bad actor or even an obvious group of bad-acting agents responsible for the oppression. She writes,

> In this extended structural sense oppression refers to the vast and deep injustices some groups suffer as a consequence of often unconscious assumptions and reactions of well-meaning people in ordinary interactions, media and cultural stereotypes, and structural features of bureaucratic hierarchies and market mechanisms — in short, the normal processes of everyday life. We cannot eliminate this structural oppression by getting rid of the rulers or making some

[7] Frye, "Oppression," 5.
[8] Frye, "Oppression," 5–7.
[9] Young, "Five Faces," 40.

> new law, because oppressions are systematically reproduced in major economic, political, and cultural institutions.[10]

Key to this aspect of oppression are several features: everyday actions of individuals, stereotypes or cultural representations, and major institutions of society like the economy, political structures, and cultural institutions. These cultural representations, small individual actions, and institutions work together to produce unjust effects on the group of people that they oppress, much like the wires of the bird cage are arranged in a certain way so as to keep the bird from being able to escape them.

In addition to her general discussion of oppression Young attempts to capture the different types of limitations that oppressed people face. She identifies five "faces" of oppression: exploitation, marginalization, cultural imperialism, powerlessness, and violence.[11] This valuable discussion of oppression helps to give content to the term and to help understand the different ways that oppression can appear in people's lived experience.

These oppressive features operate through policies and practices, both formal and informal, that are often carried out by people who do not intend to oppress or by institutions not explicitly designed to oppress. In my terminology, a system is a collection of institutions, practices, and policies that work together to produce outcomes. So systemic oppression on this account is when a collection of institutions, practices, and policies that work together to produce the unjust conditions that Young identified. Young's project in "Five Faces of Oppression" was to describe the ways that oppression appears or is experienced, but she emphasized that oppression often occurs through social structures so that there is not always one group consciously oppressing another. She notes that "We cannot eliminate this structural oppression

[10] Young, "Five Faces," 41.
[11] Young, "Five Faces," 48–62.

by getting rid of the rulers or making some new laws, because oppression are systematically reproduced in major economic, political, and cultural institutions."[12] Thus, though Young's account is most noted because it contributes a helpful and multifaceted description of the experiences of oppression, she contends, along with many feminist theorists, that oppression is structural, that is, it exists above and beyond the actions of individual agents.

Sally Haslanger offers a helpful explanation of how structural oppression works. Her theory focuses on examining policies and practices that unjustly burden people based on their group memberships. To begin to explain what she means by structural oppression, Haslanger distinguishes between agent oppression and institutional oppression.[13] Agent oppression is perhaps the more familiar conception of oppression for everyday use. She defines it thusly: "[Agent] oppression is an act of wrongdoing by an agent [where] a person or persons (the oppressor(s)) inflicts harm upon another (the oppressed) wrongfully or unjustly."[14] But not all unjust harm is oppression, so it is likely that agent oppression will have to include some threshold of harshness and involve the abuse of power, especially social power. She uses the example of rape, where when a man rapes a woman, the man who rapes the woman is wrongfully inflicting harm on her, likely by using social power related to gender dynamics. Or one might imagine an employer threatening to fire a precarious employee if the employee does not perform some kind of extra service for the employer not covered by their job description or original work agreement. This would be agent-based oppression because the employer would be abusing their power over the employee to unjustly harm the employee. One might also use violence or the threat of violence as a form of abuse of power, such as when Agent A steals a

[12] Young, "Five Faces," 41.
[13] Haslanger, "Oppressions," 311–38.
[14] Haslanger, "Oppressions," 312.

wallet from Agent B at knife point. In contrast, if Agent A sneaks into the office of Agent B and steals a laptop (assuming that access is not gained because of some social advantage such as being Agent B's boss), this would be an injustice but not a case of oppression.[15]

In contrast to agent oppression, structural or institutional oppression occurs when "the oppression is not an individual wrong but a social/political wrong; that is, it is a problem lying in our collective arrangements, an injustice in our practices or institutions."[16] In these kinds of cases, there is an unjustified or unfair balance of power in the institutions themselves that produces the oppression. Haslanger uses Jim Crow legislation as well as "disparate impact" practices (which are nominally colorblind) as examples of structural oppression. She also notes that cultural norms and informal practices, such as gender norms that assign child care to women, and "cultural practices and products that foster negative stereotypes of particular groups," are examples of structural oppression.[17] While abuse of power is a key part of agent oppression, "illegitimate imbalance of power" is at work in structural oppression.[18]

To further illustrate the difference between agent oppression and structural oppression, take two instances in which an employee is oppressed. In the first instance, the employee works for a company that has transparent policies and practices, safeguards against employee abuse, well-functioning reporting policies, etc. She may, nevertheless, end up working for a supervisor who is extremely demanding, who, knowing she needs the job, threatens to fire her if she does not stay late without extra pay, perform personal favors for the supervisor, and keep the arrangement secret from the rest of the company. This would be agent oppression. In the second instance, the company has a culture of overworking employees, no policies or inadequate

[15] Haslanger, "Oppressions," 312–14.
[16] Haslanger, "Oppressions," 314.
[17] Haslanger, "Oppressions," 315
[18] Haslanger, "Oppressions," 315–6.

policies for addressing this imbalance. It instead even gives supervisors incredible amounts of discretion, knowing that employees working under them are vulnerable. In the second instance, it is possible that all the supervisors are well meaning: no supervisor straightforwardly demands working extra unpaid hours, but the norms of the company, the actions of all the supervisors and employees of the company simply trying to get along could produce similar results for individual employees. Certainly, we could still find some blameworthy agent who failed to place safeguards or who was callous or negligent in failing to respond to the circumstances that arose. But to fix the problem, it would require changes be made beyond changing the beliefs or actions of the blameworthy parties. The culture of the company would have to be remade. In scenario two, there might also be an abusive supervisor who takes the same actions as the supervisor in the first instance. In that case, the supervisor would be a part of a structural oppression because they are enabled by the power imbalance built into the company. But they are also an agent of oppression and are likely morally blameworthy. Still, stopping the negative effects on the employee would require changing more than the individual supervisor, but correcting the power imbalances in the company.

This example highlights that, in cases of structural oppression, one might not be able to find a blameworthy oppressor that can account for the full range of oppression.[19] Those who simply benefit from the institutional oppression of another group are not necessarily oppressors, but some may have a greater role in perpetuating the oppression and so will be more blameworthy. "In such cases an individual counts as an oppressor if their moral wrong-doing compounds the structural injustice, that is, if they are agents of oppression within an oppressive structure."[20] Such people may "perpetuate the injustice; they may be more responsible for

[19] Haslanger, "Oppressions," 316.
[20] Haslanger, "Oppressions," 317

creating, maintaining, expanding, and exploiting the unjust social relationships" and thus be considered oppressors.[21]

This account of structural oppression contrasts with what Haslanger terms the "individualistic approach" to oppression in which agent oppression is the primary type of oppression and blameworthiness essential to the account of oppression. She argues that it is true that individuals are often responsible for creating laws or influencing structures, but the systems that operate and distribute power to individuals in society are "maintained through complex social conventions."[22] These systems include "the government, the economy, the legal system, the educational system, the transportation system, religion, family, etiquette, the media, the arts, [and] our language."[23] Because power is distributed to many individuals within these systems, it is rare that a single individual acting alone will have the power to actually create the unjust relationships that the complex systems create. Thus, by focusing on an individualist account, one would not be able to see oppressive harms that are perpetuated by these social conventions because they will not find an agent who is responsible for all the harm that oppression causes.

In contrast to the individual approach, the structural approach to oppression is not focused on finding a blameworthy agent, but instead on how to reorder the balance of power so that the bad effects do not continue. Haslanger notes that there is a distinction between someone who is privileged by a set of institutional power structures and a person who abuses their power. In the example above, a supervisor at the unjustly structured company may benefit from the overwork of lower employees. Still, because of company cultures and the pressures that supervisor themselves faces, they may be just getting along as best they can although the

[21] Haslanger, "Oppressions," 316–7.
[22] Haslanger, "Oppressions," 318.
[23] Haslanger, "Oppressions," 318.

structure produces benefits for them. That is to be contrasted with the supervisor who takes advantage of the imbalance, is particularly hard on supervisees, and actively works to maintain the structure by opposing changes or ignoring legitimate complaints. There are proper times when agents are responsible for oppression, and they are morally blameworthy. When there is nothing but individual agent oppression, the goal is to change the agent's actions or to find a way to lessen the power that they have so that they cannot abuse their power. But when the oppression is structural, placing blame on individuals who are merely trying to navigate these systems is not philosophically correct, nor does it help to reduce or eliminate the source of oppression. Instead of focusing on the agency of individuals in these cases, one should focus on changing the structures themselves so that they no longer distribute power unjustly. But one can also go too far the other way, ignoring those who truly are abusing their power. The goal should be to distinguish between those who are agents of oppression in that they abuse their power and those who end up reinforcing structural oppression by simply attempting to navigate the oppressive structures.[24]

Haslanger's definition of structural oppression, which, simplified from her logical equation can be written as follows: [F=member of oppressed group, I =Institution, C=Context, R= Relation]

> (SO_1) *F*s are oppressed (as *F*s) by an institution *I* in context C iff_{df} in *C* ∃*R*(being an *F* nonaccidentally correlates with being disadvantaged by standing in an unjust relation *R* to others) and *I* creates, perpetuates or reinforces *R*.[25]

She gives the following example:

> Women are oppressed as women by cultural representations of women as sex objects in the United States in the late twentieth century iff being a woman in the United States in the late twentieth century nonaccidentally correlates with being

[24] Haslanger, "Oppressions," 320.
[25] Haslanger, "Oppressions," 325.

> subjected to systemic violence, and cultural representations of women as sex objects creates, perpetuates, or reinforces the systemic violence. [26]

She notes that even if not every woman actually experiences the systemic violence, each woman is still oppressed along these lines because the being subject to the risk of the unjust harm is part of the condition of being oppressed. Some women, perhaps because of their relative privilege along race, class, sexual orientation, or gender identity, may be less subject to this violence (perhaps a wealthy white woman can take private cars rather than relying on public transit or walking, for example), she is still oppressed along these lines.

2. Social Construction and Oppression

Haslanger notably argues that policies and practices that oppress can create social groups by subjecting diverse people to the same collection of social constraints. I adopt this view, as will be apparent in my discussion of criminal oppression.

Haslanger's account is particularly interesting because she brings her account of social construction of social identities into a discussion of oppression. On her account, the same policies and practices that place some groups under conditions of oppression (limiting their opportunities, constraining them) can be the same policies and practices that construct them as a social group in the first place. Sometimes it is the case that policies and practices pick out an already-oppressed group for more oppression. For example, it is now become a widespread concern that facial recognition systems do not identify black faces as human with the same consistency that they can recognize white faces, which could have huge repercussions for all kinds of automations, including self-driving cars that use facial recognition to prioritize human safety. Practices that utilize such technology may pick out black people for less protection, etc.

[26] Haslanger, "Oppressions," 326.

Young's account is focused on this kind of analysis of oppression: given that we know that black people in the United States are oppressed, she wants to analyze what we (people involved in "new social movements since the 1960s") mean by "oppressed," given an already agreed upon set of oppressed groups.[27] But, following Haslanger, it may be the case that a collection of policies and practices that consistently put certain people together, subjecting them to the same social constraints repeatedly, can create a social group. Haslanger seems to be arguing that this is in fact how races came to be in the first place.[28]

Haslanger's account is extremely powerful because it articulates how policies and practices pick people out for unjust treatment that can amount to oppression. She focuses on groups of people who are "nonaccidentally correlated" with the given policies and practices, and it is this "nonaccidental correlation" that makes up the oppression because even those who are never actually picked out by the policies and practices but are nonaccidentally correlated with those practices are oppressed. Oppression on this account is belonging to a group that is unjustly, nonaccidentally correlated with harmful treatment.

What Haslanger's account leaves open is how some groups of people become nonaccidentally correlated with unjust policies and practices. She tends to focus narrowly on one policy or practice (objectification of women, or even more narrowly, the actions of a particularly agency in Chicago during a particular decade) in her article. But, this fails to explain the aspect of oppression that Frye and Young note: the way that collections of individual policies and practices are organized in such a manner to limit the life possibilities of groups of people. Thus,

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[27] Young, "Five Faces," 40.

[28] *See, e.g.* Haslanger, "Gender and Race." I do not necessarily adopt this view as to race, but I do adopt it for the social group 'criminal.' It is possible that different social identities arise in different ways, and nothing in my account in this chapter hinges on the fact that race is socially constructed, although I do ultimately take it to be. Much in this chapter does depend on the claim that people are often oppressed based on their race, and that people of particular races are more likely to be subject to criminal oppression than others.

in addition to the focus on individual policies and practices, one must step back and ask why a whole variety of policies and practices are all targeting certain groups of people so that they are trapped.

This leads me to an important clarificatory point. Occasionally, skeptics of structural oppression argue that all of the so-called structural injustices can actually be traced back to individual actions that are blameworthy either because they intended to discriminate or because they were indifferent to discrimination that was evident. For example, some argue that the injustice or immorality of structural racism comes from the racist intentions or character of those who built such structures knowingly or at least negligently. Whether or not all oppressive structures were at one point originated by individual people with bad or racist intentions or characters is not something my account of oppression takes a stand on. For my project, this is beside the point. I am not hoping to identify the blameworthy source of the unjust outcomes that make up oppression. Instead, I am interested in explaining why small actions by individual, well intentioned and non-negligent people, institutional impacts, and cultural representations should work so well together so as to create the kinds of oppressive structures such as those visible with racism, sexism, and xenophobia. I will also try to show that a similar structure exists around those considered to be criminals. Whether all the harms or the full magnitude of the harms produced can be attributed to blameworthy individuals is not the central question. Instead, the question that the concept of structural or systemic oppression attempts to answer is why all these policies and practices, enacted by individuals consciously or unconsciously, across a number of institutions, could all *seem to be designed* to produce harms or unequal outcomes for certain groups of people.

To summarize, systemic oppression has three elements, two of which are necessary and one which is not. First, it occurs when a related system of policies and practices results in mounting unjust social constraints (exploitation, marginalization, powerlessness, cultural imperialism, and violence) on a group of people. These policies and practices will include institutional design, cultural representations, and small, often seemingly innocuous actions of private individuals and civil society actors. Second, the oppressed group must be related to the policies and practices in a particular kind of way: being a member of that group has to be nonaccidentally correlated with being picked out for certain kinds of unjust treatment. Third, in at least some cases, the same policies and practices that oppress a group of people create and/or maintain the existence of that social group at the same time that they oppress. This is a feature of at least some kinds of oppression, but I will not defend the claim that it is a feature of all oppression (though I suspect that it is).

3. The Social Group 'Criminal'

I identify a unifying concept of 'criminal' and the social group created by a group of policies and practices that I group together under the moniker 'criminal justice system.' Who counts as a 'criminal' on my theory and why? In this section I adopt a sort of pragmatic approach in developing my account of this social group. Although I would rather not engage in metaphysics, my claims do depend on the existence of a certain type of social practice that I want to highlight and analyze. So, I will use the language and tools of social construction, particularly as developed by Haslanger and Ásta.

3.1 Core Concept (or "Base Property") of Criminal

When I say that a certain person or group of people are 'criminals,' I mean that they are *treated as* criminals by institutions, authorities, and/or members of the general public. So, I will

start by explaining what I take to be a relatively uncontroversial explanation of the common usage of the word 'criminal.' Typically, we think of a criminal as a person who has violated criminal laws. Criminal violations are a particular kind of normative violation. In criminal law, a wrongdoer violates the community in addition to simply violating a victim. So, when a person assaults another person, that assault can be addressed from the perspective of the harm to the victim of the crime by, for example, using tort law to compensate the victim for the harm caused to them. But, if the assault is prosecuted criminally, the victim is simply a witness to the harm caused to the state. In this way, criminals have not just harmed a specific victim, but also the community, often represented by the state. Often but not always, criminal laws are more serious kinds of moral violations than everyday moral violations (lying to a friend, slighting an acquaintance, arguing unkindly with a family member). Often this is reflected in stereotypes about criminals as being particularly dangerous or violent, but the more central distinction between a typical moral violation and a criminal violation is that criminal violations are the kinds of violations that threaten the working of the community. Although the crime that come quickly to mind tend to be murder, rape, assault, and theft, there are numerous crimes that are not as serious as non-criminal violations. For example, in most jurisdictions in the United States, it is a crime to pass a bad check, but not to commit adultery. I suspect many of us would think that adultery is as serious as passing a bad check. ***Thus, the core concept of criminal is a person who has violated criminal laws and, in so doing, has violated the community.***[29]

[29] The core concept criminal is a colorblind concept. By that, I mean that it is not explicitly related to race but very often has implicit connections to race (as well as class). I say that this is a colorblind concept, rather than simply race-neutral, because I do not think that in the United States it is possible to truly separate the concept of criminal from racist stereotypes and practices that equated especially black men with criminality. Thus, the core concept of criminality is implicitly tied to race though it is facially race neutral. I will talk more about the relationship between racism and criminal oppression later in this chapter, but Chapter 2 will discuss their relationship in depth.

3.2 Criminals and Social and Political Exclusion

Treatment as a 'criminal' is marked by exclusion from many spheres of public life. I call this phenomenon social and political exclusion. Exclusion from the political community is a sort of logical corollary to the core concept of criminal. If a criminal is a person who has violated serious community norms (criminal laws), it can seem justified to exclude that person from the community in some way. Punishment theorist R.A. Duff notes that this is the stance taken by both politicians endorsing the "War on Drugs" and by retributivists who are "more sophisticated and somewhat more humane."[30] Yet, as Duff notes, this exclusion also seems to be at odds with many liberal, democratic principles that suggest that all members of society ought to have some level of basic inclusion. He expresses the tension thusly:

> We should simply note that criminal punishment poses one of the sharpest challenges to the politics of inclusion: if we cannot render punishment itself inclusionary, if it cannot treat and address those who are punished as full members of the political community, we must either accept the abolitionist argument that criminal punishment cannot be justified, or argue that those who commit crimes thereby exclude themselves from at least some of the benefits and rights of citizenship.[31]

I will return to this tension about whether or not social exclusion can ever be justified in response to criminal wrongdoing in Chapter 3, but here I will make some preliminary statements about why, in criminal oppression, I view social and political exclusion as the foundational harm. Exclusion from the social and political community is the foundation that allows for the harms of exploitation, marginalization, cultural imperialism, powerlessness, and violence, explained by Young, to occur.

Social and political exclusion is exclusion from the political community and the public goods that members of the community take advantage of in building meaningful lives. Duff

[30] Duff, "Inclusion, Exclusion," 709.
[31] Duff, "Inclusion, Exclusion," 709.

defines social exclusion by giving two necessary conditions.[32] In order for exclusion to be social, it must meet two criteria. First, the entity doing the excluding in social exclusion is not private individual but a *social* unit such as a person acting on behalf of the government or community. Thus, a private individual trying to prevent me from entering a public park is generally not social exclusion unless the state somehow reinforces the private individual's actions. Second, the community is excluding the relevant people from certain *social* goods (access to the job market, voting, protection of laws, protection from violence), rather than private goods. Thus, police not letting someone onto private property is not social exclusion). I follow Duff in this definition, but I also note that private individuals may often be agents of social and political exclusion because their actions can be implicitly sanctioned by the state. One example is that when businesses explicitly excluded people based on race during Jim Crow in the United States, the government implicitly endorsed this activity until it was outlawed by federal legislation. Duff makes a similar point, noting that a shopkeeper under some circumstances can be seen as a public actor. I would push these examples further to include realtors who steer clients to neighborhoods based on race (they are excluding some people from some neighborhoods), practices of private individuals harassing people seen to be in the wrong neighborhood based on race, and similar activities by private actors that are part of historical practices that have worked together for generations to exclude people based on race, class, ethnicity, and so on from buying homes, walking down public streets, existing in public parks or places of public accommodation.

One obvious way that the criminal justice system operates to exclude criminals is through punishment. As Duff notes, apart from capital punishment, a permanent and radical exclusion, incarceration is the starkest form of social exclusion currently practiced.[33] In prison, a person is

[32] Duff, "Inclusion, Exclusion," 701–02
[33] Duff, "Inclusion, Exclusion," 708.

excluded from the public, from family and friends, communities, and from all kinds of social goods like jobs and education that are out in the public.[34] But other, less severe kinds of social exclusion can occur in less extreme forms of punishment. For example, when one's driver's license revoked, one is excluded from driving, which is a social good that can be an important means to allow one to work and pursue all other kinds of engagements in the social sphere.[35]

Duff notes that, in addition to exclusion from specific social goods, punishments also include the message that one is excluded from the community, and he notes that this message may stick much longer than the punishment itself lasts.[36] This is particularly troubling given the strong normative pull of equal political membership in modern democratic societies.

Some kind of social exclusion is a mark of many kinds of oppression: for example, Jim Crow laws and practices literally excluded black people from white American life and many benefits of belonging to the white public sphere. Ronald Sundstrom and David Kim have argued that xenophobia is most centrally a 'civic ostracization.'[37] The kind of social exclusion faced by criminals is very similar to these other forms of social exclusion, but the putative reason for the exclusion is different. While in racist exclusion, the reason is that there is something about belonging to the wrong race that makes one unsuitable for inclusion. Similarly, they argue that in practices of xenophobia, a person who belongs to a different nationality or ethnicity from the

[34] Duff, "Inclusion, Exclusion," 708. As Lisa Guenther's work has shown, solitary confinement is an even more radical kind of exclusion that she convincingly argues amounts to social death. *See* Guenther, *Solitary Confinement.*
[35] Duff, "Inclusion, Exclusion," 708.
[36] Duff, "Inclusion, Exclusion," 708.
[37] Sundstrom and Kim, "Xenophobia and Racism," 22. Sundstrom and Kim borrow their concept of civic ostracization from Hannah Arendt, who argued that even criminals have more rights than refugees. Sundstrom and Kim, 25–26. They note in an aside, however, that "much depends on what kind of criminal, refugee, and state is in question." Sundstrom and Kim, "Xenophobia and Racism," 25. They go on to argue that while some people are fully outside the community because they are actually stateless, others may suffer under varying degrees of civic ostracization. Sundstrom and Kim 25–26. Thus, a person who is a United States citizen but who is still treated with xenophobia when looking for housing, employment, and other social goods is suffering under civic ostracization even if they do have rights as a US citizen.

norm is seen as proof that that person has values so different from the norm so as to make one unsuitable for inclusion in the community.[38]

'Criminals,' like those suffering under xenophobia, are excluded based on a putative lack of shared community values, although the evidence that they do not share the values is that they are presumed to have broken a criminal law rather than that they are foreign. Criminals have supposedly demonstrated their lack of fitness to be members of the community, and therefore suffer similar social exclusion to the civic ostracism described by Sundstrom and Kim. They are literally physically excluded from society (incarcerated) in many cases, and in others, they are treated as moral outsiders by policing and collateral consequences of criminality.

The biggest difference between criminal oppression and xenophobia or racism is that the concept of criminality relies on personal moral failings to justify exclusion and oppression rather than a person's membership in a racial, ethnic, or national group. In a liberal society, criminality thus is able to perpetuate similar kinds of effects but with a moral justification, at least in theory. This move from exclusion based on identity to exclusion based on moral failure is what makes criminality such an appealing vehicle for racism when, for many people in the United States, explicit racism is no longer socially acceptable.

But of course, there are times that criminal oppression, racism, and xenophobia compound one another. Examples include the black rapist character from Birth of a Nation, conflating blackness with criminality (1915). Another century later, when he announced that he was running for president in 2015, Trump stated, "When Mexico sends its people, they're not

[38] In order to explain the difference between racism and xenophobia, Sundstrom and Kim argue that, "in caricature," white supremacy calls for "One Blood" and "One Mind." Sundstrom and Kim, "Xenophobia and Racism," 24. While racism arises when a group of people is deemed to have the wrong "Blood" for the nation, xenophobia arises when a person is seen as having the wrong "Mind." White supremacy then, will attempt to exclude those with the wrong kinds of culture or values in order to protect the "One Mind" of the white nation. Sundstrom and Kim, "Xenophobia and Racism," 24.

sending their best. [..] They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people." Here he conflated Mexican immigrants with criminals. The xenophobic idea articulated here is that people of different races or different nationalities do not share the US's moral values and therefore must be excluded for Americans' protection. For another example, take the term 'illegal alien': not only does this highlight the foreignness of an imagined group of people, and likely invokes racism as well, the emphasis on illegality offers another reason to exclude these people: the fact that they have entered the country illegally is taken as further evidence (beyond their national or ethnic outsider status) that they do not share American values such as rule of law. This individualized moral failing allows for a rhetorical denial of racism or xenophobia. With each of these examples, if we only analyze them in terms of racism, xenophobia, or both, we still will not be able to capture the work that "rapist" or "illegal" is doing. The labeling of 'criminal' allows for those who so label to avoid the illiberal act of excluding someone based on a group identity like a race or nationality. In a less obvious example, President Barack Obama's slogan for his supposedly more humane deportation plan: Felons Not Families.

> Undocumented workers broke our immigration laws, and I believe that they must be held accountable -– especially those who may be dangerous. That's why, over the past six years, deportations of criminals are up 80 percent. And that's why we're going to keep focusing enforcement resources on actual threats to our security. Felons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids. We'll prioritize, just like law enforcement does every day.[39]

The implication of this speech is that there are good immigrants who share our values (even if they are undocumented), and criminal immigrants who do not. This distinction elides the

[39] Obama, "Remarks."

possibility of people who are both loving family members and people with non-immigration criminal records. Pro-immigrant critics of Obama often note that he in fact deported twice as many people as George W. Bush during his tenure while at the same time employing softer language toward immigrants. This is an illustration of how employing criminality as a justification for exclusionary treatment can seem more humane but might not actually have humane results.

A final note about social and political exclusion: On both Duff's and Sundstrom and Kim's accounts, it is evident that social and political exclusion is a matter of degrees. Deportation is a total form of exclusion, disenfranchisement an extreme political exclusion, and incarceration a strong exclusion from all civic, political, and even typical private life. Regularly encountering hostile police in the streets of one's neighborhood has the effect of making one feel unsafe and unwelcome on the streets, but it is a lesser exclusion than incarceration or deportation, as one is not literally excluded. Moreover, as Duff notes, there are punishments that cut people off from some social goods (driving bans, perhaps restrictions on places one can work or live, people one can associate with), that are lesser social exclusions. Not every social exclusion will be unjustified, especially if they are much less in degree. Much depends on how these seemingly small social exclusions, such as driving bans, housing and employment limitations, and limits on people one can associate with, like the wires on Frye's bird cage, can seem relatively insignificant when approached on at a time. But, when one steps back, they can form a pattern of exclusion that is extremely confining.[40]

[40] Note the difference between only having a driving license revoked for 2 months when one has many other options for public transportation. But, if one lives in a rural area, such a revocation can make it impossible to keep one's job. Or if one is banned from public housing, unable to associate with "known gang members," (one's whole family can easily end up on a gang-member database by simply living on certain blocks of a neighborhood), and unable to live within one mile of a school, finding any place to live can suddenly become nearly impossible.

3.3 'Treatment as Criminal' Confers 'Criminal Status'

People belong to the social group 'criminal' when institutions, through their policies and practices, *treat them as if they are criminals*, regardless of whether they have committed a crime. In addition to institutions, other members of the public, acting as employers, neighbors, landlords, or just private individuals, can also treat a person as a criminal. This non-institutional treatment can also confer[41] the status of criminality on a person if it happens according to a pattern of associating some other social identities with criminality.

One way to understand the social group 'criminal' would be to use the externalist definition of a social group as articulated by Ann Cudd: "A social group is a collection of persons who share (or would share under similar circumstances) a set of social constraints on action."[42] This definition is reminiscent of Frye's birdcage: those who are oppressed by many of the same wires will be members of the same social group. In many ways, this captures *the result* of having been placed in the social group 'criminal,' but the conferralist approach to social properties as articulated by Ásta captures the role that social actors play in *creating the social group* criminal and *placing people into it*. Treating someone as a criminal is generally a way of placing social constraints on that person (and potentially some enablements—being charged with a crime enables one to participate in arraignments, plea negotiations, et cetera).

Ásta argues for a conferralist theory of the social construction of categories for human beings. She argues that social properties such as race and gender are conferred by others onto a person. "This property is a social status consisting in constrains on and enablements to the

[41] Here, I use 'confer' on purpose, to anticipate the conferral model of social construction as posed by Ásta in her book *Categories We Live By*, which I will discuss in more depth as I go on.

[42] Cudd, *Analyzing Oppression*, 44. Social groups that are not oppressed will likewise share a collection of empowerments or a lack of constraints on action (men will generally not be afraid to walk at night alone for fear of rape, white upper-class women will be unlikely to fear being stopped and frisked, etc.). (Cudd, *Analyzing Oppression*, 40–45)

individual's behavior in a context [….]"[43] The conferral is of a 'base' property, some property that those doing the conferring "are attempting to track" even if they are in fact not tracking that property.[44] As an example, she uses the idea of an umpire in baseball calling a strike. On her theory of social construction, what makes a pitch a strike is the umpire taking it as a strike (calling, "strike"). The umpire is trying to track the base property, that is, the ball arriving at the batter within the strike zone. Ásta argues that the pitch is a strike not in virtue of it being within the strike zone, but by virtue of the umpire taking it to be within the strike zone. In taking it as such, the umpire confers the status 'strike' onto a pitch, and the umpire is not calling the pitch based on whatever they feel like calling; the umpire is attempting to correctly identify the trajectory of the ball according to the rules of balls and strikes in baseball.[45]

Following a conferralist account of 'criminal,' people enacting institutional policies and practices (like police officers or judges) take a person as a criminal when they treat them as a person who has committed a crime. This act of treating a person as someone who has committed a crime imposes constraints and enablements on that individual and makes the person a 'criminal' in that context. For example, police officer, who is an agent of the law enforcement institution, takes a young black man in a certain neighborhood to be a criminal, *so he subjects him to stop-and-frisk*. It is the action of stopping and frisking that makes the young man a criminal in that situation. If the officer looked at the young man, believed him to be a criminal, but took no action in response to the belief, then the young man would not be treated as a criminal in that moment or be a criminal in that moment. But it is rarely the case that there will be literally no action that comes from this belief—the treatment as criminal could be as small as

[43] Ásta, *Categories,* 2.
[44] Ásta, *Categories,* 8.
[45] Ásta, *Categories,* 8–0.

a suspicious glance, a movement of the officer's hand to his gun, etc. While I focus on treatment, Ásta's account focuses more on 'taking' a person to have a base property (taking person X to be a woman, to be black). Many of her examples, however, do focus on an external action that demonstrates that a person has taken someone to have the property of being white or being a man or taken a pitch to have the property of being a strike. I think that most of the time, taking someone to have a base property will line up with treating that person as having the base property, just as an umpire taking a ball to be a strike will line up with him calling it a strike and therefore conferring the status of a strike to the ball in the context of a baseball game. The reason that I want to focus on treatment (over, to my mind, the more abstract 'taking') is that I want suggest that if a police officer does not take someone to have committed a crime, but, for example, is just a bully and so performs a stop-and-frisk on a random youth, that officer still confers the status of criminal onto the youth, even if the officer does not 'take' the youth to be a person who has committed a crime. My account, focusing on external 'treating as' behavior, may better describe Ásta's approach because she takes her primary motivation for her ontological project to be the way social categories have tangible impacts on social life, what she terms "Social Construction as Social Significance."[46]

I suggest that the way that we understand a conferralist account of 'criminal' is that the social property of 'being a criminal' is conferred onto an individual when they are treated as a criminal, and that base-property is a person who has committed a crime and thus violated the community. 'Treatment as a criminal' will be spelled out in further detail below, but for now it is important to note that anyone can treat another as a criminal. No special authority is required to do so. However, those acting with particular institutional authority relevant to criminality will be

[46] Ásta, *Categories,* 3.

able to use different kinds of treatment to confer this identity, and often their conferral will have more serious and more formal implications (enablements and constraints). I cannot stop and frisk, prosecute, or sentence a person. Each of these treatments has serious, and the latter two have very formal constrains and enablements. But I can cross the street to avoid a person, call the police on them, or subject them to regular insults, such that they feel constrained in their ability to walk freely in my neighborhood. An employer can refuse to hire them. A landlord can refuse to rent to them, and so on.

Why go through the complexity of 'treatment as' and conferral? Why not simply say, criminals are those who have committed crimes, and anyone who treats someone as if they have committed a crime when they have not is mistaken? This, roughly speaking, is what Ásta calls the constitution account, following a Searlean account of social construction where X counts as Y in C. On this theory of social construction, the baseball example is explained differently. The pitch counts as a strike when it enters the strike zone, and an umpire is mistaken when she calls a pitch that is outside the strike zone a 'strike.' Similarly, one could say Abe counts as a criminal when he has committed a crime, and to treat him as having committed a crime when he has not is a mistake. For example, if an employer believes that Abe, who has not committed a crime, is a criminal and denies him a job because of this, the employer has made a mistake, but the employer has not conferred any kind of status on Abe. Instead, a constitution social construction account would likely depend on something like, 'Abe counts as a convicted felon for employment purposes when he has been convicted of a felony.' To take another example, if in her neighborhood, Beatrice is known for buying stolen goods, and she actually does buy stolen goods, a constitution account would say something along the lines of 'Beatrice counts a criminal in the neighborhood because she commits the crime of buying stolen goods.' People around the

neighborhood might correctly or incorrectly identify her as a criminal by avoiding her, seeking her out to sell stolen goods, calling her a criminal behind her back, or other actions. These actions do not change her status as a criminal, but either accurately or inaccurately respond to it.

Ásta's primary argument against the Searlean constitution argument is that she is interested, as am I, in the "social significance" of the social categories that people inhabit. For example, in baseball, suppose that an umpire is on the take. She knows that given a pitch was not a strike, but she could use this call to influence the game. She might not 'take' the pitch to be a strike, but if she calls it a strike, it is a strike because the game continues as if it is a strike. The calling it a strike is what matters to the course of the game, not if the umpire was mistaken or cheating.[47] Ásta notes that if the trajectory of the ball and not the umpire's call is what makes a strike, there is no reason to think that the umpire is the best suited to determine if a pitch is a strike — given modern technology, why not use a more reliable method to determine if the pitch's trajectory was in the strike zone?[48] Perhaps more importantly, the game proceeds according to what an umpire has called. The "social significance" of the pitch being a ball or a strike is determined by the call, not the actual trajectory of the pitch. Baseball fans and sports reporters might criticize the call, and in extreme cases, the call may be so criticized that a cloud sort of hangs over the results of the game. But, in the game, the ball counts as a strike. Ásta admits that there is room for debate on the metaphysics of the baseball strike: on her theory, it might seem counter-intuitive that the umpire cannot be wrong about whether a pitch is a strike (although they may be wrong about whether the baseball entered a particular area called the strike zone). Ásta argues that the constitutional social constructivist has to say that the

[47] Ásta, *Categories,* 10.
[48] Ásta, *Categories*, 10.

proceeding of the game does not depend on the number of actual strikes that occur (because the umpire might not call all of them), but on the number of strikes that are called.

In a similar way, with formal 'treatments as criminal'—if a person is convicted of a crime (the jury finds them guilty, or, more likely, they plead guilty), their life, much like the baseball game with the strike, will proceed as if they are a criminal. There will be a criminal record, a punishment, and all the repercussions that come from that. Although the case is much less definitive for the informal treatments as criminal, the results, including the kinds of social exclusion of not feeling safe on the streets of one's own neighborhood in the case of black youth in heavily policed areas, in the case of not getting a job because one is or is supposed to be a felon, and so on.

Using the conferralist account, there is the attractive possibility of being able to treat the base property of 'having committed a crime' as distinct from 'being a criminal' because in the social world we live in, the consequences of being treated by institutions and individuals as a criminal do not always track having committed a crime. Even if we only look at the very narrow set of 'criminals' who are convicted of crimes, we must be able to separate the base feature from the conferred status because there are simply times that the criminal justice system gets it wrong by convicting people who have not committed the crime with which they are charged. This says nothing of the huge number of crimes committed regularly in which the person who commits them is never treated as a criminal, let alone charged or convicted. The conferralist model does the best job dealing with the social reality that treatment as a criminal will have, as Ásta puts it, social significance, regardless of whether the person doing the conferring of criminal status accurately tracks the base property of having committed a crime.

Before I move on, I want to return to the example of a police officer stopping-and-frisking a young man without reasonable suspicion. While it is important to note that the officer is conferring the status of being a criminal on the young man, the officer's individual action should not obscure the institutional or systemic background that makes this possible in the first place. The system of criminal laws, police officers, the court systems, court cases and other laws that allow officers to at least get away with such practices, police training, and possibly cultural representations/stereotypes all are necessary in order for the police officer to confer this status on the young man. Moreover, stopping and frisking young men of color is a part of a social practice embedded in policing through training, social norms, and other expectations. Thus, while one might argue, à la Haslanger, that the particular police officer is an agent of oppression, using his social power as a police officer to unjustly harm a particular young man, it is also necessary to take this as an instance of structural oppression. The officer's actions are enabled by the improper allocation of power in the institution of policing, and the practices that uphold that power allocation include stop-and-frisk.

The above example connects to the two distinct ways that social categories depend on social conferral. So far, I have discussed the conferral of a social category onto a particular person: the police officer stops and frisks the youth.[49] But, for this to even be possible, the social category must exist as well, and Ásta argues that social categories on the conferralist account are themselves result of social conferral.[50] The criteria for meeting the category come about through collective agreement, which can be through a formal policy or practice such as a law. So, the pronouncement of a court that a defendant is guilty makes the defendant a criminal because of collectively agreed upon laws and procedures spelled out relatively explicitly in statutes, codes,

[49] Ásta, *Categories*, 28.
[50] Ásta, *Categories,* 28.

and procedural rules. Another example would be the rules, determined by our state governments, about who can have the conferral of the status "spouse." But, in more opaque situations, the criteria for the base property may be "negotiated, consciously or unconsciously, but the conferrers in the context."[51] In these "communal" categories, there is no official body that determines the rules. For example, when an individual makes a decision about whether to call the police on a suspicious person, the criteria for what makes up the base property of 'having committed a crime' is negotiated by the community that person belongs to. Whether the potential caller has sufficient evidence that the potential 'criminal' 'has committed a crime' may be underdetermined by the social conventions, and the potential caller will have to improvise a bit. After all, it is likely that calling the police is not something that happens often enough that the informal social rules will be fully set. In contrast, determining which gender pronoun to use occurs relatively often, and the communal norms around when to use what pronoun are much more likely to be firmly established (although these norms may be re-negotiated as awareness of trans and gender-non-conforming people arises).

Depending on the circumstances, one can be conferred the status of 'criminal' through formal or communal processes. This is often also the case with other social statuses, including gender, which can be legally recognized through relatively formal requirements at birth or changed through similarly formal procedures. Regardless of the official state pronouncement of a person's gender, there will also be constant communal conferrals of gender. Depending on the circumstances, formal or communal conferrals can be equally consequential. With 'criminal' status, it is only through a court's pronouncements can a person be treated as a criminal by carceral punishment. But communal conferral of 'criminal' status also has meaningful

[51] Ásta, *Categories,* 31.

consequences and is more likely to be ubiquitous and difficult to clearly define and identify. This more informal kind of conferral requires no institutional authority, but may be strengthened by other forms of authority (a well respected member of the community calling the police may have more consequences, more psychological impact, or be harder to shake off than if a 'nobody' makes the call. But even 'nobodies' can treat others as criminals.[52])

While in general, the account that I have argued for is different than John Searle's "constitutionalist" account of social construction (X counts as Y in context C), I borrow from him his response to a potential objection that social construction in general is a vicious circle. To use his famous example, money counts as money because we believe it to be money.[53] Here, he argues that in fact, this is not simply self-referential because the word 'money' is a stand in for "a complex set of intentional activities."[54] It would seem I have a similar problem: I argue that a 'criminal' is someone who is treated as a criminal. Similarly, in my account, the second 'criminal' can be replaced with a wide variety of social roles that I have already gestured toward in this chapter: a moral outsider, a person who has violated the community's important norms, a person not worthy of moral regard because of their moral character, etc.

3.4 Ways of 'Treating as Criminal'

In criminal oppression, the criminal justice system is the locus of the policies and practices that work together to unjustly constrain 'criminals.' These are the most important sources of the conferral of the social identity 'criminal' because they have the biggest consequences in terms of conferring the status of being a criminal, with its attendant constraints.

[52] A painful reminder of this reality was the killing of Ahmaud Arbury on February 23, 2020. News of his death at the hands of three seemingly inconsequential men because they treated him as a criminal is exactly the kind of social phenomenon that I am trying to understand.
[53] Searle, *Mind, Language, and Society*, 132.
[54] Searle, *Mind, Language, and Society,* 132.

They are the most likely to place the most impactful constraints on 'criminals.' I focus on a non-exhaustive list of three categories of policies and practices that criminalize individual people. The exercise of these policies and practices since at least the 1970s in the United States has also created the social group 'criminal.' The ongoing assignment of people to the group 'criminal' maintains the status of the group. These policies and practices are oppressive when they are carried out in an unjust manner, including in a discriminatory manner, without strong enough due process safeguards, or with unwarranted violence or personal intrusion.

The first category I call 'policing' and refers to policies and practices putatively directed toward the detection or prevention of crime. There are many policies and practices of policing, some of which are likely benign, but many of which are unjust in themselves. The unjust practices include police activities such as stop-and-frisk without actual reasonable suspicion, coercive means of obtaining "consent" for otherwise unlawful searches, and practices of labeling gang members. Many legal policies and practices are unjust and count as oppression, and many everyday activities of police are technically illegal but there are few realistic remedies or challenges to these practices. Policies and practices are not limited to police officials themselves, but include instances such as security guards following people based on race or class in retail stores, private individuals who call police or report others for perceived criminal activity, particularly based on race or class, and vigilantes who respond to perceived criminality on their own.[55]

[55] I include as vigilantes George Zimmerman, who killed Trayvon Martin in 2012, and Travis McMichael, Greg McMichael, and William Bryan who were involved in killing Ahmaud Arbury in February 2020. The killings of Martin and Arbury were undoubtedly race-based. But in both cases the killers used perceived criminality as a reason for following and ultimately killing Martin and Arbury. I take the Movement for Black Lives to be, among other things, attempting to re-negotiate the communal terms for what the criteria for belonging to the category 'criminal' looks like.

The second category of activity is 'adjudication and punishment,' which includes courts, prisons, and their personnel. The central uniting activity of the punishment regime is the determination of guilt for and the punishment of crime. Aspects of determining guilt are fraught with injustices, including the practices of plea bargaining, insufficient funding for proper defenses, and other insufficient legal protections to preserve due process. Many if not most of the actual punishments are also unjust. Conditions of incarceration in the United States typically subject incarcerated persons to constant threats of violence and actual violence, lack of privacy in bathing and using the toilet, invasive body searches, and lack of adequate food, medicine, or hygiene products.

The third category of practices is 'collateral consequences of criminality.' These are the official and unofficial social consequences that stem from one's being taken as a criminal that fall outside of policing and punishment. These include legal consequences of convictions that are not technically punishments, such as felon disenfranchisement in some states, ineligibility for federal public assistance, and being barred from certain professional certificates, including things like barber licensing in some states. For immigrants, including everyone from legal permanent residents (green card holders) to the undocumented, there are often dire immigration consequences, including deportation and lifetime prohibitions for legal entry to the United States, that come as automatic consequences of conviction. Collateral consequences also include legal discrimination against those with a criminal record (including records of arrests for which there was no conviction) in housing, employment, and education. This can also include consequences for those who are only perceived as having a criminal record. For example, several studies have indicated that when employers do not have access to criminal histories of employees, they turn to

indirect and statistical routes to determining criminal history, including racial stereotyping.[56] Ultimately, in several studies, when employers do not have access to extensive criminal histories of applicants, they are much more likely to avoid hiring black employees.[57] This category of policies and practices is arguably the furthest from the official criminal justice system because those who carry out these policies are not usually members of law enforcement or courts. In fact, those doing the conferring are often not acting in any public capacity, but as employers, landlords, community members, and neighbors. But the policies and practices of this category still arise from criminal justice outcomes such as arrests and conviction.

Many policies and practices may fall into more than one of the above categories. Moreover, there are likely further social consequences not listed here that operate on the level of individual actions that are more mundane and difficult to identify. These might take the form of reinforcing stereotypes about criminals, avoiding certain neighborhoods or people, or even internalizing norms in popular television dramas that normalize the illegal behavior of police officers who are faced with the prospect of 'criminals' going free. These individual actions need not be individually blameworthy and, given current institutions, norms, and practices, might be reasonable.

The collective result of these policies and practices is that those who are subjected to them, particularly on a regular or prolonged basis, are subjected to unjust constraints

[56] Raphael, "Should Criminal History Records be Universally Available?" 518–19.
[57] Raphael, "Should Criminal History Records be Universally Available?" 518–19. *See also* Pager, *Marked*, 93. Pager explains that while running an experiment on race and employment, she noticed how much the young black men who worked as testers for her (ambitious college students) were treated as criminals. "On several occasions, for example, black testers were asked in person (before submitting their applications) whether they had a prior criminal history. For these employers, a young black man immediately aroused concern about criminal involvement, and this issue took center stage before getting to matters of education, work experience, or qualifications. None of the white testers, by contrast, was asked about his criminal history up front." Pager, *Marked*, 93

(exploitation, marginalization, powerlessness, cultural imperialism, and violence). ***People who are subjected to these policies and practices are subject to treatment as criminals.***

3.5 Who is a 'criminal'?

The following points on who is a criminal follow from what I have sketched above but are worth emphasizing:

It is neither necessary nor sufficient to have committed a crime to be a criminal. It is not necessary because many who are subject to treatment as criminals have not committed any crimes, or no criminal violation is the cause of the treatment as criminals. For example, people are subject to stop-and-frisk practices based on their age, race, and location with little to no actual evidence of having committed a crime. It is not sufficient to have committed a crime to be a criminal in the way that I use the concept. People who commit crimes, from illegal drug use to white collar crimes, but because of their race and class and other social locations, will never be treated as criminals. For example, even if campus police at Boston College have very good reason to believe that many of the white students they interact with are underage drinkers, the campus police will interact with these white students as if they are people to be protected, not criminals to protect others from.

It is not necessary to have been **convicted** ***of a crime to be a criminal.*** Similar examples as above apply: being followed around a department store, being given extra scrutiny on traffic stops, and having police called for normal activities are examples of when many black people in the United States are treated as criminals without conviction or arrest.

Contrariwise, ***conviction is nearly always sufficient to make one a member of the social group 'criminal.'*** A court finding a person guilty of a crime is the most literal conferral of criminal status, and punishing is the most paradigmatic treatment as a criminal. To declare

publicly and with the authority of a jury foreperson or judge that a person has committed a crime is treatment as well. In addition, repercussions that almost invariably follow conviction are the kinds of policies and practices discussed above that count as 'treatment as a criminal.' There will be literal legal consequences as well as additional social stigma attached to conviction that very often makes a convicted person significantly limited in other areas of their life, even if they are privileged along race and class lines. Actual incarceration is a real social constraint, the horrors of which can follow the incarcerated person long after release. Spending time incarcerated, especially in most types of facilities, will bring along with it a whole host of social constraints including lack of privacy, normalized violence, and dehumanizing treatment.

In rare many cases, arrest or conviction for people who are otherwise privileged will not result in treatment as a criminal because they will be able to leverage their other areas of privilege to mitigate the worse parts of 'criminal' oppression. For example, Brock Turner, a white middle class young man attending Stanford was convicted of sexual assault but only served 3 months of a 6-month sentence in county jail.[58] Turner will be affected insofar as his criminal record will likely prevent him from employment and his registry on the sex offender list will limit where he can live. Because of his race and class, however, he will likely not continue to be viewed as a 'criminal' by those who discover the arrest record or be later given extra attention by law enforcement because of this record. In limited contexts, he may be oppressed by a handful of the institutional practices, but his birdcage will have many more gaps between wires and opportunity to maneuver more freely. As Haslanger has noted, even some people who are members of an oppressed group are still subject to the oppression even if they do not actually suffer the harm. For example, a white, cis-het woman who is wealthy will still be oppressed as a

[58] Serna, "Judge."

woman even if her other privileged identities allow her to avoid street harassment by always being able to be driven around. Another woman might theoretically avoid street harassment out of sheer luck. They are both still oppressed because they are subject to harassment based on their gender, but the first woman has many resources to mitigate that oppression. We can think of Brock Turner in the same way.

To reiterate, the key to understanding the social group criminal is that the social group is defined not by who has actually committed crimes but who is being treated as a criminal, and that means being excluded from civic and political life.

3.6 Other social groups 'nonaccidentally correlated' with criminality

As many examples that I have used demonstrate, those who are picked out for treatment as criminals by the policies and practices that I identified are picked out because of other social identities, including race, class, and gender. Because of historical and present-day conditions in the United States, people who are black, poor, transgender, immigrants, or Muslims may be treated as criminals because of that social identity. These other identities are nonaccidentally correlated with treatment as a criminal, to use Haslanger's terminology. With this in mind, I understand the social group 'criminal' to include people who have been treated as criminals, and thus been conferred the social identity 'criminal,' for a variety of reasons. Based on these reasons, there are four subcategories of 'criminal.'

Category 1: People who are treated as criminal because of another social identity nonaccidentally correlated with criminality and are being treated as criminals despite a total lack of evidence that they have committed a crime. In this group, there are people who in many contexts are treated presumptively as criminals, for example, young black men in particular neighborhood, trans women, poor white people in some communities, homeless people,

especially those with mental health problems. They have not committed any actual crimes, or at least, their being treated as a criminal is not meaningfully connected with reasonable suspicion of them having committed a crime. Young black men in particular neighborhoods who are subject to stop-and-frisk of is the most obvious example of this category, but it might also include homeless-looking people being denied service at Dunkin, a Latinx person being called 'illegal,' or a Muslim person being called a terrorist.[59]

Category 2: People who have identities that are connected with criminality and they are being treated as a criminal in a context in which they have committed a crime that is very minor. By this, I generally mean crimes not inherently injurious to others, like drug-use or loitering. It is likely that, but for their social identity, they would not be criminalized for these activities because people with privileged identities get away with the same activities. For example, I regularly run through a park after dark that is closed after dusk, with a sign reading, "police take notice." Police regularly kick out the homeless people enjoying the park, while I am literally jogging past. I have never even been exhorted to not break this rule. The homeless folks are technically breaking a law (not a criminal one), but so am I. This is the case with using illicit drugs, and in many cases also with selling illicit drugs. The kinds of crimes that I have in mind are often those whose origins are racist or classist, such as loitering, which was criminalized as a part of "black codes" after the Civil War. Moreover, the war on drugs is widely acknowledged to have has at least some racial and political motivation.[60] Thus, these kinds of laws might not even be present at all (or would take different forms) but for racist motivations in the past.

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[59] Calling a Latinx person 'illegal' may be incorrect not only because the person may actually be documented, but also because many undocumented people have not committed any crimes. Though crossing the border without documentation is a criminal offense (a minor one), overstaying a visa is only a civil violation. This distinction is not important for the case at issue, however, because the person calling someone an 'illegal' is often making a claim about criminality.

[60] In 2016, John Erhlichman, Nixon's Chief Domestic Affairs Assistant infamously admitted to an interviewer that demonizing cannabis and heroine was politically motivated. He is quoted as saying, "The Nixon campaign in 1968,

Category 3: People who have identities connected to criminality and actually have committed serious crimes, including violent crimes. First, most people in prison have committed serious crimes. John Pfaff, an economist and law scholar who examines drivers of the increases in incarceration since the 1970s in the United States has told an illuminating story that contradicts some of the main narratives of Michelle Alexander. One of his key arguments is that the War on Drugs is only responsible for some of the growth in the American Prison population.[61] His data indicates that the greatest driver of increasing incarceration in the United States is violent crime.[62]

Most people in prison are either poor or non-white. For example, in 2014, in state facilities (not including federal), the Bureau of Justice Statistics reported that 35% of state prisoners were white, 38% black, and 21% Hispanic.[63] Another study has shown that incarcerated people from all races are concentrated at the lowest income brackets in the United States.[64] Before they were incarcerated, inmates made 41% less than their non-incarcerated counterparts based on data from the Bureau of Justice Statistics in 2004.[65]

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and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news." Baum, "Legalize It All."

[61] Pfaff, *Locked In,* 32–38. In fact, those incarcerated (in state and federal prisons) at the time of his book's publication in 2017, only about 16% of those incarcerated where incarcerated due to drug convictions (and only 6% of those are non-violent first- or second-time offenders). Pfaff, *Locked In,* 32–38. Other data that looks not only at people currently incarcerated, but also at total admissions suggests that only 18% of those admitted to prison were admitted only for drugs, whereas 72 percent of admissions were for crimes that included no drug charges whatsoever. Pfaff, *Locked In,* 32–38.

[62] Because his focus is on explaining the increase in the incarcerated population, Pfaff focuses on growth over absolute numbers of people incarcerated at any given time. But he notes that between 1990 and 2009, 60% of the additional inmates (those who entered prison during these years, not including people who were already serving time) were convicted of violent crimes. Pfaff, 187. Moreover, he explains that in 2013, if one released all those serving time for drug possession, half of those convicted of property crimes and public-order crimes, and 75% of those convicted of drug trafficking, the prison population would have fallen from 1.3 million to 950,000.

[63] Carson, *Prisoners in 2014.*

[64] Rabuy and Kopf, "Prisons of Poverty." The researchers relied on a data set gathered by the Bureau of Justice Statistics gathered in 2004, the most recent collection of this data available.

[65] [65] Rabuy and Kopf, "Prisons of Poverty."

Thus, this group makes up the majority of those actually incarcerated, although it is important to keep in mind that incarceration is just one way of being treated as a criminal. Nevertheless, it is worth pointing out that this group that is clearly treated as criminals (and a group that is more easily amenable to statistical analysis than those subject to other forms of criminal treatment), very many of them are in groups that are nonaccidentally correlated with criminality. There are many inferences that could be drawn from this fact, and not all of them support my argument that criminal oppression is a distinct type of oppression from race or class oppression. But, it does support my claim, articulated below, that those in category 4 play an outsized role in justifying oppressive policies and practices in liberal circles.

Category 4: Finally, there are also people who have no identities or vectors of oppression that would lead them to be preconceived as a criminal. They are treated as criminals because they have committed crimes and have been caught. High profile examples are Harvey Weinstein, Brock Turner, and Larry Nasser. The only reason that they are being treated as criminals is because they engaged in criminal activities and actually got caught. Their race, class, and other social statuses in fact protected them from more harsh treatment as criminals (Turner) or helped shield them from being treated as criminals despite clear criminal activity for years (Weinstein, Nasser). These men and men like them play outsized roles in justifying the policies and practices that I have highlighted, particularly in left or progressive circles. It is appeals to otherwise unoppressed men, most often those who have committed sexual violence, that most people turn when arguing that incarceration, even as it is actually practiced in the United States, is appropriate punishment for these privileged oppressors.

Before I turn to explaining how each of these subcategories of 'criminal' is oppressed, I must clarify that the groups sketched above are imprecise and of course cannot account for every

instance of criminal treatment. There will be, for example, people in category 3 and possibly even category 4 who are innocent completely. Moreover, many people in category 3 have been in categories 1 and 2. In fact, it is likely that many people who are quite poor, particularly those who are poor and black or Latinx, who spend their lives moving between categories 1, 2, and 3. As Jeffrey Fagan, Columbia Law Professor and Epidemiologist, has explained, concentrated policing in New York City is best predicted by race, not crime rates. Concentrated policing leads to a feedback loop.

> "[T]hose racial and neighborhood differences in arrests per crime and the use of force have cascading effects that subsequently have profound consequences for health, mental health, housing, voting, and economic well-being [. . .] Financial burdens from misdemeanor arrests are associated with bankruptcy and foreclosure. And being detained prior to trial, which can occur due to financial limitations, makes conviction more likely during a trial and contributes to the "marking" effect of conviction on employment. This financial instability often makes offenders unable to pay fines, further adding to their criminal history in ways that have stigmatizing and further economic consequences.[66]

This feedback loop of poverty, contact with police, inability to pay fees, fines, or bond, conviction, unemployment, and then poverty keeps many poor and non-white people in near constant contact with the criminal justice system.

There are also complicated cases that blur the boundaries between categories 3 and 4, such as the late Kobe Bryant, who, despite being black and credibly accused of rape by a white woman, seemed to largely shed the criminal identity by the time of his death. Bill Cosby could arguably be placed in category 3 or 4 because his tremendous social power based on his elite status protected him from treatment as a criminal for decades despite fairly clear evidence of serious crimes. But in nearly every case of the famous or infamous, these are the exceptions rather than the rules.

[66] National Academies of Sciences, Engineering, and Medicine 2018.

There may be rare cases of extremely powerful individuals for whom oppression does not result from conviction at all—for example Martha Stewart was convicted but spent time in a lower security prison with less violence and more privacy, avoided much social stigma for being a criminal, and the collateral consequences of conviction she faces are likely to be meaningless apart from the fact that she cannot vote in some states (but she probably has the power/wealth to set her residency in any state she chooses, and thus is much less constrained by this consequence than the vast majority of convicted felons). In general, however, she faces very few of the external constraints due to being convicted of a crime.

4. Conferring the Status of Criminal in the United States is Tantamount to Oppression

Recall that at the conclusion of the first section, I noted that my conception of oppression includes the following: First, oppression occurs when a related system of policies and practices results in mounting unjust social constraints (exploitation, marginalization, powerlessness, cultural imperialism, and violence) on a group of people. Second, the oppressed group must be related to the policies and practices in a particular kind of way: being a member of that group has to be nonaccidentally correlated with being picked out for certain kinds of unjust treatment.

For members of categories 1 and 2, treatment as a criminal places unjust social constraints in a relatively straightforward way. Based on race, class, or another group membership, one is subject to treatment as a criminal. Race and class are not fair reasons to be subject to these policies and practices. The second criterion is also fulfilled because membership in these groups is the reason for being subjected to these policies and practices. For these two categories of 'criminal,' the challenge for me is not to explain why these people are oppressed, but to explain why their oppression should count as criminal oppression and not racial or class-based oppression. The brief appeal I will make here is to the nature of the obstacles: invasive

policing, exclusion from public places, arrests, and the like are types of treatment as criminals. At minimum, the criminal justice system is being used as a tool of racial or class oppression. In the next chapter, I will make the case that criminal oppression is not collapsible into racial, class, or other kinds of oppression.

As for category 3, it is harder to argue that the obstacles or constraints are unjust because I have stipulated to the fact that people in this category have actually committed serious crimes, including violence against others. It seems therefore justified that they should face some kinds of obstacles. But, as I argued above, given the fact that most people who fall into this category have experienced exclusion by being in categories 1 and 2, they have not had the opportunities that many non-criminals have had. Likely that social exclusion of experienced by being members of categories 1 and 2 already pushed many of the people in category 3 into situations where crime was a more likely outcome. As the study on poverty and incarceration noted, the vast majority of people incarcerated are from the lowest socio-economic statuses in the United States. Moreover, many have significantly less education than their non-incarcerated comparators. For this reason, many philosophers of punishment make various arguments that those who have not benefitted from the social contract should not suffer the full consequences when they break the social contract.

Even if one is convinced of the fact that we should not take social and political situatedness into account when determining if hard treatments are appropriate responses to crime, particularly serious crime, there is an additional argument. Here, I rest on the non-ideal theory aspect of my research. The actual policies and practices involved in policing and incarceration, are unjust no matter what the person has done. For example, the prevalence of rape in prison is hard to justify unless on is a strict *lex talionis*, eye-for-an-eye retributivist model. In

fact, some contemporary retributivists object to the current conditions in prisons in the United States, and the retributivist insistence on proportionality in general would likely lead many to criticize much of the actual practices of incarceration in the United States.[67] Here, I do not argue that theorists who justify punishment along retributivist or consequentialist lines are justifying inhumane treatment. Instead, I am arguing that the conditions in prisons are in fact so degrading that very few would find them justifiable even for the worst criminals.

Surely it is most difficult to make the case that treatment as a criminal is unjust for people in Category 4 because they actually have committed crimes and there is no other evidence of oppression that can mitigate their responsibility for having committed such crimes. But, I again appeal to non-ideal theory and point to the actual practices that take place in incarceration.[68] The constant appeal that I make to the violence, lack of privacy, and other inhumane treatment in prisons points to the underlying social and political exclusion that is paradigmatic of treatment as a criminal. It is not just that prison conditions are somehow just a bit too bad for the people who are in them, and we should scale back the amount of hardship suffered there because it is disproportionate to the crimes committed by most of those incarcerated. Instead, the way to understand the violence of prison, the intrusiveness and risk of the stop-and-frisk, and the exclusion from voting, housing, and employment protection from violence, physical safety and autonomy, and inclusion in social life are guarantees of social and political membership. When a

[67] See, e.g., Hampton "Correcting Harms" at 1686–87 (explaining that many punishments of felons in fact constitute the kind of moral injuries she thinks punishment must attempt to correct, thus making two wrongs instead of righting a wrong).

[68] This is a good place to pause and note, along with many black social commentators, that often people in category 4 are treated better by police than people in categories 1-3. For example, Dylann Roof was somehow safely transported out of the church where he had just murdered nine black churchgoers in an effort to start a race war. In comparison, Philando Castile was shot and killed when he attempted to show a police officer his license to carry a concealed weapon. He had committed no crime, but was instantaneously killed by police. I note, however, that incarceration for notorious criminals like Roof is extremely dangerous and often leads to long-term solitary confinement, which, as Guenther argues, is extremely damaging.

person does not have access to these social goods, particularly if they are excluded from many of these social goods, it is an indication that they have been socially and politically excluded so as to reach a level of exclusion where they are basically second-class citizens. The reason that our prisons are so violent is that our public morality dictates that that criminals are justifiably excluded from the privileges of our polity. Because they have violated our community's most important norms, our social norms dictate that we are justified in excluding them from all the benefits of membership, including the protection of their basic rights. Though under law, those who are incarcerated are protected from cruel and unusual punishment by the Constitution, ways of enforcing these rights are few and far between.

5. Conclusion

This chapter has aimed to do many things: explain oppression and social construction, define 'criminal' and the policies, practices, and people that confer the status of 'criminal' to individual people. But I have also attempted to explain why I think that we should look at criminal oppression as a special kind of oppression, something distinct from racial oppression or poverty. That is because the underlying logic of criminal oppression is different, and the logic is most evident when we look at the most vicious criminals among us who have no apparent excuses of other oppression to mitigate their violations. The conditions of our prisons belie this fundamental fact about our society: we have decided that people who violate criminal laws do not deserve to be members of our society any more, and they lose the right to complain about what happens to them in practice, even if they technically retain the legal right to do so. It should be of no surprise that the people that the already oppressed members of American society are the most likely to be thrown out of the community using this particular mode of exclusion as well. But criminal oppression is more difficult to identify and dislodge because it has the appearance of a

moral justification. The logic of criminal oppression dictates the people we exclude from social and political membership, and the benefits that come with membership, have brought it on themselves because they have shown themselves morally unfit for our community.

Chapter 2: On Race and Criminal Oppression

0. Introduction

In this chapter, I sketch a broad answer to the question of how criminal oppression relates to race and racism in the United States. In the last chapter, I asserted that some social identities are nonaccidentally correlated with criminality, and in the United States, being black is the paradigmatic case of nonaccidental correlation with criminal oppression. This is the case in major part because the criminal justice system and related social norms were explicitly used as a tool of racial oppression after slavery was declared (mostly) illegal. In the first section, I will lay out a brief history of the relationship between anti-black racism and criminal law practices in the United States, connecting the practice of slavery with incarceration and criminal stereotypes that operate today. Without America's history of slavery, our present-day criminal justice system would look different. I draw on work by Angela Davis, Henry Louis Gates Jr. and Michelle Alexander, amongst others, for this brief sketch.

Taking that history into account, I will use Sally Haslanger's conception of secondary oppression to capture the relationship between racial oppression and criminal oppression as two types of oppression that can and do intersect. In secondary oppression, being a member of one type of oppressed group makes on susceptible to being oppressed by another group of policies and practices that subject one to a new type of oppression. While this conception gives a framework for understanding how two types of oppression can relate, it does not give a rich explanation of the relationship between racism and criminal oppression that I want to capture. One thing that I want to capture is that the way that black people are particularly picked out for oppression by the criminal justice system is not simply a matter of degree (i.e. that the criminal justice system treats them harsher than their white counter parts), but also that criminal

oppression for black people in the US is qualitatively different than criminal oppression of poor white people.[69] To capture this aspect of the relationship between racial oppression and criminal oppression, I turn to the concept of intersectionality as developed by Kimberlé Crenshaw and, later, Kristie Dotson. This concept has become popular as a part of public feminist discourse, and as such, has taken on a variety of meanings. I will spell out very specifically the way that I use the concept, which I believe to be in close alignment with Crenshaw's earliest texts on intersectionality.

Finally, I will turn to Dotson's distinction between the holistic approach to understanding intersectionality and the interlocking systems approach to intersectionality to address some concerns that arise from my insistence that we understand criminal oppression to be distinct from racial oppression. I will explain that by doing a system's analysis, I focus on the structures that interact to oppress black people in the United States. This interlocking systems approach offers a different view than that of a person who is experiencing these oppressions. For that person, the holistic approach to intersectionality highlights that the experience of oppression is not of distinct systems, but a unified experience of oppression. When one is experiencing oppression based on membership in more than one oppressed group, they cannot parse out where one oppression ends and other begins. My analysis offers a different view of oppression with different advantages than a holistic approach can. One of the advantages it offers is the ability to see how an oppressive structure appears differently in different contexts. This discussion will help me address a second concern. This second concern is it seems that in saying all members of the group 'criminal' that I described in chapter one are oppressed, that I am making some equivalencies between black people who have done nothing wrong at all (e.g., black teenage

[69] I thank Cory Dout for pushing me on this particular point.

boys stopped and frisked in Crown Heights) and (sometimes powerful, rich) white men who have done very bad things (e.g., Brock Turner, Dylann Roof). Here, I argue that the intersectional analysis allows me to make meaningful distinctions between these two groups while maintaining the attention to the unjust structures that make up the criminal justice system and criminal oppression.

1. Brief History of the Criminal Justice System and Anti-Black Racism

The criminal justice system in the United States is intimately tied with the history of slavery and anti-black racism. Black people in the United States, perhaps more than any other social group, have a relationship of nonaccidental correlation with criminality because of this history and its relationship with present practices. In the last chapter, I noted that there are several oppressed groups that also have a nonaccidental relationship with criminal oppression, including the poor, the disabled, LGTBQ people, immigrants, and likely others. Each of these groups has a historical connection, a story of how this identity became entangled with the structures of criminal oppression in the United States. To fully understand criminal oppression, each would have to be explored in depth. Anti-black racism, however, I believe has the strongest and deepest historical and present-day correlation with criminal oppression, and this is why I am devoting a chapter to its exploration.[70] The close relationship between racial oppression and criminal oppression is evident in a number of historical developments. Among others, Angela Davis, Henry Louis Gates Jr., and Michelle Alexander have shown the historical links between slavery and the criminal justice system. All rely on the work of historical activists like Ida B. Wells and Frederick Douglass, and Davis and Alexander weave together the work of historians,

[70] Nothing in particular, besides my choice of race over class or other oppressed group to focus on for this chapter, hinges on the claim that race (in particular, being black) is the most connected to criminality in the United States, so I will not attempt to give empirical data to defend it. I do think that the history and present data that I give in this section do support this claim, though certainly not definitively.

sociologists, and legal scholars to tell the story of race and criminality in the United States. In this section, I will highlight what I take to be the most important parts of this historical story to help understand why being black in the United States is nonaccidentally correlated with being treated as a criminal.

1.1 Criminal Law and Punishment before and after the 13th Amendment

Incarceration as a primary form of punishment for crime took root in the United States around the time of the Revolutionary War, replacing more common capital and corporal punishments as part of enlightenment-based humanitarian reform of punishment.[71] While slavery was still legal and operating in the United States, in general, slaves were not treated as criminals or incarcerated because they were already lacking in the basic rights of citizens, the right to freedom of movement, the right to self-determination, and other rights that incarceration was meant to curtail.[72] Likewise, non-slave (usually white) women, who experienced civil death upon marriage, were not treated as criminals or incarcerated because they were not seen has having a right to freedom of moment, so incarceration as a form of punishment could not apply to them. Instead, they were generally "punished" inside the home with corporal punishments for failing to perform the duties of wives and mothers.[73] During this time, the view of incarceration was that it separated wrongdoers from the community so that they could experience solitude and penitence, thus reforming them so they could return to society.[74]

It was only when slavery was abolished, and former slaves were legally (at least nominally) free that the relationship with incarceration began. Angela Davis points to the Thirteenth Amendment which states:

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[71] Davis, *Are Prisons Obsolete?* 40–44.
[72] Davis, *Are Prisons Obsolete?* 40–44
[73] Davis, *Are Prisons Obsolete*? 45
[74] Davis, *Are Prisons Obsolete* 46–48.

> Neither slavery nor involuntary servitude, ***except as a punishment for crime whereof the party shall have been duly convicted***, shall exist within the United States, or any place subject to their jurisdiction.[75]

Thus, involuntary servitude, or slavery, could continue so long as those enslaved were convicted of crimes. As a result, "both Emancipation and the authorization of penal servitude combined to create an immense black presence within southern prisons and to transform the character of punishment into a means of managing former slaves as opposed to addressing problems of serious crimes."[76] After the Thirteenth Amendment, there was a dramatic change in the systems of punishment, as illustrated by the state of Alabama's penitentiary system, where the prison population grew by three times between 1874 and 1877, and nearly all the growth was in black prisoners.[77] Moreover, even as more and more former slaves were arrested, prisons were scarce in the south because people convicted of crimes were not sent to prisons, but leased out to coal mines, sugar and cotton plantations, and other places as workers.[78] Similarly, slave codes, which has been used to prevent slaves from running away and to return them when they had, were repurposed into Black Codes, laws that only applied to black people and required that they have proof of employment, that they not "loiter," and that they not disrespect white people lest they be charged with a crime. Thus, during this time, when criminal codes were created specifically to criminalize black people, being black made one subject to being treated as a criminal.[79] Black Codes made it illegal for former slaves to be drunk, insult white people, be absent from work, or even possess firearms, making black people targets for law enforcement and criminal punishment.[80]

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[75] Davis and James, *Angela Y. Davis Reader*, 99.
[76] Davis and James, *Angela Y. Davis Reader*, 99.
[77] Davis and James, *Angela Y. Davis Reader*, 100.
[78] Davis and James, *Angela Y. Davis Reader*, 100.
[79] Davis and James, *Angela Y. Davis Reader*, 100.
[80] Davis and James, *Angela Y. Davis Reader*, 100.

At this time, newly freed slaves were arrested and convicted of a high rate of petty crimes, especially stealing small amounts.[81] This reinforced a link between criminality and blackness in social stereotypes.[82] Historians have been quick to explain that given the new social dynamics, it would have been necessary for newly freed slaves to turn to "petty thievery" to feed themselves.[83] But more recently, scholars who were skeptical of the fact that newly freed slaves seemed to be so much more inclined to petty theft have argued based on historical research that in fact, many or most of these petty crimes were entirely fabricated for the purpose of controlling and re-enslaving huge numbers of newly freed slaves.[84] As Frederick Douglass wrote in 1883, it was common to "impute crime to color" so that if a crime was committed, it was assumed to be committed by a black person.[85] As a journalist, he reported on a situation in which observers saw a black man committing robbery, and the robber was shot and wounded, ending his attempt to flee.[86] When authorities caught up to him, instead of finding the robber to be a black man, it was a white man who had painted his face black.[87]

Thus, before slavery ended, the criminal justice system in the United States was reserved for white people, and incarceration was seen as a rehabilitation for criminals so that they could return to society. Incarceration was a part of reforming prior forms of punishment, such as corporal and capital punishment, that were less enlightened. After the passage of the 13th Amendment, however, numbers of convicted people grew as former slaves were charged with crimes. Though they did fill prisons, they also were put into forced labor across the south where they were put into forced into "involuntary servitude" due to convictions of crimes. Whereas in

[81] Davis, *Are Prisons Obsolete?* 29.
[82] Davis, *Are Prisons Obsolete?* 29.
[83] Davis, *Are Prisons Obsolete?* 33.
[84] Davis, *Are Prisons Obsolete?* 33–34.
[85] Davis, *Are Prisons Obsolete?* 30.
[86] Davis, *Are Prisons Obsolete?* 30.
[87] Davis, *Are Prisons Obsolete?* 30.

the south before the 13th Amendment, slaves were not regularly associated with criminality, the passage of black codes and the criminalization of newly freed slaves also began to sow the seeds for a new stereotype of the black person as a criminal.

1.2 Convict Leasing and Chain Gangs

According to historian David Oshinksy, "Between 1870 and 1910, the convict population grew ten times faster than the general one. Prisoners became younger and blacker, and the length of their sentences soared."[88] Once newly freed slaves were convicted of violating Black Codes, specially designed to keep them as second-class citizens, or of petty crimes they may or may not have committed, they were then subject to the same unpaid labor that existed during slavery.[89] Convict leasing was the practice of leasing out groups of convicts to private individuals, including those who had previously owned slaves, to do work. The prison was paid by the private party while the prisoners did free labor with treatment many historians describe as worse than that under slavery.[90] Because the private parties purchasing the labor convicts did not own the convicts and could readily replace one with another, there was no incentive at all to protect the body of the prisoner (whereas slave owners often limited the severity of punishments to protect their investment, as slaves were profitable commodities), so conditions worsened.[91] Chain gangs were often seen throughout the South, where groups of prisoners performed hard labor chained to one another with heavy shackles, imagery that reinforced the connection between being black and being a criminal.[92]

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[88] Oshinsky, *Worse Than Slavery*, 124.
[89] Davis, *Are Prisons Obsolete?* 33.
[90] Davis, *Are Prisons Obsolete?* 33.
[91] Davis and James, *The Angela Y. Davis Reader*, 86–87.
[92] Davis, *Are Prisons Obsolete?* 31–34.

1.3 Lynching and Rise of the Black Rapist Myth

Along with the growing association of black men with criminals through Black Codes, convict leasing, and chain gangs, in the late 19th and early 20th century, the myth of the black rapist began to shape American society.[93] This mythology consists of asserting that black men are particularly prone by their very nature to rape, especially white women.[94] Many, including Frederick Douglass and, later, Angela Davis, argue that lynching black people, men in particular, was a common tool used by anti-black nationalists who sought to terrorize black people and maintain a hierarchy, and the myth of the black rapist arose as a justification for this practice.[95] In fact, before the Civil War, there was little concern that black men, including slaves, were sexual at all. They were often depicted as asexual and docile, and no one seemed to be concerned about white men leaving their wives and daughters with slaves to fight in the Civil War.[96] However, after the Civil War ended, the idea that black men were particularly prone to rape white women flourished.

Ida B. Wells, a journalist and anti-lynching advocate, calculated that at least 10,000 black people were lynched between 1865 and 1895.[97] The rape of white women by black men became a justification for lynching at the society-wide level despite the fact that, in specific cases of lynching, rape rarely the given justification. In a study done in 1931 by the Southern Commission for the Study of Lynching, between 1889 and 1929, only one sixth of lynching

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[93] Gates, *Stony the Road,* 141–148. *See also* Duverney and Moran.
[94] Gates, *Stony the Road,* 141–148.
[95] Davis, *Women, Race, and Class*, 183–187.; Douglass, "Why is the Negro Lynched?" 498–499.
[96] Sommerville, "Rape Myth," 481–518. Somerville argues that the myth of the black rapist did not enter the American consciousness until about 1918. She documents in detail how very few black men were charged with rape before the Civil War, and how all-white juries and townspeople pled for leniency in the view times that black men were convicted of rape before the Civil War. She contrasts that with the legally mandated harsher sentences for black men convicted of rape postbellum. Sentences also were harsher for raping white women than black women. In practice, this may continue today, but the de jure legal practice of harsher penalties for black men convicted of rape and for those who rape white women began after the Civil War.
[97] Wells-Barnett, *On Lynching,* 8.

victims were accused of rape.[98] Frederick Douglass wrote that during Reconstruction, white nationalists justified lynching as a means of keeping black people from gaining political power, but as Reconstruction was undermined, this justification became less convincing.[99] When black people were basically disenfranchised as Reconstruction fell, and lynching apologists could no longer credibly claim that black people posed any threat to white political power, white supremacists turned to the charge of rape as a justification for lynching.[100] Public apologists for lynching, including US Senators, argued that they had to protect white women from the unbridled sexuality of black men, who were often compared to animals with animalistic sexual drives.[101] White women were often complicit in this characterization, and some white women in leadership roles in the suffragist movement espoused such views.[102] Still, some white women's organizations did respond to calls from Ida B. Wells and Mary Church Terrell, the first president of the National Association of Colored Women, to end lynching in the 1930s.[103]

Perhaps the most infamous example of this mythology comes from the film *The Birth of a Nation,* in which a black man, Gus, a former slave, is depicted as a rabid rapist chasing a virginal white woman who throws herself off a cliff to her death rather than be raped by the man.[104] Her brother organizes the KKK to find Gus and lynch him. When it came out in 1915, President Woodrow Wilson watched it in the White House, and it was of such great popularity

[98] Davis, *Women, Race, and Class,* 189.
[99] "The altered circumstances have made necessary a sterner, stronger and more effective justification of Southern barbarism, and hence we have according to my theory, to look into the face of a more shocking and blasting charge than either Negro supremacy or Negro insurrection." Douglass "Why is the Negro Lynched," 498–99.
[100] Davis, *Women, Race, and Class*, 186–87.
[101] Davis, *Women, Race, and Class*, 189–90. Davis argues that the myth of the Black Rapist implies the myth of the Black Whore, imputing an animal-like sexuality to the whole race. Davis, *Women, Race, and Class*, 191.
[102] Davis, *Women, Race, and Class*, 187.
[103] Davis, *Women, Race, and Class*, 193–94.
[104] Gates, *Stony the Road: Reconstruction,* 154–57.

that many scholars explain that it shaped the American narrative of the Civil War and Reconstruction for years.

1.4 Civil Rights Movement and the Rise of Colorblind Racism

In the 1940s and 1950s, the Civil Rights Movement fought back against Jim Crow and the explicit segregation in the South in areas such as housing, education, employment, and public accommodations. In the 1950s, largely heralded by the landmark *Brown v. Board of Education* Supreme Court decision outlawing segregation in public schools, de jure segregation waned.[105] With the passage of the Civil Rights Acts of 1964 and the Voting Rights Act of 1965, slowly, Jim Crow laws and practices that explicitly segregated based on race disappeared and became illegal.[106] But, as Michelle Alexander points to, a new language and system of social separation were already building.[107] She argues that Slavery, Jim Crow, and Mass Incarceration are three different racial caste systems, and that as Jim Crow dissolved, criminality and incarceration rose to replace it.[108] After the Civil Rights Movement, explicitly racist laws and language were illegal and unpopular, but there was still racist sentiment, and politicians still used this racist sentiment to gain power and maintain a racial caste system by appealing to "law and order."[109] During the Civil Rights Movement itself, the appeal to law and order regularly thinly veiled calls to vilify its leaders, who were, after all, breaking the law. The appeal to law and order continued after the victories of the civil rights era seemed to be set in stone.[110]

The foundations for criminality to be used as a "dogwhistle" for racism were already in place. The Thirteenth Amendment still allowed for slavery for those convicted of crimes, and

[105] Alexander, *The New Jim Crow,* 35–38.
[106] Alexander, *The New Jim Crow,* 35–38.
[107] Alexander, *The New Jim Crow* ,40–41.
[108] Alexander, *The New Jim Crow,* 12.
[109] Alexander, *The New Jim Crow,* 40–42.
[110] Alexander, *The New Jim Crow,* 35–40.

though chain gangs and convict leasing had ceased, prison labor had begun to flourish in new settings. Moreover, the imagery and stereotypes of black men as criminals and rapist that developed as Reconstruction fell did not go away. At the same time, a huge increase in crime swept the United States in the 1960s and crime in some black neighborhoods rose sharply as well.[111] The "tough on crime" Law and Order Movement appealed to many Americans, including some black Americans who were living in neighborhoods with significant crime.[112]

Given this context, the Republicans, particularly Richard Nixon, employed the "Southern Strategy," to appeal to white southerners, who up to that point had voted for Democrats, using implicitly racist messages.[113] This strategy continued in the election of Ronald Reagan, who brought 22 percent of democratic voters to the Republican Party in 1980, with his twin promises of cutting welfare and cutting crime. He regularly used the stereotypes of the "welfare queen" and the "human predator" in his campaign speeches and in advertising, and these stereotypes implicitly referred to black people, while being careful to avoid explicit racial language. In 1982, Reagan announced his "war on drugs," which had a disparate effect on black and Latinx Americans.[114]

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[111] Alexander, *The New Jim Crow*, 41.
[112] Alexander, *The New Jim Crow*, 40–42.
[113] Alexander, *The New Jim Crow*, 42.
[114] Alexander, *The New Jim Crow*, 44, 48-50. Alexander argues that the War on Drugs is primarily responsible for Mass Incarceration. While the story is a compelling one, and her focus on racism as a prime motivator in mass incarceration is correct, other accounts, with more compelling data, seem to contradict the idea that the war on drugs caused the massive increases in incarceration between 1970 and 2014. For an excellent treatment of the many causes in the rise in incarceration, see Pfaff, *Locked In.* In fact, those incarcerated (in state and federal prisons) at the time of his book's publication in 2017, only about 16% of those incarcerated where incarcerated due to drug convictions (and only 6% of those are non-violent first- or second-time offenders). Other data that looks not only at people currently incarcerated, but also at total admissions suggests that only 18% of those admitted to prison were admitted only for drugs, whereas 72 percent of admissions were for crimes that included no drug charges whatsoever. Pfaff, *Locked In*, 32–38.

1.5 Law and Order and the Anti-Violence Movement

In her book, *Arrested Justice: Black Women, Violence, and America's Prison Nation*, Beth E. Richie defines the anti-violence movement as "the work that is done by individuals, groups, and organization to end male violence against women by looking at the root causes of the problems."[115] This movement began in the 1960s, building off of models of political activism from the civil rights movements, and first began making the claim rape and domestic violence were public problems rooted in "gender inequality" and the "subordination of women" rather than private acts of violence.[116] Initially, this movement began with consciousness-raising groups that formed around a political analysis with a relatively monolithic conception of the category of "woman," and argued that all women were equally subject to male violence regardless of race, class, ethnicity, or other identities. From these consciousness-raising groups, self-help coalitions developed primarily around women's shelters for domestic violence and rape crisis centers in the early 1970s. These early centers were volunteer-led with little outside funding, and they remained highly political. At this point, a more complicated political consciousness began to arise. "Class based oppression, racial discrimination, and exploitation based on sexuality were targets in the work against the root causes of male violence, even though challenging gender inequality dominated as the undisputed primary political goal." [117]

As this movement continued to expand, it recognized the role of the state and other institutions in perpetuating violence, from emergency room staff who ridiculed rape survivors to police who failed to protect victims of domestic violence and rape.[118] Thus, the movement expanded its targets from just cultural notions of gender inequality, family and community

[115] Richie, *Arrested Justice,* 66–67.
[116] Richie, *Arrested Justice,* 66–67.
[117] Richie, *Arrested Justice,* 71.
[118] Richie, *Arrested Justice,* 71–72.

dynamics, to institutions. Leaders in this movement identified systemic gender disadvantages that made women susceptible to male violence: "a general lack of political representation, employment discrimination, systematic disregard for women's contributions to the domestic sphere, as well as associated problems like lack of publicly funded child care, health disparities based on gender, constant threats to reproductive health services, and stereotypical media and cultural representations."[119] This opened up many more conversations about the ways that class, race, and sexuality contributed to violence against women, and it also presented new questions for realistic strategies to combat such a wide sweeping array of causes of this violence.

Richie argues that at this point, in the late 1980s and early 1990s, a split in the anti-violence movement produced a more radical left wing of the group that remained committed to systemic change by focusing on power dynamics and more pragmatic, moderate liberal wing that wanted to provide services to women affected by violence. The second group was able to take up the Law and Order Movement's successes by formulating violence against women as primarily a criminal problem, while the leftist movement focused on systemic, structural inequality. By aligning itself with the Law and Order Movement, the second group was able to get more resources and even have a large impact on legislation. While these legislative victories, including statutory rape laws, primary aggressor laws, new mandatory police practice around domestic violence calls, and rape shield laws did make some women significantly safer, little regard was taken for which women actually benefitted most from these laws.[120] The most well known and significant piece of this legislation was the Violence Against Women Act, first passed in 1994, which foremost provided criminal justice tools for fighting violence against women, and also

[119] Richie, *Arrested Justice,* 73.
[120] Richie, *Arrested Justice,* 77–85.

added funding for shelters and other victims' services.[121] It is less well known, however, that it was passed as part of the now infamous Omnibus Crime Bill, which, among other things, created 60 new federal capital crimes, ended Pell Grants for prisoners, provided extensive funding for new prisons and new police programs.[122]

It is unquestionably true that these legislative advances helped some women in significant ways. But, Richie argues that, in focusing on male violence as a criminal matter instead of as a part of a bigger system of gender inequality, and because this view did not focus on the ways that gender-based violence appears differently in women's lives based on race, class, and sexuality, the gains for some women were losses for others. She notes that, given the new realities of limited welfare and increased criminalization starting in the 1990s, black women and other women who are in precarious positions are not able to benefit from these advances. She cites "(1) communities suspicious of law enforcement because of aggressive tactics and occasional maltreatment; (2) . . . women whose gender performance, life circumstances, and /or sexuality threatens normative standards; (3) . . . women [who] attempt to protect themselves; and (4) for women whose victimization and risk of violence is so severe that they are forced to choose among very bad options to protect their own safety."[123] Because of increased mandatory arrest laws for domestic violence calls, many black women and other women of color no longer will call the police in cases of domestic violence.[124] Radically different arrest rates for men of color in domestic violence cases raises questions of racism and stereotyping around gender-based violence.[125] Moreover, combination of public welfare cut backs and increase in criminalization

[121] Richie, *Arrested Justice,* 85.
[122] Richie, *Arrested Justice,* 86.
[123] Richie, *Arrested Justice,* 101.
[124] Richie, *Arrested Justice,* 83.
[125] Richie, *Arrested Justice,* 83.

means that having a family member use violence results in the whole family being kicked out of public housing. This means that poor women, disproportionately women of color, in public housing have strong incentives to avoid calling the police in domestic abuse situations.[126] Finally, the fact that the types of violence against women that are highlighted by these policies do not include state-based violence against women, including forced sterilization, rape by police and correctional officers, highlights the fact that many of the concerns of women of color, especially black women, are not addressed by these laws.[127]

1.6 The New Jim Crow

Michelle Alexander's book *The New Jim Crow* has brought the connection between slavery, racism, and the criminal justice system to a broad audience. She argues that, under the guise of "law and order," there has been a massive increase in the number of people incarcerated in the United States, and black and Latinx people are vastly overrepresented in this system.[128] Beyond simply incarceration, policing practices have expanded greatly, supported by Supreme Court rulings that chipped away at constitutional protections against searches and seizures and other Fourth Amendment Rights.[129] This resulted in the ability of police to have wide discretion in who they pull over, stop and frisk, and interrogate, and they have many tools available for these practices.[130] Empirical evidence suggests that with this discretion, they tend to over-police people of color.[131] Sometimes explicitly racialized orders come from the top down, as with

[126] Richie, *Arrested Justice,* 115.
[127] Richie, *Arrested Justice,* 78.
[128] Alexander, *The New Jim Crow*, 6–7
[129] Alexander, *The New Jim Crow*. See especially chapter 2, "The Lockdown," 59–96, which examines a series of influential Supreme Court decisions granting more and more leeway to police for searches, seizures, questioning, and other activities.
[130] Alexander, *The New Jim Crow*, 59–96.
[131] Alexander, *The New Jim Crow*. See especially chapter 3, "The Color of Justice," 97–139.

Michael Bloomberg while he was mayor of New York City.[132] Other times these disparities seem to result from something like implicit bias or implicit police practices and norms.

Evidence suggests that people of color are punished more harshly as well, and the Supreme Court has foreclosed the possibility of challenging racially disproportionate sentencing without evidence of racist intentions on the part of juries, whose deliberations are closed and secret.[133] The wide discretion given to prosecutors is another place where implicit policies and practices as well as conscious or unconscious bias result in differing outcomes.[134] And, these implications do not end when the sentences are served, as black and Latinx people are also more likely to be subject to the collateral consequences of convictions, arrests (even those that do not result in any conviction), and even of being assumed to be a criminal.[135]

Michelle Alexander opens her book with a poignant example of how the current criminal justice system in the United States has replaced slavery and Jim Crow and recreates the racial caste system in nominally colorblind ways. She introduces Jarvious Cotton.

> Like his father, grandfather, great-grandfather, and great-great-grandfather, he has been denied the right to participate in our electoral democracy. . . . Cotton's great-great-grandfather could not vote as a slave. His great-grandfather was beaten to death by the Ku Klux Klan for attempting to vote. His grandfather was prevented from voting by Klan intimidation. His father was barred from voting by poll taxes and literacy tests. Today, Jarvious Cotton cannot vote because he, like many black men in the United States, has been labeled a felon and is currently on parole.[136]

This section has demonstrated that from the end of the Civil War through the present day, the criminal justice system in the United States has been intertwined with maintaining a

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[132] Fermino, "Mayor Blumber." see also Alexander, *The New Jim Crow,* 130–137 (explaining several supreme court decisions that recognize the right of police to use race as a factor in a variety of situations during investigations)
[133] *McCleskey v. Kemp*, 481 U.S. 279 (1987); Alexander, *The New Jim Crow,* 109–112
[134] Alexander, *The New Jim Crow*, 114–19.
[135] Alexander, *The New Jim Crow*, 151–153. Alexander cites a study that suggested that even when employers did not know if applicants had a criminal history, a criminal history was imputed to black men and not white men applicants.
[136] Alexander, *The New Jim Crow*, 1.

racial caste system that leaves black people in the United States subject to forced labor, violence, and second-class citizenship. In this way, criminal oppression in the United States is fundamentally intertwined with racial oppression, particularly anti-black racial oppression. I have also highlighted the way that the black rapist myth justified significant violence against black people, especially black men. Moreover, as the law and order movement mounted, violence against certain women was taken seriously, expanding the power of law enforcement and leading to more arrests of men of color without giving significant assistance to women of color who suffer from gender-based violence. With this history and present practice in mind, I want to articulate how the structural phenomenon of criminal oppression that I outlined in chapter one interacts with racial oppression.

2. Criminal Oppression as Secondary Oppression for Black Americans

In this section, I will apply Sally Haslanger's concept of secondary oppression to the relationship between racial oppression and criminal oppression. Among other things, this means that being black makes it very likely that one will be oppressed as a criminal, but not all people oppressed as criminals are black.[137] I will argue that Haslanger's concept does capture the basic relationship between types of oppression that are "nonaccidentally correlated" with one another, but this relationship does not give enough information to capture the historical realities that have created the nonaccidental correlation between race and criminality that is present today.

[137] It would be consistent with my claims about structural oppression to say that ALL black people are oppressed qua criminal because all are, due to the membership in the group 'black Person in the US,' which nonaccidentally correlates with criminal oppression, means that, even if a particular black person is not unjustly harmed by the criminal justice system, they are still subject to the risk of being so harmed. A woman in the US who is never sexually harassed is still oppressed qua woman by the practice of sexual harassment because being a woman is nonaccidentally correlated to being sexually harassed. See Haslanger, "Oppressions," 326–27.

To explain secondary oppression, let me first return to Haslanger's discussion of oppression, which I first outlined in chapter 1: [F=member of oppressed group, I =Institution, C=Context, R= Relation]

> (SO_1) *F*s are oppressed (as *F*s) by an institution *I* in context C iff_{df} in *C* ∃*R*(being an *F* nonaccidentally correlates with being disadvantaged by standing in an unjust relation *R* to others) and *I* creates, perpetuates or reinforces *R*.[138]

She gives the following example:

> Women are oppressed as women by cultural representations of women as sex objects in the United States in the late twentieth century iff being a woman in the United States in the late twentieth century nonaccidentally correlates with being subjected to systemic violence, and cultural representations of women as sex objects creates, perpetuates, or reinforces the systemic violence. [139]

She notes that even if not every woman actually experiences the systemic violence, each woman is still oppressed along these lines because being subject to the risk of the unjust harm is part of the condition of being oppressed. Some women, perhaps because of their relative privilege along race, class, sexual orientation, or gender identity, may be less at risk for this kind of violence, or it is not something that shapes her day-to-day experiences. One might imagine that a wealthy white woman who can take private cars rather than relying on public transit or walking, does not have to deal with street harassment on a daily basis as many women who take public transit do.

Secondary oppression occurs when one type of oppression is nonaccidentally correlated with another kind of oppression. Being a member of one oppressed group makes a person likely to be subject to structural injustices that arise from a different set of policies. Because that group is unjustly disadvantaged by one type structural oppression, they are then more likely to be subject to another kind of oppression.

[138] Haslanger, "Oppressions,"325.
[139] Haslanger, "Oppressions,"326.

Let me explain how this model would work out in more detail. The following is Haslanger's definition of secondary oppression:

> (SO_2) *F*s are oppressed (as *F*s) by an institution *I* in context C iff_{df} in *C* ∃*R* (((being an *F* nonaccidentally correlates with being unjustly disadvantaged either primarily, because *being F* is unjustly disadvantaging in *C,* or secondarily, because (∃*G*)(*being F* nonaccidentally correlates with *being G* due to a prior injustice and *being G* is unjustly disadvantaging in *C*)) and *I* creates, perpetuates or reinforces *R*.)[140]

She spells out a specific example of how secondary oppression could work:

> Blacks are oppressed as Blacks by child welfare policies in Chicago in the 1990s because in that context being poor results in having one's family unjustly disrupted, and being poor nonaccidentally correlates with being Black due to a prior injustice, and the child welfare policies cause or perpetuate unjust disruption of families.[141]

In this particular case, she uses the work of noted child welfare historian Dorothy Roberts, who has argued that child welfare policies in the United States perpetuate racial oppression. Roberts points to a history of explicit racism in these policies as well as to present day disparate effects, including worse treatment for black children, higher likelihoods of being removed from the home compared to other races, and pejorative attitudes toward black families. Roberts argues that even if the present-day realities of the system are only due to the fact that black families are more likely to be poor, and poor families are more likely to have their families split apart, this is still racial oppression because of the fact black families are poorer because of a history of racism, not for any morally justified reason. Haslanger attempts to capture this idea with her model of secondary oppression: current unjust practices that are nominally not connected to race can still be considered racial oppression if they fail to address a current inequality that was created by past racism. Thus, in her example, *even if* there is no trace of racial bias in the current system

[140] Haslanger, "Oppressions," 326–7.
[141] Haslanger, "Oppressions," 332.

itself, the fact that black people are disproportionately affected because of prior injustice is enough to make this a type of racial oppression (in addition to a type of class oppression).[142]

This is one possible way of modeling the relationship between criminal oppression and racial oppression, with criminal oppression as a secondary kind of oppression for black people. In this case, criminal oppression, an oppression of its own kind, is nonaccidentally correlated with being black, and being racialized as black includes oppressive practices in the United States as well. To apply it to my case of the criminal justice system, I would fill out the claim of oppression thusly:

> Black people are oppressed as black people by the criminal justice system in the United States in the present day because in that context being labeled a criminal nonaccidentally results in systemic violence including police brutality, incarceration, and collateral consequences of conviction, and being treated as a criminal *nonaccidentally correlates with being black due to a prior injustice*, and the criminal justice system causes or perpetuates the systemic violence at issue.

By using this model, we can imagine that we are taking a snapshot of the way that criminal oppression and racial oppression look in the present day (2020-ish). Given the facts of the overrepresentation of black people in the criminal justice system, the presence of police brutality directed at black people (so powerfully brought to mainstream white consciousness by the Movement for Black Lives), and the disparate sentencing of black people, secondary oppression seems to capture the relationship between anti-black racism and criminal oppression. Being black is "nonaccidentally correlated" with being treated as a criminal. Moreover, this nonaccidental correlation is caused by a prior injustice: slavery, Jim Crow, and the racist (but nominally "colorblind") Law and Order Movement, et cetera, described in section one. Thus,

[142] Haslanger, "Oppressions," 333. She is not denying that there is also primary racial oppression in the Chicago child welfare system, but simply explaining how, even if that were not the case, there would still be racial oppression of a secondary kind in this system.

when a black person is, for example, stopped and frisked, they are being oppressed qua criminal *and* qua black.

Secondary oppression is a good place to start when explaining the relationship between racial oppression and criminal oppression because it points out that membership in one group of oppressed people, in this case, being black, makes one likely to be subjected to another kind of oppression, in this case criminal oppression. Recall that even being subject to the risk of the oppressive policies and practices makes one oppressed even if they are not actually subjected at any point to these policies and practices. One way that this could manifest is that a black person in the United States would be totally justified in being psychologically affected by criminal oppression even if they are never followed by a security guard, incarcerated, or otherwise treated as a criminal. The likelihood that this could happen is itself part of the oppression. The history and present practices outlined in section one provide the explanation for why being black is nonaccidentally correlated with criminal oppression in the United States.

While secondary oppression provides a rubric for thinking about the intersection of race and criminality, it is insufficient to explain the relationship without the historical and present-day practices. Without this history, there is no content to the "nonaccidental correlation," which is essential for understanding race and criminality in the United States.

3. Important Objections

Thinking of racial oppression and criminal oppression as primary and secondary oppressions presents a picture of two distinct oppressive structures that interact when particular individuals are picked out for oppressive practices. Neither system is reducible to the other system, but they are both activated when a black person is treated as a criminal. This particular kind of analysis may ring untrue for many people who rightly press the point that for a black

person who is treated as a criminal, this analysis of two interlocking systems does not seem quite right. When one is profiled by a police officer, the person will not be able to point to parts of the experience and say, there I was treated as black, but here I was treated as a criminal. It may seem that being treated as a criminal is simply one of myriad ways that they are oppressed as a black person, and there is nothing that marks this treatment as different from all kinds of racial oppression.

Another related criticism of this approach is that it seems to suggest that black people treated as criminals, particularly when they have not committed particularly bad crimes, are in the same category as well-off, privileged white men who commit real crimes. I will use two examples. Under my theory, two white men who committed terrible crimes are 'criminals' and will thus count as oppressed, but both, in some ways, because of their other identities, were able to mitigate their oppression. The first is Brock Turner, the 19-year old Stanford swimmer who raped Chanel Miller while she was unconscious in an alley. He was found guilty by a jury, but the judge in his case expressed sympathy for him and sentenced him to six months in county jail, of which he served three. The second is Dylann Roof, who shot and killed nine black members of Emanuel AME Church in Charleston, South Carolina when he attended their prayer meeting. He clearly expressed extreme racist views, and it is unquestionable that these murders were hate crimes. He was apprehended completely unharmed as he fled the scene with multiple weapons. The police gave him a bullet proof vest as he was transported and got him a fast-food meal before he was interrogated. The leniency shown both men produced outrage in many parts of the public.

What do these men have in common with Philando Castile, killed by an officer as he attempted to show the officer his permit to carry a gun, or Trayvon Martin, who was killed by a

self-appointed neighborhood watch man who supposedly thought his skittles were dangerous? Or Sandra Bland who died in police custody under suspicious circumstances after being arrested with little cause during a traffic stop. As I work on this chapter, video footage of three white vigilantes chasing, shooting, and killing 25-year-old Ahmaud Arbury have surfaced, and the men were not even arrested until a huge national uproar, including celebrity pressure, forced the case. Breonna Taylor was killed by multiple gunshots from police when they stormed her apartment to serve an arrest warrant for someone who no longer lived there. Preliminary evidence suggests police indiscriminately fired into her apartment and two others.

This is an important objection that I do not take lightly, and I want to clarify what my theory commits me to. Before I explain what these black victims of police and vigilantes have to do with Turner or Roof, I will use a discussion of intersectionality to explain what an analysis of criminal oppression can and cannot do, and what claims I am making (and which ones I am not).

4. How Intersectionality Tells Us More About Racism and Criminal Oppression

Crenshaw first introduced the concept of intersectionality in an article in 1989 in order to capture the way that black women's experience of oppression differed from both black men's and white women's, and how the structure of law worked to obscure this particular kind of oppression. Since then, the concept has been used across many disciplines and been taken up by popular culture, activist projects of all kinds, and political candidates. There are so many ways that it has been used that it is important to be specific about how I am using intersectionality as a concept and how my analysis is "intersectional." Recently, Crenshaw, with several other theorists, noted that intersectionality can be thought of as three types of engagements.[143]

[143] Cho, Crenshaw, McCall, "Toward a Field," 785–86.

> This field can be usefully framed as representing three loosely defined sets of engagements: the first consisting of applications of an intersectional framework or investigations of intersectional dynamics, the second consisting of discursive debates about the scope and content of intersectionality as a theoretical and methodological paradigm, and the third consisting of political interventions employing an intersectional lens.[144]

The first engagement, which I call "analysis" as a shorthand, requires using the idea of intersecting oppressions to analyze a social situation; it is an application of the concept to phenomena in the world. In the second engagement, which I call "conceptual analysis," scholars analyze the concept intersectionality, explaining what the concept means and how it works with other related concepts. Finally, when people engage in certain political and social projects intended to fight oppression along more than one axis, recognizing the ways identities can intersect, I call this "political praxis."

Intersectionality as analysis: When I explained the relationship of race and criminality by giving a brief history and then using a structural analysis to understand this history, I was practicing a kind of intersectional analysis. Crenshaw, Cho, and McCall define intersectional analysis thusly:

> [W]hat makes an analysis intersectional—whatever terms it deploys, whatever its iteration, whatever its field or discipline—is its adoption of an intersectional way of thinking about the problem of sameness and difference and its relation to power. This framing—conceiving of categories not as distinct but as always permeated by other categories, fluid and changing, always in the process of creating and being created by dynamics of power—emphasizes what intersectionality does rather than what intersectionality is.[145]

They note that one need not go through a particular set of citations, note the right scholars or invoke any magical words to be doing intersectional analysis. When I explained in section one that the category of 'criminal' developed through forms of racism, that was an intersectional

[144] Cho, Crenshaw, McCall, "Toward a Field," 785.
[145] Cho, Crenshaw, McCall, "Toward a Field," 795.

analysis that recognized that the categories of 'criminal' and 'black person' are distinct but "permeated" by one another.

Intersectionality as a Concept: Having performed an intersectional analysis, I will explain how my structural approach to understanding race and criminal oppression fits into the bigger picture of intersectionality by engaging in conceptual analysis of the concept of intersectionality, using both Crenshaw and Kristie Dotson's work as a launching point. In this section, I will explain the particular conceptions of intersectionality that I have in mind. I will be undertaking the second engagement that Crenshaw and her co-authors delineate:

> A second field of inquiry focuses on discursive investigations of intersectionality as theory and methodology. This approach includes but is not limited to questions and debates about the way intersectionality has been developed, adopted, and adapted within the disciplines. It considers what intersectionality includes, excludes, or enables and whether intersectionality's contextual articulations call either for further development or for disavowal and replacement.[146]

I will unpack the essential features of intersectionality and explore two different models of theorizing intersectionality as explained by Kristie Dotson. Here, I will be analyzing and clarifying the concept and methodology of intersectionality itself.

Intersectionality is a name for analysis that demonstrates how different axes of oppression intersect with one another. The classic example of intersecting axes of oppression is race and gender. Black women suffer both racism and sexism, and thus, understanding their oppression is a good place to start building a conception of intersectionality. One way to think of their oppression is that it is "additive," meaning that black women experience racial oppression on top of gender oppression. This may be true, and some of the earliest work on intersectionality does suggest that black women's oppression is worse than black men's or white women's. For example, in 1989, Crenshaw coined the term "intersectionality" in an article on anti-

[146] Cho, Crenshaw, McCall, "Toward a Field," 785.

discrimination law, she used an analogy in which black women were at the bottom of a social hierarchy, with black men and white women above them, and those with no oppressed identities on the top.[147] At first blush, then, it seems that Crenshaw is arguing that black women are the most oppressed because they are oppressed as black and as women.

While the "additive" model of intersectionality has a sort of intuitive appeal, it is not the only way to understand intersectionality, nor is it the primary way that Crenshaw describes it. The more powerful and useful way to understand intersectionality is to recognize that all aspects of a person's identity will shape their experience of oppression. For example, white women will not experience "sexism" without reference to race. Instead, their experience of sexism will be shaped by their race, even if their race is overall an axis of privilege. She gives an example from Sojourner Truth's famous speech, "Ain't I a Woman?" In that speech, Truth was responding to arguments from white men that women were too weak to endure politics, so they should not get to vote. Truth, a former slave, stood up, demonstrating her strong body with its scars from being beaten. The implication was that she was a woman, and she was not weak. She was not only putting down these men who thought so little of women, but she was also highlighting that "womanhood" actually was white womanhood. Her speech revealed that this common sexist trope of women being weak and frail is actually a racial stereotype as well. Black women were not, and are not, seen as frail and weak. That is a gender stereotype of white women. So, even in this example of white women's oppression, the idea that they are weak, requires an implicit reference to race to make sense.

Crenshaw gave another example of how race inflects gender discrimination by looking at an anti-discrimination court case, *DeGraffenreid v. General Motors*. In that case, a black woman,

[147] Crenshaw, "Demarginalizing," 151–52.

DeGraffenreid, claimed racial and gender discrimination when she was laid off.[148] The court examined the two discrimination claims in isolation, saying there is no civil rights remedies that are special for 'black women.' The court said that because the other women in the firm were not fired, she could not have been fired for her gender, ignoring the fact that all the other women in the firm were white women.[149] The court resolved the racial discrimination claim by dismissing it so that it could be consolidated with an existing racial discrimination case against the same employer.[150] The court could not recognize that DeGraffenreid was discriminated against as a black woman, and that what she faced was different than the white women at her employers (or the black men that were in the other lawsuit). As Crenshaw explains in a Ted Talk, DeGraffenreid was caught between different stereotypes. What the court could not recognize was that the black men were all employed doing manual labor, for which, she as a black *woman*, was not seen as appropriate. Similarly, all the white women were receptionists, a position that the employer thought that she, as a *black* woman, was not right for. Only when you understood that she was discriminated against as a black woman, not simply as black or simply as a woman, could you understand her position. She fit into neither stereotype: the black man manual laborer nor the white woman receptionist, and therefore she could not fit into the workplace because she was a black woman.[151] This is different than the additive model of intersectionality because the claim is not that she is oppressed as black and as a woman. If that were the case, then she would have been able to get some remedy by being lumped with the white women and some from being lumped with the black men in her anti-discrimination claim. Instead, because her oppression was

[148] *DeGraffenreid v. General Motors Assembly Div., Etc.*, 413 F. Supp. 142 (E.D. Mo. 1976). This case is slightly more complex than this. She was laid off due to a seniority system, but she claimed that she was only hired so much later than the white women and black men because the company used to discriminate against black women before the Civil Rights Acts of 1964, making race and gender discrimination in employment illegal, became law.
[149] Crenshaw, "Demarginalizing," 142–43.
[150] Crenshaw, "Demarginalizing," 142–43.
[151] Crenshaw, "The Urgency of Intersectionality."

not like the black men's (being kept in manual labor) or white women's (being kept as receptionists), her claim was invisible to the court.

In addition to recognizing that gender oppression is inflected by race, Crenshaw explains that racial oppression is inflected by gender. She points to the stereotypes of the absent black father advanced by the Moynihan Report, a government sponsored report that blamed racial inequality on the nature of black families. In that example, black men are being oppressed by this stereotype of the absent father, which is a racialized and gendered stereotype.[152] Thus, even though being a man is overall a privileged identity, when one is oppressed as a black person, that oppression is affected by gender as well.

Crenshaw critiques the response of the black community to the Moynihan report and its progeny because she says the community fought back against the falsehood of the absent black father without recognizing or resisting the concomitant stereotype of the irresponsible black mother.[153] She explains that neither the black community nor white feminists expressed outrage at the idea that there is something wrong with a household headed by a black woman. And this is why she comes around to the argument that we should look to black women in our organizing against oppression, because where black women can enter, so can all women and all black people. This sounds like the additive approach, but it is not. The reason that she says that political organizing should seek to include black women is that there are already developing remedies for white women and black men. And black women could only have access to these remedies when their oppression looked like either a black man's or a white woman's. So, when she argues that black women are at the bottom of the social hierarchy, it is not because they simply have black oppression and women's oppression added together. It is that their particular

[152] Crenshaw, "Demarginalizing," 163–64.
[153] Crenshaw, "Demarginalizing," 164–65.

oppression, inflected by subordinate race and gender, is not as visible as the oppression of people whose oppression is inflected with only one subordinated identity. So, while it is true that she sees black women as being worse off than black men and white women, this is largely because the movements organizing to fight racism are focused on black men's oppression and the movements organized to fight sexism are focused on white women's oppression.

To summarize the key points that I take from Crenshaw's concept of intersectionality, one's different identities are all at play in experiences of oppression. Even if one identity is a privileged one, it will still play a role in how one is oppressed by the non-privileged identity. For example, Hillary Clinton, a white, upper class, cis, heterosexual woman, was harshly criticized for choosing to continue her career while her husband campaigned for president in 1992.[154] White women assumed to be wives and mothers under classical sexist stereotypes, so the idea was that there must be something wrong with her for not wanting to conform to this stereotype. Michelle Obama was also criticized while helping her husband campaign, but as she explains, she was "the angry black woman" who was "emasculating her husband."[155] Both women were criticized for being active in their careers and strong public figures, but the gender stereotypes were also both racialized. Additionally, the stereotypes invoked in Clinton's case were stereotypes about white, cis, heterosexual women—she was criticized for failing to live up to the ideal woman, who is white, cis, and heterosexual (and able-bodied, and so on).

To apply this insight to the race and criminality discussion, it is not simply the case that those who are racially oppressed and criminally oppressed are more oppressed than people who are only criminally oppressed. That is true. But, the way that the oppression shows up will be

[154]She was especially criticized for this statement: "I suppose I could have stayed home and baked cookies and had teas, but what I decided to do was to fulfill my profession." She then had to have a chocolate chip cookie bake off with Barbara Bush in an attempt to soften her image. Chozick, "Hillary Clinton."
[155] Obama, Michelle. Interview with Gayle King.

different. For example, the stereotypes of young black men as criminals (as gang members or drug dealers, or as particularly dangerous) are different than the kinds of stereotypes at work for poor white young men (petty thieves, meth-heads, or other stereotypes). Because black men are stereotyped as particularly dangerous, they will be more likely to experience the kind of police brutality highlighted by the Movement for Black Lives. For Muslims, different stereotypes will shape the way that they are targeted by police, for example, by the use of vast surveillance networks supposedly in place to prevent terrorism.[156] Thus, recognizing the intersectional nature of racial and criminal oppression will highlight that a black person will not only be subject to more oppression than a white 'criminal,' but also that oppression will be qualitatively different, as the racial oppression will be inflected by criminal oppression and criminal oppression will always be inflected by race, even when that race is a privileged one.

Kristie Dotson adds to this conception of intersectionality by describing two different ways of understanding oppression. She finds both methodologies of understanding intersectionality in the Combahee River Collective's 'A Black Feminist Statement,' and she suggests that often they can seem at odds with one another. To attempt to capture this idea, Dotson argues that oppression is "multi-stable." By this, she means that understanding oppression in one way will seem like a complete description of it, and it will be accurate. But this method will also obscure another accurate and complete understanding of oppression. Intersectionality is the name that Crenshaw gave to the practice of trying to uncover hidden aspects and experiences of oppression, though black feminists have been doing this for much longer than the term "intersectionality" has been around. There are two ways of understanding oppression that are both true, but they take different perspectives and that can make them seem

[156] For an excellent discussion of criminality and Islamophobia, see Beydoun, *American Islamophobia.,* especially chapters 4 and 5.

like they are at odds with one another. These two ways of viewing oppression are both reveled by different kinds of intersectional analysis, and this is part of why some discussions of intersectionality have become so contradictory. Dotson suggests that by clarifying these different approaches, each of which captures something true about oppression that the other hides, we can better understand debates about the nature of intersectionality. For my purposes, understanding these two different approaches to intersectional analysis help me respond to the criticisms I outlined in section 3.

The first approach to intersectionality articulates oppression as multiple interlocking systems, and the second approach focuses on the holistic experiences of those in particular social locations where different aspects of their identity shape their experience of oppression.[157] Of the interlocking systems approach, Dotson writes,

> Oppression, then, can be seen to function according to diverse systems of jeopardy that interlock and complicate one another. The descriptors – systems-based, interlocking and manifold – fix oppression as a conglomerate of diverse, discrete systems that represent different and complicated sites of jeopardy according to a functionalization by description.[158]

On this model, intersectionality requires examining distinct structures of oppression, for example, anti-black racism, sexism, poverty, sexuality, as well as the locations where these distinct systems of oppression overlap. We see black women's experience as the experience of people at the intersection of the race structure and the gender structure. Returning to the example of Michelle Obama, using the first method, we can think about the two oppressive structures that are at work in the experience of being stereotyped as an angry black woman: anti-black racism and gender oppression. In this interlocking systems method, we would analyze the structure of anti-black racism, thinking about all the institutions that keep this racial hierarchy in place,

[157] Dotson, "Making Sense," 47.
[158] Dotson, "Making Sense," 48.

including the history of slavery and Jim Crow in the United States. And we would do the same for gender oppression. We might focus on family roles and sexual violence and other tools that seem to keep women oppressed. And then we would think about how those two oppressive structures come together to oppress black women by showing how anti-black racism and sexism produce the 'angry-black-woman' stereotype.

On the second model, we can analyze the experience that Obama had holistically, focusing on her experience. She did not experience being treated as an angry black woman as two distinct things: being a woman and being black. The holistic model does not analyze overlapping oppressions (plural), but the experience of oppression (singular) that is activated by different identities. Dotson writes of the holistic approach: ,

> Oppression can be understood, then, according to ranges of jeopardization, and that range can often be tracked according to the ways one's readable social identities increase or decrease one's risk and experiences of harm in a given geopolitical space. Therefore, noting the transformation of 'oppressions' (plural) into 'oppression' (singular) for the Collective is important.[159]

In this methodology, we do not think of oppression as a laundry list of identities, but as a singular experience. When Michelle Obama was treated as an angry black woman, her experience was not compartmentalizable into gender oppression and racial oppression. Instead of being the target of distinct oppressive systems, in a holistic approach, being black and being a woman place Obama in jeopardy in different ways depending on the context, and she will be in jeopardy in different times and in different ways than Clinton. The holistic approach resists looking at racial oppression and gender oppression as distinct systems because the actual experience is seamless.

[159] Dotson, "Making Sense," 49,

Dotson prefers the holistic intersectional methodology because she says that it does a better job capturing the reality that intersectionality was meant to capture in the first place: it is impossible to parse out the pieces of one's oppression that are due to one identity rather than another.[160] To emphasize this point, we can think back to DeGraffenreid, whose oppression was not visible to the judge because he could not find the gender oppression or the race oppression. Dotson argues that the interlocking systems approach first disintegrates the oppression to analyze the distinct systems at work, and then tries to put it back together. This is why the holistic and interlocking system approaches seem, on the surface, to be conflicting accounts of oppression. Strict adherents to one model will be suspicious of strict adherents to the other because of how each model emphasizes something different. For example, Dotson suggests that the interlocking systems approach would focus on what all women share, looking at the system of gender oppression, and then thinking of the ways that race can inflect that oppression. Adherents of this model might be more hopeful about women's solidarity across racial lines. On the other hand, the holistic approach would emphasize unique oppression faced by black women, and especially the ways and contexts that particular black women are in jeopardy and white women are not. It would also highlight the fact that black women are in more types of jeopardy in more contexts than white women.[161] Adherents of this model may be more suspicious of the possibility of

[160] Dotson, "Making Sense," 50.

[161] Dotson notes thinking about "jeopardy" framework for understanding oppression and intersectionality is an "additive" model, where the more sites of jeopardy one has (race, gender, class), the more jeopardy one is in. Dotson, "Making Sense," 47–48. This is almost certainly the case. If one has many privileged group memberships, then one will be less in jeopardy by belonging to one oppressed group than a person who belongs to many oppressed groups. But I do not want to give the impression that either the systems-based nor the holistic experience models are simply additive. To return to Crenshaw's example of DeGraffenreid, she was discriminated against as a black woman, and her race made her stereotyping as a woman who could not do the kind physical labor performed by the black men was different than the kind of gender stereotyping at play for the white woman because she was not feminine in the right kind of way to be a receptionist. It was not simply that she was more oppressed as a black woman. It was that her gender oppression is fundamentally different than white women's, making it illegible to the court, and the same with her racial oppression. Intersectionality, from the first moment Crenshaw introduced it, highlighted the fact that when different forms of oppression intersect, there is a qualitative and quantitative difference in the kind of oppression that people at the intersections face. And the holistic approach might be additive

women's solidarity across race. Politically, the holistic approach will tend to lead to advocacy for identity politics to fight oppression. Dotson notes that this is the approach outlined Combahee River Collective's statement. People who are subject to a wide range of jeopardizations will be particularly well equipped to fight oppression, on this model, and black women play an essential role in fighting both gender and racial oppressions.

Although she thinks the holistic approach has more promise, Dotson still recognizes a place for the interlocking systems approach. Dotson explains that an advantage to the interlocking systems approach is that, in looking at the different structures of oppression, for example, race, class, and gender, one will find often unexpected "bridges across different experiences of oppression"[162] For example, examining race and gender as two discrete power structures can allow for the recognition of the fact that the system of gender oppression affects women of all races, so that white women and black women will share the experience of being sexually objectified, though the experiences will be distinct because they will be inflected by race. As I noted above, such an analysis can reveal possibilities of solidarity as well.

Thinking about these two methods or ways of thinking about intersectionality can shed light on the two potential objections to my project that I raised above. The first objection is that my approach to separating criminal oppression from racism, particularly anti-black racism, does not ring true to the experience of many black people who have been criminally oppressed. Being stopped and frisked does not feel like racial oppression *and* "criminal" oppression: that experience is impossible to sort out into distinct oppressions. And that is exactly what a holistic approach to intersectionality would say: there is no way to separate out something like 'criminal'

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in some ways, emphasizing that black women face more jeopardy than white women, but it is also going to emphasize the qualitatively different experiences black women and white women have.

[162] Dotson, "Making Sense," 50.

oppression from black oppression in real life. My account of the historical development of the current criminal justice system in the United States points also to the permeation of anti-black racism and criminal oppression, and for many who focus on the experiences of black people oppressed by police, for example, criminal oppression simply is a type of racial oppression. This makes sense on a holistic account because no one would be able to sort out the different systems at work in that experience. Dotson notes that an interlocking systems approach obscures what the holistic approach highlights: the inability to truly disentangle the experience of oppression. It is thus unsurprising that my systems-based account does not capture what it feels like to be oppressed as black or as a criminal. That is a shortcoming of my account, and I as a white woman who has never been treated as a criminal, do not occupy the kind of identity position that is well suited for a holistic account. Following Dotson's notes on this account, I emphasize that my account of these kinds of oppression is limited by the fact that it is an interlocking systems analysis. There is much that my account will not be able to illuminate because of my subject position and the tools (system's analysis) that I am using.

The second objection that I raised to my account was that I seem to be placing very different people in the same category. How can Trayvon Martin, Philando Castile, Sandra Bland, Ahmaud Arbury, and Breonna Taylor be in the same category with Brock Turner, a white rapist, and Dylann Roof, a racist murderer? First, I will note what I do not mean by this claim. To say that they are all in the category 'criminal' is not to say that they are morally equivalent. Nor does it mean that they are subject to the same 'range of jeopardization,' to use Dotson's language. To say that they are in the same category does not illuminate anything about the divergent experiences of these people. Dotson is correct to point out that an interlocking systems theory

threatens to obscure the important differences in experience and jeopardization. But it can also highlight the way a system can work across widely different contexts.

The usefulness of the interlocking systems approach is that it ought to illuminate new and perhaps surprising connections, "bridges across different experiences of oppression," in Dotson's words. This bridge that unites the different experiences of criminal oppression is that (even alleged) criminal wrongdoing is used as a justification to socially and politically exclude people. In the two examples that I introduced before the discussion of intersectionality, Brock Turner and Dylann Roof, each were treated, at some point after committing their crimes, as members of the community. They were treated as we ought to treat all people, even those who have done horrible things, because they are still members of the political community. But the general response from the public was that these men should not be treated with care. And the treatment of black men is often used as a backwards justification for why these white criminals should be treated worse.

In my first example, when Brock Turner was sentenced to six months and served three, people were outraged because he was sentenced to more time, that he was not excluded more. The judge who sentenced Turner discussed his future, and considered how much Turner had lost already.[163] Much of this outrage appeared as comparisons between Turner and black men charged with a variety of crimes, highlighting the stark differences between their sentences. In

[163] Kate Manne, in her book *Down Girl: The Logic of Misogyny*, spends a considerable amount of time discussing Brock Turner's case. She argues that the judge was wrong to be concerned for Turner's future and gives this as an example of her concept "himpathy" in which abusive men end up getting sympathy rather than their victims. This makes the men into victims and the real, usually women, victims into aggressors. I think she makes a similar mistake as Harris does. That is, the problem with Brock Turner is not that we as a society cared too much for him and his life, it is that we do not have built into the criminal justice system, or any system, a place to show care and concern for the life of Chanel Miller, the person who he raped. The judge did not discuss how Turner's actions impacted her future, which I agree is problematic. Manne, *Down Girl,* 195–211. The response, however, should be to treat everyone as well as the judge treated Turner, not to treat Turner as badly as society treats victims of sexual assault or black people. I will return to this question again in chapters 4 and 5 of this dissertation.

one meme, Corey Batey, a black Vanderbilt football player who also raped an unconscious woman, was sentenced to 10–25 years.[164] Black social activist Misee Harris noted that Batey, who had accepted guilt and apologized to his victim in court, still deserved harsh punishment. She stated, "Brock Turner only admits his guilt in underage college campus drinking and has never once even attempted to at the very least acknowledge his victim. Both very sad situations, however, both deserve to face the ultimate punishment for their actions."[165] Harris is not the only one who thought that Turner's sentence was too short: a group of feminist advocates successfully organized and won a recall of the judge who sentenced Turner. But Harris, rather than suggesting that the vast inequality in these sentences meant that we should give Batey a lesser sentence, considering what kind of a future he might have, she wanted to make Turner experience the same long-term social and political exclusion as Batey. As this is an intersectional analysis, I must note that Turner's race and class status protected him from a more serious encounter with criminal oppression. If he were black, and likely if he were quite poor (his family was surely able to afford a big legal team), the outcome would have been different. And by the same token, there Corey Batey's race played a significant role in subjecting him to a much harsher sentence. But the focus on what criminals deserve came out in the response to Turner. Rather than calling for a shorter sentence for Batey, and for the judge to take into account his future, as Turner's judge did, the focus was on more punishment.

In my second example, Dylann Roof, who disturbingly shot and killed nine members of a black church in an attempt to start a race war, was apprehended by police without a hint of violence toward him. Police officers also put Roof in a bullet proof-vest to protect him when he

[164] Gutierrez, "Meme of Brock Turner."
[165] Gutierrez, "Meme of Brock Turner."

was being transferred and got him fast food before interrogating him.[166] The care shown to protect Roof's life and feed him, hardly indicators of great kindness, were met with anger on social media, and again, comparisons were immediately made to the way that black people have been treated by police.[167] In one meme, a photo of 12-year old Tamir Rice is next to a photo of Roof. Under Rice's picture, text reads "Toy Gun: Shot Dead." Under Roof's, the text reads, "Murdered 9: Apprehended Alive."[168] The general upshot of these criticisms of the police who apprehended Roof were not simply that a black person would have been treated worse, which is almost certainly true, but that Roof should have been treated worse. In these criticisms is the idea that, even beyond the scope of the actual punishment of Roof (who has been sentenced to death), there should be violence and lack of care for his physical safety while he is being apprehended, before facing trial or even being charged. Of course, legally, this is not the case, and de jure, all criminals are legally supposed to be treated as Roof was. And, as the criticism highlights, a white supremacist was treated the way the law is supposed to treat him. Again, I want to suggest that we ought to be arguing the other way around. There is inequality in the treatment of black and white 'criminals,' and the standard should be that we treat all people who are being arrested like those police treated Roof.

Our criminal justice system has been used to keep black people as outsiders in our political and social lives, and popularly, we resist the moments when even white criminals are treated as though they are members of the political community. As I noted in chapter one, the heart of criminal oppression is the idea that if one has committed a crime, they deserve to be

[166] Some police and legal scholars have pointed out that it was essential for the police to feed Roof quickly because they knew this would be a high-profile case, and they did not want to risk any actions (not feeding Roof, roughing him up) that could give a lawyer the chance to argue that his confession was coerced. There is some debate, however, as often defendants are given bologna sandwiches or other cheap, bad food. Nevertheless, the high-profile nature of this case likely did contribute to extra careful treatment by law enforcement.
[167] Pearl, "Why Are Some People."
[168] Pearl, "Why Are Some People."

civically and politically excluded. This idea may have emerged as the criminal justice system began to be used against black people, but seeds of that idea were already present in the system of incarceration as a means of separating criminals from the community, even if for rehabilitative purposes. We should resist the connection between criminality and social and political exclusion in all of its forms. One might correctly note that many white people seem to be able to avoid treatment as a 'criminal' on my definition — a rapist and a racist murderer were treated without social exclusion in these particular moments. Turner was able to leverage his race and class and will largely escape criminal oppression. Roof will almost surely face the most radical exclusion of the death penalty and his years up until then will likely be under solitary confinement, another radical form of exclusion.

To return to the two methodologies of intersectionality, my approach of interlocking systems does obscure the range of jeopardies that a holistic approach would highlight. Politically, we should be especially concerned about those who suffer under a wider range of jeopardies because they live at the intersection of race and criminality, or class and criminality, and so on. But understanding the system of criminal justice and the way that it operates in many different places with many different subjects helps illuminate the fact that this system uses a moral justification to exclude members of society.

By clarifying the concept of intersectionality that my project has applied, I have responded to two important criticisms. First, one might argue that distinguishing between criminal and racial oppression does not accurately capture the experience of being an oppressed member of these groups. A black man experiencing police brutality cannot separate out being treated as black and being treated as a criminal. That is true, and it is a short-coming of the type of intersectional analysis that I do. The second objection is that I am putting very different

people in the same group: innocent black people hurt and killed because of perceived criminality and actually guilty white people who end up being treated better than the innocent black people. I have argued that this is the strength of my project, not because I argue that they are morally the same or equally worthy of our concern or political activity. But I have shown how the logic of criminality is to exclude for putatively morally justified reasons. This requires looking at the structures of criminal law enforcement as distinct from racist structures, as well as how they interact.

Intersectionality as political praxis: Having discussed conceptual analysis and I want to gesture toward what Cho, Crenshaw, and McCall note the third use of intersectionality is—political praxis. Understanding the fact that the criminal justice system is oppressive and that it has a unique history of oppressing black people in the United States, those who are fighting against other kinds of oppression must be wary of using the criminal justice system or the stereotypes and social practices of criminal oppression, including social and political exclusion, to achieve these ends. Those who mobilize to end gender-based violence should take special care to avoid this system. I will take up the discussion I left off here to argue that the activists who worked to recall the judge who sentenced Brock Turner focused incorrectly on punishing Turner more rather than working to get more meaningful justice for Chanel Miller and other victims of rape. I will take up this argument in chapters 4 and 5. I will take insights drawn from the interlocking systems of oppression approach, which highlights the way that the criminal justice system (as well as society at large) oppresses when it excludes with the justification that it is morally justified to exclude because the excluded person has committed a wrong against the community. But, I will also note the holistic approach to understanding intersectionality should push us to place special emphasis on those who face the largest and most serious ranges of

jeopardization, which will be those who are oppressed as criminals and oppressed along racial, class, or other lines. I will argue that using the criminal justice system to fight gender-based violence re-entrenches the logic of criminal oppression as well as threatens to expand the ranges of jeopardy for those who are already the most in jeopardy

5. Conclusion

In the first chapter of this dissertation, I set out a distinct system of oppression, criminal oppression, and outlined the policies and practices through which it operates, what its chief harm is (social and political exclusion), and its unique logic of using moral blame as a marker for outsider status. In the first two sections of this chapter, I explained how the system of criminal oppression interacts with the system of racial oppression, in part by noting their historical intertwinement in the United States. I noted how gender featured in this history and present day, especially in the black rapist myth and the present-day criminal justice response to violence against women. In the words of Cho, Crenshaw, and McCall, I used the historical development of the criminal justice system in the United States to show that it is "not … distinct but is always permeated by other categories, fluid and changing, always in the process of creating and being created by dynamics of power."[169] In the second section of this chapter, I used the model of primary and secondary oppression to conceptualize the link between the two kinds of oppression. In the third section I raised two objections, and in the fourth section I explained how thinking about the two different methodologies of intersectional analysis, interlocking systems and the holistic approach, allow me to respond to these objections. My project is primarily one of an interlocking systems intersectional analysis, which makes it a good tool for understanding structural dynamics. But, it also can obscure the realities of the experiences of those who face

[169] Cho, Crenshaw, McCall, "Toward a Field," 795.

oppression. With that being said, my project will be stronger at examining the structure, and I note the limitations of that kind of analysis for describing some aspects of oppression. Still, there is a great strength in interlocking systems intersectional methodology. By conducting this analysis, I have been able to highlight the way that criminal oppression can mask racism by giving a moral justification for the exclusion of people who are 'criminals.'

Given what I have said about the similarities between those who experience primary and secondary oppressions of race and criminality and white people who have actually committed serious crimes, there is a lingering objection that my next chapter will respond to. One might argue that it is of course unjust and oppressive to socially and politically exclude people who have not committed serious crimes, particularly when it looks like criminality is an excuse for racism. But, the criticism goes, there are some people who are rightfully excluded from political and social life because they committed bad crimes. I will turn to this in the next chapter.

Chapter 3: Criminal Law is a Political Institution
Why Moral Desert is Irrelevant

0. Introduction

In the last chapter I discussed the relationship between racial oppression and criminal oppression in the United States. In this chapter, I want to address a different concern motivated by the current prevailing justification of punishment in contemporary Anglo-American philosophy of law: retributivism. A retributivist might argue that one subset of the group that I labeled 'criminals,' that is, those who have been duly convicted of a crime, are not oppressed because exclusion from social and political life is what they *deserve*. Roughly, most retributivists argue that wrongdoers deserve hard treatment and condemnation because they have committed some wrong. Insofar as they have committed wrong, they are morally blameworthy, and the state ought to play a role in doling out the appropriate hard treatment and condemnation that their blameworthy actions call for. On such a view, it might seem particularly fitting that, having violated social norms, a convicted criminal is not treated as an equal member of society, but is instead socially and politically excluded, at least if they have committed a particularly bad act. One could hold this view while still pointing to many individual injustices that I have highlighted with the current system in the United States. For example, holding retributivists views is consistent with being opposed to stop-and-frisk, current police practices around use of force, solitary confinement, the death penalty, criminalization of cannabis or other drugs, and many harsh prison conditions. One might hold that while many of our current practices are unjust, the foundational harm that I have pointed to, that of social and political exclusion, is not itself unwarranted for those who have actually committed crimes, at least of a serious enough level.

To counter this argument, I will make an ideal theory argument that, even in a completely just society without a history of racism and classism, a government-sponsored system of social

and political exclusion is unjust. This is because criminal law is a political institution that exists as a part of the other social and political institutions that make up the basic structure of a society. Here, I appeal to a social contract model of political life, where criminal law is an institution within the social contract, and those who are governed by the contract cannot be kicked out of the contract for failing to follow the rules of the contract. There are appropriate sanctions for failing to follow the rules of the agreement, but such sanctions should be meant to foster future compliance with the social contract rather than exclusion from it. Criminal law should also be governed by the same principles that the social contract is founded on.

In characterizing criminal law as a part of the social contract, I will draw on Vincent Chiao's argument that criminal law is public law. I take him to be making a very similar argument to my social contract argument, with slightly different framing. Criminal law is a political institution that is subject to the principles of justice just as any political institutions are. First and foremost, a criminal law institution must be seen as conforming to the principles that govern the social contract that it is a part of. These are principles of fair distribution, not retribution. Moreover, criminal law ought not work to exclude people from the contract, but offer them reasons for abiding by the rules of the contract. It can achieve this while still serving the purpose of serving as a last resort for maintaining rule of law. This argument will conclude that retributivism can only play, if anything, a secondary role in the function criminal law, and only if criminal law is first playing its primary role of maintaining the social contract. Any retributivist view that suggests that the primary function of the criminal law is for the state ought to punish people who are morally blameworthy because of their wrongdoing is inconsistent with the fact that criminal law is a political institution that is part of the basic structure of society.

Having argued that retributivist functions and justifications cannot be primary for criminal law as a part of the basic structure of society, I next will argue that concepts of moral desert, particularly blameworthiness, are not fit for criminal law as a political institution at all. I will draw on Erin Kelly's *Limits of Blame,* noting that criminal law is not well equipped to track moral blameworthiness, but only criminal culpability. Criminal culpability is distinguishable from moral blameworthiness because the former focuses on whether the wrongdoer has objectively violated criminal laws, determined by the society as a whole, while the later requires a subtle and nuanced attention to subjective features of an actor's motivations, will, and potential excusing conditions. This makes moral blameworthiness, which contributes to social and political exclusion, inappropriate for criminal law and punishment. The nature of criminal law, with its reliance on due process, equality of treatment, and rule of law, ought never treat a rule violator as a political outsider, but always as a member of society whose behavior can be brought back into alignment with the rules of the political community. This argument will draw from legal practice and doctrine in the United States as well as potential improvements to that law. In conclusion, criminal law in the United States, even when working according to its own rules, cannot track moral blameworthiness. Conviction of crime in the United States or in an ideal society does not track blameworthiness and therefore does not offer a reason to exclude the convicted person from social and political life.

This chapter will proceed in two parts. The first part will develop the idea of criminal law as a political institution that is part of the social contract. This part will emphasize that the primary function of criminal law is to support the social contract and not to give wrongdoers what they deserve. In the second part, I will argue that giving wrongdoers what they deserve is not an appropriate function of a political institution because it requires fine-grained moral

analysis that is inappropriate for a political institution. In the conclusion, I will explain why such a political institution can only offer sanctions that fall within the realm of a political institution, not a moral one, which means that the sanctions cannot function to exclude rule violators from the social contract.

1. Criminal Law is Political, not Moral, Institution

In the first section of this chapter, I will argue that the criminal law is a political institution that is a part of the social contract, or, in Vincent Chiao's language, criminal law is public law. While Chiao's uses the framing of "public law" rather than social contact, I chose to use social contract theory because it is familiar to a political philosophy audience and highlights important features of political life: First, political life is a joint undertaking meant to benefit everyone involved. Second, one gains privileges and takes on burdens by being a member of the social contract. Of course, one of the downsides to social contract theory is that it can present an inaccurate picture of an *optional* participation in the joint endeavor. This is not accurate in any meaningful sense in real political communities, but the idea of society as an agreement emphasizes that terms of the contract should be such that they would be acceptable to the members of the community. These features are also part of Chiao's account of criminal law as public law, but rather than speaking of an abstract social contract, he focuses the historical emergence of criminal law as a part of the modern administrative state, which developed to redistribute benefits and burdens more equally across members of society. I think that this is an accurate description, and my re-framing in terms of social contract is a matter of emphasis, not of contradiction. As I will note throughout my discussion of his work, I think something like a social contract theory is implicit in his conception of public law, even if the abstracted construct of the social contract is not explicitly invoked.

Chiao argues that criminal law should be understood as public law, that is, as institutions of public policy that work together with other public institutions to create a just society. Criminal law institutions subject citizens to extreme state-based coercion, and yet most philosophical justifications of these extreme exercises of state power are based on pre-political concepts of morality rather than theories of political justice, democratic principles, or appeals to widely shared liberal values.[170] Chiao articulates a theory of criminal law that depicts criminal law as one among many political institutions in a modern society that is built to provide helpful social cooperation among equals.

Chiao explains the historical emergence of criminal law as a public law in modern society, meaning that in the modern era, criminal law developed to replace private responses to criminal behavior with public ones. Modern criminal law developed at the same time that the "social provision" model replaced the "alms for the needy" model of dealing with poverty and other social ills. Social provision, as opposed to alms for the needy, is characterized by three features. First, it is statist, meaning the government rather than private individuals takes on the task of dealing with a particular ill (poverty, lack of education, crime). While the private sphere may play a role in distributing a good on this model, it only does so when the government or public decision-making body has delegated this function to the private sphere. Second, the social provision model treats poverty or other ills as problems to be managed collectively, meaning that the harms do not just fall where they may. Essentially, this second part is a social insurance

[170] Chiao, *Criminal Law,* x. The criminal law and its attendant institutions of enforcement are arguably the most coercive institutions in the modern state, including the United States. As Chiao notes, the criminal law is both extremely coercive and entirely involuntary. Being subjected to criminal law is entirely mandatory: one cannot simply opt out of the criminal law applying to them. At the same time, the state can, through criminal punishment, legally confine a person for life or even kill them. In more mundane ways, it can confine one to jail without a conviction while they await trial, or it can fine a person, remove driving privileges, or force them into counseling or recovery programs.

model where all members of a community seek to spread the costs of certain ills amongst one another, while also sharing benefits of good fortune. Finally, on this conception, members are entitled to benefits and protection from ills as a matter of right, that is, of justice and not of charity.[171]

The social provision model shares much with the idea of the social contract. Members of society gain benefits from joining together to protect themselves from various harms. This requires contributing to the community as well. A system of distributing the benefits and burdens fairly gives rights to certain kinds of benefits and duties to take on certain burdens. These benefits and burdens must be acceptable to the members of the community, and the way that they become acceptable is if the distribution is dependent on acceptable principles. The idea of the social contract and the social provision model is to distribute benefits and burdens through a centralized representative of the political community, creating rights and duties.

Criminal law emerged as a public system of addressing the harms of criminal behavior along a 'social provision' model. Modern criminal law developed in the United States and the United Kingdom relatively recently. Up until the 19th century, crimes were largely privately investigated and punished by families of victims, or the wealthy paid for private security and private prosecutors to round up those who did them wrong and bring them to a court to be punished.[172] But, as other aspects of the government modernized and professionalized, so did the criminal law:

> In short, the century from the mid-1700s to the late 1800s witnessed a thoroughgoing transformation in the institutions of criminal law. The functions of preventative patrolling and investigating crime were taken over by organized public forces. The function of deciding whether and how to prosecute a crime – especially in North America – were similarly taken out of the hands of private parties and consolidated in the hands of public officials. In addition, punishment

[171] Chiao, *Criminal Law,* 6–8
[172] Chiao, *Criminal Law,* 12–15.

> became less exemplary and more uniform, less a matter of private, local control and increasingly a matter of national (or at least regional) legislation and policy. Substantive law incorporated regulatory offenses, with new offenses aimed at preventing harms rather than simply responding to willful and malicious attacks. The result was a criminal law, and a criminal justice system, that lost its local and private character and became "bureaucratic, largely impersonal, and increasingly centralized."[173]

Essentially, through the modernization of American criminal law, investigation, prosecution, and punishment became matters of public policy, shaped by public and political concerns, determined by legislators, and expanded beyond the scope of so-called *mala in se* crimes such as murder and assault.

As Chiao argues, criminal law became public law. Criminal law as public law can be contrasted with the idea that criminal law is matter of the vindication of private, pre-political rights, implicitly or explicitly endorsed by most contemporary philosophy of crime and punishment.[174]

> Crime becomes a problem for society, rather than a series of private tragedies to be dealt with on a case-by-case basis. Public officials determine which neighborhoods will be patrolled, which crimes will be investigated, and which types of victim will be prioritized, and they have the institutional and legal wherewithal to control the conditions in which punishments is meted out.[175]

He emphasizes that crime began to include all kinds of violations of regulatory laws. For example, the institution of tax collection is ultimately backed up by criminal laws against tax evasion, welfare is backed by criminal laws against welfare fraud, and so on. Thus, criminal law plays an important role in assuring compliance with all kinds of other public institutions and non-criminal laws. Each area of law and public institution developed a corresponding set of criminal violations as last resorts to ensure compliance with non-criminal law. Criminal law acts

[173] Chiao, *Criminal Law,* 21.
[174] Chiao, *Criminal Law,* 27–28.
[175] Chiao, *Criminal Law*, 25.

as a regulatory backstop to ensure compliance with all other laws in addition to working to prevent harms against the rights of individuals.

The public law model of criminal law contrasts with the theories of many influential philosophers of punishment like Herbert Morris, Doug Husak, Samuel Scheffler, and John Gardiner, who argue that interpersonal moral rules of blameworthiness are appropriately taken up by the state. Most philosophers of punishment have justified criminal law institutions as individual morality backed up by the coercive power of the state. This view of crime centers *mala in se* laws as the core of criminal law, with regulatory criminal laws as peripheral laws whose justification is generally not important. Such positions do not see any problem with the state enforcing pre-political rights with the power of political institutions.[176] Here, I think the social contract is helpful for understanding Chiao's position. Pre-political rights are those rights prior to or outside the social contract. Chiao argues that this way of justifying criminal law fails to take account of the fact that the criminal law is not a stand-alone institution. It is part of the administrative state, that is, criminal law institutions are no different than other political institutions that actively distribute benefits and burdens rather than allowing burdens to fall wherever they may.[177]

In general, retributivist theories of punishment argue that the state should back up at least some interpersonal moral rules with coercive punishment, seemingly ignoring the public and political role of criminal law. While one may argue that some types of retributivism, including negative retributivism (the idea that a wrongdoer loses their right to not be punished, even if

[176] Chiao, *Criminal Law,* 28–32.
[177] In a related discussion, Chiao notes that philosophers of punishment focus on a few, generally rare types of crimes (homicide). Moreover, they treat *mala in se* crimes as the core of criminal law, when such crimes do not make up the majority of crimes or convictions. Chiao, *Criminal Law,* 150–59. He argues that this is an unjustified focus that takes for granted that the core of criminal law is interpersonal morality rather than social and political policy. Chiao, *Criminal Law,* 150–59.

there is no positive reason to punish them), or weak retributivism (the idea that committing a wrong provides a reason to punish the wrongdoer even if, all things considered, the state ought not punish them), [178] do not have this problem because they do not *require* that the state punish wrongdoers, the point is still that the determination of what is a criminal wrong deserving a state response is a political rather than moral determination. The determination of what counts as a crime, how crimes can be investigated and by whom, the adjudication process of determining guilt, and punishment are each exercises of state authority and therefore must be justifiable to members of the political community. Even if the same act is prohibited pre-politically and under the social contract (e.g. killing another person), the reason that it is criminally prohibited is because it has undergone the political process of becoming part of criminal law.[179]

The distinction between the moral and the political requires rejecting a natural law interpretation of the role of government where the function of our social cooperation is to enforce (in some form) the natural laws of morality (as suggested by St. Thomas Aquinas). Instead of this theory of law and government, Chiao implicitly adopts a social contract theory of the role of government, where members of a political community agree to limit their freedom for

[178] As an example, see Husak, "Why Punish the Deserving?" There, Husak presses for retributivist philosophers to distinguish between a criminal deserving punishment and the state being required to provide punishment to a criminal (who deserves it). He argues that the fact that the criminal deserves punishment is not on its own enough to justify building an institution to punish, and he thinks that there must be an "extra-desert" component to justify the state actually building an institution (with what he calls "the drawbacks of punishment"). Ultimately, he determines that the best candidate for the extra-desert component is crime reduction. Of course, this makes Husak's theory not purely retributivist. In this article, Husak article points to some of the same features that Chiao points to (the need to justify an institution of punishment, the fact that desert cannot provide this on its own given the costs of the institution, the emphasis on crime reduction (which is at least a similar concept to discouraging rule breaking). But, crucially, Husak does not distinguish between criminal law and morality. He does not quite articulate the idea that criminal law is public law. There he argues that while blameworthiness offers a compelling reason for the state to punish, it might not offer an all-things-considered reason to punish given the immense costs of the criminal justice system. This seems to contrast with Chiao's characterization of Husak as offering an account where one can simply use the exact same justification for individual blameworthiness to justify the state punishing someone. See Chiao, *Criminal Law,* at 29.

[179] This does not mean that there is no way to criticize criminal law. The political principles that make the social contact acceptable offer grounds to determine what laws are just and what are unjust. For example, murder is criminally prohibited because doing so protects the political equality of each member of society in a society that is governed by some form of liberalism.

the sake of the benefits of social cooperation, but they only chose to do so knowing that there are some principles that will guide this social cooperation. Chiao's implicit rejection of natural law is evidence in his strong reliance on the idea that the government cannot simply enforce pre-political morality. Additionally, as will become clear, his reliance on the idea that the government exists for the purpose of coordinating shared life indicates a kind of social contract theory implicitly. Moreover, this kind of social contract will be more like a Rawlsian social contract than a Lockean one because of his reliance on the distinction between the political and the moral. By this I mean that the sort of social contract (or social coordination) Chiao presupposes in his defense of criminal law as public law is not drawn up to enforce pre-political natural laws, as Locke can be interpreted as endorsing. It is beyond the scope of this chapter to take on the debate between natural law and contemporary social contract theory.[180] Chiao's project is distinctive, however, because he addresses criminal law from within the contemporary political philosophy landscape rather than as a distinctive category of law unrelated to other aspects of the basic structure of society.

Once criminal law is seen in the context of the basic structure of society, retributivism loses much of its appeal. An "orthodox" retributivist view of criminal law and punishment frame punishment as an appropriate response to moral wrongdoing in the private sphere. The "orthodox view," a retributivist view, of criminal law and punishment is that the practice of punishment is "hard treatment motivated by, and expressive of, resentment directed at morally wrongful conduct,"[181] and thus the purpose of criminal law is to "vindicate rights and condemn

[180] Some may argue that early social contract theorists (Hobbes, Locke, Rousseau) were natural law theorists because their work often refers to laws of nature. Wacks, *Philosophy of Law,* 6–12. I think their relationship to natural law is more complicated, and particularly Hobbes can be seen as breaking with any kind of Aristotelian or Thomist view of natural law. In any case, I think few contemporary social contract theorists can be meaningfully said to be natural law theorists because the creation of a social contract tends to break the relationship between natural law and positive law.

[181] Chiao, *Criminal Law,* 35 (citing Husak. "Retribution in Criminal Theory," 960.)

wrongs."[182] On this view, "[t]o justify the criminal law, therefore, is to explain when criminal punishment is, and when it is not, a morally appropriate means for making manifest a shared reactive attitude of resentment at moral wrongdoing."[183] Notice that these are all related to individual moral wrongdoing. But to think of criminal law as public law is to think of it as an institution that functions to facilitate social cooperation and to spread the burdens of criminal law violations more fairly throughout the political community.

Chiao argues that the function of the criminal law is primarily to support social cooperation, and its justification is derived from the value of the type of social cooperation it supports. In social contract terms, criminal law promotes compliance with the social contract, and therefore it is only justified if the social contract is a justifiable one, that its, its terms are acceptable to those who are governed by it. He progresses through seven premises that build on one another to make his argument. First, Chiao argues that the primary function of this institution is to "promote[] social cooperation under stable political institutions"[184] and so the stability of political institutions takes priority over these other things, vindication of rights, deterrence. The first premise captures the idea that sanctions for rule violations are good means for the end of social cooperation. He writes, "(1) Negative reciprocity, that is the use of sanctions conditional on defection from a shared rule, is instrumental to ongoing cooperation."[185] The idea is not necessarily that sanctions to deter people from breaking the rules, although it does that, but game-theoretical models and empirical research across cultures emphasize that negative

[182] Chiao, *Criminal Law,* 35.
[183] Chiao, *Criminal Law,* 35.
[184] Chiao, *Criminal Law,* 36.
[185] Chiao, *Criminal Law,* 39.

reciprocity encourages social cooperation by assuring cooperators that others will not defect from the agreed upon rules.[186]

For social cooperation, there need not be a state, but in general, as social cooperation develops over bigger and more heterogenous groups, the likelihood of needing a centralized institution to clarify rules and perform negative reciprocity arises. This is basically what happened in criminal law in the 18th and 19th centuries in the United States and the United Kingdom. This produces the second premise: "(2) Whatever it is that makes them legitimate, public institutions that engage in generically coercive rule enforcement are engaged in a practice of negative reciprocity, that is, a practice of sustaining social cooperation."[187] This premise argues that no matter what kind of social organization that you have, if it sanctions those who purposefully violate the rules of the organization, then this sanction functions to sustain the social cooperation. It might also do other things, such as express disapproval, but it will always shore up social cooperation because negative reciprocity serves this purpose whether or not it is intended to.

The third premise follows more or less directly from the second: "(3) Whatever else they are, criminal justice institutions are institution that stabilize ongoing social cooperation, paradigmatically cooperation with legal norms established by public institutions."[188] This third premise follows from simply naming the institutions that are tasked with sanctioning deliberate rule violations in modern societies "criminal justice institutions." Rules are set out by public institutions like legislatures and regulatory agencies. Chiao notes that the criminal law is not the only institution that supports rule-following. Many other institutions within a society can also do

[186] Chiao, *Criminal Law,* 39–42. This is, of course, reminiscent of the assurance problem in Hobbes' Leviathan.
[187] Chiao, *Criminal Law,* 45.
[188] Chiao, *Criminal Law,* 45.

so without negative reciprocity. Indeed, the more individuals are integrated into the society's other institutions, the less likely they will be to violate the rules. For example, public education and social safety nets might support rule-following more effectively than negative reciprocity. Social science in fact indicates that as societies become more integrated, with advanced regulatory regimes, rule violations are fewer and negative reciprocity plays a decreasing role in assuring social cooperation.[189]

His fourth claim is perhaps the most important. "(4) Stabilizing cooperation with public institutions is the most basic function of criminal justice institutions."[190] To support the claim that stabilizing cooperation is the functional (not moral or conceptual)[191] priority of criminal law, he compares two hypothetical constitutional conventions. It the first case, the hypothetical framers eschew the goal of punishing wrongdoers based on moral blameworthiness because they disagree about how to define moral blameworthiness in their heterogenous society. But, they determine that they must create a system to sanction those who violate the rules that allow for community cooperation, which will include rules against harming other members as well as rules that simply facilitate cooperation (e.g., what side of the road to drive on), in order to promote social cooperation. "[B]y contributing to the possibility of long-term social cooperation, coercive rule-enforcement contributes to the very possibility of organized social institutions, and this is true even if those institutions do not, strictly speaking, ever 'punish' anyone."[192] It is possible, then, to have a system of sanctioning rule-violators that does not require a notion of moral wrongdoing. One would be sanctioned because they violated a rule, not because their action was morally bad. To get any complicated scheme of social cooperation off the ground,

[189] Chiao, *Criminal Law,* 45–46.
[190] Chiao, *Criminal Law,* 46.
[191] Chiao, *Criminal Law,* 50–51.
[192] Chiao, *Criminal Law,* 47–48.

some kind of generically rule-enforcing institution is required to assure everyone that others will comply with the rules.

Compare that to a similar group of framers who want to create an institution to punish wrongdoers. In order to set up a *system* of retributivism, they would have to decide what the important rules are, how to determine if one has broken them, what the punishments ought to be, and who adjudicates these matters. In so doing, they would also be promoting cooperation with the system itself. In essence, no matter how they organize it, it will also function as a system of promoting social cooperation through negative reciprocity. Thus, "generically coercive rule-enforcement" is functionally prior to retributivism in a system of negative reciprocity because you could not set up a system of social cooperation without it, but you could set up a system of "generically coercive rule-enforcement" without retributivism. Indeed, to have a system of retribution in a society, one would necessarily have a generically coercive rule-enforcing institution. This is not to say that retributivism in general requires generically coercive rule-enforcement, but if there is *a social institution* that performs retributivism, it will include generically coercive rule-enforcement, which, in turn, works to stabilize social cooperation. This is why it is functionally primary—there is no way to build a criminal law system that is not also reinforcing compliance with the greater political community it is a part of. Criminal law does not function in a vacuum, but as one institution in the basic structure of society. It will reinforce compliance with the rest of the basic institutions even if it is also designed to do other things.

From the primary function of the criminal law, stabilizing social cooperation, Chiao moves to the justification of criminal law. Because criminal law will serve the function of promoting social cooperation, even if it is designed to be retributive, then justifying the criminal law will require justifying the system that it is promoting, especially because criminal law, as I

have noted, is extremely coercive. It is only justified to use coercion to enforce a system of social cooperation if one can justify the social cooperation system itself. The reasons to use coercion to promote a system of social cooperation are the reasons to support the system itself. [193] Regardless of what the other intended goals of a criminal justice institution are, it will work to support cooperation with a set of institutions because it is a generically coercive rule-enforcing system. Thus, we must insure that those institutions should be supported if we are going to support the institution that promotes them. This gives rise to his fifth premise about criminal law: "(5) The criminal law is worth supporting only if the institutions whose rules it enforces are worth supporting."[194] He notes that "worth supporting" is a standard that is less than "perfectly just," and mainly means that they are worth supporting if they are better than available alternatives or that they are worth supporting because it is better in the long-run than not supporting them. Again, this is highly reminiscent of many social contract theories which argue that the social contract is justified when it produces a better society than if no social contract, or system of cooperation, were in place. It is also reminiscent of the idea that the terms of the social contract have to be acceptable to those who are governed by them (acceptability is a different standard than perfectly just).

Premise number five gives a necessary but not sufficient justification for the criminal law. This is because even if the set of institutions that the criminal law supports is worth supporting, one cannot take any means to support them. The means the criminal law takes to support the system of cooperation must also be just and justified. This gives rise to the sixth proposition: "(6) The criminal law is worth supporting only if its use in a particular context would be consistent with the principles that make the institutions whose rules it enforces worth

[193] Chiao, *Criminal Law,* 51.
[194] Chiao, *Criminal Law,* 52.

supporting in the first place"[195] If you put proposition 5 and 6 together, you get a "a fully political standard of justification":

"(7) The criminal law is worth supporting if and only if:

a. The institutions whose rules it enforces are worth supporting, and

b. Its use in a particular context would be consistent with the principles that make those institutions worth supporting in the first place."[196]

The standards that support the criminal law are the same ones that support every other political institution. Thus, blame, moral responsibility are only justifications for the criminal law if they are consistent with the principles that justify the system of social cooperation in the first place. In theory, a criminal law system could be set up to give people what they morally deserve and still be politically justified, but only if the system did so without violating the principles that make the system of social cooperation justified in the first place.

Chiao does not hold that there is one given set of principles of justice that must apply, but instead holds that the fully political justification can work regardless of the types of principles of justice a given society chooses to follow, whether libertarian, utilitarian, or egalitarian. Though he does not name it, Rawls's famous principles of justice (Justice as Fairness) could also provide the relevant principles.,

Chiao argues that one could begin with any broadly liberal political principles and then determine what a politically justified criminal law looks like under this system. To illustrate this, he explains how this fully political justification would unfold in a society governed by the principles of "anti-deference," a brand of political egalitarianism marked by two features: "each person has an equal opportunity for influence over the laws and policies they are subject to; and

[195] Chiao, *Criminal Law,* 53
[196]Chiao, *Criminal Law,* 53.

subject to that democratic principle, effective access to the capabilities that count, in that society, as constitute of basic equality."[197] In a slightly more broad scope, these two principles can be conceived of as political equality (equality in creating the procedures of the society) and substantive equality (equality in the benefits and burdens of society). He develops the role of criminal law in such a society, noting that in such a society, the criminal law would have to be limited by four principles. First, equality of opportunity for input is paramount, considering that criminal law is so coercive. This principle rules out felon disenfranchisement and likely prisoner disenfranchisement. But it also requires real, substantive equality of opportunity for influencing the creation of law, including strong education and a robust democratic decision-making process. Second, criminal law cannot be carried out in a way that includes subordinating one group to another, which racialized stop-and-frisk policies exemplify. Thus, a criminal justice system cannot perpetuate existing inequalities or oppressions and still be justified.

Third, criminal law must meet the quality of optimization. This is basically the idea that criminal punishments generally target the most basic capabilities of members of society, and so they can only be justified if they meet two conditions: they protect the capabilities of other members of society, and criminal punishment is the best way to protect those capabilities. In short, because of the extreme level of coercion involved in criminal punishment, criminal law ought to be used only when it optimizes the basic capabilities of *all* members of society. Notably, this means that we must choose less coercive institutions whenever possible. For example, ample evidence suggests that money spent on early education in particular communities drastically reduces crime in the long run. The optimization principle would require that money be spent on early education, which is less coercive than criminal law, rather than on the institutions of

[197] Chiao, *Criminal Law,* 72.

criminal law. This example highlights also that viewing criminal law as a public institution amongst others means that the financial costs of the system of criminal law should be weighed against spending on other social programs and public institutions.

Finally, he argues for 'inclusive aggregation,' by which he means that even those who are guilty of committing crimes should have their interests equally taken into account when determining criminal justice policies. This does not mean that those who violate the criminal laws cannot be punished, but that we have to take their political and substantive equality into account when we make policy decisions about criminal law. This principle is an example of how viewing criminal law as a part of the social contract means that those who violate the social contract are punished within the social contract. They are not excluded from it. Not only is this the best way to promote rule following (negative reciprocity cannot be too punishing or it works against cooperation), but also because maintains the social and political inclusion of the rule violator. Negative sanctions must be limited by the principles that maintain the social contract.

These four principles of a fully politically justified criminal law are developed in a society that has justified the rest of its social cooperation around "anti-deference," but similar principles would develop in any politically liberal society that adopts a version of justice that involves conceptions of liberty and equality. Using any politically liberal conception of justice would yield a guarantee against being excluded from the scheme of cooperation altogether, as doing so would undermine social cooperation itself. Moreover, any system that recognizes criminal law as one amongst many political institutions and values liberty will likely require a preference for less coercive means of gaining rule compliance, given the fact that enforcing criminal law requires the community's resources and is highly coercive.

Finally, blame and moral desert are not present in the political justification of criminal law on this model. While, as I have noted, there is nothing about the political justification that absolutely excludes the possibility that the criminal law could *also* function as a retributive system that gives wrongdoers what they deserve based on a moral evaluation of blameworthiness. Still, I share with Chiao the doubt that retributive aims would end up in fact being consistent with any set of liberal principles of justice. This model indicates that we should not view criminal law as an institution where the state addresses pre-political moral wrongs on behalf of members. Instead, criminal law punishes violations of the rules established by the system of social cooperation as a matter of last resort—when no other institution can effectively promote social cooperation. The criminal law is an institution that acts within and on behalf of the social contract, and it cannot act so as to kick members out of the social contract. Any punishment or sanction ought to be in furtherance of the political principles that justify the social contract.

In conclusion, there are two main arguments that support the view of criminal law as a political institution that is part of the social contract. First, criminal law functions to reinforce cooperation with the political structure as a whole. Therefore, the criminal law cannot have only an internal justification (internal to the nature of criminal law alone) because the system it supports will need to be justified as well. Retributivism cannot provide a justification for the whole political structure, so it alone cannot justify criminal law. Second, the operation of criminal law imposes burdens and provides benefits for the society beyond just the rule-breaker and the immediate victim (when there is one). These benefits and burdens need to be justified to the entire political community, and they ought to be fairly distributed. Thinking of the criminal law as one political institution among many, all meant to support the goals of the community,

requires justifying the workings of a particular criminal legal structure to the political community it serves. Among other things, this means that money and other investments spent on criminal law are investments that cannot be spent in other areas of the political community, including education, healthcare, the arts, infrastructure, and so on. In Rawlsian terms, criminal law is part of the basic structure of society, and as such, it should be subjected to the principles of justice that make living in the community justifiable.

2. Blame is Inconsistent with Criminal Law as a Political Institution

In the model that I articulated above, blameworthiness does not play a role in justifying criminal punishment because the inescapable function of criminal law is promoting social cooperation, and that function must be justified regardless of what kind of system of criminal law is present. Criminal punishment is instead viewed as sanction for breaking the rules of an established system of social cooperation. In essence, criminal law punishes wrongs determined by political institutions, not pre-political wrongs. But, at the end of the last section, I left open the possibility that a criminal law institution could be politically justified according to Chiao's two requirements and might also have a moral retributivist function, so that, in addition to promoting cooperation or compliance with the social contract, the criminal law also condemns a certain subset of morally blameworthy actions. That is, the criminal law could operate as a political institution and at the same time a moral retributivist one.

In this section, I will argue that criminal law cannot track moral blameworthiness and therefore cannot act as a moral retributivist institution. It can give people what they deserve, but only by the terms of the social contract, not what they deserve according to an interpersonal moral judgment. That is, what is criminalized is determined by the legislator or executive

agency, not by a moral system that determine right and wrong action. Though the legislators might appeal to moral values, (e.g., the dignity of persons, the harm of violence, etc.) in making criminal laws, these laws become political by being enacted by a legislature or by a regulatory agency. Therefore, the wrongs that are punished are punished as political wrongs, not moral ones. The distinction between criminal liability and moral desert is central to understanding the modern criminal system.

In this section, I argue that being criminally liable for a crime (being found guilty, or more realistically, pleading guilty) in the United States is not enough on its own to show that one is morally blameworthy. Therefore, neither the function of criminal law nor its justification can rest on punishing the blameworthy. I will for the most part discuss the criminal legal system in the United States as if it is actually following its own doctrines. Thus, this is not quite an ideal theory model, as we are discussing an existing criminal law system, but it is an idealized version of the United States' legal system, one that ignores (for this chapter of the dissertation only) the history of racism and classism, the failings of due process in real life, and the fact that most criminal convictions are not the result of carefully adjudicated trials with equally financed parties, but instead the results of coercive plea deals. The idea is to show that, on its best day, the American criminal law system is not capable of determining moral blameworthiness, but only criminal liability. And moreover, criminal legal systems require justiciable rules that can be applied equally by looking at objective facts, not by adjudicating the subjective motivations, psychological backgrounds, and other burdens faced by criminal defendants.

This argument is developed from the argument that Erin Kelly makes in her book *The Limits of Blame: Rethinking Punishment and Responsibility.* There she defends a position that blame has no place in a criminal justice system in a liberal society. She argues that focusing on

the wrong itself to determine punishment rather than on the character of the wrongdoer, is the only legitimate course for a criminal justice system to take. In making this argument, she distinguishes between minimal rationality—the level of culpability that a person must have to be criminally liable, and a thicker notion of moral culpability that is required to blame a person for the wrong that they have committed. She argues that our criminal justice institutions, as political institutions, do not function in such a way that they are even able to make determinations about blameworthiness, even if we wanted them to. They can make judgments about criminal liability by determining if a law violator is minimally rational so that their actions can be attributable to them at all. The fact that criminal law is incapable of making fine-grained determinations of moral blameworthiness is due to the fact that criminal law is a public institution that must rely on justiciable legal standards which are too blunt of instruments for making distinctions between people's culpability based on nuanced features of people's psychology or background. Nuanced features of psychology, background, motivation, and social obstacles are all features that play important roles in assessing blameworthiness and moral desert. Thus, what the criminal law can offer is only an assessment of criminal liability, a public and political adjudication, not a moral one.

Given the fact that the most we can get from our criminal justice institutions is a determination of criminal liability, not moral blameworthiness, Kelly argues that we must be more modest about what punishments and attitudes are appropriate responses to criminal liability. She introduces the concept of Just Harm Reduction as a principle of criminal law and punishment that justifies punishment for wrongs while remaining agnostic about blame. Punishment is focused on reducing the harms from rule violations in a society, limited by rules of public reason.

2.1 Blameworthiness, Moral Culpability and Excuses[198]

Retributivism is the idea that punishment should track blameworthiness. "[T]he notion at the core of a retributive conception of justice is that wrongdoers are due a punitive response that is proportional to their blameworthy wrongdoing: wrongdoers should suffer harm *because and to the extent that they are culpable for having doing wrong*."[199] There are other theories that would suggest that blame is useful for other ends (blame is a good tool for getting people to change behavior, for example), but retributivism would call for blaming responses because blame is the fitting response for committing a wrong. Blaming and punishment are simply appropriate responses to moral wrongdoing, and they are permitted or even required regardless of the costs or benefits of such responses.

Virtually all notions of blameworthiness are connected to the idea of moral culpability—the wrongdoer must have been morally culpable, that is, somehow their will or their character must be connected to the wrongdoing they are blameworthy for. Michael S. Moore, for example, argues that people are blameworthy for moral wrongdoings that are made even when highly emotional, and even if the person could not have acted differently because they were overwhelmed by emotion, they are still blameworthy for their wrongdoings because their emotions are attributable to them.[200] Similarly, David Schmidtz argues that we are responsible

[198] It is important to note the difference between blame and blameworthiness. A person might be blameworthy, but no one actually blames them, or a person might be blamed despite not being blameworthy. Kelly, *Limits of Blame,* 77. As Kelly notes, just because one is blameworthy, this does not mean that I must or may blame them. Sometimes a person is blameworthy, but, because of my own actions, I lack standing to blame them (I am guilty of the same thing, perhaps). Kelly, *Limits of Blame,* 77. Moreover, Kelly notes that if I am a victim of someone's blameworthy action, I can choose to blame them or have a variety of different attitudes toward them. Kelly, *Limits of Blame,*114–18. In general, for my argument, I focus on whether an agent is blameworthy, and if that blameworthiness is a necessary and sufficient condition for criminal punishment. Interpersonally, a victim can choose to blame the wrongdoer or not, and Kelly argues that because blame is optional for the victim, it is unlikely that it could be obligatory for the state. I agree with this argument, but it is not central to my overall thesis. Kelly, *Limits of Blame,* at 119–20.

[199] Kelly, *Limits of Blame,* 49–50

[200] Kelly, *Limits of Blame,* 47.

for any internal features of ourselves even if we did not chose them because we often praise people for characteristics like beauty, talent, intellect, and so we can blame people for negative characteristics they did not chose.[201] Therefore, we are responsible for actions that arise from character traits we do not chose, like laziness, weakness, or selfishness.[202] Kelly argues against Schmidtz that moral blameworthiness is different than praise for abilities, as punishment and blameworthiness are about moral failures.[203] On Moore and Schmidtz's views, we are blameworthy for wrongdoings even when our character, strong emotions, or other unchosen causes mean that we could not have acted otherwise.

Kelly argues that instead, moral culpability should rely on the idea that the blameworthy person could have acted differently when they committed the wrongdoing. [204] We blame someone when they could have done better, and we can also blame them when they act from character flaws when we think that they are responsible for having those character flaws. Kelly argues that as individuals interacting with others, we typically take for granted that those we interact with have the moral capacity to choose the right actions. Theories that upset this presumption—that people sometimes commit a wrong because of things outside their control (their background, their psychology, etc.)—are difficult to square with many moral responses, including blame. There is a tension between thinking that blameworthiness depends on the ability of someone to act according to moral rules and empirical evidence that suggests that our actions are impacted by unchosen psychological deficiencies, background conditions in our lives, and other outside influences.

[201] Kelly, *Limits of Blame,* 47.
[202] Kelly, *Limits of Blame,* 47.
[203] Kelly, *Limits of Blame,* 47–48.
[204] Kelly, *Limits of Blame,* 48.

One way of working around this tension is by adopting a minimal rationality position on moral culpability, much like Kant's "ought implies can" principle, Kelly argues. To explain this principle, Kant uses an example of a person who claims that they could not have stopped themselves from an affair because of the power of their lust. Kant argues that saying that if the person would have stopped themselves if there were a hangman's gallows outside ready to punish them immediately after the deed is done, then the person *could* have acted otherwise and therefore is morally culpable for the failure. He presses further, arguing that if a powerful ruler told a person that they must bear false witness against an innocent person or themselves be put to death, a rational person would agree that it is possible to resist the ruler and do the right thing, even if that person does not think that they themselves could do it. The thrust of this argument is that even when it is very hard to do the right thing, and virtually no one would be able to do it, it there is still a possible world where that person could do it, and therefore they can be blamed for failing to do the right thing. If there is a reason, any at all, to act morally, then it is possible.[205]

Kelly argues that the Kantian "ought implies can" principle seems distant from the real world, where we encounter evidence that people's choices are often meaningfully limited by the circumstances they find themselves in. This Kantian minimum rationality position is basically what the criminal law relies on for criminal liability, as I will note in the next section, but Kelly suggests that we have many reasons to discard it as sufficient for blameworthiness. "Ought implies can," would seem to be in conflict with a lot of empirical evidence to the contrary. First

[205] Kelly argues that the best way to understand Kant's *ought implies can* argument, where the fact that a rational person recognizes that they ought to follow a moral rule implies that they can follow it, is the following: "His view is that judgment about moral competence make the most sense when we view them as judgments about what it is reasonable to commit ourselves to, morally speaking, rather than as metaphysical claims that could survive epistemic worries." Kelly, *Limits of Blame*, 59. Kelly thus takes the Kantian argument to mean not that we are morally culpable for failing to follow the moral law if we are minimally rational enough to recognize what the moral law is. Instead, she makes this a claim about how we should strive to follow the moral law even when circumstances are difficult, but not a claim about how we can blame ourselves or others.

of all, there are all kinds of situations in which we recognize that a person has genuinely committed a wrong, but we have reasons to excuse them, or at least to mitigate blame.

> Examples extend from the ordinary to the extra-ordinary: the parent under emotional strain who abuses her child, […] the inmate who brutalizes another person to avoid appearing weak, the solider in a field of battle who shoots an unarmed civilian on orders from a superior, […] the compulsive who tells a lie. We might excuse such agents, wholly or in part, from blame for their morally faulty actions.[206]

These examples demonstrate that when faced with examples of wrongdoers, we often apply a more nuanced approach to culpability than Kant's picture grants. First, rather than a black-and-white appraisal of blameworthiness, we are likely to see blameworthiness in a matter of degrees. Second, Kelly makes the proposal that blameworthiness ought to be understood with more attention to fairness — it is much harder for some people to do the right thing because of psychological makeup, stressors, deprivation, social injustice, and a variety of other factors. The fact that it is much harder for some people in some circumstances to do the right thing should lead us to excuse or mitigate blame, which does not require that we ignore the wrong or fail to recognize it as such.[207] Third, we should also account for evidence in the social sciences that our environment can deeply affect our actions. A classic example of this is the Yale study in which most students were willing to inflict harsh pain on others when an authority figure told them to do so.[208] Fourth, abuse, violence, oppression, illness, and poverty often present hurdles to acting with good will—"Hardships muddle the waters of blame."[209] Nearly all of us are 'minimally rational,' that is, upon reflection, we know what morality requires most of the time, and a narrow reading of Kant's argument is that this is enough for us to be able to conform ourselves to it. But

[206] Kelly, *Limits of Blame*, 79.
[207] Kelly, *Limits of Blame*, 91–99.
[208] Kelly, *Limits of Blame*, 52.
[209] Kelly, *Limits of Blame*, 113.

this view of moral competence is not a realistic view of what most humans are actually capable of when put in demanding circumstances. We should be wary of applying blame based on a thin notion of moral capability expressed in the 'ought implies can' of minimal rationality.

What lessons can we draw from this discussion of blame? Philosophers disagree about what kind of culpability is required for blameworthiness. Some philosophers argue that we are morally culpable for things we do not chose, like character traits we are born with. Kant argues that if we could have acted differently if we are minimally rational, that is, if we have the rational capability of recognizing what morality requires of us, we are blameworthy for wrongdoing. Kelly herself argues that we are only morally culpable when we actually could have acted differently, but she argues that actually making this determination of whether one plausibly could have acted differently is incredibly difficult given the evidence that we have that all kinds of outside conditions influence our behavior. She argues that we cannot use a Kantian minimal rationality test to determine blameworthiness (i.e. if someone is minimally rational, they are morally culpable for any wrongdoing) because we have so many reasons to think that the actual possibility of the person conforming their actions to morality is dependent on many conditions.[210]

I pause here to note that the fact that there is deep disagreement about what is required for moral culpability gives a reason against using blameworthiness as a foundation for a political institution that is as coercive as the criminal justice system. If there is reasonable disagreement about how to determine if someone is blameworthy, it follows under a liberal society that this is not a desirable foundation for the use of the state's coercive power. Similarly, expecting people with significantly bigger hurdles to meet the same moral requirements as those without such

[210] Kelly, *Limits of Blame*, 59–60.

hurdles should lead us to a deeply nuanced, individualized approach to blameworthiness that includes mitigating blame. Interpersonally, we may be able to be more sensitive to these factors and chose a variety of responses, from blame to compassion to withdrawal. As I will show in the next section, criminal law is not so sensitive to these complex conditions nor can it operate with such nuanced responses given the necessary rigidity that comes with rule of law and due process concerns.

2.2 Criminal Liability does not entail moral culpability or blameworthiness

Kelly argues that if we examine what kinds of evidence criminal law looks at in the United States, and the types of evaluations necessary for criminal liability, criminal law actually does not offer the right kind of evaluations to determine blameworthiness. At most, criminal law entails that a person found guilty was minimally rational when they committed a wrongdoing, but as I argued in the section above, minimal rationality is the most demanding view of moral culpability and is inconsistent with our practices of moral excuse.

Criminal liability for a criminal wrong act does not require a robust showing that the person could have acted otherwise or that they did not act in circumstances that mitigate blame or call for excuses. Instead, the law finds liability where a wrongful act was "voluntary," and the standard of voluntariness is one that is easily met and can be determined by objective observation. Acts committed, for example, while sleepwalking, as a result of a seizure, or physically forced by another, are not voluntary. This standard, however, is very thin.[211] In many ways, it resembles the Kantian minimal rationality model.

Moreover, motivation for an act, which would be relevant to determining blameworthiness, is nearly always irrelevant in determining criminal liability because criminal

[211] Kelly, *Limits of Blame*, 26.

liability is actually tracking wrongfulness not blameworthiness. While we might not find Robin Hood blameworthy (or less blameworthy than, for example, Bernie Madoff) stealing (even from the rich) is stealing. As long as the acts committed violate a criminal statute, both Robin Hood and Bernie Madoff would be equally subject to criminal liability.[212] Except for very few criminal laws in the United States, (hate crimes, treason) most crimes are not determined by motivation, but instead by simple voluntariness: did the wrongdoer intend to perform the physical action? If so, they committed a criminal wrong.[213]

Even when determining *mens rea,* or a guilty state of mind, courts generally do not allow fact finders (juries or judges, depending on the case) to examine individual features of the psychology of a defendant to determine guilt, as many of us would if we were determining moral blameworthiness. For example, in *State v. Patterson*, the defendant's conviction of criminally negligent homicide ("criminally negligent" is the *mens rea*) was upheld when she withheld water from a boy in her care for four days, and he died of dehydration. But, the defendant had an extremely low IQ and was trying to prevent the boy from bedwetting, and she did not understand that she could kill the boy by withholding the water. Nevertheless, the court found that a reasonable person could have foreseen the risk, the standard for determining negligence, so it was irrelevant that she could not. She was held criminally liable despite the fact that her low IQ, or her inability to understand that she was harming the boy would at least mitigate if not excuse her blameworthiness. The courts found her criminally liable, but most of us would excuse or at least mitigate her blame because of her psychological features.[214]

[212] Kelly, *Limits of Blame*, 104
[213] Kelly, *Limits of Blame*, 102–06.
[214] Kelly, *Limits of Blame,* 25–31. My discussion of *State v. Patterson* is largely taken from Kelly's account.

In fact, looking to the requirement of *mens rea,* meaning "guilty mental state," in criminal law as a locus for blameworthiness is misguided. Nearly all crimes have a *mens rea* element that requires that the government demonstrate that the accused has a certain mental state when they committed the *actus reus*, or guilty act. *Mens rea,* however, is like the voluntariness standard in that having a sufficiently guilty mental state is not difficult to establish practically speaking. While *mens rea* differ from crime to crime, the "highest" standard in the Model Penal Code is usually considered "purposeful." This simply requires that the *actus reus* was action was undertaken on purpose, or with the intention of doing the prohibited act. For example, in a homicide law using the "purposeful" standard, this would simply mean that the defendant intended to kill the person. Evidence that the defendant pointed a gun at the victim and shot the gun would be more than sufficient for a finding of purposefulness, and yet such a fact would not tell us very much about the motivations, pressures, or other subjective factors operating on the defendant. Establishing even the most stringent *mens rea* does not require showing that the accused acted with ill will. Criminal statutes that rely on common law *mens rea* terms such as "willfully" or "with knowledge" to simply mean intentionally or knowingly, which are relevant for making determinations of blame, also do not provide enough information about the other circumstances to warrant a determination of blame.

Even the most morally laden sounding *mens rea,* from common law, the term "malice aforethought," has been defined by statute and case law into much narrower terms because the term itself offers little guidance to juries who have to determine if a particular defendant met that *mens rea*. These definitions and narrowing rulings tend to offer more objective and externally measurable standards for juries to apply, speaking in terms of intentions to act or other language that does not equate to a determination of the bad will of a person. For example, in California,

"Murder is the unlawful killing of a human being, or a fetus, with *malice aforethought*."[215] While this sounds like language that could only be fulfilled with explicitly blameworthy action, it is defined with less moral language in the next section. "For purposes of Section 187, malice may be express or implied. . . . Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature. . .Malice is implied when no considerable provocation appears, or when the circumstances attending the *killing show an abandoned and malignant heart*."[216] Explicit malice is fulfilled by "manifest deliberate killing" (which could be demonstrated by objective evidence that a defendant pointed a gun and shot, without any information about what the defendant was thinking or why they shot). Implied malice, however, contains the kind of language that is suggestive of more than awareness of or intention to commit an act: "an abandoned and malignant heart." Courts, however, interpret this kind of language to give guidance to juries. In a case interpreting this statutory language, the California Supreme Court further defined and narrowed the meaning of this statute. The court expressed concern over precisely this language.

> The statutory definition of implied malice, a killing by one with an "abandoned and malignant heart" (§ 188), is far from clear in its meaning. Indeed, an instruction in the statutory language could be misleading, for it could lead the jury to equate the malignant heart with an evil disposition or a despicable character instead of focusing on a defendant's awareness of the risk created by his or her behavior. Two lines of decisions developed, reflecting judicial attempts to translate this amorphous anatomical characterization of implied malice into a tangible standard a jury can apply. Under both lines of decisions, implied malice requires a defendant's awareness of the risk of death to another.[217]

[215] CAL. PENAL CODE § 187 (emphasis added).
[216] CAL. PENAL CODE § 188 (emphasis added).
[217] *People v. Knoller*, 41 Cal.4th 139, 59 Cal.Rptr.3d 157, 166 (2007).

The court went on to hold that implied malice "requires proof that a defendant acted with conscious disregard of the danger to human life,"[218] which was shown by appealing to externally viewable evidence, not the internal life of the defendant. What this discussion of *mens rea* demonstrates is that in making determinations of criminal liability, the requirements must be justiciable. That means that juries (or judges, when they act as factfinders) must be able to have a standard that can be applied to knowable facts about a case. As the California Supreme Court noted, the language of "malice" or "malignant heart" does not leave the jury with a standard that can be fairly applied. The court is also concerned that juries might interpret "malignant heart" to mean bad character. This would be a problem because it is a constitutional tenant that one cannot be found guilty of having a bad character, but for committing bad acts. Rules of evidence as well as constant refinement of the law are specifically designed to prevent juries from finding a defendant guilty because the jury thinks the defendant is a bad person. The need for a justiciable standard, one that can be applied to facts about a case (not judgments of character) in a consistent way (not according to what this or that juror thinks is 'malignant'), further strengthens the argument that the kinds of things one might evaluate in making a moral determination about the blameworthiness of a person, their character, their motivation, their attitude, are not essential (and may be prohibited) factors in determinations of guilt.

In adjudicating criminal liability, moral excuses based on the particularities of a defendant are generally not relevant because juries are instructed to make presumptions about the mental states of individual defendants based on what the mental states of most people are like. Courts direct juries to ask what a "reasonable person" would do in the circumstances, which is a marker of objective expectations for what most people would do or would understand. Courts

[218] *Id.* at 170.

generally enforce an objective standard for what most people would be able to know or anticipate, rather than allow for the nuances of individualized psychology to inform the jury of blameworthiness of a defendant. *Patterson* is just one example of how using an objective standard requires the court to hold someone criminally responsible when it is unlikely that most theories of blameworthiness would hold the person morally responsible.[219] And, though they make up a tiny fraction of criminal laws, strict liability laws like statutory rape clearly hold people criminally responsible for actions in ways that completely ignore the kinds of judgments about character or intent that would ground most blameworthiness evaluations.[220]

At first blush, one might argue that many affirmative criminal defenses such as provocation, duress, and the insanity defense do allow for findings of moral excuses. Affirmative defenses are those in which a defendant admits that they committed the crime in question, for example, they did violate a homicide law by killing another person, but there are reasons that they should not be held liable. Though the structure of affirmative defenses certainly mirrors the concept of moral excuses, Kelly argues that the practice in criminal law is not nearly as fine-grained as we would expect an evaluation of moral excuses to be.[221] Just as in the *Patterson* case, provocation and duress are mitigated by an objective person standard. Rather than consider whether a given individual was provoked or felt that they had no other choice than to act as they did, the court asks that juries consider whether a reasonable person in that state would have felt provoked or under duress. For example, in *People v. Cassasa,*[222] the defendant was found guilty of second-degree murder, but his lawyers attempted to argue that he was under extreme emotional distress because the homicide victim had broken up with him, and he was extremely

[219] Kelly, *Limits of Blame*, 29.
[220] Kelly, *Limits of Blame,* 29.
[221] Kelly, *Limits of Blame,* 33–34.
[222] *People v. Casassa*, 49 N.Y.2d 668, 404 N.E.2d 1310 (1980); Kelly, *Limits of Blame,* 33–34.

disturbed by this situation. The New York Court of Appeals (the state's highest court) said that the fact that he was extremely emotionally disturbed did not give him access to the defense of provocation, because a reasonable person under such circumstances would not be extremely emotionally disturbed. His distress was "so peculiar to him" that it did not allow him to meet the second prong of the provocation defense.[223] The second prong says that "there must have been 'a reasonable explanation or excuse' for such extreme emotional disturbance, 'the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be.'"[224] These are not the kinds of individualized evaluations that a determination of blameworthiness would take because we often excuse people when we understand that particular features of their background, their psychology, their immaturity, or their mental illness might make them minimally less culpable, or even totally excused.[225] The law does not allow for such cases, and in fact, it would likely be undesirable if it did.

Another example of how the law does not track moral excuses is the insanity defense. Most states follow the classic *M'Naghten* test for insanity, which comes from a 19th century British case. This test requires that the defense show that "at the time of the committing of the act, [the defendant] was laboring under such a defect of reason, from disease of the mind, as to not know the nature and quality of the act he was doing; or, if he did know it, that he did not know that what he was doing was wrong."[226] Only those who cannot understand their actions are deemed criminally insane, and those who suffer from severe mental illness will never be able to meet the standards of the *M'Naghten* test. Put quite simply, those who will be allowed the

[223] *Casassa*, 49 N.Y.2d at 680.
[224] *Casassa*, 49 N.Y.2d at 678.
[225] Kelly, *Limits of Blame,* 33–34
[226] *M'Naghten*, quoted in Kelly, *Limits of Blame,* 34.

insanity defense are extremely few and far between.[227] In one infamous case, *Clark v. Arizona,* a 17-year-old boy was held criminally liable for killing a police officer even though he believed the police officer to be an alien because of a paranoid schizophrenia episode. The Arizona state court found that he knew that killing the police officer was wrong because the officer was plainly dressed in a police uniform and declared himself to be a police officer. This is another case in which the objective scenario, a 'reasonable person' approached by a uniformed police officer, is prioritized over the individualized psychology of the defendant, who believed his town was taken over by aliens who were impersonating government officials.[228] Thus, considering things like mental illness, except in even the most extreme cases, does not mitigate criminal liability, though in many cases it would mitigate if not completely excuse blameworthiness.

Kelly also notes that fact that criminal liability does not track moral blameworthiness is also supported by the high percentage of incarcerated people who have mental illnesses. One comprehensive study suggests that more than half of all incarcerated people have mental illnesses, and others have significant intellectual disabilities.[229] While surely not every instance of mental illness or intellectual disability would mitigate every determination of moral blameworthiness, these numbers, paired with the objective standards for culpable mental states and excuses and the high bar for insanity, point to the conclusion that many people are found criminally liable who would likely not be found to be morally blameworthy on a variety of theories of moral culpability and excuse.

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[227] Kelly, *Limits of Blame*, at 42.
[228] *Clark v. Arizona*, 548 U.S. 735, 743–46 (2006). Here the Supreme Court of the United States, who was reviewing the constitutionality of this case on a number of grounds, ultimately upholding it, describes the lower court's findings.
[229] Kelly, *Limits of Blame*, 16.

2.3 The Criminal System ought not be reformed to track blameworthiness

One could argue that this is a problem with the current implementation of the criminal justice system in the United States, and we can and should build a system that better tracks moral blameworthiness.[230] Perhaps we should expand criminal defenses like provocation, duress, and insanity to better match theories of moral culpability and blameworthiness that are informed by empirical information about when people are able to act in accord with the law or when they are unable. This view is incorrect because the nature of due process in law and the empirical difficulties in making accurate, repeatable determinations of whether or not one could have acted otherwise make such a project inappropriate for a legal institution.[231] In short, criminal law requires justiciable standards, and those are not standards well suited to evaluation of moral blameworthiness.

A brief attempt to modify the insanity defense to be broader demonstrates why criminal law is not the kind of institution that can make fine-grained determinations of blameworthiness. In the United States in the 1960s, criminal law experts made a concerted effort to remodel the insanity defense to accommodate a broader view of insanity. As Kelly explains, criminal justice reformers put forward the Model Penal Code (MPC), which offered new, modern definitions of nearly all crimes and defenses in the United States in an attempt to provide more clear, uniform, and humane criminal codes.[232] The MPC, first published in the early 1960s, is not itself law, but it was put forward in hopes that states would adopt all or parts of the new code, which many states did. The MPC formulation of the insanity defense introduced a broader definition that

[230] Kelly. *Limits of Blame*, 46.
[231] Kelly. *Limits of Blame*, 46.
[232] For example, the MPC relied on specific *mens rea* or mental states: purposeful, knowing, negligent, rather than the diverse and often unclear terminology that arose out of conflicting common law traditions, such as 'malice aforethought' and 'premeditation' (which, counterintuitively, can take place in a matter of milliseconds).

some states and the federal government attempted to take up. The MPC insanity defense is as follows: "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the law."[233] These two prongs, often called the cognitive and volitional prongs, offer two ways for a defendant to show that they were not responsible for their conduct: (1) because they could not appreciate that it was wrong (cognitive); or (2) because they could not actually make themselves do the right thing (volitional). The volitional prong seems to codify the idea that one is not liable for an action if they could not have acted otherwise.[234]

While many criminal reform advocates support the broadening of categories of excuse, including the insanity defense, Kelly is skeptical that doing *so with the purpose of trying to make criminal law match up with blameworthiness* is a worthwhile pursuit.[235] The court in *United*

[233] MPC § 4.01, quoted in Kelly, *Limits of Blame*, 34.
[234] Notably, the MPC insanity defense was taken up by many states during the 1970s, but it was limited by many and repealed by some after John Hinkley was found not guilty by reason of insanity for his attempted assassination of President Ronald Reagan. The political untenability of the more liberal MPC insanity definition was what ultimately removed it from law around the same time that the Law and Order movement was at its peak (see my discussion of the Law and Order movement and its racist undertones in chapter 2). *See* Kelly, *Limits of Blame,* 35.
[235] While I agree with the thrust of Kelly's argument here — that the criminal law is not nuanced enough to attend to the particular kinds of features that blameworthiness must track — I do think that defenses such as the insanity defense, duress, and provocation ought to be widened. Kelly has outlined some principle doctrines in criminal law, including voluntariness and criminal defenses, with textbook-like accuracy (it reflects my Criminal Law course, often down to the cases she cites). But this is still an idealized theory of sorts because while these criminal law doctrines are operative in a theoretical and indirect way, the reality of the practice of criminal law is much different, as it generally has much more to do with plea bargaining. I would argue then for widening the availability of these defenses because that would take away some of the disparate power that criminal prosecutors have in a system where approximately 95% of criminal convictions are the result of plea bargains. The non-ideal operations of criminal law are less about criminal doctrines and more about leverage at the level of plea bargaining. Very narrowly defined defenses, along with increasing sentences, proliferation of new crimes, and more difficult standards for showing 4th Amendment violations, have increased the leverage prosecutors have. Moreover, tightening public defender budgets and loosening of certain evidentiary standards have decreased leverage defendants have. In this light, doctrines such as the ones discussed do not actually tend to result in forcing juries to make tough decisions about moral culpability, but they actually have indirect effects on the relative bargaining powers of prosecutors and defendants. In principle, however, the fact that the criminal law is generally a blunt tool that is not subject to nuance is accurate, and this supports the overall claim that the criminal law is incapable of making determinations of moral culpability and blameworthiness.

States v. Lyons, the Court of Appeals for the Fifth Circuit explained why the volitional prong of the MPC test, while in theory more in line with empirical evidence about the role of external pressures in decision making, is not legally practicable. Previously, the Fifth Circuit had adopted the MPC version of the insanity defense. In *Lyons*, the Fifth Circuit ruled that the so-called "volitional" prong, which allows a person to claim insanity if they can show that they could not conform their conduct to the law, was stricken from federal law. They did so for several reasons. First, the medical community does not possess the ability be sure when a defendant could or could not conform his conduct to the law, and when medical experts attempted to testify about the conditions under which individuals were suffering, they could not offer anything beyond conclusory evidence to assist juries in making this decision. Second, the court worried that this vagueness left the defense too open to manipulation and mistake.[236]

The court's explanation points to the biggest problem with equating criminal liability with moral wrongdoing: in criminal wrongdoing, there must be a justiciable standard that a jury can apply to a particular defendant. To be justiciable, it must be general enough to apply consistently across a wide range of cases. There cannot be unending exceptions and nuances. It also must measure things that juries can actually get accurate information about. The standard cannot rely on knowing directly what is going on in the mind and heart of a criminal defendant. This is the same for the excuses of provocation or duress. The criminal law cannot treat people who committed the same acts differently based on particularities of their circumstances *ad infinitum*. This is especially the case when we lack the ability to get accurate, consistent evidence about the capacity of an individual to conform their conduct to the law. When courts attempted to bring the volitional prong of the insanity defense into the law, the lack of availability of

[236] *United States v. Lyons*, 731 F.2d 243, 248–49 (5th Cir. 1984); Kelly, *Limits of Blame,* at 35, 42.

reliable evidence meant that the standard could not be equally applied to all cases. Determining if a person was actually capable of conforming their conduct to the law is full of counterfactuals and nuanced judgments about the person's background and how much of that background they should be responsible for. The criminal courts are not capable of that kind of decision without departing significantly from the rule of law.

But ascertaining moral blameworthiness seems to require a more nuanced individualized approach. This is unsurprising as theorists who discuss blameworthiness generally build from the interpersonal rather than from the political. As human beings, we generally know better how to evaluate competencies and moral failings of those in our interpersonal sphere. A friend who is normally kind lashes out at us, and we suspect that there is something that explains his unusual attitude. The family member who is consistently unreliable elicits frustration rather than blame because we understand the difficulties she has in her life. We may find a particular person to simply be cruel with no explanation or excuse available, and we may blame that person and avoid them if at all possible. We may even encourage others to do the same. But criminal law cannot be attentive to this kind of analysis because it is a political institution that must apply justiciable standards focused on the rules passed by democratic institutions, and not moral evaluations, excuses, and choices for compassion that mark individual moral assessments of the actions of others.

Not only do we have more nuanced information as private individuals in our interpersonal sphere, but we lack the kind of coercive power that the government has. If my judgement that someone is simply cruel and has no excuse is wrong, my resentment or exclusion may be harmful to her, but not in the way criminal punishment can be. While I can withhold blame from a flakey friend because of her personal problems, I may still decide to not make

plans with her. I can disassociate myself with the person who seems to simply have a cruel character. But the state's instruments—punishment—are much too blunt. The state in fact cannot chose to disassociate with a person because of their crimes. In fact, the state generally builds stronger associations with criminals though incarceration, parole, and keeping of private information.[237] The state cannot forgive or show compassion. These are moral responses of the individual.

For these reasons, Kelly argues that criminal law should focus on wrongfulness instead of blameworthiness. Blameworthiness is a contested concept. And on the more lenient view, which requires that a person needs to be actually able to conform their conduct to morality, we lack the ability to make clear-cut determinations of culpability. Kelly argues that wrongfulness is act focused, while blameworthiness is agent-focused.[238] Wrongfulness is determined by the harm caused to the victim or by other features of the act, not by features of the person who commits the act. We determine wrongfulness by examining an act or behavior, and we can do this without making a determination about the moral competency of the wrongdoer. For example, we can establish that a person who steals in order to feed their child (when there are no other realistic alternatives) has committed a wrong while recognizing that they are not blameworthy. The act was wrong because the person who was stolen from had their property taken from them, even if we excuse the thief in this case. Though there may be disagreement about what constitutes a wrong, criminal law ought to focus on the objective act, whether it violates a criminal statute, with special attention to whether it has harmed another person. Criminal law is not well suited to attending to the subjective qualities of the actor, including motivations, psychological

[237] Chiao makes a similar point, arguing that states do not typically have the option of disassociating with criminals, short of execution. Chiao, *Criminal Law*, 84.
[238] Kelly, *Limits of Blame*, 71-73

background, and other outside influences that can ground determinations of blameworthiness. Because criminal law is a blunt instrument, criminal liability is properly distinguished from moral culpability and blameworthiness.

2.4 Principle of Just Harm Reduction

From Kelly's conclusion that blame is not a valid justification for criminal law, she moves to a positive theory of the function and justification of criminal law. She argues for 'Just Harm Reduction,' which focuses on using criminal law to reduce the harm of rule violations in a society.[239] Just Harm Reduction is a cautious and morally modest response to criminal wrongdoing without exaggerating the responsibilities of wrongdoers. Like Chiao's approach, Kelly's proposal is based on the idea that criminal law must distribute burdens and benefits according to principles of justice. We can justify distributing more burdens to individuals who have violated laws on her account because the criminal violator has already shown that they do not respect the rule, and so punishment is needed to deter them from violating the rights of others again. The criminal rules have to be known ahead of time and be publicly justified in order to provide a just basis for punishment.[240] This is very similar to Chiao's political justification of criminal law.

Kelly notes that this kind of political justification of criminal law is respectful of the rationality of individuals. "Just harm reduction must be sensitive to a person's capacity to make choices that satisfy the requirements of law, even when a person has disregarded those requirements in the past."[241] Punishment for violating the publicly justified rules is appropriate, but it cannot be the kind of punishment that removes the ability of the criminal violator to change

[239] Kelly, *Limits of Blame*, 122
[240] Kelly, *Limits of Blame*, 127–30.
[241] Kelly, *Limits of Blame*, 128.

behavior in the future. Thus, long sentences, incarceration conditions that degrade an agent's capacities, and permanent exclusion from society are all unjust and unjustified in a system of Just Harm Reduction. This is reminiscent of one of Chiao's discussions of the need for negative reciprocity to secure social cooperation. In game theory, the best way to achieve social cooperation is to punish a rule breaker, but only in the very short term.[242] If the punishment lasts far into the future, so that the rule breaker is not allowed to rejoin the social cooperation repeatedly, there is no more reason for the rule breaker to conform to the rules. Thus, the whole reason for the punishment breaks down. Negative reciprocity, that is, sanctions for breaking rules, is self-defeating when forgiveness is withheld for too long, preventing the rule-breaker from rejoining the social cooperation.[243] Kelly adds that punishments or sanctions that do not allow criminal wrongdoers to rejoin society not only work against social cooperation, but also fail to respect the agency of the person involved by rejecting the possibility that the person can change their actions.[244] We have pragmatic reasons as well as agent-respecting reasons to fashion punishments that bring rule breakers back into the community with new tools and reasons to follow rules. This is pragmatically and principally preferable to fashioning punishments that exclude them from society literally and figuratively.

To return to Kelly's discussion of what level of culpability is necessary to establish for criminal liability, people who have been found, through due process, to have violated a criminal code should be criminally liable so long as they have the capacity to be deterred by punishment.

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[242] Chiao, *Criminal Law Age Administrative State*, 37–38. Chiao uses a game theoretic justification, arguing that to secure social cooperation that is maximal for all parties, the best methodology is a tit-for-tat- methodology in which punishment for defection is immediate, but there is no over punishing, and the defection is forgiven "after one round" because otherwise the social cooperation does not continue to work out. It has to be more rational to begin to follow the rules again after punishment than to keep defecting for this strategy to work.
[243] Chiao, *Criminal Law*, 37–38
[244] Kelly, *Limits of Blame,* 130

Criminal liability does not hang on moral blameworthiness as many people have the capacity to change their actions in response to sanctions though they at one point had other reasons (of psychology, background, opportunity, education) that prevented them from being fully able to have chosen otherwise when they committed the crime.[245] In other words, punishment is only legitimate under the Just Harm Principle for those who can be deterred by it. One example of when this deterrence would be defeated is when people are punished or treated as criminals regardless of what they do. In these circumstances, punishment, even for a legitimate rule violation, is not justified because it cannot act as a deterrent.[246] Similarly, those whose actions do not even meet the legal level of voluntariness due to mental illness or those who are too mentally ill to appreciate punishment cannot justifiably be punished.

General deterrence may emerge from punishing specific individuals who have been found guilty on this model, but we cannot punish people who have not been found criminally liable through due process because to do so undermines rule of law, undermines the overall deterrence logic, and violates basic principles of liberty. Moreover, Just Harm Reduction must be subject to public reason, and punishment of those not found criminally liable is not publicly justifiable. Much like Chiao's approach, Kelly situates the criminal law in the context of the rest of the political institutions that make up society. Punishing those not found guilty is inconsistent with any principles of liberalism that govern a contemporary society. To emphasize this feature, the modifier "Just" is added to the "Harm Reduction": we cannot do anything to reduce the harms of criminal wrongs, but we can work to reduce them within the limits of the principles of justice that undergird the society. Punishing those who have not been found guilty is a violation of virtually any conception of liberty.

[245] Kelly, *Limits of Blame*, 136–137
[246] Kelly, *Limits of Blame*, 134

The Just Harm Reduction approach to criminal law can include public acknowledgement of the harms done to the victims, which many philosophers find to be of value (and which I will discuss at length in the next chapter). The focus, Kelly argues, should be on condemning the bad act, as a way of reinforcing the norms of the community and the respect for its members that these norms reflect. But this does not require public blaming of the criminally liable person, and, as discussed above, blame is an inappropriate response to criminal liability.[247] Just Harm Reduction endorses "using the criminal justice system to incapacitate, deter, and rehabilitate criminal wrongdoers, and, when possible, to redress the harmful effects of crimes on their victims. These purposes together constitute a morally adequate response to victims. I submit that victims have no right to a retributive form of justice that would go beyond these aims."[248] The criminal law cannot determine moral blameworthiness, nor can it apportion suffering appropriate to that blameworthiness, and so, no matter how much victims may want such a response, it is not possible or politically just to give that to them. The criminal law can reinforce the laws by sanctioning rule violators, and it can express the fact that the rules are important for protecting individuals' rights.

Throughout her book, Kelly moves between careful analysis of existing legal doctrine in the United States, theories of blame and punishment, and political philosophy. But she also highlights at each step the rhetoric that has become common in the United States, including statements from politicians, bureaucrats, and thought leaders, that draws upon retributivist thinking. She argues that we ought to be particularly wary of this view of criminal law because it demonizes so many people, dials up our punitive responses, and overestimates what our system is actually capable of.

[247] Kelly, *Limits of Blame*, 145.
[248] Kelly, *Limits of Blame*, 145–46.

> Fear of crime should not be allowed to offset the importance of our shared responsibility to advance this broader social justice agenda. There is a disturbing tension between our shared responsibility to address the social injustice underlying much criminal behavior and the retributivist's focus on individual culpability for crime. Our understanding of criminal justice should not be at odds with our collective responsibility to secure the broader terms of social justice.[249]

As I have noted, a retributivist understanding of criminal law is not philosophically at odds with protesting many concrete injustices of our contemporary criminal justice system. One can endorse a blame-centric view of crime and still support ending the death penalty, solitary confinement, and many drug policies on the basis because these policies could be said to be disproportionate to their crimes. And one could also argue against the racialized policies of stop-and-frisk by noting that the vast majority of those targeted are not blameworthy for any wrong. But, in real life, the main arguments against strong criminal law reforms come from the view that injustice committed against criminals is not morally pressing and does not deserve our outrage. This, I believe, is rooted in the idea that those found criminally liable are morally culpable for wrongdoing and thus deserve at least some of what they experience.

3. Conclusion

Criminal oppression relies on the logic that a person who has committed a crime is has shown themselves to be unfit for membership in the political community. The deep injustices that appear in the American criminal law system, including police brutality, violence and degradation in incarceration, and legal and social norms that prevent criminals from getting jobs, housing, education, the franchise, and other social goods all stem from this political outsider status. It might be tempting to justify that *some* of the people I have called 'criminals' in chapter one *deserve* to be political outsiders, even if they do not deserve the all of the particular

[249] Kelly, *Limits of Blame,* 147

injustices that the United States' uniquely violent criminal system perpetuates. Moral desert, moral culpability, and blameworthiness, however, are not appropriate parts of a system of criminal law in a modern society.

Criminal law is like any other political institution: ideally, it aims to fairly allocate benefits and burdens in a society. It itself produces benefits and burdens which also must be fairly allocated in a society. When we partition criminal law off as a magically unique system, unbounded by the political justifications that rightfully limit our other institutions, we can fail to notice that punishment is costly. Not only do prisons cost money, but police forces, courts, and parole officers do too. There are non-financial costs to law enforcement's presence in a community, and there are benefits as well. There are costs for the incarcerated and their families, and there are benefits that other members of society have in feeling secure not only that they are safe from crime, but that they are unlikely to be subject to criminal punishment. The distribution of benefits and burdens should be justified according to the political principles that govern the society, and in a society of free equals, moral desert cannot play a justificatory role in this distribution.

Because criminal law is a political institution, it is a mistake to believe that violating criminal law is the same as a moral violation. Punishment then ought to be thought of as a sanction against rule violations rather than as a doling out of what a person *deserves* because of their character. Both Chiao and Kelly explain that the criminal law is not the right kind of institution to address morality. It punishes rules of a political community, not pre-political moral wrongs, and because of due process constraints and epistemic limitations surrounding the moral capabilities of defendants, it is not a fine-grained enough institution to determine blameworthiness. From Chiao, I take on the idea that the criminal law is a public law, or in my

terms, a political institution that is part of the social contract. From Kelly, I take the idea that blameworthiness cannot be determined by using the tools that criminal law has at its disposal. From both theorists, I take the idea that the criminal law must be subjected to the same systems of political justification that the rest of our political institutions are. Here, I leave aside the merits of the particular value of the "anti-deference" egalitarianism that Chiao used to fill in an example of a political justification of criminal law would look. And, while there is much that recommends Just Harm Reduction model, I will refrain from adopting it in its details for the purposes of this chapter.

Criminal law is our most coercive state institution. We ought to be doubly sure, then, that it is justified by our political principles. While the particular conceptions of justice in modern society differ, by in large most modern conceptions prioritize some conception of liberty and equality. Blame doled out by a political institution is inconsistent with these principles. As Kelly notes, retributivists are quick to argue that blaming the morally culpable is a way of showing equal respect. But in reality, blame is an exclusionary reaction.

> [B]lame—at least in its more punitive realization —is a moralized form of social condemnation that sets the morally culpable apart, either temporarily or permanently; the moral engagement of blame belongs to a form of social control that bears a close relationship to the exercise of social expulsion.[250]

Social expulsion is a rejection of equal political membership. Blame is inconsistent with the exercise of criminal law as a political institution because blame works to set a person outside of the political community. But the proper role of criminal law in an ideal society is to sanction rule breakers with the ultimate goal of supporting social cooperation of everyone, including the rule breakers. Judgments of moral culpability, blame, and excuse are the domain of interpersonal morality, not criminal justice. When we act as if the criminal law can determine moral

[250] Kelly, *Limits of Blame*, 108

culpability and should give people what they morally deserve, our system has tended toward excessive punishment, inhumane treatment, and the justification of intrusive and violent law enforcement for the sake of stopping the morally depraved. Not only is that not the domain of criminal law, it is not something any political institution can do or should attempt.

Chapter 4: Criminal Law as Public Policy Tool for Fighting Violence Against Women?

A Feminist, Expressivist Justification for Punishment of Rapists and Domestic Abusers

0. Introduction

In first several chapters of this dissertation, I argued that the American Criminal Justice System is an oppressive structure that has created a new class of oppressed people, those oppressed qua criminal. I have argued that this type of oppression is intimately linked with racial oppression, but that it is not reducible to a form of racial oppression. I have also argued that we ought to abandon retributivism as a justification for criminal law and punishment in the United States, and that criminal conviction is not sufficient evidence of moral culpability. Instead, I argued in the last chapter that we ought to think of criminal law in an ideal society as a political institution that helps support social cooperation with the greater political community. Criminal law and punishment then are not ends in themselves, but support the goals and policies of the political community. Erin Kelly notes that in criminalizing and punishing certain behaviors, the political community can expresses disapproval of those kinds of acts, although she is careful to note that this is distinct from expressing blame for those who have committed the acts (as we cannot know just because they are criminally liable that they are morally blameworthy).[251] Vincent Chiao explains that, because criminal law is public law, calibrating particular aspects of criminal law is a matter of weighing public policy concerns using an example of how to define sexual assault in Canada.[252] The Canadian Supreme Court dealt with a complex problem of whether or not someone could be guilty of rape if the person believed that the would-be victim

[251] See Chapter 2 of this dissertation; Kelly, *Limits of Blame*, 144–47.
[252] Chiao, *Criminal Law,* 107–09.

was consenting if the would-be victim did not consent. Ultimately the court made the defendant's subjective belief in consent an affirmative defense in which the defendant would have to convince a fact finder that they had objective reasons for the subjective belief. He argues that if this change made prosecutions for rape easier and therefore resulted in lower rates of sexual assault in Canada, on his theory, this benefit should be weighed against the costs—and not just financial costs. Essentially, some new class of people would be subject to conviction and punishment, and we would need to be sure that this cost was justified by the benefit with reference to our overall political principles. The example highlights the fact that, if we focus on the ideal theory of criminal law as a political institution, the door is left open for using this political institution as a tool ameliorate inequality. But, because I have argued that the criminal justice system in the United States is oppressive, I argue that we cannot use it in this way.

As I shift from arguing that 'criminals' are oppressed in the United States to unpacking the implications of that oppression, I will address an argument for using criminal law as a public institution to support gender equality. Specifically, in this chapter, I will build what I take to be the most favorable argument for using the criminal law to fight against rape, domestic abuse, and other forms of violence against women. Anecdotally, I have found that many mainstream feminists are eager to join a movement to end mass incarceration, focusing mainly on shortening sentences for drug offenders and other non-violent criminals. At the same time, feminist activists have been pushing for more incarceration and law enforcement involvement when it comes to rape and domestic violence. In this chapter I offer what I take to be the most coherent and strongest case for using criminal law in this way. To do so, I draw on the work of Jean Hampton.

Jean Hampton has argued that addressing the injustices of the criminal justice system is simply at cross purposes with addressing violence against women,[253] which she calls "one of the most important — perhaps the most important, tool in the oppression of women."[254] In this this chapter, I will explain why rape is so often raised as an objection or limitation to radical reformation of the United States' criminal justice system, and I will articulate what I take to be the best argument in favor of using the criminal justice system to fight gender inequality in the form of gender-based violence. Particularly, this question is raised by feminists (academic or otherwise) who have worked to combat violence against women, and they are genuinely upset about the prospect of leaving rapists unpunished.

In this chapter, I aim to create the most defensible position that I believe feminists can build to justify prosecution and incarceration of those who commit rape and domestic violence. This position attempts to address the structural nature of violence against women by using the social meaning of punishment to stigmatize this violence.[255] I think that something like this theory undergirds the public calls by feminists and women's rights advocates who call for better enforcement of laws against rape, sexual assault, and domestic violence. Here, with the help of feminist political and legal theorist Jean Hampton's work, I hope to articulate and systematize this type of justification. In the next chapter I will show its limitations. In short, this is a model that combines expressivist retributivism with a focus on justice for the victims with a public

[253] Hampton, "Punishment, Feminism," 31–36. She calls this the problem of working with different "cross-currents" of oppression. She grounds this question in trying to understand how to respond to the fact that within racially oppressed groups, there is still gender-based oppression, and it is difficult to try to understand how to deal with those who are both victims (of, say, racial oppression) and perpetrators (of, say, gender oppression). I hope that this dissertation goes a long way toward answering that question, at least within the context of the criminal justice system and feminist concerns about violence against women.
[254] Hampton, "Punishment, Feminism," 31.
[255] This position does not represent the actual justification rationales most commonly expressed in the public spheres by politicians, and I believe that it presents a tension with the Law and Order movement that is historically linked to the rise of mass incarceration because it views rape as a structural problem, not simply as a matter of individual responsibility and morality.

education theory of punishment that ultimately would deter people from committing violence against women by changing the norms around rape and domestic violence. This model is centered on the claim that punishment, at least in part, is an institutional communication about the values of the community and of the lives of women.

I will proceed by first examining why rapists pose a particular challenge to my position that criminals are oppressed. Second, I will examine a high-profile case in which feminist activists responded to a convicted rapist receiving a light sentence with a strong call for harsher sentences for rapists on the grounds that harsh punishments express the value of the victim. Third, I will explain how this feminist activism can be backed by a theory of punishment, and I will explain that theory drawing from Jean Hampton's work. I will close by gesturing toward some particular problems with this theory that I will take up in more depth in the final chapter of this dissertation.

1. Why the Rapist?

The most common question that people, philosophers and non-philosophers alike, ask me when I tell them that I think criminals are oppressed is, "What about rapists?" Why the Rapist? Out of all the possible crimes, this is the one that all kinds of people invoke. There are at least two reasons for this. First, along with murder, rape is the worst of the typical crimes that come to mind. So, by asking this question, people are often trying to ask how someone who has done something that nearly everyone agrees is morally abhorrent can be oppressed. They are thinking of the "worst of the worst" criminals.[256]

[256] Additionally, the victim can be imagined, she is typically a woman, and, for some, she will be imagined as helpless and innocent. Compare the stereotyped victim that this question conjures with the stereotypes often raised when rape and sexual assault victims make claims against particular men. In these cases, feminists often note that women are often asked how they contributed to their own circumstances. Rather than being viewed as agency-less victims, they are viewed as having so much agency so as to be able to dominate those they accuse. I note this just to highlight that women's relative agency or victim status can be evoked by different people at different times for

Secondly, particularly when feminist theorists or practitioners ask, they are thinking of the issue of a countervailing oppressed class. When I suggest that incarcerated people are oppressed, a legitimate feminist response might be that the same person who I am claiming is oppressed has been involved in the oppression of women. Moreover, the objector might respond that the importance of taking the oppression of women seriously by punishing rapists is at least as legitimate as trying to end oppression against those who are incarcerated. In fact, Jean Hampton makes just this point in her "Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law."[257] There are two claims that I think are wrapped up in one: first, a rapist cannot be oppressed because they will likely be getting what they deserve, and second, regardless of whether or not the circumstances of criminal law or punishment are oppressive, we cannot give them up as tools for fighting the oppression of women, in particular, by punishing those who commit violence against women.

So, if people ask about rapists because they are asking about the most violent criminals and/or those who commit crimes against women as a part of gender-based oppression, there are at least three rationales that such objectors would have for imprisoning rapists. All three are typical punishment justifications, but they take on special significance because of the severity of the violence of rape and the fact that it is a part of systemic violence against women. The first reason that we might need to incarcerate rapists is incapacitation. In this argument, rapists have shown their propensity to harm people (usually women), and with domestic abusers, there is ample evidence that they will harm their partner again, as stalking and partner murder are often the endgames of serious domestic abuse. This argument then is that, for the safety of the victim

different uses. us to ask what role the image of the rape victim is playing when we are justifying punishment versus how we actually tend to treat those who claim they have been sexually assaulted or raped.

[257] Hampton, "Punishment, Feminism," 32–34.

and other potential victims, the rapist or abuser must be locked up. This argument also might be raised with murder or other violent crimes, with slightly different details, as the contexts of murder, recidivism rates, and other factors will differ. I will call this reason for demanding incarceration the *incapacitation rationale*. Sometimes the term 'incapacitation' can feel too theoretical, so I often think of this as the idea that the government should do what it can to keep women safe.

A second and related reason is the *deterrence rationale.* This is a typical argument for punishment for all kinds of crimes, but I think that often when feminists raise it in regards to rape or domestic violence, they are making a more specific argument about these kinds of crimes. They argue that rape and domestic violence are extremely common crimes in the United States, and that rape and domestic violence are not prosecuted at the same rates as other crimes. They argue that at least one cause of this lack of prosecution and under-punishment is that the victims are women, and we take violence against women to be normal or acceptable. In other words, because we do not value women's lives, we do not punish those who perpetrate violence against women very much. In turn, the lack of meaningful investigation and punishment fails to deter others from committing violence against women, thus reinforcing the normalcy and acceptability of violence against women. They would argue that it follows that we especially need to punish (and punish harshly) those who rape and abuse because lax punishment in the past has contributed to the extremely high rates of these types of crimes against women, and it has reinforced their normalization. This is different than the safety or incapacitation rationale because it is intended to deter future crimes, both those that the person being punished might commit (specific deterrence) but also those that anyone in the society might commit (general deterrence). Moreover, it explicitly will recognize the role that rape and domestic violence play

in structural sexism because it picks out that rape and domestic violence are part of bigger structures of sexism, so that crimes against women are, in part, caused by and reinforce structural sexism.

While the above rationales can be seen as broadly consequentialist because the purpose of incarceration is to achieve some other end, be it incapacitation or deterrence, many people who ask this question might feel that their concern is more that rapists *deserve* punishment in the form of incarceration. This is broadly a *retributivist rationale*, the argument that people who commit certain types of wrongs deserve to suffer or to undergo hard treatment because of the wrong that they have done. Cases in which another person is deeply harmed, such as rape or hate crimes, seem to draw the most intuitive support for retributivist theories. In this case, the extreme moral harm of rape gives strong intuitive motivation that the rapist *deserves* incarceration. Like incapacitation and deterrence, retributivism is a theory of punishment that is used to justify punishment for all kinds of wrongdoing, but when rape is concerned, there are special motivations for retributivist arguments. First, rape is a deep kind of violence, and one which rightly outrages most people. Second, some feminists might argue that because rape is a kind of sex-based oppression, it is particularly deserving of hard-treatment. Similar arguments can and have been made to explain why those who commit racially motivated violence especially deserve harsh punishment. In fact, it usually these types of crimes that retributivists are quick to refer to when justifying their positions: rape, race-based violence, and genocide. While these kinds of arguments are largely supported by appeals to moral intuition, these intuitions are quite strong and may be motivating to a broad range of people, from feminist philosophers to members of juries. There is something about group-based harms that seems to elicit especially strong feelings that the perpetrators deserve extremely harsh punishment.

One type of retributivist theory of punishment is the argument that punishment *has an important expressive function*, which, broadly speaking, argues that when a government punishes, it expresses condemnation of the crime it is punishing. In this case, an expressivist argument for the punishment of rapists is connected to the idea of rape as a type of oppression which especially needs to be denounced by the state in the form of punishment that expresses the depth of the moral wrong. It is retributivist in the sense that the expression of condemnation for the wrong is deserved regardless of the consequences. Like hard treatment, expression of condemnation is simply the fitting response for moral wrongdoing.

Political activists often rely on this idea when they make a converse claim: the lack of punishment for crimes demonstrates that the government or society as a whole do not truly care about these crimes because they fail to decry the moral wrongdoing. Advocates against gender-based violence can be understood as making this claim when they argue that the government shows lack of concern for women when they fail to punish rape and therefore condemn it. Similarly, in the Movement for Black Lives, one of the central claims is that the government's failure to punish those who kill black people (often police officers, but not always), demonstrates a lack of concern for homicide when victims are black. This lack of concern shows that black lives do not matter to the government or society, which is why the movement counters with the slogan "Black Lives Matter."

Expressivist rationales are typically seen as types of retributivism because the wrongdoer is said to deserve moral condemnation or shaming. But, there are also times that expressivist views of punishment are employed as a part of an overall consequentialist project. For example, one might argue that expressing moral condemnation though punishment will work to deter would-be rapists. Or, to put the point in terms that feminists examining oppressive structures

might use, the moral condemnation of violence against women through punishment (which has been insufficiently employed by our sexist institutions up until now) might alter the structural or institutional incentives so as to weaken structural sexism. By changing the government's expression, increasing official condemnation of rape and other forms of violence against women, we can change social norms. Indeed, changing criminal law institutions would actually amount to structural change as failures to punish rapists or domestic abusers are exactly the kinds of structural flaws that contribute to or even constitute institutional sexism.

This paper will focus exclusively on the expressive justification, both in its retributivist and its deterrence versions. The expressivist view, I think, is the most powerful justification for incarcerating rapists for feminists. The incapacitation rationale can be satisfied by less coercive and less demeaning policies than employed by the American criminal justice system. Whether punishments actually work effectively as deterrents is much debated by empirical studies. But, the arguments for deterrence that seem to be driving most feminist accounts focus on the importance of stigmatizing rape and other forms of violence against women by prosecuting and punishing those who commit such violence.

2. Brock Turner: Case Study for the Expressivist View of Punishment

One striking example of a rapist whose light sentence provoked public outrage is Brock Turner, who notoriously raped an unconscious woman in an alley outside a fraternity party near

Stanford University.[258] Two graduate students saw Turner on top of the Chanel Miller[259] in the alley, and when they yelled at him, they observed that she was unconscious. They corralled him as he tried to run away, called for help, and later testified against Turner. Turner was charged with several counts of sexual assault. A jury heard the testimony of Miller, Turner, and the graduate students, as well as expert testimony about how intoxicated both Turner and Miller were based on blood alcohol tests. He testified that both he and Miller were drunk, that they had danced and kissed at the party, and she had agreed to accompany him to his dorm. He said she fell on the way, pulling him down on her, and they began kissing. He testified that, with her consent, he digitally penetrated her. On her account, however, she did not recall meeting him, let alone kissing or consenting to sexual activity. The jury then found Turner guilty of three felonies: assault with intent to rape an intoxicated woman, sexually penetrating an intoxicated person with a foreign object, and sexually penetrating an unconscious person with a foreign object.[260]

The case drew national attention when Judge Aaron Persky sentenced Turner to six months in a county jail (of which he served three), as well as probation and registration as a sex offender. Many viewed this sentence as problematically short and insufficiently light to be proportional to the harm that he had done to Miller. Moreover, many found Judge Persky's

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[258] Kate Manne has treated this example in her book *Down Girl: The Logic of Misogyny*. She uses Turner as the paradigm example of 'himpathy,' a situation in which people express more sympathy for a man accused of sexual assault or harassment because of the implications of the allegations than for the victim of the assault. Manne, *Down Girl,* 195–211. I do not deny that this dynamic is at play in the Turner case, and I think that it is relevant that Turner was a well-placed, heterosexual, white, cis man. Certainly, who we have empathy for is colored by racism, misogyny, and other structural inequalities. Nevertheless, here I argue that the form of expressive retributivist thinking at work in the non-ideal world can result in support for practices that themselves are deeply inhumane and damaging. I argue that no human being deserves such treatment, even if he is a rapist, murderer, or abuser.

[259] Chanel Miller, the woman who Brock Turner raped, has since identified herself and specifically asked that her name be used. She is tired of being referred to as simply "Brock Turner's victim." See her powerful account in Miller, *Know My Name*.

[260] The account in this paragraph comes from Miller, "All-American Swimmer."

comments at the sentencing hearing problematic because they seemed to downplay the seriousness of the sexual assault and the impact on the victim. Judge Persky noted how much anxiety the media attention had produced for Turner, and he thought that he was less culpable for the attack because he was intoxicated. Judge Persky said that, though Turner seemed not to take full responsibility for the sexual assault, Judge Persky believed that Turner was being truthful about his subjective experience, implying that Turner had believed Miller had consented.[261] During sentencing, Judge Persky stated, "Obviously, the prison sentence would have a severe impact on him."[262] Outrage grew when Turner's father's statement was also made public. He lamented that his son was depressed, no longer wanted to eat T-bone steaks, and was unable to continue what had been a promising career as a swimmer. The father said that his son's life was ruined based on "twenty minutes of action."[263]

Later, Miller released her victim's statement, which would have been heard by the judge as part of the sentencing, to the press. In it, she decried the judicial system, noting that the probation office seemed to give credit to Turner for his swimming scholarship in making its recommendation for a short stint in county jail. In the statement, she explained how the sexual assault had impacted her life, including her inability to sleep at night, her struggles to go to work, and her general fear and anxiety. She described the awful process that rape survivors go through when nurses take rape kits, which involves extremely invasive procedures that I will not recount in this paper. She recounted the litany of embarrassing, confusing, and blaming questions the

[261] It is worth noting that this this would imply that the judge disagreed with the jury, who could not have found Turner guilty if it believed his story that he believed that she had consented. Some have argued that this comment demonstrated that the judge was not in fact sentencing Turner for the crime he was convicted of by the jury. That, however, is a different question, one of legality, from the main argument put forward by detractors, which is that the judge simply did not take the crime seriously enough to punish it sufficiently harshly.
[262] Levin and Walters, "Judge in Stanford."
[263] Hunt, "'20 Minutes of Action.'"

defense attorney asked her on the stand. She also described being re-traumatized when she heard Turner's testimony that she had consented to this sexual activity behind a dumpster.[264]

In response to the light sentence and the public comments, Michele Dauber, a law professor at Stanford, led a campaign to recall Judge Persky. Voters successfully recalled Judge Persky, who is the first judge in 80 years to be recalled in the state of California. Dauber explained why the success of the recall was so important: "We voted that sexual violence, including campus sexual violence, must be taken seriously by our elected officials, and by the justice system."[265] Although it may seem so obvious as to not be noteworthy, it is important to highlight the fact that Professor Dauber, and surely many others, think that the measurement of the severity of the crime is equal to the severity of the punishment to the punishing authority. A short sentence, therefore, conveys the message that the punishing authority, in this case, Judge Persky, does not think the crime was very serious. This statement voices the idea that punishments express society's values by punishing more or less harshly crimes that the society considers to be more or less serious or harmful. On this view, punishments may also express something about the victim or the perpetrator. Harsher punishments may express a society's view of the vulnerability of, for example, children, by punishing crimes against children more harshly. Thus, on this view, when rapes are not prosecuted or the sentences given for them are not as harsh as sentences for drugs, non-sexual violence like simple assault, or property, society is expressing the view that women, who are the most typical victims of rape, are not valuable. We might also find a similar view expressed in the Movement for Black Lives when police are not prosecuted or punished for killing black men and women who pose little if any threat to the

[264] Baker, "Here's the Powerful Letter." Miller was still anonymous when she released her statement in summer of 2016. She gave the statement to a BuzzFeedNews reporter who published it with her permission.
[265] Astor, "California Voters."

police. The defining phrase "Black Lives Matter" may be understood as countering what supporters take as the expression that a lack of punishment, light punishments (maybe a suspension or a firing), or non-prosecutions express the sentiment that the lives of the black people who were killed by police are not important enough to merit serious punishment for their killers.

This idea is very similar to claims Jean Hampton makes in her article, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution." In this article, Hampton argues that certain types of wrongdoing create "moral injuries" to victims. In Hampton's own words,

> When a serious wrongdoer gets a mere slap on the wrist after performing an act that diminished her victim, the punisher ratifies the view that the victim is indeed the sort of being who is low relative to the wrongdoer. When the American courts, until recently, responded to spousal abusers with light punishment or no punishment at all, they were expressing the view that women were indeed the chattel of their husbands. When the present day Canadian courts use a sentencing policy that gives certain types of sexual offenders lighter sentences, on average, than those given to people who have been convicted of burglary, they are accepting a view of women that grants them standing similar to-but slightly lower than-mere objects. Moreover, the widespread tolerance in the American South in the past [of racial violence particularly toward African Americans] demonstrates societal support for the message about relative value which [acts of racial violence] conveyed. Behavior is expressive, and the state's behavior in the face of an act of attempted degradation against a victim is itself something that will either annul or contribute further to the diminishment of the victim.[266]

In this statement, Hampton argues that the severity of a punishment or the lack of prosecution of a crime are expressions of the state about how it views those crimes and their victims. The article as a whole argues that the role of the state in punishment is to restore the moral status of the victim, which is diminished by the wrongdoer in certain kinds of crimes. The quotation above, however, is an aside, a conclusion that Hampton does not expressly argue for in this article.[267] I

[266] Hampton, "Correcting Harms" 1691–92.
[267] Instead, she unpacks the claim that because actions can have meanings, some kinds of wrongdoings express the meaning that the victim of the wrongdoing does not have the equal moral status of human being as the wrongdoer.

will use Joel Feinberg's discussion of the expressivist functions of punishment to introduce the expressive functions of punishment. Here I will explain how these functions relate to the argument that the government does something of value when it punishes rape and expresses lack of concern for rape victims and perhaps all women as members of a group that is structurally vulnerable to rape.

3. Feinberg's Expressive Functions of Punishment

In his seminal article, "The Expressive Function of Punishment," Feinberg argues that punishment can be differentiated from mere penalties because punishment is "a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority or those 'in whose name the punishment is inflicted.'"[268] Punishment, then is an expression of condemnation, and the reason that punishment is able to convey condemnation is because of social norms that attach condemnation to certain punishments, particularly incarceration in our society. He argues that this is the case because punishment serves several important functions in society beyond deterrence and rehabilitation. Broadly, his view is a kind of retributivism because he argues that hard treatment is deserved based on a person's wrongdoing, regardless of the other consequences of hard treatment. Moreover, he argues that the hard treatment itself sends the message of disapproval because "certain forms of hard treatment have become the conventional symbols of public reprobation" and that the "expressive aspect of …incarceration is precisely the element by reason of which it is properly characterized as punishment and not mere penalty."[269] He suggests that we should not think of the expressive aspect of punishment something that is added on top

She argues that this is a unique harm called moral injury. Thus, the role of punishment is to create a situation in which the moral status is returned to the victim.

[268] Feinberg, "Expressive Function," 400.

[269] Feinberg, "Expressive Function," 402.

of hard treatment, such as a judge proclaiming "we condemn you!" Instead, the very infliction of incarceration or other hard treatment is itself the condemnation because we as a society have developed this meaning through convention.[270]

Feinberg recognizes that in the actual criminal justice system, incarceration in particular, has come to mean more than simple resentment or disapproval. Cool resentment or disapproval are appropriate expressions of condemnation for modern democracies in Feinberg's liberal theory, but he recognizes that our incarceration practices also express something less civic: "vindictive resentment" or even "hatred, fear, or contempt for the convict."[271] In other words, Feinberg recognizes that when we look at "our" practices (as an American writing in 1965), our punishments express much more than resentment or cool disapproval. They express revenge and hatred. "[T]o any reader who has in fact spent time in a prison" he argues that it will be clear that the expression is more than cool disapproval.[272] Although there is a certain conventional aspect to punishment, some acts will only be able to bear certain kinds of conventional meanings: the brutality of some punishments may not be able to bear the coolheaded meaning of disapproval. They may reveal a more passionate meaning. This gesture at a critique of current practices is tempered by Feinberg's suggestion that there are proper civil and cool-headed expressions that

[270] I suggest that there is an important entailment of Feinberg's premise that punishment can express condemnation because that is its conventional meaning, though he does not note it. If punishment is successful in expressing condemnation because of social convention, this indicates that it is possible that we could have developed other acts that conventionally communicate condemnation or disapproval. Conventions can and do change, so the convention of hard treatment as an expression of condemnation may be changeable as well. Without going into too much detail, there is some (but not unlimited) flexibility as to what social conventions can become attached to natural acts, but the acts that make up hard treatment, which historically included corporal punishment, and today include physical confinement and execution, can probably never take on a positive valence. I am suggesting rather that we may be able to create other social conventions that have the meaning of social condemnation without incarceration or the infliction of physical pain. Thus, it is possible to imagine a society in which we do not measure the severity of a crime by length of the prison sentence. The length of a prison sentence is merely the most common social convention for measuring society's condemnation of a criminal act in the United States now and in recent history.
[271] Feinberg, "Expressive Function," 403.
[272] Feinberg, "Expressive Function," 403.

hard treatment could convey, even if our current system often seems to slip into more vindictive responses.

Feinberg argues that the expressive function of punishment is what enables several other "derivative symbolic functions of punishment." I turn to these functions because I believe they best voice what Hampton and activists like Dauber mean when they suggest that a failure to punish rape or domestic violence expresses society's attitude toward women. The first function that Feinberg elaborates is "authoritative disavowal": "Punishing [a wrongdoer] is an emphatic, dramatic and well understood way of *condemning* and thereby *disavowing* his act. It tells the world that the [wrongdoer] had no right to do what he did, that he was on his own in doing it, and that his government does not condone that kind of thing."[273] Here, punishment is a way for the government to distance itself from the act. With rape, we want the government to say that this is not the kind of action the government endorses, that it is not done with the support of the government. Without active prosecution and severe punishment, there is the sense that the government is not particularly concerned with rape: we get the sense that it does not officially condemn it beyond mere lip service.

The second function, which Feinberg calls "Symbolic Non-Acquiescence,"[274] is similar to the first, but with the emphasis that failing to punish makes one complicit in the crime. This second function adds to the first the idea that the government speaks for the people it governs, so when it fails to punish wrongdoers, the people become complicit in the wrongdoing. Feinberg uses the example of a Texas law in which one would not be punished for murder if they killed their wife's lover in the heat of the moment of discovering the lover in bed with his wife. Feinberg notes that many people in Texas were outraged that such a killing would not be

[273] Feinberg, "Expressive Function," 404.
[274] Feinberg, "Expressive Function," 405.

punished as murder.[275] He argues, "The demand that paramour killings be punished may simply be the demand that this lopsided value judgment be withdrawn and that the state *go on record* against paramour killings, and the law *testify to the recognition* that such killings are wrongful."[276] This, he argues, left the people of Texas with the feeling that they were complicit in condoning the killing of paramours discovered in the act of adultery. This expression is extremely similar to the call for rapes to be punished more harshly—it is a call for the government to expressly condemn rape on behalf of the citizens of the community that the government represents.

Thirdly, Feinberg argues that punishment functions as the vindication of the law.[277] Punishment expresses the idea that the government really means the laws: not only are the laws technically on the books, but also, they are sincerely meant. This fits well with the idea that many women's rights advocates demand that more rapes be prosecuted. Though many rape laws are on the books, the many unprosecuted cases show that the laws are not really important to the government. Similarly, the failure of grand juries to indict police officers for killing unarmed black people is one of the prime complaints of Black Lives Matter activists: if the laws are not actually vindicated, they are mere lip service. Feinberg argues, "A statute honored mainly in the breach begins to lose its character as law, unless, as we say, it is *vindicated* (emphatically reaffirmed); and clearly the way to do this (indeed the only way) is to punish those who violate it."[278] Punishment is the way to distinguish between lip service or empty platitudes and the government actually meaning that it takes seriously the crimes that it has enumerated. If laws are understood (as is common in the positive law tradition) as commands with threats, the threats

[275] Feinberg, "Expressive Function," 405–06.
[276] Feinberg, "Expressive Function," 406.
[277] Feinberg, "Expressive Function," 407.
[278] Feinberg, "Expressive Function," 407.

cannot be empty threats or the laws are not really operating as laws. Laws without actual punishment backing them would be dead letter. In addition to being ineffective in influencing behavior (by, in the case of criminal law, deterring), unpunished law violations demonstrate that the government does not care enough about the law to express resentment or disapproval when it is broken.

Finally, the last symbolic function of the law on this account is the absolution of others.[279] Feinberg gestures at several parties who may be absolved by punishing a wrongdoer. First, he suggests that if there has been a public scandal, punishing the wrongdoer absolves other suspects (at least officially) of the cloud of guilt that may have hung over them. He also argues that when an accuser is publicly considered to be a potential wrongdoer, the punishment of the accused clears the air for the accuser. This may be one of the most important meanings for those who advocate for punishment (and severe punishment at that) of rapists. For example, in the case of rape, often the victim is accused of lying, exaggerating, or simply for complaining about something that she has no right to complain about. With Brock Turner, there was little doubt that Turner raped Miller, but the comments of the judge and the father showed that they thought that what happened to her was not that serious, that she or the prosecutors were making too much of a small crime. The short sentence sent this message as well. Imagine, however, if Turner had been given a sentence of several years. In this case, the victim would be vindicated that her claim against Turner was valid and weighty and that her wellbeing and safety mattered to the government.

Oddly, Feinberg's primary example of how vindication works is an example of how this expressive function of law was misused. He uses a literary example of a young woman who

[279] Feinberg, "Expressive Function," 408.

falsely accuses a young man of rape and then is absolved herself when a jury finds the young man guilty. In this case, she is absolved, though she does not deserve it.[280] But, without turning to fiction or a tricky woman stereotype, a similar case could prove the same point. When Bill Cosby was finally found guilty of sexual assault after dozens of women accused him, though only one accuser's case was actually adjudicated in court, in a way, all the victims were absolved of the question of false allegations. They were vindicated in their claims, most of which could not be brought because of the statute of limitations. One accuser stated, "This is fair and just," and "I am victorious," after he was sentenced to 3–10 years in prison.[281]

Feinberg anticipates that the criticism that one need not actually be punished, just be declared guilty, to perform this function. "Could not the state do this job without punishment? Perhaps, but when it speaks by punishing, its message is loud, and sure of getting across."[282] Although analytically speaking, this is not a very satisfying response, the Turner case illustrates to some extent that this is true, at least in public perception. The jury found Turner guilty, but the failure to give a punishment that seemed to fit the verdict failed to satisfy the public. Punishment seems to add teeth to the criminal law, to prove that the government and the people it represents really mean what has been legislated, and that violation of the law is weighty and serious. A simple proclamation of guilt, perhaps because of the development of our social conventions around what incarceration means, does not convey weightiness in the same way that a severe punishment does.

Feinberg's explanation of the expressive function of punishment supports the claim that failure to prosecute and particularly to punish rapists and domestic abusers demonstrates that the

[280] Feinberg, "Expressive Function," 408.
[281] Bowley and Coscarelli. "Bill Cosby."
[282] Feinberg, "Expressive Function," 408

government, and perhaps the society it represents, does not take these crimes seriously. As Feinberg explains, even if these things are technically prohibited, without punishment, we do not see the state explicitly disavow the behavior, and we do not see the people who the state represents disavowing it. Though laws against such actions are on the books, we do not believe that the state actually means that they are prohibited. Finally, we do not think that the government believes the victims worth vindication: their claims are meritless or unimportant. Perhaps they are lying, or their claims are not worth taking decisive action. When it comes to violence against women, swift and harsh punishment would demonstrate that the government totally disavows it, and that it values the wellbeing of the victims involved. At least, as Feinberg began his discussion, this is what most members of society would interpret the harsh punishment to mean because our conventions tell us that we punish with incarceration those crimes that we abhor. But Feinberg could not help but note that also, when we look at our actual incarceration practices, we see that those people we incarcerate, we hate. And this is why so many are outraged at the lack of harsh punishments for rapists. Our practices suggest that we hate drug offenders and do not mind rapists or domestic abusers so much.

4. Hampton's Dual-Purpose Expressivist Theory of Punishment

Throughout her career, Jean Hampton developed a theory of punishment based on the expressive function of law to ultimately argue that punishment can be justified first and primarily on a retributivist model wherein punishment effectively gets as close as possible to righting the wrong by expressing the moral value of the victim of a wrongdoing. Secondarily, the act of punishment is important moral education. It communicates to the wrongdoer that what they did was wrong, and punishment that inflicts some kind of pain is necessary to direct the wrongdoer to the wrong committed and to educate the wrongdoer as to why it is wrong. Also, the

community as a whole, in witnessing the punishment, is educated about why the wrong was wrong, and can even be educated about the moral worth of the victims and others like the victim. I think that this view, which puts retributivism as the primary justification and moral education as a secondary, consequential benefit, captures many of the intuitions of those who argue that rape and domestic violence are not punished often enough nor severely enough. Some feminists may find the moral education part of the argument more compelling, and may even completely disregard the expressivist retributivism here. Either way, I want to explain this view because I think that together, or separately, these are the best justifications for incarcerating those who commit violence against women. Because her view developed significantly throughout her career, I will make my best attempt to articulate the most complete, fullest arguments that Hampton gives, and where I can, even improve upon her arguments or make additional connections she may not have made as she was not engaged in specifically addressing the question I use her theory to address.

4.1 Retributivist Vindication of the Victim

The retributivist vindication of the victim[283] piece of Hampton's view begins by explaining that acts, including wrongdoings, criminal acts, and punishments, can have expressive functions. Laws perform an important expressive purpose in democracies as well. She states:

> A law can be not only a tool for the organization of the community (e.g., by promoting order, or coordination, or public wellbeing), but also a significant expressive force in that community, symbolizing the community's sense of its

[283] She rejects distributive justice justification for retributivism, which generally states that when a person commits a wrong, they take more of the benefits of living in a shared society by breaking the norms of living together, getting an unfair advantage. Punishment then is supposed to redistribute the benefits and burdens of society to make up for that wrong. Hampton rejects this view because on the whole she says that very few of us would understand most of the serious crimes as something that we have to stop ourselves from committing or that we believe that we would benefit from. For example, rape or murder are not typically things that we prevent ourselves from doing for the sake of society even though they would benefit us. But, what she thinks that this approach gets right is the idea that a theory of punishment must connect the thing which makes an act wrongful with the punitive response. So again, she asks what makes an act wrongful, having rejected the idea that what makes an act wrongful is the undeserved benefit that violates distributive justice.

> values and (what I will call) its "political personality". Indeed, for countries which are not culturally homogeneous and in which the unity of the community is primarily purchased through the principles of its polity, the expressive nature of certain laws can be essential in the creation, maintenance or revision of a unifying identity for that society; this is an identity that not only helps to hold the pluralist society together but also helps people to have a sense of themselves as members of that political community.[284]

Thus, for Hampton, laws express the value of a community, but also, in expressing the values the community shares, laws can themselves create the identity of political communities particularly in those nations, like the United States and Canada, where there is (at least purportedly) no ethnic people that undergird the nation.

Hampton argues that, in addition to laws, acts have expressive values. In her interpretation of philosopher of language Paul Grice, she explains that conduct can have meaning in four ways: natural meaning, word meaning, speaker meaning, and conversational implicature.[285] To explain these four kinds of meaning, she uses a particularly heinous act in order to show that one person can use act to diminish the human value of another person or persons. The story, passed down in a Black family who supposedly knew the victims, is told this way: a white farmer was somehow offended by a black farmhand and his four sons. The farmer caught the men, placed them in burlap bags hung from trees, and was about to light them on fire. One of the black farm hands asked for a cigar before he died. The farmer then castrated the man and placed his penis in his mouth and told him to smoke it. He then burned all the men alive.[286]

This story is heinous not only for its dehumanizing cruelty, but also because of the racial terrorism implicit in it, and in the United States, most will have some sense of the background racist structures that likely allowed this white farmer to commit these murders with impunity.

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[284] Hampton. "Punishment, Feminism," 23
[285] Hampton, "Correcting Harms" 1675–77. I only explain her interpretation of Grice's categories, and I take no position on whether she is accurately representing these categories or his views on how conduct can have meaning.
[286] Hampton, "Correcting Harms, 1675.

For Hampton, this act demonstrates how conduct can diminish the human value of people. "The message conveyed by the farmer's behavior in this incident is one that not only denies *all* of the humanity these men possess, *all* of their manhood, and *all* of their rights as sentient creatures, but also any part of creature of them that could be thought to make them worthy of any degree of respect."[287] The act was dehumanizing because it treated the men as if they did not have the same moral worth as other human beings. The farmer treated them as less than human, and indeed, he enjoyed treating the man he castrated as an object even in the face of a human request for comfort before death. Not only did the farmer convey that the men were less than other human beings, Hampton argues that conduct includes a corresponding elevation of the actor: the farmer's conduct conveys the meaning that he is superior to his victims, elevating his own power and mastery over them by doing to them whatever he pleased in complete denial of their right not to be treated as trash or useless objects because of their humanity.

From these features of this example, she defines wrongful actions that produce moral injury and thus require a retributive response:

> A person behaves wrongfully in a way that effects a moral injury to another person when she treats that person in a way that is precluded by that person's value, and/or by representing him as worth far less tha[n] his actual value; or, in other words, when the meaning of her action is such that she *diminishes* him, and by doing so, represents herself as elevated with respect [to] him, thereby according herself a value that she does not have.[288]

Again, Hampton's definition of moral harm is based on the difference between the value that each human being actually has, regardless of any circumstances, and the way the wrongdoer treats that person so as to represent the victim as having less or no such value. This diminishment can also be achieved by violating the rights and norms that are entailed by having human value.

[287] Hampton, "Correcting Harms," 1675.
[288] Hampton, "Correcting Harms," 1677.

The very act of doing this is a statement by the wrongdoer that they are worth more than the victim because they are asserting that they have the power to deny this human status to the victim. Thus, the diminishment of the victim entails the statement of the superiority of the wrongdoer.

Hampton argues that the farmer is able to communicate all these things without explicitly saying them because the acts themselves are expressive. Following Grice and using the farmer's conduct as an example, Hampton explains the four different kinds of meaning that an act can convey. The first, the natural meaning, is not linguistic, but more evidentiary, as when we say "smoke means fire" we really mean that smoke is evidence that there is fire. When the farmer killed the five men in this manner, he meant it as evidence that they had no value as human beings at all.[289] The second, word meaning, is the kind of fixed conventional meanings that words and other kinds of acts have. Thus, in contemporary America, showing someone a raised middle finger is meant to convey disrespect or anger. Burning alive and castrating, Hampton argues, have fixed conventional meaning. They have a conventional meaning of being particularly demeaning, cruel, and dehumanizing.[290] Third, speaker meaning, is when a person uses other things beyond convention to make an intention known. Thus, a person could misspeak when trying to curse someone out and still convey the meaning intended by the attempted cursing. Hampton argues that the way in which the farmer burned the men as if they were trash was not a typical convention, as say, lynching was, but burning the men in burlap sacks conveyed the farmer's contempt for the value of the men's lives. Moreover, in making novel use of castration by his "joke" with the penis went beyond the typical conventions of racialize killing and conveyed a deep sense of his intentions. In so doing, not only did he castrate the man, but

[289] Hampton, "Correcting Harms," 1675.
[290] Hampton, "Correcting Harms," 1675–76.

implied through his actions that his penis was a mere object and had no meaning as a human organ deeply connected with manhood.[291] Finally, conversational implicature is also meaning that differs from explicit language spoken, for example, the use of sarcasm. Hampton argues that when the farmer used the form of responding politely to a request, "here, smoke this," while actually performing a heinous and cruel act, the farmer used conversational implicature.[292] Thus, the farmer used his act, and the meaning the act conveyed, to express that the men were below him. In so doing, he committed an act of moral injury, and a particularly heinous one at that.

Given Hampton's extended discussion of this particularly violent crime as an example of moral injury, one might be tempted to think of moral injuries as only being serious or violent crimes. But Hampton notes that it is the communication of moral superiority in an act that makes it a moral injury, not the seriousness of the crime. For example, she argues that taking a book from a university library without checking it out can be a moral injury because the library-rule breaker can keep the book as long as she wants without incurring fines, having the book recalled, or having to return the book on time. She is putting her own desires or needs for the book above those of other library patrons.[293]

Hampton is careful, however, to distinguish moral injury from harm. Harms require correction, but moral injuries require retributive responses. The wrongfulness of an action is distinct from the harm that it causes. Here, she refers to the fact that in the Anglo-American legal system we have a legal structure—tort law—which is responsible for correcting harms. Under a tort theory, the central goal is to identify a harm and the actor responsible for causing it. There often has to be some kind of wrongfulness in the actor, such as negligence (such as, for example,

[291] Hampton "Correcting Harms," 1676–77.
[292] Hampton "Correcting Harms," 1677.
[293] Hampton "Correcting Harms," 1680.

driving a little too fast for prevailing road conditions), but under tort law, it is not necessary for the actor who caused the harm to have done something that draws *moral* condemnation. Indeed, there are times when an actor who causes harm is still liable for correcting it even when her actions are overall not morally condemnable.[294]

This leads to the question of what makes an act wrongful such that the actor needs to do something other than simply correct the harm. To return to her example, the farmhand and his sons were harmed: they were burned alive, and one was castrated. Certainly, this involved tremendous amounts of physical and psychological pain in addition to loss of life. But if this same physical pain and death happened as a result of a natural disaster or even as a result of a negligently caused fire, we would have a different response to it: we would mourn the loss of life and feel anger or regret that the men suffered pain. Hampton suggests, "However, what makes the harm effected by a wrongdoing 'worse' for us, and hence the target of a special kind of anger in us, is the way it constitutes a treatment of the victim that violates entitlements which that person's value requires other human beings to respect."[295] In this way, Hampton separates out moral injury from harm. Even the psychological harm suffered by the victims in this example is distinct from the moral injury that results from the violation of their human value. This diminishment occurred because the farmer represented the men as not having value by killing them, particularly in such a demeaning manner, and by violating the rights that are necessary correlates of that human value, including the right not to be tortured, maimed, and murdered.

[294] Hampton uses the famous case of the person who tied up a boat on another person's dock in a storm even though he did not have permission, and the dock was destroyed, but not doing so would have caused much more damage. He was still liable for paying to fix the dock, and he did one small wrong thing by using the dock without permission, but the overall act was not wrongful.
[295] Hampton "Correcting Harms," 1678.

Because wrongdoings inflict moral injury diminish the human value of another person or persons, Hampton argues that a proper response must address this diminishment. She explains that conduct deserves a *retributive response* when it "causes a moral injury, which means that it expresses and does damage to the acknowledgement and realization of the value of the victim."[296] Because acts can be expressive, some acts can express the idea that the victim is less valuable than she really is, or an act can prevent a victim from appreciating her own human value. This particular expression makes an act wrongful in a way that requires a retributivist response.

Hampton defines a retributive response as follows:

> In short, retribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.[297]

The central goal of this response is to attend to the victim's human value, and this kind of mending generally requires more than words or pronouncements. This is why she uses the idea of constructing an event; she notes that simply proclaiming (arguably even in an official venue like a court) that the act was wrongful and denied the victim's rightful value does not address the diminishment. Instead, she argues that we must "respond by trying to remake the world in a way that denies what the wrongdoer's events have attempted to establish, thereby lowering the wrongdoer, elevating the victim, and annulling the act of diminishment."[298] The idea of "constructing an event" and "remak[ing] the world" is certainly compelling, but what could this mean in the real world? Being incarcerated for a period is certainly is a type of event, and in many ways, when a person serves a prison sentence, at least they are remade.

[296] Hampton "Correcting Harms," 1685.
[297] Hampton "Correcting Harms," 1686.
[298] Hampton "Correcting Harms," 1686–87.

But Hampton does not go this route. She writes, "Moreover, it is a mistake to focus, as philosophers have always done, on the punishment of felons to explain and give examples of retribution because constricting retributive responses for those who commit serious wrongdoings is extremely difficult, and there is good reason to believe that our legal system does not do a very good job of it."[299] She notes that in many cases, punishments (especially those that aim at eye-for-an-eye *lex talionis* proportionality), end up instead morally injuring the wrongdoer as well.[300] When a punishment itself treats a wrongdoer as not having human value, it fails to be an appropriate retributive response and becomes another instance of moral injury.

Still, Hampton has left us with a grueling story of a heinous act and the call for the construction of an event that might respond to this grave moral injury. The murder of these farmhands was a racist hate crime, among the worst imaginable, and the victims' human value utterly denied with the kind of cruelty that is attentive to detail, delivered with a kind of cool detachment that evades excuse. These kinds of crimes are often those appealed to by retributivists, acts that are not just violent, but that often have an element of group-based oppression in them: genocide, rape, racial terrorism, police brutality, domestic violence and family annihilation. Although Hampton argues that an act as non-violent and even impersonal as taking a book from a library without checking it out may also cause moral injury (because the library-rule breaker puts themselves and their desire to have the book above the needs or desires of other patrons), it is the most brutal acts that leave us reaching for some kind of response that can match the deep injury that they cause.

Interestingly, Hampton turns to punitive damages in tort cases as a better example of a retributivist response than typical criminal punishments. Specifically, she finds exemplary the

[299] Hampton "Correcting Harms," 1685
[300] Hampton "Correcting Harms," 1690–91.

punitive damages awarded by a jury for defendant company Ford after it failed to recall Ford Pintos despite knowing that they were highly likely to explode, injuring and killing passengers.[301] A passenger severely damaged in a fire caused by the explosions sued Ford, and during the case it was discovered that Ford knew of the problems with its Ford Pinto. Ford had calculated the cost of paying out injury and wrongful death suits, placing a relatively low value for each life it expected to be lost, versus the costs of removing the car from the streets. It determined that it would cost less to keep Pintos on the streets and pay families for the deaths caused by the car than to recall it.[302] When the jury on this case received this information, it gave an extremely high punitive damages award to the carmaker. In fact, the jury awarded the total profits that Ford expected to make by not recalling the car and awarded it to the plaintiff: exactly the amount that Ford had expected to save by not recalling the faulty car, and the jury made this explicit (125 million dollars).[303] Hampton found this to be a fitting retributive response because it put the punishment in terms the company could understand, cost/benefit terms, while at the same time demonstrating that the value of the human lives lost to the faulty car design could not be captured by the costs of wrongful death lawsuits. Though a higher court found the award to be excessive and lessened it, Hampton holds this punitive response as an example of the right kind of retribution.

But money damages are certainly not appropriate for many cases. Indeed, when the wrongdoer is a human and not a company,[304] money damages are often impossible. For example, how much money did the racist, homicidal farmer have? Certainly not enough for a retributive

[301] Hampton "Correcting Harms" 1687–89.
[302] Hampton "Correcting Harms" 1688.
[303] Hampton, "Correcting Harms" 1689.
[304] Arguably, on Hampton's theory, the people working for Ford who made the relevant decisions deserve a retributive response as well. Even if one could get 125 million dollars from one of them, it is difficult to imagine that this is an appropriate retributive response on Hampton's theory.

response. In circumstances where a crime has been committed, money damages might be very appropriate for correcting harms (to use Hampton's distinction) by, for example, replacing damaged or stolen property or paying for medical costs including mental health treatment for trauma after an assault. But, Hampton argues that what is needed is a response to the moral injury, not a correction of a harm. For her argument, harm is a different moral category that deserves attention, but it does not exhaust the required response, especially from the state in the case of serious moral injuries. Therefore, punitive damages in tort cases do not provide a hopeful resource for proper retributive responses on Hampton's theory. What she seems to find promising about the Ford case is the thought process involved in the jury's response, which is unique. It cannot be the case that criminal punishments must be so inventive and almost poetic. There is no way to replicate the kind of response the jury in the Ford case found.

One example in the criminal justice sphere that Hampton finds promising is a program in which perpetrators of rapes must, through court-mandated therapy sessions, confront what they did to their victims by listening to or reading victims' accusations and engaging in role play where they imagine being rape victims.[305] The purpose is not rehabilitative, though that was often a positive side effect noted by the programs, but to reshape the roles so that wrongdoer is no longer in the position of superior or master, but is instead feeling what the victim would have felt in some way. It is important to note that in this case, it is not a strict *lex talionis,* the idea that a wrongdoer should suffer the exact same ill he visited on another. This program does not include a rapist actually being raped, and Hampton is careful to delineate that the program she advocates does not actually put the wrongdoer in the position of his victim because to do that would be to morally injure him, diminishing his human value (which, no matter his crime, is not

[305] Hampton, "Correcting Harms," 1689–90.

actually ever lessened). Again, there may be something of value in such a unique response, but it is difficult to imagine how to replicate such a punishment. Criminal law cannot be expected to respond to moral injury with novel and creative ways of reshaping the world. It is unclear whether or not such a program would even have the intended effect of putting the rapist back in his place.

Additionally, Hampton's theory requires proportionality, which is difficult to square with these creative and almost singular retributive responses. "The more awful the wrong, the larger the purported gulf between wrongdoer and victim, and the more substantial and severe the punishment must be in order to defeat the wrongdoer and thereby deny his claim to superiority."[306] Though she does not argue for this point in detail, Hampton relies on our intuition that certain acts, such as racial violence or rape are more diminishing than simple assault, which in turn is more diminishing than the library-rule breaker, who only places herself above others in the case of unlimited access to a book, not violence. The retributive responses for these different acts must be proportionally calibrated on Hampton's account. We might think that fining the library-rule breaker is a good punishment, as she was in effect able to access a book without due dates or fines, and, should it be effective, suspending her borrowing privileges, which she abused, for a time. But it is not so clear how we would calibrate an appropriate retributive response for people whose wrongdoings were so horrendous that to simply perform a *lex talionis* response would entail committing moral injury to the wrongdoer.[307]

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[306] Hampton, "Correcting Harms," 1690.

[307] The point I am making here relies on the idea that there can be moral injury, as Hampton explains, that is based on the particular social context, such as taking a library book without checking it out. There, one is placing themselves above others with respect to having access to what is supposed to be, by the convention of the library system and the rules of the particular library, a shared resource. Within that context, taking away the right to borrow books is not a moral injury. But, if the wrongdoer has done something that is a moral injury in any context, a *mala in se* crime like violence, there is no way to respond in exact kind without causing moral injury. We can say to library-rule breaker, 'you don't get library privileges because you broke the agreement that gave you the privilege to check out that book.' But we cannot say to the rapist, 'we are going to rape you because you raped someone else.' Indeed,

Illustrating the difficulty of crafting the retributive event that restores the human value of the victims and puts the wrongdoer in her place, Hampton shies away from fully endorsing any one retributivist response to the farmer who heinously killed the farmhands. She notes that in fact, the failure the state to punish the farmer was a statement of agreement with the degrading message of the crimes.[308] She compares this to the state not punishing rapists, which she understands as an expression of the state's lack of concern for the lives of women.[309] She then explicitly appeals to the reader's intuition about what fate the farmer ought to have met (presumably at the hands of the state):

> Indeed, if I asked you "What ought to be done to such a farmer?" surely you would demand the severest possible infliction of pain that you believe morally justified (and even those who do not favor capital punishment might find themselves wanting to respond "kill him"). What is it that produces this reaction? Surely it is not elicited in us because we believe that such behavior ought to be deterred: of course we want it deterred, but that goal has nothing to do with our fury at this man that our reaction expresses. Nor does that reaction betray any interest in morally educating or changing him for the better; maybe after some consideration we might agree that these goals are appropriate (so that killing him would be inappropriate), but regardless of whether he can be changed, we want him to pay severely for what he did to those men.[310]

How much pain can we inflict on the racist, homicidal farmer and be morally justified? Our current social practices would certainly suggest that we could imprison him, even for life. But it is unclear how imprisonment can *right the wrong* of brutal racist murder. Can we have the state torture him? To the execution table or firing squad? On the one hand torturing him is certainly a

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we could not even say to the individuals in the Ford company that were responsible for keeping Pintos on the road that we are going to be reckless with their lives, force them to ride around in Pintos for years, or subject them to fiery car crashes. I think that this is Hampton's biggest hurdle in expressing her concept of retributive response because the moral impulse that justifies the retributive response of needing to *right the wrong* does not seem to be satisfiable in serious cases without crossing the line into morally injuring the wrongdoer. Especially with defendants like Harvey Weinstein or Larry Nasser, it is difficult to imagine a prison sentence that *rights the wrong* of abusing one's power to rape many, many women. Fifty years of prison time will not give a victim of rape the sense of self and security that the rape took from her. In fact, Hampton is asking for a response that is not usually possible.

[308] Hampton "Correcting Harms" 1684.

[309] Hampton "Correcting Harms" 1684.

[310] Hampton "Correcting Harms," 1684–85

violation of his human value, and thus a moral injury. But simple limitation of freedom, even for life, seems not to fit the requirement of remaking the world so that his victims are returned to their place as valued human beings and he is returned to a place of human equality.

Hampton recognizes that the current incarceration practices of the west are probably not the place to start with regards to an appropriate retributivist response. She cautions philosophers, stating that confining our thinking of retributivism to the kinds of punishments that felons receive in western societies' criminal justice systems is a mistake because these institutions have not been good exemplars of the kind of retributivism that she advocates. But she struggles to articulate what a proper retributive response would actually look like, particularly when confronted with heinous acts of racial terror. She shows tentative optimism at the idea of rapists who are confronted by therapists with the horror of the pain of rape victims, but this program seems like it must be taking place within the confines of incarceration, and it is unclear whether it would really have the world remaking ramifications for the actual victims of the rapists. Instead, it seems to be more focused on reminding the rapists of their place rather than raising up the victims.

The tension that Hampton's expressive retributivism comes to is that, as much as she grasps at potential punishments that might be able to right the wrongs that she discusses, in very many cases, there simply is no act or event that will right the wrong that does not also morally diminish the wrongdoer in the process. In this particular iteration of her theory of punishment, she is demanding that criminal punishment achieve something that is simply not possible. There is no way to right the wrong of the racist murders of the black men she described.

Hampton recognizes the difficulty in giving an appropriate response to violent crimes, and she is also circumspect about the role the state can play in responding to moral injury. In

many cases, she thinks that someone besides the state might be better suited to respond to everyday moral injuries. But, when it came to the racist, homicidal farmer, she argues that only the state "in its capacity as impartial moral representative of the entire community, is in a position to send the kind of profoundly humbling message, and the kind of profoundly humbling experience, that stands any kind of chance of vindicating the value of the victims."[311] She also explains that a liberal state would fail to meet its own standards if it did not respond to the racist farmer's actions with a retributive response.[312] Her discussion of how a state must balance its obligations of retribution with other principles (squaring punishment of hate speech with freedom of expression, attending to various obligations to differently situated citizens) recognizes that the state cannot have an unlimited imperative to punish moral injury. Nevertheless, she sees the state playing an essential role as a moral agent that uses acts to express the value of members of society.

There are two ways of interpreting the particular role that Hampton has cut out for the state in righting moral wrongs, a strong sense and a weaker sense. In the stronger sense, the sense she seems to mean in this article, is that the state has the moral obligation in serious cases of moral injury (at least racist murders, rape) to actually *right the wrong* caused by moral injury through a retributive response that lowers the bad actor. Here the state is acting as a moral agent and representative of the whole community. This is the kind of view that Kelly and Chiao criticize in their respective theories of criminal law and punishment. As is evident by the difficulty in constructing an appropriate retributive response these serious injuries without morally injuring the wrongdoer, a system of criminal law cannot achieve a moral response to a pre-political wrong. As I argued in chapter 3, criminal law systems work to support systems of

[311] Hampton, "Correcting Harms," 1694.
[312] Hampton, "Correcting Harms," 1701.

cooperation. It is unrealistic to expect that they can right moral injury, and if we expect them to be able to do this, our punishments will likely be extremely harsh, at least when confronted with violent crimes.

But this political view suggests a weaker version of Hampton's retributive response to victims. The state has an obligation to respond to violations of the rules of social cooperation. In any liberal society, that obligation will include rules that respect the liberty and equality of each member of the political community. The government has a strong reason to use criminal law and other political institutions to express the equal value of all, and that requires some kind of response to serious moral injury. This will look much more like what Kelly suggests the state owes victims of crime under her Just Harm Reduction model. As she concludes, a criminal law response to victims means "using the criminal justice system to incapacitate, deter, and rehabilitate criminal wrongdoers, and, when possible, to redress the harmful effects of crimes on their victims. These purposes together constitute a morally adequate response to victims. I submit that victims have no right to a retributive form of justice that would go beyond these aims."[313] On this weaker version of Hampton's view, the state might use criminal law (not "retributive responses") to acknowledge and promote the equal standing of a victim of a crime, particularly if that victim is from a group that has been subject to a history or recurring practice of inequality as is the case in violence toward black people and gender-based violence. But demanding that the state do the impossible, *right the wrong* of racist murder or rape, is demanding something that is not possible.

[313] Kelly, *Limits of Blame,* 145–46.

4.2 Moral Education

In her later work, Hampton begins to emphasize a different approach to justifying punishment. She argues punishment can morally educate both the wrongdoer and the society as a whole. She differentiates moral education from rehabilitation by noting that rehabilitation aims to make the offender a functioning member of society by, for example, teaching him a trade or to read, or more generally, to get along well in society. A moral education, on the other hand, "attempts to teach both the wrongdoer, and the public at large, that there are important moral reasons for choosing not to perform the criminal offence."[314] For example, a moral education could instill in a thief respect for property rights. At the same time that the punishment educates the wrongdoer, it expresses and thus strengthens the social norm that property rights are important. If the wrong in question violence against women, which Hampton calls the most important tool of gender oppression,[315] then the punishment expresses moral condemnation of violence against women and aims to educate the rapist or abuser of the nature of the wrong he committed. Here, she argues against what she calls a left-wing approach to punishment as rehabilitation only, which sees the roots of crime as poverty and inequality. Instead, she insists that "those who are guilty of a criminal offense have a moral problem."[316] In giving the wrongdoer a moral education, she argues that the punishment both improves the wrongdoer and treats him like a moral agent rather than a hapless victim of circumstances (a view that she condemns her left-wing critics for). She refers to this as specific moral education, and like specific deterrence, it is aimed at the individual wrongdoer and will hopefully have the effect of preventing the individual wrongdoer from committing this moral wrong again.

[314] Hampton, "Punishment, Feminism" 40.
[315] Hampton, "Punishment, Feminism," 30.
[316] Hampton, "Punishment, Feminism," 40.

Just like deterrence, moral education has a specific form, which is aimed at the education of the wrongdoer, and a general form, which is aimed at society as a whole.[317] When the wrongdoer is punished, she is morally educated. At the same time, the punishment expresses to the greater community the importance of the moral norms at play, such as respect for persons, respect for property, the equal value of women or of racial minorities, depending on which crime is being punished. In turn, this education acts as a kind of general crime prevention by providing moral-social motivations for complying with the law in addition to simply punishment-avoidance.

Punishment is able to educate because punishment has expressive functions. Hampton writes:

> A free and democratic society expresses, and ought to express, through its punishment, its commitment to behavior that respects the freedom and equal dignity of all its citizens. To the extent that this commitment is conveyed through the operation of the criminal justice system, the larger society is benefitting from the moral messages this system sends, insofar as its values are reinforced in a way that may strengthen people's allegiance to those values and deter behavior that violates them."[318]

Hampton argues that punishing those who commit crimes proportionately to their crime expresses of the equal value of each person in a democratic society. Punishing those who commit gender-based or race-based crimes in a way that acknowledges the moral injury done to the victim is a way for a democratic society to express the equal value of all genders and races.[319] From her argument, it follows that when a rapist is punished, that sends the moral message to the community that rape is not something that we allow because we value the life and bodily autonomy of the rape victim. This reinforces the norm against raping so that others will not only

[317] Hampton, "Punishment, Feminism," 40
[318] Hampton, "Punishment, Feminism," 40.
[319] Hampton, "Punishment, Feminism," 40–41.

avoid raping to avoid punishment, but also to avoid violating an important norm. When society does not punish rapists or domestic abuser's sufficiently harshly, that society is not expressing the equal value of women, who are the likely victims of such crimes. Not only this, but the lack of punishment fails to educate the public about the equal value of women. Punishing rapists and abusers more harshly would educate the public about the equal value of women and thus deter people from committing these crimes against women.

Punishments, which include both a moral communication and hard treatment, can educate in a particularly compelling way. "Expressive punitive responses […] have the potential for provoking thought that can bring about a change in the wrongdoer's way of thinking about himself and his society."[320] Hampton suggests that the act of being punished provokes the wrongdoer to think about why he is suffering hard treatment, hopefully leading the wrongdoer to repudiate his wrong acts. Punishment prompts this thinking on Hampton's view because punishment is "an educative communication."[321] This ultimately is a benefit to the wrongdoer because it treats him as accountable for his wrongs, thus upholding his agency. It also benefits him by addressing the moral problem that he had when he committed the wrong. Poverty, lack of education, and other circumstances of oppression may often contribute to the likelihood of crime, and rehabilitation can attempt to ameliorate those conditions. But, punishment as educative communication attempts to explain to the wrongdoer that the wrong was a *moral* failing, not simply a causal implication of circumstance. Hampton, in reaching for words to describe how this might work, quotes Herbert Morris, a retributivist theorist, saying that the wrongdoer's "soul

[320] Hampton, "Punishment, Feminism," 43.
[321] Hampton, "Punishment, Feminism," 40. Here, she seems to have a similar idea as the original penitentiaries, in which punishment was supposed to be a way to force the wrongdoer to think about his wrong, ultimately becoming penitent. For a discussion of the development of penitentiaries, see chapter 2 of this dissertation.

is in jeopardy as his victim's is not."[322] This moral peril is then supposed to justify the moral educative function of punishment. In a way, we owe it to the wrongdoer to punish him in this particular kind of way in order to help him save his soul, or, less dramatically, to learn to be a more moral person.

In her earlier work on moral education, she likens punishment to an electric fence that sets up moral boundaries. She writes, "But on the moral education view, it is incorrect to regard simple deterrence as the aim of punishment: rather, to state it succinctly, the view maintains that punishment is justified as a way to prevent wrongdoing insofar as it can teach both wrongdoers and the public at large the moral reasons for choosing not to perform an offense."[323] The pain of the shock tells the wrongdoer not to commit the act again, and warns any who can see of the consequences of committing the act. But this is not merely social conditioning of associating proscribed acts with pain, Hampton argues, because human beings are able to reflect, and the pain of the shock should prompt the wrongdoer and the onlooker to reflect about why the punishment occurred and hopefully will come to learn a moral lesson.[324] In this way, she argues that the moral education theory does not run into the same criticisms that a deterrence theory does because the punishment is aimed at doing something *for* the wrongdoer—it aims to educate him—and only secondarily educates the greater public.[325] She also points out that her view relies both on moral objectivism (there has to be a correct moral truth to communicate to the wrongdoer) and human freedom (the person has to be able to choose how to act, not merely react as animals avoiding another shock at the fence without understanding why).

[322] Morris, "A Paternalistic Theory," 268, quoted in Hampton, "Punishment, Feminism," 40.
[323] Hampton, "A Moral Education," 117.
[324] Hampton, "A Moral Education Theory," 117–18.
[325] Hampton, "A Moral Education Theory," 118.

Additionally, Hampton argues that the focus on education provides a helpful upper limit on punishment. While deterrence theory would seem to justify any brutal punishment if it successfully deterred others from breaking the law, Hampton argues that the upper limit of moral education is much more appropriate. "On this view the goal of punishment is not to destroy the criminal's freedom of choice, but to persuade him to use his freedom in a way consistent with the freedom of others. Thus, any punishment that would damage the autonomy of the criminal is ruled out by this theory."[326] This fits nicely with Hampton's retributivist response theory, which insists that the retributivist response carefully balance the need for proportionality with the restraint that the punishment cannot itself be such that it morally injures the wrongdoer by treating him as if he does not have equal moral value with every other human being.

Punishments that inflict some kind of pain (not necessarily physical) are essential for educative purposes.[327] Hampton argues that the pain, like the electric fence, notifies the wrongdoer that society prohibits this action. But Hampton also argues that inflicting a certain kind of pain, the limitation on the wrongdoer's freedom, will give him a dose of what he has done to the victim. "By giving a wrongdoer something like what she gave to others, you are trying to drive home to her just how painful and damaging her action was for her victims, and this experience will, one hopes, help the wrongdoer to understand the immorality of her action."[328] But, Hampton does not argue for a strict *lex talionis* type of proportionality (the literal proportionality of eye-for-eye, life-for-life punishments) in which the exact same harm done by the wrongdoer is visited upon her. This would often lead to the kind of moral injury described

[326] Hampton, "A Moral Education Theory," 127.
[327] Hampton, "A Moral Education Theory," 131.
[328] Hampton, "A Moral Education Theory," 131.

above: we do not respect the wrongdoer as a rational human being by killing or raping her. Hampton argues that when wrongdoers steals or rapes, they

> are performing immoral acts in order to satisfy their own needs and interests, insensitive to the needs and interests of the people they hurt. The way to communicate to such people that there is a barrier of a very special sort against these kinds of actions would seem to be to link performance of the actions with what such people care about most—the pursuit of their own pleasure.[329]

Because most wrongs that are criminalized in some way involve the wrongdoer placing illicit limitations on a victim's freedoms (property crimes limit what the victim may do with her own property, and certainly violence and rape also involve some kind of limitation on one's bodily autonomy), subjecting the wrongdoer to "disruption of the freedom to pursue the satisfaction of one's desires," points the wrongdoer to how unpleasant this restriction is, and therefore to the moral wrong that he has committed against the victim.[330] In this way, Hampton argues, the wrongdoer can be moved from a mere acknowledgement that society prohibits certain actions to the knowledge that it is morally wrong to act in ways that limit the freedom of others. These kinds of limitations on freedom, incarceration, fines, and forced service do not morally harm the wrongdoer, argues Hampton, as strict eye-for-an-eye proportionality, but they do connect the type of harm committed to the punishment. And this punishment can be scaled according to the severity of the crime.

The fact that this kind of moral communication is public means that the punishment can secondarily serve as education to the community. In a passage partially quoted above, Hampton argues, "Our moral convictions as a community are implicit in the stand we take either for or against certain kinds of behavior. A free and democratic society expresses, and ought to express through its punishment, its commitment to behavior that respects the freedom and equal dignity

[329] Hampton, "A Moral Education Theory," 131.
[330] Hampton, "A Moral Education Theory," 128–130.

of all its citizens."[331] When the laws are upheld through punishment of violators, the values that undergird the laws are supported in the community as a whole, in part through deterring law violations, but also by demonstrating that the state takes these kinds of violations seriously. Hampton is certainly drawing from Feinberg's functions of punishment, as punishment is a way for the state to communicate its commitment to the laws and the values in them. Therefore, if a state punishes a rapist harshly, it is communicating not only to the rapist that he has done something deeply wrong, but it is reasserting to the community at large that rape is very bad, and we value women and do not want them to be victims of rape.

For Hampton, the two justifications for punishment, retributivism for the victim and moral education, can work together to mutually reinforce one another.

> Ideally, one would hope that a punishment that is properly vindicative of the victim's value will also be a communication that is morally educative for the criminal – if he will but listen to it. One would also hope that it is a message that the larger society will hear so that the community will see the value as a free and democratic society implicit in the punishment process of those who have behaved in ways that are violative of those values.[332]

The primary purpose of a justification for punishment is to vindicate the victim who has suffered moral injury. The reason that punishment can vindicate the victim is because it is expressive: punishment can express in a concrete way that the victim's human value, denied by the wrongdoing, is morally equal to everyone else's, including the wrongdoer. Because it is expressive, it can also express that diminishing the victim is wrong, a message that both the wrongdoer and the community can hopefully hear. This message must be more than mere words, however, as the diminishing act, the moral injury, was more than mere words. As Hampton argues, the retributivist response must "remake the world" and one way of doing that is to limit

[331] Hampton, "Punishment, Feminism," 40.
[332] Hampton, "Punishment, Feminism," 40.

the freedom of the wrongdoer so that they can understand the pain of limited freedom (which they inflicted on the victim). This has the effect of putting the wrongdoer back in their place, dethroning them from the elevated place they put themselves in through their wrongdoing.

5. Applying the Dual Expressivist Theory

In "Correcting Harms versus Righting Wrongs: The Goal of Retribution," Hampton is tentative about her recommendations for actual policies that could turn her expressivist theory into practice. She cautions against turning to the typical incarceration practices of the United States and Canada as exemplars, as their policies are too likely to go too far in inflicting pain on wrongdoers, likely causing more moral injury in need of a retributivist response. She expresses some interest in a program in which rapists have to, under the guidance of mental health professionals, listen to the testimonies of victims of rape in order to try to experience, though in an abstracted way, what it is like to be raped (without actually undergoing the moral injury of rape, somehow). Likely the most telling example of how this theory would play out in real life is Hampton's own position on a real legal issue in her native Canada. In her paper, "Punishment, Feminism, and Political Identity," she recounts her role as an expert witness for the Canadian government when it defended its law prohibiting prisoners from voting while incarcerated. Hampton was asked by the government of Canada to testify on its behalf, supporting the disenfranchisement of those in prison serving a sentence of longer than 2 years.[333] She agreed, and this paper is her explanation of why she agreed that disenfranchising these incarcerated people was just.

Using both her retributivist vindication and moral education approaches to justifying punishment, Hampton argues that disenfranchising citizens who are behind bars is consistent

[333] Hampton, "Punishment, Feminism," 24–25.

with the democratic ideals of Canadian society. The law in question is not like many laws in the United States that disenfranchise felons after they have been released from prison. Rather, the legal and moral question was whether or not people convicted of relatively serious crimes (demarcated by the fact that they are serving sentences of more than 2 years) should be able to vote while they are serving their sentences.[334] She hesitates before concluding that the law is just because she is concerned about the systemic discrimination apparent in the Canadian Criminal Justice System, where indigenous people were significantly more likely to be incarcerated than their white peers.[335] She also expresses concern that denying voting rights to some people, here, incarcerated people, could send a message that the incarcerated people were insubordinate to others.[336] Such a message of course would be undemocratic and could also be a moral injury on her own definition. But, she ultimately denies that either concern is substantial enough to override the retributivist vindication of the voter disenfranchisement.

Hampton argues that both the left-wing experts, who argued that those incarcerated had committed crime in large part because of their socio-economic backgrounds, and the right-wing experts who insisted on individual responsibility alone, failed to understand an important view of the matter: the victims' view.[337] She (noting her position as the only woman expert witness and as a feminist scholar) argues that violence against women, one of the crimes that could result in incarceration for more than two years, is also a form of systemic oppression, even if race and class oppression contribute to their incarceration. She argues, "The traditional left-wing analysis of crime that laments the 'criminalization' of people by certain systemic forces in our society and calls for us to rehabilitate them, but then says nothing whatsoever about the victims, particularly

[334] Hampton, "Punishment, Feminism," 25.
[335] Hampton, "Punishment, Feminism," 29.
[336] Hampton, "Punishment, Feminism," 29–30.
[337] Hampton, "Punishment, Feminism," 30.

the female victims, of these 'criminalized' people, is blind to the way these offenders are actually encouraging and helping to enforce a form of oppression in our society."[338] Here, just as the person who asks, "What about the rapist?" Hampton argues that there are two kinds of oppression at issue in considering the negative consequences of criminal punishment in American (or in this case, Canadian) society. Although she recognizes that there are likely racial oppression concerns, she refuses to sacrifice the oppressed women's cause. She argues that the feminist position forces her to take up the perspective of victims, particularly victims of gender-based oppression. Once we take up this position, rather than asking whether the wrongdoer (the conservative position or the society (the liberal position) is the true cause of the crime, we focus on making the situation right for the victim.[339]

Hampton also raises the issue of the communities that are disadvantaged, and the women who come from them, and asks how those women feel. She raises the concern that indigenous women in Canada have tried and failed to get their communities to take violence against them seriously.[340] She also uses the example of a "woman from Watts" who was the strongest retributivist she had met, who said that her (presumably black) family was regularly the victim of crime, and the rehabilitation promised by well-meaning reformers never came.[341] Hampton does not use the term 'intersectionality' but she argues that this is the result of taking a "single-focus" emancipatory focus," looking at one kind of oppression, the oppression of the wrongdoers, without looking at how the wrongdoers oppress others based on gender. "To put it succinctly: when there are cross-currents of oppression in a society, how do we develop a theory that will give us a blueprint for dealing with them? No matter which group any of us comes from in our

[338] Hampton, "Punishment, Feminism," 32.
[339] Hampton, "Punishment, Feminism," 31–32.
[340] Hampton, "Punishment, Feminism," 32.
[341] Hampton, "Punishment, Feminism," 32.

societies, these cross-currents will be a burden for us."[342] This, she argues, is not an easy task, and there is no straightforward answer to that question.

Nevertheless, she argues that it is just to prevent those who are incarcerated for serious crimes from voting because to allow them to vote would represent a failure to vindicate the rights of the victims of these crimes. Because voting is a type of political power, she argues, we do not want to give that power to people bent on destroying the community. Just as it would seem contrary to the very idea of political community to give a vote to someone who had committed treason, she argues that it is undemocratic to allow those who express the inequality of others through their crimes a vote. For example, to allow five white men who committed a racist murder of a black man to vote would be "insulting," "repulsive," and "upsetting." They would be participating in a democracy whose values (racial equality) they have repudiated with their actions. Likewise, allowing a rapist to vote would be to allow a person who has shown contempt for the equality of women to vote. She argues that disallowing participation in the electoral system is a good retributivist response precisely because the acts that are being punished are acts that eschew the values of democracy. Disenfranchisement is a retributive response "that negates [the crime's] significance, lest the meaning of a crime go unanswered and the flouted values go unvindicated in a way what would surely encourage future harms to the nation as a whole and some of its members in particular, such as women and visible minorities."[343] She expresses several reasons to justify the retributive response of disenfranchisement: negating the significance of the crime, or "righting the wrong" in the language of her other article; responding to the flouting of society's values, and the effect that such flouting could have in the future if it is not punished.

[342] Hampton, "Punishment, Feminism," 35–36.
[343] Hampton, "Punishment, Feminism," 42.

From these extreme cases of crime: treason, racial violence, and rape, Hampton then goes on to argue that the Canadian law might be "too inclusive" by covering crimes that do not have the political dimension that she sees in all three of these types of crime. But, she suggests that in fact, a white-collar criminal embezzler also could be seen as committing a similar type of crime (her category of moral injury helps here), putting herself above other fellow citizens whose money is lost in her scheme. Though she does not hang her hat on this argument, it seems that if we begin to include any crime in which the wrongdoer acted in such a way so as to put himself above a class of people, then we risk the special moral force of her first three examples being lost. But Hampton does not follow this suggestion all the way, and she is willing to bite the bullet by admitting the law could be over-inclusive.

She also admits that there are costs to this punishment, and that the criminals are the ones to pay the cost, despite the fact that they may have also been on the receiving end of other oppressive structures, including class and racial oppression. She argues that these costs are justified because without these costs, the state would not be able to make the statement that vindicates the victims.

> And when the crime is central to the oppression of some of those victims, in the way that violence is central to the oppression of women, the state's refusal to respond strongly and firmly to that violence amounts to an acquiescence that violence and a refusal to affirm the value of equality that is supposedly in the foundation of the polity. Such a refusal can help to reinforce, rather than combat socially oppressive practices that take the form of violence. It has been insufficiently appreciated that well-meaning compassion toward offenders can, in and of itself, do damage. Kindness toward the criminal can be an act of cruelty toward his victims and the larger community.[344]

[344] Hampton, "Punishment, Feminism," 42–43.

6. Conclusion: Putting the Pieces Together

I will return to the Brock Turner example from the beginning of this chapter to put together the pieces of Hampton's theory into a coherent, feminist defense of the use of criminal law and punishment as tools to fight gender oppression, particularly violence against women. Using Jean Hampton's dual expressivist theory, we can now articulate a full theory to support the outrage at Turner's short sentence. First, let me note a few factors that I think make the Turner case exceptional. Turner is white, affluent, and seemingly unoppressed on any typical rubric of oppression. Therefore, the so-called left-wing approach of the structural disadvantages that can lead to criminality cannot be cited as contributing to his crime. Also, there is little question that he committed the rape given the eye-witness testimony and DNA evidence. Therefore, there were unusually low risks of convicting or punishing the wrong person.

On Hampton's theory, the relatively short sentence sent the message that the crime of raping the victim was not that serious. His punishment failed to vindicate Chanel Miller's rights of bodily integrity and equality. A harsher sentence would have sent the message that the acts Turner committed against her were wrong, a violation of our shared moral norms as a society. On Hampton's strong retributive response view, a harsher sentence could have potentially restored Miller's diminished human value and would have brought Turner down from the elevated social position he took for himself in diminishing Miller. On her moral education theory, in serving a longer sentence, Turner would have been more likely to experience the pain of the limitation of his freedom, hopefully prompting him to deeper consideration of the harm he caused Miller This could have been a gift to Turner: a valuable moral education. And, finally, the punishment would have sent the message to the rest of the community that rape is not tolerated, and it is not tolerated because it is morally wrong. Given the setting of the rape—a college

scene—it could have worked against the "rape culture" on campuses, sending the message that sexual assaults at parties, regardless of the intoxication level of the victim, are unacceptable.

If we, like most feminists, understand rape as a part of structural gender-oppression, then this theory helps to understand how the criminal justice system is a part of that structural oppression. This theory posits that the failure to punish rape and domestic abuse is part of the system of gender oppression. The criminal justice system is a public institution, and its failure to treat rape and domestic violence as serious crimes is itself a structural injustice. By analogy, we understand that lynching was only possible because law enforcement was known not to punish the perpetrators of this racial terrorism. The fact that the law did not prosecute or punish these murders was part of the structural racism of the late 19th and early 20th century United States. Sexism, which is prevalent across social, political, and legal structures, appears in criminal law as meager punishments or lack of prosecution. Short sentences may appear especially insulting to women victims when harsh prison sentences are the norm for much less damaging crimes. We punish so much that it is startling that we do not in fact punish rape and domestic violence (or police brutality). Under this theory, forcing changes in the legal world, including acting to make punishments more severe by, for example, recalling judges who do not sentence harshly enough, is a way of attacking the institutional or structural oppression of women.

This theory is compelling, and it captures the spirit of many of the activists and commentators who are sympathetic to the concerns about the racism and classism inherent in the criminal justice system, and yet not willing to part with it. It also explains how many people can be eager to end incarceration for drug crimes but not for other types of crimes, particularly rape and domestic violence. It also accounts for why in the Movement for Black Lives, harsh criticism for the criminal justice system stands alongside calls to use the criminal justice system

to punish the very police who brutalize black people. This theory takes as its starting place the claim that violence against women is a structural problem, but it includes the criminal justice system as a part of the structure. In this theory, punishing rape and domestic violence more harshly is a way to protect and vindicate the victims of violence against women that can also, in the long-run, change the norms around this kind of violence.

Another attractive feature about the two prongs of this theory is that they can fit within a view of criminal law as a political institution as articulated in chapter 3. We can take a weaker view of Hampton's retributivist victim's rights function of punishment, extracting the insight that criminal law can express the equality of members of society by taking the violation of their rights seriously, so long as this is taken into account alongside other political values. The moral education prong is consistent with using criminal law as a tool to promote social cooperation by reinforcing social norms, particularly those that are most tied to the equality of each member of society, which will be a central principle of any liberal society.

Both prongs of this theory rest on the assumption that punishment sends a message, and the government or society as a whole is the author of that message. Through punishment, the government can express the value of the victim, and work toward righting the wrongs of certain crimes. Through punishment, the society can express its values and teach people to value all lives equally—with special attention paid to women or people of color because members of those groups are being targeted for moral injury based on gender and race. If we understand criminal law to be a public, political institution, as outlined in chapter 3, we can be wary of the strong retributivist version of this claim. But the other two functions of this theory — expressing equal value of all citizens by punishing those who violate other members of society by breaking laws written to protect them, and by expressing clearly the shared norms that undergird the social

cooperation of the political community—seem like worthy ends to use the tool of criminal law to meet. Promoting equality and norms of social cooperation are worthy goals of a criminal legal system in the ideal world. In the next chapter, however, I will argue that the criminal law and punishment systems in the United States today cannot achieve these goals because the current legal system is too deeply unjust to be able to effectively communicate these norms.

Chapter 5: A Non-Ideal Theory of Criminal Law
The Limits of the Feminist Expressivist Theory of Punishment

0. Introduction

In the last chapter, I put forward what I take to be the best defense of criminal law against the claim that the criminal justice system in the United States is deeply oppressive. There, I followed an expressivist theory of punishment, drawing primarily on Jean Hampton, to suggest that criminal punishment ought to be used to express condemnation for particular kinds of wrongs, especially violence against women. I argued that on this view, criminal punishment can begin to vindicate victims as well as change social norms by expressing condemnation for violence against women. In particular, I noted that criminal law could be used to express the equality of all members of society and to encourage social cooperation, goals that fit with Vincent Chiao's view of criminal law as a political institution that functions to facilitate social cooperation. I used this example in part because rape is so often conceived of as one of the worst crimes, but more importantly because it, along with domestic violence, is also part of another system of oppression, gender-based oppression.

In this chapter, I will explain why Hampton's theory, and the political activists who call for criminal punishment in order to address systemic gender oppression, ultimately will fail at their aim.[345] Basically, I argue that punishment cannot express the nuanced message that

[345] There is a parallel between the antiviolence feminist calls for more prosecution and harsher sentences for perpetrators of rape and domestic violence and the Black Lives Matter (BLM) protestors who call for prosecution for police who kill black people. Not all BLM activists are in favor of criminal justice responses, but the demand often made by protestors and activists is for the arrest of specific police officers involved in brutality and murder in addition to calls for other types of structural changes. Although there are certainly parallels, many of which I noted in chapter 4, there are also differences in the social contexts of these two different political movements. These differences mean that I would not straightforwardly apply my critique of the feminist antiviolence movement to the BLM movement. The biggest difference is that the oppression that BLM folks are fighting is within the criminal justice system. They are not trying to use the criminal justice system to fight another kind of oppression. Similarly, in BLM, the same group, black people, is the subject of the criminal justice system's oppression (police brutality) and also the group asking for the criminal justice response (prosecution). Moreover, there is a different historical

Hampton aims for. Because of the history and present practices of the criminal justice system, there is no way to express condemnation for wrong acts without expressing (and through this expression achieving) social and political exclusion of the wrongdoers. As I argued in chapter 3, such exclusion is never a just outcome because the criminal law only properly operates within the social contract, not outside of it. Moreover, given the actual history of the criminal justice system in the United States, this social and political exclusion will fall heaviest on those who are members of other oppressed groups who are nonaccidentally correlated with being treated as criminals. Finally, the use of the criminal justice system in this way could lead to increasing the system's reach and making it appear more legitimate or justified, again at the expense of those who are already disproportionately targeted by the system.

To situate this claim, I argue that both Chiao and Hampton are working under problematic idealizations of the criminal justice system. Chiao works under the assumption that society is a system of mutual cooperation that the criminal law works to reinforce, abstracting away from the actual history of the societies his theory is meant to describe and the actual criminal justice system in the United States. Despite his engagement in application of his model to the non-ideal world, his model itself fails account for the structural inequalities in the criminal justice system. This abstraction from the real world means that we cannot trust the conclusions he draws about the role that criminal law can play in securing buy in with our norms.

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context shaping these protests. Police violence against protestors for civil rights of all kinds means that there is a different historical relationship between BLM protestors and the criminal justice system than between the feminist anti-violence movement and police. These significant differences require a different analysis that the one I give in this chapter regarding the feminist anti-violence movement. Still, I suspect that some of the conclusions I draw will be broadly applicable, though details will certainly vary. For example, although I would not criticize calls from black social movements for asking for particular prosecutions, such prosecutions will be unlikely in my view to make significant institutional change on their own. Shrinking the institutions of policing, prosecution, and punishment is a better way for institutional change.

Hampton's work suffers from similar abstraction problems, some of which I began to hint at in the last chapter. Hampton's theory does not take place in an idealized society, however, as her punishment theory is focused primarily on victims, and not just any victims. She focuses on victims of structural injustices: women and people of color. Her theory then, does not problematically work from a picture of society in which society is mostly a well-functioning cooperative endeavor with a few injustices to solve here and there. Hampton's theory of law, however, does not address the actual workings of the criminal justice system in the United States or Canada. She notes the racial disparities in the criminal justice system, and she even acknowledges that people of color are oppressed (perhaps in a structural way), but she does not take that oppression to be part and parcel of the criminal justice system itself. When it comes to her theorizing about punishment, she fails to understand the criminal justice system as one that is oppressive in structure. Instead, she seems to relegate the overrepresentation of people of color in the criminal justice system to the periphery, an injustice that is accidental rather than essential to the system. Because both are operating under idealizations that abstract away from oppression in the criminal justice system (and for Chiao, in society at large), the conclusions that they draw about the possibilities of the criminal justice system are misguided because they do not take into account structural features of criminal law as it is.

In contrast to the presentation of criminal law as a tool for reinforcing social cooperation, I will argue that the criminal law in the United States is really a type of domination contract, a term used by Charles Mills to describe social arrangements made for the benefit of a subset of members of a political community that claims to be universal. A non-ideal view of the criminal justice system in the United States starts with the understanding that particular groups of people are non-accidentally correlated with criminality, for example, black people in the United States,

as I discussed in chapter 2. It also requires acknowledging that 'criminals' are socially and politically excluded (to varying degrees) because of real or perceived moral failures, which I argued for in chapter 1. Because the criminal justice system in the United States has these features, its ability to communicate clearly about the social equality of members of society is compromised. As it itself regularly victimizes, its ability to stand for the victims is compromised as well. Moreover, Hampton's own concerns that an improper punishment might itself cause moral injury rather than right a wrong are particularly salient given the reality of the domination contract of criminal law.

Finally, I will address a potential criticism. It seems like I am using Chiao's work to make an argument for a central claim in my dissertation in chapter 3: social and political exclusion is not an acceptable criminal punishment because criminal law is a part of the social contract. It punishes wrongs outlined by the social contract, and it cannot expel people from the social contract. If I am rejecting Chiao's argument as an ideal theory abstraction, how can I help myself to that conclusion of his for my overall claim that even 'criminals' who actually commit serious crimes are oppressed? In answer, I explain that ideal theory can play a role in diagnosing some injustices in the non-ideal system, such as clear violations of normative principles. But it cannot explain how the non-ideal systems are actually operating or offer principles or guidance for corrective justice (sometimes called reparative justice). So, we can use ideal theory to say that in a just society, with properly functioning criminal law, there would be no social and political exclusion. There is social and political exclusion in ours, so it must be unjust. But we cannot use ideal theory to say that our criminal justice system can communicate important norms because the ideal system could communicate important norms.

1. Non-Ideal Theory and the Social Contract

There is some debate about what the term 'non-ideal theory' refers to. Many working in political theory, especially contemporary social contract theorists, talk about ideal theory as a project of constructing a "well ordered" or "ideally just" society. The features or principles that shape the society are taken to be normative ideals that can then be used to measure 'non-ideal' societies. Non-ideal theory on this model is like the applied version of ideal theory. One uses ideal theory to produce normative principles of justice, and then, using non-ideal theory, the principles of justice can be used to measure the justice of an existing societies like our own. I refer to this kind of non-ideal theory as 'non-ideal theory as application,' and usually advocates of this kind of non-ideal theory are ideal theorists. That is, their work centers on using the ideally just or well-ordered society a model for theorizing about justice, and secondarily using the principles therein to examine existing societies.

There is another way that theorists use the term 'non-ideal theory,' in which the project of political philosophy is to start with societies that are not well ordered, perfectly just, or mostly just to build one's normative principles. Rather than building a theory of justice based on an ideally just society and only then proceeding to existing societies, proponents of this kind of non-ideal theory want to start with existing, unjust societies and circumstances. Non-ideal theorists of this sort critique ideal theory by arguing that it abstracts away from precisely the kinds of injustices that are present in existing societies. Non-ideal theorists often also add that ideal theory works to hide or obscure the injustices of existing societies. I refer to this use of non-ideal theory as 'non-ideal theory as foundation.' For the most part, throughout this chapter, when I use 'non-ideal theory' I mean it in the second sense of 'non-ideal theory as foundation' unless I specify the first sense (non-ideal theory as application').

Charles Mills' critiques of Rawlsian political philosophy is one well known non-ideal theory critique of ideal theory in the form of social contract theory. Mills criticisms of ideal theory and the social contract tradition go hand in hand. In the social contract tradition, theorists use the device of the social contract to argue about what types of governments or political principles are justified. Going back to Thomas Hobbes and John Locke, social contract theorists imagine human beings in a 'state of nature' meaning that they are not already existing in a social or political community. From there, human beings decide to form a social contract for mutual benefit, and arguments about what people would want that social contract to include provide the ideals for a just government or principles of political justice. No one really believes that these social contracts where actually made this way, but the social contract argument is a kind of metaphor or device for thinking about what the core principles of a government that everyone could endorse look like. Typically, the social contracts also start with moral equality (except Hobbes, who argues for factual equality in being vulnerable to being killed) in the state of nature, and end with a social contract that protects some of that moral equality in the form of political equality. This is usually supported by the idea that no one would give up total moral equality in the state of nature if the social contract did not give some political equality in the new arrangement.

Though he finds much fault with this tradition, Mills recognizes that the social contract tradition helpfully intervened in the prevailing political theories of pre-modernity that focused on natural law or divine command theories. Despite the criticisms that social contract theory hides inequality, it is not without value. "Certainly it is not the case that feminists and critical race theorists want to argue, on the contrary, that sociopolitical institutions *are* natural rather than humanly created or that some humans *are* morally superior to others. At this highly abstract level

of characterization, social contract theory is unexceptional."[346] Mills argues that social contract theory got two things right: (1) social and political organizations are human-made not natural, and (2) human beings are morally equal (and ought to be treated as such). Even if some feminists and critical race theorists argue that social contract theories and ideal theories obscure existing inequalities, they typically agree that all people are morally equal and that human beings created the system of existing inequality.

The problems with social contract theory begin with other aspects of the social contract as it is represented by ideal theorists, particularly in the kinds of abstractions involved in the description of the social contract. In particular, Mills notes that the description of the social contract includes problematic idealization and abstraction from real societies. "While it is true that society and the state are human creations, it is obviously false, as mainstream contract theory classically implies, that all (adult) humans are equal contractors, have equal causal input into this process of creation, and freely give informed consent to the structures and institutions thereby established."[347] Mills' concern is that at the founding moment of the new society, the making of the social contract, each person is represented as having social and political equality in making the determination. In the United States, slavery subjugated a huge part of the population to non-personhood, and non-slave women were also not legally treated as independent persons. There were also class inequalities, such as landownership, that kept many poor white men from equal membership.

One of the key assumptions that Mills finds to be flawed in the contemporary social contract theory of Rawls is that a society by definition is "a cooperative venture for mutual

[346] Mills, "Domination Contract," 86.
[347] Mills, "Domination Contract," 86.

advantage."[348] Moreover, on Rawls' articulation, society is "governed by rules 'designed to advance the good of those taking part in it.'"[349] Mills argues that this is a problematic abstraction because in fact society works as a cooperative venture for some, to the detriment of others, and the rules are designed only to advance the good of a subset of the people who are subjected to them. The role of Rawls' description of society is debated: some argue that Rawls means for this to be a definition of an ideal society, not of actual ones, so they argue that Mills is unfairly critiquing Rawls because Rawls was saying that societies *ought to be* cooperative ventures for mutual advantage, not that society in fact is. Mill's responds by pointing to language in Rawls' work that adds "well ordered" to indicate normatively ideal societies. Hermeneutical disputes aside, Mills' argument is that Rawls believes he is providing an ideally just version of existing societies, whereas attention to the world that we live in reveals that the social contract of Rawlsian ideal theory is not related to existing societies in any meaningful way. Whether Rawls actually thought that his theory of justice presents principles that could, with some work, actually be relevant to the society we live in aside, I agree with Mills that this description of society does not match the United States as a society. The rules governing society have historically and presently worked to mainly benefit a subset of wealthy, white men. Among other things, the United States' deep history of racism, sexism, xenophobia, and classism make it so far removed from a well ordered society that the principles seem irrelevant to addressing existing injustice.

The problem is not simply that the social contract presents an ideal theory that is factually inaccurate, but that the inaccuracies "obfuscate crucial social realities, embed certain tendentious conceptual partitioning, … and thereby undercut the transformative normative egalitarian

[348] Mills, "Racial Liberalism," 37 (quoting Rawls, *Theory of Justice,* 4).
[349] Mills, "Racial Liberalism," 37 (quoting Rawls, *Theory of Justice,* 4).

potential of the apparatus."[350] Mills argues that even if contemporary social contract theorists accept that, for example, the American project did not start out with all people being equal contractors in the United States' origin story, and they would agree that the social contract does not capture these founding inequalities, they fail to trace the repercussions of that 'idealizing abstraction'[351] all the way through the theory. Thus, when the social contract theorists later draw conclusions from this social contract with built-in idealizing abstractions, they can no longer pick out what from the resulting theory can be useful for the world in which the idealizing abstractions do not hold. This is how the description of the community in the state of nature, which is markedly different from actual societies, can lead to principles that do not appropriately respond to the actual circumstances of injustice in existing societies. Moreover, Mills thinks that they can fool us into thinking that the existing world is closer to the ideal social contract than it actually is.

The inaccuracies of the description of the society and people in the social contract lead to complications in the status of the normative claims derived from the social contract. As Mills notes, the typically egalitarian principles that emerge from the social contract theory are not the problem. The problem is that the political equality that emerges in the social contract has been denied in real societies to swaths of people based on their membership in certain groups, e.g., women, people of color, poor people, and so on. Because contemporary social contract theorists did not pay adequate attention to the actual exclusion of women, for example, they did not note the problem with the public/private distinction, which emerged when it was taken for granted that women were not equal members of society. The creation of the public/private distinction in

[350] Mills, "Domination Contract," 86.
[351] Mills takes the term 'idealizing abstraction' from Onora O'Neill. Mills, "Racial Liberalism," 37. Idealizing abstractions are abstractions "that abstract away from social oppression." Mills, "Racial Liberalism," 37.

political theory is a result of the exclusion of some people, i.e. women, from existing societies and from meaningful consideration in social contract theories, even that of Rawls in the mid-twentieth Century. The problem with the social contract is not the principle of political equality. Instead, the problem is that social contract theorists did not recognize how the exclusion of women from equal membership in actual societies affected the resulting political theories. If all we have is the principle of equality without a historical context of gender oppression, the public/private distinction does not appear as a way to exclude women from political equality.[352]

The most damning flaw of ideal theory and the mainstream social contract model is that it cannot provide principles of corrective or reparative justice. "Simply put: in ideal theory, certain problems do not even arise in the first place; but given the fact that in the non-ideal world, they *have* arisen, what should now be done to address them?"[353] Although it might be tempting to think that one could simply apply the ideal theory principles to the non-ideal situation, this does not account for the different ways that harms have accrued because of the history of injustice, how the structures might be corrupted by the entrenching of injustice, or indeed how the individuals in the political society might have been shaped by the injustices. As Mills argues, just because these are the ideal concepts that a society with no history of injustice would build, that does not mean that this is what a society that has had a history of injustice *and has corrected for it* would look like. Both could be considered ideally just societies, but it is not at all a logical deduction that the second society would look exactly like the first.[354]

One example of how such an idealizing abstraction could provide inaccurate principles for an existing society is the idea of being "colorblind." It is true that in an ideal world with no

[352] Mills, "Domination Contract," 87–90.
[353] Mills, "Repairing the Racial Contract," 113.
[354] Mills, "Repairing the Racial Contract," 114–15.

history of racism, nothing in particular should hinge on one's race (leaving aside for now whether or not there would be races at all in such a society). So, in a perfectly just society with no history of racism, one would rightly attend to race very little. But, to take that principle and apply it in, for example, the United States just after slavery was abolished would not be very just. It would arguably be more just than racialized slavery, but it would not provide justice for newly freed people who have no resources or social structure with which to build new, free lives. Walking around that society with nothing by ideal theory principles would actually cause you to be unjust toward the recently freed people. One needs a bit more theorizing to figure out who precisely owes what to the newly freed people to move toward a more just society.

The flaws of the ideal theoretical tool of the social contract originate from the fact that the device depicts human beings as equal contractors in determining the shape of their shared lives. Mills proposes a non-ideal theory counter-part to this device: the domination contract. Of the early social contract theorists, only Rousseau seems to share Mills' insight about the potential problems of the ideal social contract. He presents his own version in his book *The Social Contract*, but Mills sees a nascent domination contract in Rousseau's *Discourse on the Origin of Inequality.* Mills interprets Rousseau' second text thusly: Rousseau paints a rosy picture of the state of nature where all human beings are equal, and inequality is introduced through an inchoate community in which some members start to get more wealth than others. Because they are still without a social contract, the wealthier people are worried that the others will take their wealth, and so they plan amongst themselves to offer everyone a social contract that will, on the surface, give everyone political equality, but in fact secures their wealth and status.[355] This is a domination contract because it recognizes that the contract arose from a state of existing

[355] Mills, "Domination Contract," 81–82.

inequality, and, though the political community that formed was human-made, it was not equally made by all members. It was made by a subset for the purposes of maintaining their higher status.

In addition to Rousseau's contract from the *Discourse,* Mills identifies Carole Pateman's book *The Sexual Contract,* and his own *Racial Contract,* which explicitly took up Pateman's model and used it to analyze racial structural injustice, as domination contracts. Like Rousseau, the domination contracts retain the valuable insights from the social contract convention (the artificiality of the polity and the moral equality of people), but each domination contract starts from existing oppression, recognizing the historical background that enabled the current oppression, and identifying who the current "contract" or political institutions benefit and at whose expense.[356]

Mills explains the domination contract as a device for non-ideal theorizing, just as the mainstream contract is a device for ideal theory. Instead of modeling a perfectly just society by assuming the equality and inclusion of everyone affected by the political community, the domination contract, begins with existing societies, especially the United States and other western countries. "Rather than a fictitious universal inclusion and a mythical moral and political egalitarianism, this revisionist contract expresses the reality of group domination and social hierarchy."[357] The domination contract identifies groups of people who are benefitting from the current political structures and those who are bearing the costs of them. This includes looking at society as made up of social groups in addition to individuals, with an understanding that one's group membership will have important ramifications for how one fares in society. The insight from early social contract theorizing that political institutions and social hierarchies are human is

[356] Mills, "Racial Liberalism," 36–37.
[357] Mills, "Racial Liberalism," 37.

combined with the reality of actual social inequality. These two premises yield the conclusion that the existing social hierarchies are created and maintained by human beings, and likely those who are the beneficiaries of the inequality. Such non-ideal theorizing requires engagement with historical analysis, but unlike Rousseau's creative anthropology, the domination contract, it is more empirically grounded.

The purpose of the device is different in non-ideal theory as well. While social contract theory is meant to offer principles of a perfectly just society, the domination contract's purpose is to uncover the "systemic social injustice and need for appropriate corrective measures."[358] It should also reveal that the existing contract (or set of political institutions) is in place to "reinforce and codify" social hierarchy rather than to promote social cooperation.[359] The domination contract is meant to show that the injustices of a particular group, a race or a gender, are not peripheral anomalies or small injustices in a society that is basically cooperation for the mutual benefit of everyone. The domination contract is meant to show that the institutions are operating as if they were designed to reinforce domination over one group for the benefit of the other, and maybe they were in fact designed that way.

In summary, Charles Mills critiques ideal theory, especially the use of the social contract as a device for theorizing about political justice because it makes inaccurate 'idealizing abstractions' by replacing existing oppression with abstract equality. Social contract theory

[358] Mills, "Domination Contract," 93.
[359] Mills also argues that the very purpose of the mainstream social contract is to secure endorsement of an existing social contract by appealing to an ideal one. Mills, "Domination Contract," 93. This point can appear as an unfair criticism of well-intentioned philosophers doing what philosophers do: make abstract arguments. His point, however, is a gesture toward his work on epistemic injustice, particularly 'epistemology of ignorance,' or what recent work also calls 'white ignorance.' I think there is much to recommend this line of argument, but it is well beyond the scope of this particular chapter. For my purposes, I do not need to adopt the claim that the purpose of the social contract is to secure endorsement of actual unjust conditions through appeal to ideally just ones. For my argument to work, I can take ideal theorists at their word that they are trying to come up with normative principles to help us identify injustice. I argue that their project cannot do that, if that is what they intend.

produced two important insights, however. The first is that the polity is a human creation, not a natural inevitability. The second is that human beings are all morally equal. Social contract theory, however, describes the foundation of the human-created polity ahistorically, and it represents it as an agreement that everyone equally had a hand in creating. This idealizing abstraction of equality and inclusion at an ahistorical founding produces an ideally just society, but one that has little resemblance to our own. The domination contract, as a device of non-ideal theory instead looks at existing, unjust society, describes how existing political institutions actually create and perpetuate unjust inequalities and social hierarchies.

2. Public Law as Social Contract and Ideal Theory

In chapter 3, I relied on Vincent Chiao's theory of criminal law as public law. I argued that he was making a kind of social contract theory argument because he relies on the idea of society as a system for mutual cooperation. His development of the political justification of criminal law is ahistorical, and depends on the idea of the political institutions developing to support mutual cooperation. Criminal law is an institution that is part of that system of social cooperation, offering a last resort backup to the other institutions to assure everyone in the system of mutual cooperation that everyone will comply. Thus, I argued, Chiao presents criminal law as a part of the social contract, not as an independent sphere operating separately from the rest of society to vindicate pre-political moral norms.

Just like the original social contract theory made important interventions in political philosophy when it first appeared, Chiao's theory of public law makes important interventions in the way that philosophers of law have justified criminal law and punishment. For the most part, other philosophers of criminal law have not placed criminal law and punishment so squarely within the political domain. Although retributivists are Chiao's most central targets in his theory,

most consequentialist theories have also failed to take not of this important feature of criminal law: it is a political institution, and not a moral one. Much like the social contract theorists' recognition that social and political structures are human-made, not natural, Chiao's theory intervenes to place criminal law in that same domain.

While his theoretical justification of the political institution of criminal law is ahistorical, he does make some concessions to non-ideal theory. His argument that we should think of criminal law as public law emerges from a historical account of how the modern criminal law system emerged out of a largely private system for redressing wrongs. This account, which focuses on criminal law developments in the United States and the United Kingdom in the 18th and 19th centuries is notably completely void of all discussions of race and most references to class. He only notes that criminal law as public law was, at least in theory, a move to a more equal distributions of the benefits and burdens of criminal law, as prior to public police forces and prosecutors, poor victims would have no recourse for crimes committed against him. His account, of course, is in sharp contrast with the account I present in chapter 2, which makes clear that the 19th century marked the beginning of the deep entwinement of racial hierarchy with the criminal justice system. In Chiao's defense, the period in which criminal law emerged as public law was primarily before black people were considered subjects of criminal law (as property, during slavery, criminal law could not apply to them). Nevertheless, the racial oppression is left out of his chapters that develop the theory of criminal law as public law. In those chapters, criminal law is presented as an abstract adoption of a system for "negative reciprocity" to reinforce social cooperation. It is clear that Chiao means for his theory to apply to the United States and other existing and non-ideal theory societies. Yet, it is precisely the oppressive parts

of the United States that he abstracts away from when he is developing his model of criminal law as public law.

Chiao makes other concessions to non-ideal theory. One of Mills' repeated critiques of ideal theorists is that they never actually get to the non-ideal theory that they argue their ideal theory is in service of. That is, they never do non-ideal theory as application because they are actually more interested in arguing about ideal theory.[360] Chiao, however, spends most of the second half of his book explaining how his criminal law as public law can explain why mass incarceration, over-criminalization, formalism in criminal law, and paternalism in punishment are unjust. He, therefore, engages in non-ideal theory, but of the as-application kind.

It is also clear that he has real-world problems and injustices in mind even as he explains how his theory of criminal law as public law, a largely ideal theory, unfolds in a society governed by "anti-deference" egalitarianism. To illustrate what would be a violation of the principles of criminal law as public law in an anti-deference society, he uses the following practices from the United States: the (now-defunct) common law exception for marital rape,[361] racialized policing and stop-and-frisk,[362] felon disenfranchisement,[363]and other police humiliation and violence.[364] He also connects problems with police brutality to more general concerns about social and political exclusion, meaning that if everyone is not actually equally able to participate meaningfully in group decision-making, the likelihood that police will act more like occupying military than public servants .[365] Finally, while disavowing punishment abolitionism as an ideal, he notes that, given the "dense administrative state," "*here and now,*"

[360] See, e.g., Mills, "'Ideal Theory' as Ideology," 87.
[361] Chiao, *Criminal Law,* 86.
[362] Chiao, *Criminal Law,* 86–87.
[363] Chiao, *Criminal Law,* 81.
[364] Chiao, *Criminal Law,* 77.
[365] Chiao, *Criminal Law,* 77–85.

punishment likely should play a much diminished role in securing cooperation because other institutions will be much better at actually integrating people into the system of mutual cooperation.[366] This strangely seems to be attentive to the real world situation in which it is likely that encouraging rule following by investing in education and social services would be more effective than more prisons, and yet, at the same time, totally ignorant of the reality that there are vast disparities along racial, class, and other lines for access to that dense administrative state.

Despite Chiao's nods to non-ideal theory, his theory of criminal law as public law still suffers from the biggest flaw of ideal theory and the mainstream social contract. That is, we cannot deduce from his view of the role of criminal law in an ideal society what the role of criminal law ought to be in an unjust society like our own. The role that criminal law has played in American society has been to more deeply entrench racism and classism and to oppress people by excluding them from social and political life. Chiao's theory of how law should ideally operate can assist in pointing out the ways that criminal law is currently failing in the United States. But it cannot explain what the society ought to do to correct for this or what role criminal law can play in correcting the oppression it creates or other kinds of oppression in the society like gender-based oppression.

Chiao's argument that culminates in the political justification principles of criminal law, much like Rawls' theory of justice, starts with the assumption that society is a system of mutual cooperation. Criminal law works to support that system by assuring each member that the others will equally share costs and benefits without free-riding through the use of negative reciprocity. Chiao gives a history of how this public law model of criminal law emerged in the United States

[366] Chiao, *Criminal Law,* 95.

and the United Kingdom, where the state took on the task of making the benefits and burdens of criminal acts more evenly distributed throughout the society, but, as I noted earlier, he makes no note of the development of the system into the future and how it did not evenly spread the benefits and burdens of crime. Moreover, when he moves to the detailed argument for the political justification of criminal law, he moves to a highly abstracted game theory. It is not simply that game theory idealizes human beings as highly rational, self-interested actors. It is that this kind of a model presents idealizing abstractions: those that ignore oppression. The actual system of criminal law that was developing where Chiao left off in the 19th century was not operating to solve an assurance problem to help secure a system of mutual cooperation that would benefit everyone. It was a system that imprisoned the poor and re-enslaved black people. Thus, we cannot be sure what parts of the theory that follow are so far afield from the criminal justice system in the United States so as to be completely unhelpful for fixing the structurally unjust criminal justice system.

What we can conclude, however, from Chiao's work is that, on his theory of criminal law, the United States does not have a criminal justice system worth supporting. Let me turn to Chiao's conclusion of what a fully political justification for criminal law would look like. Chiao's argument produces the following conclusion:

"(7) The criminal law is worth supporting if and only if:

a. The institutions whose rules it enforces are worth supporting, and

b. Its use in a particular context would be consistent with the principles that make those institutions worth supporting in the first place."[367]

[367]Chiao, *Criminal Law,* 53.

It is outside the scope of this paper to argue that the United States' institutions are worth supporting (although Chiao notes that "worth supporting" does not require being perfectly just). It also would be difficult to identify the exact principles that make the United States' institutions worth supporting in the first place. We can still conclude that in the United States,' criminal law is not worth supporting following Chiao's principle of public justification. First, when Chiao describes the principles that a criminal justice system would have to adhere to in order to meet this standard of justification in a society that adopted "anti-deference" egalitarianism, he explicitly rules out many American criminal law practices, such as stop-and-frisk, felon disenfranchisement, and lack of meaningful equal opportunity to influence the laws. Second, Chiao spends the remainder of his chapters critiquing important aspects of American law, including mass incarceration, overcriminalization, and adherence to formalism with regard to what counts as punishment (and so who gets the protections of the 4th–8th amendments). From Chiao's ideal theory, then, we can conclude that the actual existing criminal law in the United States is not justified and not worth endorsing. But, it does not tell us what measures to take to move from the unsupportable criminal law to a justified one.

3. Hampton's Ideal Criminal Law

Jean Hampton's theory of punishment cannot be said to be ideal theory in the same way that Rawls' or Chiao's theories are.[368] Nevertheless, her work contains problematic "idealizing abstractions." While Rawls and Chiao idealize society as a system of mutual cooperation as the foundation of their respective theories, Hampton's philosophy of punishment is imbued with the idea that there are deep injustices occurring. Her theory of punishment assumes that there are

[368] Hampton has her own work on social contract, with which Mills engages. While he approvingly cites her work for the premise that social contract theories helpfully reveal social and political institutions to be human-made and humans to be equal in the state of nature, he goes on to critique her use of social contract theory for feminist purposes. Mills, "Domination Contract," 85, 89–91.

structural injustices, particularly gender-based violence, but it also works from idealized assumptions about criminal law.

Hampton's focus on gender injustices and her use of racial violence examples point not only to random, peripheral injustices, but instead on these types of injustices as structural or society-wide. In her essay, "Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law," she explicitly takes the perspective of women as an oppressed group, from which she evaluates whether or not certain prisoners should be disenfranchised. "When all women, regardless of their background, fear the threat of male violence (and modify their behavior so as to avoid it), this violence is not some private affair but a societal practice-with a point. The violence expresses-and helps to realize-the view that men are entitled to dominate over women."[369] She expresses the view that gender-violence is a structural phenomenon used to dominate women. Critical of left-wing and right-wing views on crime, she criticizes both social-justice minded criminal reform advocates and harsh traditionalists about punishment for failing to address violence against women as a structural social phenomenon.[370] Perhaps because she was also responding to criticisms that the criminal justice system perpetuated racial discrimination, she also refers to an example of a racial hate crime, comparing it to violence against women, as both are more than crimes against individuals but also ways of subordinating whole groups.[371] Emphasizing existing structural oppression, in this case gender

[369] Hampton, "Punishment, Feminism," 31.
[370] Hampton, "Punishment, Feminism," 32–33.
[371] Hampton, "Punishment, Feminism," 41–42. Interestingly, her racial parallel to rape and domestic violence is racial hate crimes, and her example in this article, as well as in "Correcting Harms," is of a private individual or individuals committing race-based hate crimes. She is much more dismissive of the fact that the criminal justice system itself includes systemic racial discrimination. She also does not recognize the role that police and correctional officers play in the systemic rape and sexual violence of many women of color. For information on the prevalence of sexual violence by police and correctional officers against women of color, see, Richie, *Arrested Justice,* 49–58. In Hampton's theorizing, the state's injustice is in failing to address the actions of private individuals rather than the state, through public officials, actually enacting the oppressive acts.

and race oppression, as a starting place for theorizing is exemplary of non-ideal theory, particularly when the goal of the project is to find a way to correct that injustice.

In contrast, her view of criminal law as an institution is largely an idealizing abstraction because she presents it as an ahistorical tool whose use will send a straightforward communication about the values of the political community. Consider Hampton's claim that punishments operate like electric fences, giving wrongdoers a shock that invites reflection for the wrongdoer and the general public who sees the shock. She writes, "But on the moral education view, it is incorrect to regard simple deterrence as the aim of punishment: rather, to state it succinctly, the view maintains that punishment is justified as a way to prevent wrongdoing insofar as it can teach both wrongdoers and the public at large the moral reasons for choosing not to perform an offense."[372] In arguing that punishment acts as a moral communication to a wrongdoer, she is assuming an idealized version of punishment. Successful communication through punishment in this manner can only occur if we assume that there are not people who get random shocks regardless of what they do, whether they are touching the fences or nowhere near them. It presupposes a minimally well-functioning system of punishment (not a perfect one, but minimally well-functioning). This is an assumption about the nature of the criminal law that is more in line with an ideal theory approach. If criminal law and punishment did not have a history of oppression, then perhaps it could morally educate in this way.

One could argue against the claim that Hampton has an ideal theory view of criminal law by explaining that in fact, she critiques current practices in the criminal law (namely the under-prosecution of gender-based crimes). This is a claim she makes throughout her work, and I emphasized the claim and explained how her theory supports it in the last chapter. But in fact,

[372] Hampton, Jean. "A Moral Education Theory of Punishment," in Simmons, A. John. *Punishment. Philosophy & Public Affairs Reader*. Princeton, N.J.: Princeton University Press, 1995: 117.

this critique of the under-prosecution of gender-based crimes shows up more as a critique of the state for failing to use the criminal law.

> When the American courts, until recently, responded to spousal abusers with light punishment or no punishment at all, they were expressing the view that women were indeed the chattel of their husbands. When the present-day Canadian courts use a sentencing policy that gives certain types of sexual offenders lighter sentences, on average, than those given to people who have been convicted of burglary, they are accepting a view of women that grants them standing similar to-but slightly lower than-mere objects. Moreover, the widespread tolerance in the American South in the past [of racial violence particularly toward African Americans] demonstrates societal support for the message about relative value which [acts of racial violence] conveyed. Behavior is expressive, and the state's behavior in the face of an act of attempted degradation against a victim is itself something that will either annul or contribute further to the diminishment of the victim.[373]

She refers to explicit states here, not criminal law or punishment in the abstract (as she does when she discusses the moral educative role of punishment). In this particular passage, rather than talking about the abstract possibilities of criminal law, as in the passages on punishment as an electric fence. It is a sort of non-ideal approach, but it is still lacking an important part of the domination contract approach to non-ideal theorizing. She faults governments for failing to properly punish gender-based and race-based crimes, and she finds fault with the sentencing aspect of specific courts, but this is not the kind of structural, historical criticism of the institution that non-ideal theory calls for. In this picture of punishment, criminal law does not oppress, and has no history of oppression, and therefore can send clear, unambiguous messages about the values of the community.

There is one point in which Hampton acknowledges the potential deep-seated oppression in the Canadian criminal justice system. When she narrates her coming to the decision to support the Canadian government's disenfranchisement of prisoners, she explains that the systemic racial

[373] Hampton, "Correcting Harms" 1691–92.

bias evident in the Canadian system, where indigenous people are vastly overrepresented, was one of two things that slowed her decision to support the disenfranchisement.[374] While she is ready to admit that racial oppression plays a role in criminal law in Canada (and presumably the United States) she argues that sometimes different kinds of oppression are simply at cross purposes. One cannot address both, and she chooses to address gender oppression. She appeals to the fact that women of color are also oppressed by men of color, and so seems to make gender oppression a more primary or more important kind of oppression.[375] One can appreciate Hampton's willingness to bite the bullet, so to speak, by acknowledging that she is choosing to prioritize fighting gender oppression over racial oppression. She is likely correct that there are simply times when one must make trade-offs in fighting to alleviate different kinds of oppression, but I do not think the case she presents is actually one of them.

Hampton's observations about the failures of specific states to punish gender violence (and racial hate crimes) and her reluctant admission that racial oppression is in some ways connected to criminal punishment failed fully to impact her theory about the expressive potential of criminal law and punishment. When she explains that the failure of the United States to punish those who murdered black people in the south represented a failure to treat black people with equal respect, the claim rings true. As I have argued, this is the claim that the Movement for

[374] Hampton, "Punishment, Feminism," 29–32.
[375] Hampton, "Punishment, Feminism," 33–36. She also appeals, unfortunately, to a problematic concept of masculinity for men of color. "[T]hose who are oppressed are not immune to the attractions of oppression against others. This is especially true if remedying the oppression that some minority men suffer seems, in their minds, to require that they engage in the oppression of women. That is, if, as some theorists have maintained, the dominant notion of manhood in western societies has built into it the idea that men are the sort of beings who are the superiors of women, and who are entitled to govern them both within the family and in the public sphere, then it may seem to some disadvantaged men that achieving equal standing as men with the men of the dominant group requires that they define themselves as dominant over women—using violence if necessary." Hampton, "Punishment, Feminism," 33. It is worth noting that this is exactly the view of black masculinity that Tommy Curry has strongly critiqued both white and black feminists of various theoretical backgrounds for employing, and rightfully so. Curry, *The Man-Not,* 10–19.

Black Lives makes today. In a society where the criminal law is used so often to address so many issues, a failure of the criminal law to respond to an act of violence certainly suggests, at minimum, lack of concern on the part of the relevant political institutions and their leaders. Criminalization and punishment express social values, even if that alone is not a justification for using them, and the failure to punish people who seriously harm women and people of color does express that women and people of color are not valued (or are valued less) by our society. Though this is an accurate diagnosis of our system, again, her idealizing abstractions about the criminal justice system itself mean that she cannot address corrective justice matters. She might be able to explain to us why this failure to prosecute is unjust, but she cannot offer a path toward a more just society.

Hampton fails to truly account for the history and current practices of the criminal justice system in the United States. The historical failure to prosecute domestic violence and rape as well as crimes against people of color, most especially black people, have communicated the state's and society's lack of concern for women and people of color. But the criminal justice system in the United States expresses many values. Failure to prosecute expresses lack of concern for women or black people, but felon disenfranchisement, stop-and-frisk, exceedingly harsh prison conditions, solitary confinement, and other 'treatments as' criminals have communicated that 'criminals,' especially those doubly oppressed by race or class, are not members of the social and political community. Given the fact that this history and oppression have already occurred, the criminal justice system is not a neutral tool for communicating shared norms like equality.

These other actions, which express moral inequality, in fact prevent the criminal justice system from being able to express the nuanced view that Hampton finds necessary for a just

retributive response. For example, Hampton argues that two scenarios would be equally troubling. One scenario includes the idea that voting means you are an equal member of the polity in good standing, and criminals, including rapists, are allowed to vote. This she says would be a terrible blow to victims of rape and to women as a whole.[376] It would be deeply unjust. The following circumstances, she argues, would be equally unjust:

> [I]magine a state that decided to deprive prisoners of the right to vote so as to denounce not only their conduct but also *them*. On this view, disenfranchising prisoners would be a way of condemning them as outlaws-people who are outside the state and the community as a whole. I regard this way of understanding prisoner disenfranchisement as abusive, degrading, and unjust: abusive because of its message of hate, degrading because of what is said to be his "bad" nature (so that its message makes it akin to banishment) and unjust because of its unresponsiveness to possible systemic forces that can provoke criminal conduct.[377]

This is actually the situation in the United States, and not just with voting rights. Given the context of the United States' criminal justice system, it would seem nearly impossible for it to express condemnation of an *act* but not the *person* who did it. The idea that the state or the society could communicate that we are denouncing the crimes, not the person seems a stretch in any circumstances, but especially in the circumstances, present and past, of the United States. Elsewhere, Hampton stresses that the punishments given to those who commit moral injuries ought not to express that the criminal is of a lower status than the rest of society, lest the punishment end up being itself a moral injury.[378] Even if the actual punishment given to a particular offender in the United States today were not as harsh as typical punishments are (the offender is not, for example, subject to random violence in prison), the meaning of criminal law

[376] Hampton, "Punishment, Feminism," 36.
[377] Hampton, "Punishment, Feminism," 36.
[378] Hampton, "Correcting Harms," 1690.

and punishment in the United States has been to confer outsider status and to reject the person rather than the wrongdoing.

If Hampton used the same approach when examining the criminal justice system in the United States and Canada as she did in explaining violence against women and racial hate-crimes (committed by non-state actors), she would likely have come to a more modest understanding of the capacity of law to morally educate or vindicate victims in actual societies. Unlike thorough ideal theorists, Hampton regularly engages with real societies, and she clearly wants her theories to be responsive to the most critical injustices of actually existing societies. She is also aware of existing social oppression in the form of gender oppression, and she is precisely eager to do corrective, reparative justice for that oppression. But her inability to recognize the structural, historically entrenched oppressive mechanisms of criminal law distorts her ability to evaluate its expressive capacities.

4. A Non-Ideal Theory of Criminal Law

A non-ideal theory of criminal punishment in the United States starts not with an ideal version of how criminal law ought to work, but with a sober analysis of how it does work, with attention to social groups and their subordination and domination. This project has been non-ideal from the start. First, it engages in non-ideal theory by beginning with the recognition of existing oppression: not only is the criminal justice system a tool of racial and class oppression, but everyone who is treated like a criminal is oppressed. Moreover, oppression is a group-based concept, and this theory of criminal law has taken the perspective that the basic agents in society are "people as members of social groups in relationships of domination and subordination."[379] The criminal justice system is taken to have a history, and theorizing about the system

[379] Mills, "Domination Contract," 93.

presupposed historical development rather than as arising from an abstracted, ahistorical "ground zero." A full non-ideal theory account of criminal law would not only engage in the history of anti-black oppression in the criminal justice system, but also of the oppression of other racialized groups, especially Indigenous Americans, the poor, disabled people, including those with mental and intellectual disabilities, LGTBQ+ people, non-citizens, and ethnic minorities.

Non-ideal theory of criminal law also ought to reveal how existing social structures hide oppression. In the United States' criminal justice system, the role of moral blameworthiness is essential. As I argued in chapter 1, the heart of criminal oppression is the idea that those who violate criminal laws deserve to be excluded from social and political life. This appears to be a neutral reason for exclusion. Unlike race or gender, this exclusion seems to be based on something that is within the power of the 'criminal,' and not on some arbitrary characteristic. The fact that criminal exclusion purportedly relies on a moral principle and not on an arbitrary personal characteristic is what makes it so amenable for use as a tool of racism or class oppression.

As I noted, Chiao's work makes an important intervention in philosophy of criminal law and punishment at a very general level, just as social contract theory introduced some important concepts into political philosophy. For the most part, philosophers of crime and punishment have treated criminal law as its own silo, distinct from the principles that govern the rest of society and operating on principles of interpersonal morality that are backed by strong state-based coercion. At this highly general level, Chiao captures an important fact about the nature of criminal law: it is a political construct, and because it uses the coercive force of the state, it needs a political justification, not a moral one. Kelly's work, which does not employ the same kinds of idealizing abstractions as Chiao, draws similar conclusions: we should recognize the difference

between criminal liability, which is a determination that is necessarily limited in scope because it is a legal proceeding, and moral blameworthiness, which is an interpersonal determination that allows for a variety of responses from individuals.

The implication of Chiao's general point that criminal law is a political institution is that it is illegitimate for it to expel people from the political community. The distinctive harm of criminal oppression is exclusion from the social and political community for putative moral unfitness. But if the only justified criminal law is an institution that punishes violations of the system of social cooperation, not for moral violations, it ought not socially and politically exclude. This is consistent with Kelly's theory that, even if we wanted it to, the tools of criminal law do not allow for the type of fine-grained evaluation of motives, backgrounds, excusing conditions, and unfair social burdens that are required for making determinations of moral blameworthiness.

One might object that I have just criticized Chiao and Hampton for their ideal theories, but it seems that I am helping myself to a helpful conclusion of Chiao's ideal theory, specifically that social and political exclusion are always unjust even for those who have been duly convicted of serious crimes. While many conclusions of ideal theory cannot apply to the non-ideal societies we live in because they are based on idealizing abstractions, there is some role that ideal theory can play. It cannot address issues of corrective justice because the conclusions that are drawn from ideal theory do not take into account how institutions and even people have been influenced by injustice and oppression. As I noted before, an ideal theory of justice might be able to identify that treating people unequally because of their race is unjust, it cannot come up with principles of how to correct for a history of racial injustice. But, ideal theories can set out basic principles of justice which are useful insofar as they are measures for when societies and institutions are not

meeting the standards of justice. That is, they can often pick out injustice even though they cannot point the direction toward repairing the injustice.

How do we distinguish between helpful insights of ideal theory and irrelevant conclusions that obscure existing oppression? As an example, I will return to Mills' argument that radical feminists and critical race theorists do not take issue with the liberal principle that all persons are equal. They take issue with the claim that our contemporary societies offer anything like equality. But, feminist theorists like Susan Okin and Carole Pateman take issue with the public/private distinction. To sort out the distinction between a valid political principle like the moral equality of all people and a problematic conclusion that results from idealizing abstraction, such as the public/private distinction, we must more carefully trace the idealizing abstractions. The idealizing abstraction in this example is that the family does not have oppression built into it. Therefore, the family presents a special case, different than the other spheres of distributive justice, to which the principles of justice do not apply. The public/private distinction emerges as a way to shield the family from the same demanding norms of liberty and equality that shape the public sphere, thus reinforcing gender subordination while maintaining the veneer of egalitarianism. In contrast, the principle that political institutions ought to treat everyone, regardless of gender, equally, comes from the insight that people are moral equals in the state of nature, that is, outside of political institutions. Thus, they ought to be treated as equals within the political institutions.

The same distinction can be drawn between two claims that arise from Chiao's theory of criminal law as public law. The first is that criminal law ought not exclude people from the social and political community. The second is that criminal law functions to promote a system of social cooperation. The idea that criminal law ought not exclude people from the political community

in Chiao's work can be traced back to the insight that the criminal law is a political institution, not an institution for giving people what they deserve based on pre-political, interpersonal moral norms. The criminal law then only applies in the political context, that is, to people who are within the political society. This is like the principle of equality in the social contract theory tradition. The problem is not in the identification that all people are morally equal or that that they should be treated as equals by the institutions of society. The problematic abstraction occurs when it is assumed that because they are moral equals in the state of nature, everyone is an equal contractor so the resulting political institutions treat people equally. Non-exclusion as a principle of criminal law is not based on the abstraction of a society that is actually a system of mutual cooperation, but instead is a regulating principle for what a just society should look like. It is appropriate for measuring whether a given criminal justice system is just or not because it is a requirement for a just criminal law. It is problematic when it is assumed that everyone is equally included in the system of mutual cooperation and not excluded by criminal law. If we apply the ideal version of Chiao's criminal law to the United States, we might be led to believe that the criminal justice system in the United States can actually function to promote social cooperation. Because the American criminal justice system does not actually work at all like Chiao's criminal law as public law, we cannot follow his conclusion that the criminal law in the United States functions to reinforce shared social norms.

Moreover, Kelly's arguments about the inability of criminal law to make moral determinations and the necessity of a theory of punishment that is more circumspect about the limitations of criminal law offer independent, non-ideal theory-based support for the argument that criminal law ought not socially and politically exclude criminals, even those duly convicted of serious crimes.

5. Conclusion

I have argued that the feminist expressivist justification for using the criminal law to combat gender-based justice is wrongheaded because it idealizes the criminal justice system, abstracting away from its history of oppression, including racial oppression. Nevertheless, Hampton's arguments are compelling because in American society the criminal law has so often seemed like the only institution interested in justice. Considering the society that we live in, it is understandable that oppressed people would seek justice in the criminal law and would find vindication when individual wrongdoers are punished. I would not be honest if I did not admit to feeling vindicated when Harvey Weinstein was found guilty of sexual assault or when the men who killed Ahmaud Arbury where arrested. There are times that retributivists are criticized as wanting revenge, and certainly some aspects of the American criminal justice system point that way. But what drives so many people to this theory, whether or not they are scholars or lay people, is a sense of the need to vindicate the rights of victims and to do something toward righting a wrong. This is what makes Hampton's theory compelling: it is able to wed the idea of vindication of victims' rights and the chance to change social norms to government action.

This theory is compelling also because we have made the same mistake that Hampton has. We believe that the problems with the criminal justice system are external to the system, not part of its basic structure. But a non-ideal theory approach that centers the historical development of the system as well as taking proper account of the ways that it is operating in the world as it exists right now point toward the conclusion that this system is intrinsically oppressive. We cannot use it to promote social cooperation or communicate the moral equality of each member of society without radically changing the system first. Or maybe starting over. It is too late to

have an ideal criminal law without racism or dehumanizing treatment. Our ideal criminal law will have to be one that has that history but has found a way to correct for it.

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