A New Criminal Response Framework: Rejecting the "Four Horsemen of the Carceral State"

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INTRODUCTION

Many first-year criminal law courses begin with a discussion of the nineteenth-century English case *Regina v. Dudley & Stephens*.[1] In this case, a ship was caught in a storm, and while stranded at sea, two men decided to kill and eat a younger man in order to survive.[2] The case considers whether these two men should be punished for killing the third man, and if so, how severe should that punishment be. For many law students, this is one of the rare occasions when they are asked whether punishment is justified. Soon, they will instead be asked which of the four

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1. 14 Q.B.D. 273 (1884). Most criminal law casebooks include this case in the first or second chapter. *See, e.g.*, SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES Chapter 2 (10th ed. 2017); JOSHUA DRESSLER & STEPHEN P GARVEY, CRIMINAL LAW: CASES AND MATERIALS Chapter 2 (9th ed. 2022); JOSEPH L. HOFFMANN & WILLIAM J. STUNTZ, DEFINING CRIMES 5–11 (4th ed. 2021); CYNTHIA LEE & ANGELA P. HARRIS, CRIMINAL LAW, CASES AND MATERIALS 7–12 (4th ed. 2019).

2. Regina, 14 Q.B.D.

justifications for criminal punishment—retribution, deterrence, incapacitation, or rehabilitation—should be applied to each case through the semester.[3]

By relying on these "four horsemen of the carceral state"[4] to presume punishment is justified in a given case, first-year criminal law courses often neglect a growing area of legal scholarship regarding decarceration and prison abolition. Because the four justifications of punishment are outdated and often have little verifiable support,[5] in this Note I propose a new criminal response framework to analyze moral responses to crime as well as proactive and reactive utilitarian tools to decrease criminal activity.[6]

This Note proceeds in four parts. Part I provides a background on abolitionist tools and concepts and how current first-year criminal law courses neglect to consider them. Part II discusses the four theories of punishment taught in criminal law courses today, the history of each, and some of the shortcomings of using each theory as a justification for punishment. In Part III, I propose a new criminal response framework that uses some familiar theories from the old justifications of punishment and adds abolitionist concepts that give a more holistic approach to criminal justice. Finally, Part IV considers how using my proposed framework will impact criminal education, legal scholarship, and future lawyers.

I. BACKGROUND AND CONTEXT

A. The Abolitionist Movement

While the modern prison abolition movement started in the 1990s,[7] many activists view it as a continuation of the slave economy abolitionist movement that dates back to the American Revolution.[8] Both of these movements share common features: (1) they aim to destroy oppressive systems,[9] (2) they aspire to implement structural changes that render the oppressive systems obsolete,[10] and (3) they are primarily driven by the people being oppressed.[11]

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3. Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1660 (2020) ("Indeed, the appropriateness of punishment is often presented as self-evident; students are asked to consider *why* punishment is justified, not whether.").

4. *Id.*

5. *See infra* Part II.

6. *See infra* Part III.

7. Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 5 (2019).

8. *Id.* at 48; *see also* ANGELA DAVIS, ARE PRISONS OBSOLETE? 22 (2003).

9. Lisa Guenther, *These Are the Moments in Which Another World Becomes Possible: Lisa Guenther on Abolition*, ABOLITION JOURNAL (July 10, 2015), https://abolitionjournal.org/lisa-guenther-abolition-statement/ [perma.cc/9J8T-ZBBC].

10. *Id.*

11. *See* W.E.B. DU BOIS, BLACK RECONSTRUCTION 716 (1st ed. 1935) ("[T]he decisive action which ended the Civil War was the emancipation and arming of the black slave; that, as Lincoln said: 'Without the military help of black freedmen, the war against the South could not have been won.'"); *Mission & Vision*, CRITICAL RESISTANCE, https://criticalresistance.org/mission-vision/ ("The success of the movement requires that it reflect communities most affected by the [prison industrial complex].") [perma.cc/4ND6-7DJS].

The prison industrial complex we know today—which, in some states, labels more than one-third of all Black men as felons[12]—was born out of the desire to control people recently freed from slavery after the abolition of legal slavery in the United States.[13] Today's organized movement to abolish the prison industrial complex started in 1998 with a conference organized by Critical Resistance,[14] a national grassroots organization whose mission is "to build an international movement to end the prison industrial complex (PIC) by challenging the belief that caging and controlling people makes us safe."[15] It aims to accomplish this mission by opposing any extension of the prison industrial complex and promoting healthy, stable communities that do not rely on imprisonment and punishment to respond to community harms.[16]

Abolition can mean different things to different people, but in this Note, abolition will refer to the abolition of the prison industrial complex. Prisons are, by their very nature, a violent system that restricts the freedom of those inside. Beyond the inherent inhumanity of locking people in cages, jails and prisons are unnecessarily dangerous places to live.[17] Critically, prison abolition is *not* focused on reforming prison systems to make them better; instead, it recognizes the brutality of the current system and seeks to dismantle and replace it with more civilized and effective means of justice.[18]

Police abolitionists share similar transformational goals. Investing more money into police departments will not meaningfully decrease police violence—only radical change and investment in communities can make such necessary changes.[19] Some

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12. DAVIS, *supra* note 8, at 38.

13. *See id.* at 29 ("In the immediate aftermath of slavery, the southern states hastened to develop a criminal justice system that could legally restrict the possibilities of freedom for newly released slaves. Black people became the prime targets of a developing convict lease system, referred to by many as a reincarnation of slavery.").

14. Roberts, *supra* note 7, at 5; *History*, CRITICAL RESISTANCE, https://criticalresistance.org/mission-vision/history/ [perma.cc/TL98-EGTB].

15. CRITICAL RESISTANCE, *supra* note 11.

16. *Id.*

17. *See* Shaila Dewan, *Jail Is a Death Sentence for a Growing Number of Americans*, N.Y. TIMES (Nov. 22, 2022), https://www.nytimes.com/2022/11/22/us/jails-deaths.html (describing the deaths of six incarcerated people, including incidents of suicide, inmate violence, and lack of access to medication). "From 2000 to 2019, jail deaths per capita increased by 11 percent, to 167 per 100,000. In 2019, suicide was the leading cause of death." *Id.*

18. *See, e.g.*, Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1207–08 (2015) ("[A]n abolitionist ethic, in virtue of its structural critique of penal practices, is oriented toward displacing criminal law as a primary regulatory framework and replacing it with other social regulatory forms, rather than only or primarily moderating criminal punishment or limiting its scope or focus."); DAVIS, *supra* note 8, at 20–21 ("The most difficult and urgent challenge today is that of creatively exploring new terrains of justice, where the prison no longer serves as our major anchor."); Roberts, *supra* note 7, at 42–43 ("[R]eforms that correct problems perceived as aberrational flaws in the system only help to legitimize and strengthen its operation. Indeed, reforming prisons results in more prisons.").

19. ALEX VITALE, THE END OF POLICING 222 (2017) ("More money, more technology, and more power and influence will not reduce the burden or increase the justness of policing. Ending the War on Drugs, abolishing school police, ending broken-windows policing,

reformists assert that to effectively decrease incarceration, part of the answer is to increase the number of police officers.[20] However, these claims ignore the root causes of crime, create a false trade-off between societal ideals and personal safety, and promote false narratives directly from police departments.[21]

Prisons will not be abolished in one day at the flip of a switch, so abolitionists use an arsenal of tools and frameworks to steadily and consistently promote their goals. For example, the starting point for the movement is simply naming it.[22] By naming the movement, it gives people a shared vocabulary to discuss it, generate further ideas, and rally people to the cause.[23] Abolitionists also use the concept of "non-reformist reforms" to describe incremental steps toward abolition that are not simply reforming the current system but striving for radical change.[24] For example, a reformist reform might be to build jails and prisons with better conditions and rehabilitative services, but a non-reformist reform would be to reject building new jails and prisons and instead invest in social and community services.[25] There is also a growing theory of constitutional interpretation that reads the U.S. Constitution through the lens of prison abolition, including the Reconstruction Amendments and some of the paradoxes that exist in the text of the Constitution and its interpretation over the years.[26] While law schools are only one place where abolitionist concepts can be developed and taught,[27] it is essential for a holistic legal education—

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developing robust mental health care, and creating low-income housing systems will do much more to reduce abusive policing.").

20. Charles Lane, *Why More Police Might be the Key to Real Criminal Justice Reform*, WASH. POST (Nov. 30, 2022, 7:00 AM), https://www.washingtonpost.com/opinions/2022/11/30/police-criminal-justice-reform/ [perma.cc/VXW9-FS5Z].

21. *See* Alec Karakatsanis, *Distracting People from the Material Conditions of Our Society*, ALEC'S COPAGANDA NEWSLETTER (Nov. 13, 2022), https://equalityalec.substack.com/p/distracting-people-from-the-material (critiquing a *New York Times* article about bike theft in Burlington, Vermont) [perma.cc/3LRV-EHVU]. *But see* Michael Corkery, *The Bike Thieves of Burlington, Vermont*, N.Y. TIMES (Nov. 12, 2022), https://www.nytimes.com/2022/11/12/business/burlington-police-stolen-bikes.html (describing a "clash of ideals and reality" in considering reallocating resources away from police departments).

22. Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://jacobin.com/2017/08/prison-abolition-reform-mass-incarceration [perma.cc/P836-TSNF].

23. See id.

24. *See, e.g.*, *Reformist Reforms vs. Abolitionist Steps to End Imprisonment*, CRITICAL RESISTANCE; Roberts, *supra* note 7, at 114; Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 103 (2020) (quoting ANDRÉ GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 7 (Martin A. Nicolaus & Victoria Ortiz trans., 1967)) ("Non-reformist reforms are 'conceived not in terms of what is possible within the framework of a given system and administration, but in view of what should be made possible in terms of human needs and demands.'").

25. *Reformist Reforms vs. Abolitionist Steps to End Imprisonment*, supra note 24.

26. *See generally* Roberts, *supra* note 7 (proposes the concept of abolition constitutionalism as a valid jurisprudence).

27. Christina John, Russell G. Pearce, Aundray Jermaine Archer, Sarah Medina Camiscoli, Aron Pines, Maryam Salmanova & Vira Tarnavska, *Subversive Legal Education:*

particularly in criminal law—to develop abolitionist concepts in a scholarly environment and teach future lawyers about the system they are about to enter.

B. *The Current Landscape of Criminal Legal Education*

Before proposing changes to substantive criminal law curriculums, we must start with understanding the subject's history in law schools. Substantive criminal law courses were not always a key feature—or even present at all—in early American legal education.[28] While courses such as property, contracts, and torts were viewed favorably by academics as subjects worth scholarly resources,[29] criminal law professors had to fight for a seat at the proverbial table. Common law was seen as a scientific endeavor worth studying, but criminal law was largely developed by legislators with little to no concern for precedent.[30] As scholars developed substantive criminal law canon and fought for its place among the other substantive law courses, they argued that criminal law was exceptional in the legal system because it dealt with particularly serious injuries and exercised mechanisms not present in other legal disciplines.[31] This legal exceptionalism helped promulgate the idea that serious injuries caused by criminal activity necessitate serious criminal penalties. Eventually, criminal law scholarship developed the Model Penal Code (MPC) widely taught in law schools today,[32] even though the MPC has never gained the universal adoption expected.[33] Since the 1960s, the MPC has been a central part of first-year criminal law courses, and it continues to inform casebooks and criminal law professors today.[34]

The most popular of these casebooks is Stanford Kadish's *Criminal Law and Its Processes*.[35] While a casebook alone does not reshape an entire area of legal scholarship, Kadish's book has been present in classrooms for so long and has influenced so many students—some of whom are now criminal law professors and casebook authors—that it truly has formed the legal community's concept of criminal law and punishment.[36] For example, the next most influential modern casebook was authored by Joshua Dressler,[37] who refers to Kadish's book as "the

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Reformist Steps toward Abolitionist Vision, 90 FORDHAM L. REV. 2089 (2022) ("We imagine legal education beyond the existing walls of law school and the gates of the legal profession.").

28. Ristroph, *supra* note 3, at 1640–41.

29. Joshua Dressler, Criminal Law, Moral Theory, and Feminism: Some Reflections on the Subject and on the Fun (and Value) of Courting Controversy, 48 ST. LOUIS U. L.J. 1143, 1147 (2004).

30. Ristroph, *supra* note 3, at 1641.

31. *Id.* at 1643; *see also* Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1952–54 (2019).

32. Ristroph, *supra* note 3, at 1644.

33. *Id.* at 1648.

34. *Id.*

35. Jens David Ohlin, *The Changing Market for Criminal Law Casebooks*, 114 MICH. L. REV. 1155 (2016) (describing Kadish's *Criminal Law and Its Processes* as a "market leader"); *see also* KADISH, SCHULHOFER & BARKOW, *supra* note 1.

36. Dressler, *supra* note 29, at 1146 n.9; Ohlin, *supra* note 35, at 1156 ("Multiple generations of scholars and polished pedagogues learned from Kadish's casebook as students and carried over its influence when they entered the academy.").

37. Ristroph, *supra* note 3, at 1648 n.82 (describing Dressler's book as "[t]he only

classic in the field"[38] and proudly accepts that his book is considered a "son-of-Kadish."[39] By focusing criminal legal education on the theories of law professors who developed their legal understanding in similar environments, substantive criminal law courses miss out on the voices of people who actually experience the criminal justice system as either victims or offenders.[40] This epistemic oppression of people's lived experiences removes law students from the real-world consequences of the legal system by essentially silencing a large portion of the "knowers" in criminal law.[41]

There are, however, new criminal law textbooks that challenge how criminal law has been taught in the past. For example, most substantive criminal law textbooks begin by describing restraints on the criminal legal system, such as the idea of "legality"[42]—meaning criminal liability can only be imposed when a pre-existing rule prohibits certain conduct.[43] However, Joseph Hoffmann and William Stuntz's *Defining Crimes*[44] notably forgoes teaching the idea of legality as a restraint on criminal liability because their book rejects the idea that theoretical criminal definitions truly determine criminal liability.[45] Other progressive tactics used by textbook authors—such as Herbert Wechsler and Jerome Michael in *Criminal Law And Its Administration*[46] and Cynthia Lee and Angela Harris in *Criminal Law, Cases and Materials*[47]—prioritize creative approaches to how substantive criminal laws *should* be applied over analysis of how the laws have been applied in the past.[48]

II. JUSTIFICATIONS OF PUNISHMENT TAUGHT TODAY

Kadish's textbook[49] and the ones it inspired[50]—including the more progressive ones mentioned above[51]—all introduce and discuss the four dominant theories of

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contemporary casebook that may hold as much market share" as Kadish's); *see also* DRESSLER & GARVEY, *supra* note 1.

38. Dressler, *supra* note 29, at 1146.

39. *Id.* at 1147 n.11.

40. See Yvette Butler, Demonizing Our Sisters Through Epistemic Oppression 17–21 (2022).

41. *See id.*

42. Ristroph, *supra* note 3, at 1653.

43. *Id.*

44. HOFFMANN & STUNTZ, *supra* note 1.

45. Ristroph, *supra* note 3, at 1653 n.4.; *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506–09 (2001) (arguing that substantive criminal law simply expands enough to allow prosecutors and police offers to define actual criminal liability).

46. Jerome Michael & Herbert Wechsler, Criminal Law and Its Administration: Cases, Statutes and Commentaries (1940).

47. LEE & HARRIS, *supra* note 1.

48. Angela P. Harris & Cynthia Lee, *Teaching Criminal Law from a Critical Perspective*, 7 OHIO ST. J. CRIM. L. 261, 261–62 (2009).

49. *See* KADISH, SCHULHOFER & BARKOW, *supra* note 1, at ch. 2.

50. *See, e.g.*, DRESSLER & GARVEY, *supra* note 1, at ch. 2.

51. *See* HOFFMANN & STUNTZ, *supra* note 1, at 11–13; LEE & HARRIS, *supra* note 1, at 20–31.

punishment: retribution, deterrence, incapacitation, and rehabilitation.[52] These "four horsemen of the carceral state" presume the need for punishment without sufficiently examining whether the four theories effectively meet their purported goals.[53] To an abolitionist, notably missing from the four theories of punishment is the theory of non-punishment—or at least non-incarceration—as a legitimate response to criminal offenses. By teaching these four justifications of punishment to first-year law students, law schools produce attorneys who presume that criminal offenders deserve punishment, typically through incarceration.[54]

In the sections below, I discuss each of the four typical justifications of punishment, how they are taught today, and some of their shortcomings. After analyzing each justification in depth, the need for a new criminal response framework becomes evident.

A. Retribution

Retributivists approach punishment from a moral standpoint rather than a utilitarian one. Legal scholars justify retributive punishment because "wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his guilt."[55] Because this theory relies on the morality of punishing a guilty individual, it neglects to consider the larger societal impacts and the collateral consequences of punishment. Before analyzing the retributive justification for punishment, it helps to explore the history and development of retribution as a widely accepted theory.

Retributive punishment can be traced back to early human societies, most famously in the Old Testament's "an eye for an eye" teaching.[56] Ancient Greece also had stories of retributive punishment, including Zeus chaining Prometheus to a mountain as punishment for stealing fire.[57] Many early societies justified retributive punishment because criminal offenses were perceived to "pollute" one's family and neighbors.[58] However, using prisons as tools for retribution—rather than as tools of

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52. Ristroph, *supra* note 3, at 1641. These four theories are sometimes referred to as "offender-facing justifications" as they focus on the actions, mental state, and other characteristics of the criminal offender, as opposed to "victim-facing justifications," which include the harms suffered by a victim of crime, or "differential punishment," which differentiates criminal offenses based on "statutory harm." Jack Boeglin & Zachary Shapiro, *A Theory of Differential Punishment*, 70 VAND. L. REV. 1499, 1505, 1523, 1540–41 (2017). In this Note, I will focus on the offender-facing justifications because they are the most popularly taught in first-year criminal law courses today.

53. Ristroph, *supra* note 3, at 1660.

54. *See* Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 168–69 (2021).

55. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1995); *see also* Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 71 n.1 (1980) (listing sources with definitions similar to the one provided by Rawls).

56. Posner, *supra* note 55, at 71.

57. Edward M. Peters, *Prison Before the Prison: The Ancient and Medieval Worlds*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 3, 4–5 (Norval Morris & David J. Rothman eds., 1995).

58. *See* Posner, *supra* note 55, at 72–75. More recently, scholars such as Richard Posner justify retribution through economic means—arguing that punishment internalizes the costs of

containment pending trial—did not develop until around the American Revolution when incarceration became a more humane alternative to capital and corporal punishment.[59]

Over time, particularly in the United States, the power to charge crimes shifted dramatically. From the early days of the United States until the latter half of the nineteenth century, criminal enforcement by the government was not highly funded, and instead, law enforcement was primarily a voluntary force.[60] Public prosecutors were underpaid and spent more time on their private prosecutions,[61] which allowed people of means to determine when to enforce laws. A combination of legislative intervention, increased police force funding, and public fear led to a massively expanded body of criminal law.[62] Eventually, private discretion transferred to public prosecutors and law enforcement agents, and thus the modern criminal justice system was born.[63] With this undercalculated and extremely rapid expansion of discretion, prosecutors and judges defaulted to the age-old biblical theory of retribution—an eye for an eye.[64]

However, a more modern approach to retributive theory asserts that punishment is not "an eye for an eye" but rather "*only* an eye for eye."[65] This version of "limiting retributive theory," which is now arguably the consensus model for penal sentencing,[66] attempts to give criminals their just deserts while conceding that utilitarian justifications for punishment are also necessary.[67] Another way to limit the effects of retributive punishment is to apply the "harm principle," which argues that society should define crimes based on the harms they cause rather than on the morality of the act.[68] The problem with the harm principle is that it has evolved to the point where the relative harms of criminalization are weighed against the relative harms of decriminalization, which just leads back to moral policing.[69] Viewing retribution as a limit to punishment rather than as a tool for revenge can make it more

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committing crime to only the criminal offender. *Id.*

59. DAVIS, *supra* note 8, at 26.

60. Lawrence M. Friedman, Crime and Punishment in American History 28–29 (1993).

61. Ristroph, *supra* note 31, at 1966.

62. *Id.* at 1967–69.

63. *Id.* at 1967; *see also* Stuntz, *supra* note 45, at 582 (discussing the introduction of "a kind of czarism among prosecutors, to the practice of substituting their own discretionary enforcement decisions for the decisions legislatures enshrine in criminal codes").

64. *See* Ristroph, *supra* note 31, at 1967–69 (discussing how the expansion and professionalization of law enforcement led to highly discretionary and controversial policing).

65. Norval Morris & David J. Rothman, *Introduction*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY, *supra* note 57, at vii, x.

66. Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1104 (2008).

67. Richard S. Frase, *Limiting Retributivism*, *in* THE FUTURE OF IMPRISONMENT 83, 84 (Michael Tonry ed., 2004). Some scholars purport that retributivism is grounded in contradictory logic, but even these scholars do mental gymnastics to ensure retributivism can still coexist with utilitarian theories. *See, e.g.*, Jean-Christophe Merle, *A Kantian Critique of Kant's Theory of Punishment*, 19 LAW & PHIL. 311, 311–12, 325 (2000).

68. *See* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 109–13 (1999).

69. *See id.* at 113–15.

palatable to society, but in reality, it is simply a way of dressing up state-sanctioned vengeance as a valid response to crime.

Because retribution is a moral theory of punishment—not an objective one—it requires retributivists to select a moral vantage point from which to view criminal offenses. Some retributivists view criminal punishment from the perspective of a victim when deciding whether a criminal offender deserves punishment.[70] Others view it from the perspective of the "aegis of the law."[71] However, in practice, punishment is not derived from a divine peek into the natural order of law; it is decided by police officers, prosecutors, judges, and juries. By emphasizing the restraints of legality, casebook authors fail to consider that law is administered by people—typically attorneys—with vast amounts of discretion.[72] Therefore, instead of avenging a victim or applying the natural order of law, retributive punishment accounts only for the morality of those with power in the judicial system.

Because retributive punishment focuses on whether an individual deserves to be punished, it fails to consider the societal harms of punishing whole groups of people.[73] If we accept the concept that "[t]he state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him,"[74] then there is no need to even analyze the societal harms caused by mass incarceration. However, proponents of retributive punishment often pair the theory with a version of deterrence to account for these societal impacts.[75] The danger in separately analyzing these two theories is that it implies the case-by-case approach of retributive punishment is valid in its own right.

B. Deterrence

Very closely related to the theory of retribution is the theory of deterrence. Where retribution aims to internalize the cost of crime to the criminal offender, deterrence seeks to eliminate the incentive to commit crime because of the internalized cost.[76] At its core, the deterrent theory of punishment is an economic justification that seeks to incentivize citizens to conform to certain desired behaviors by increasing the cost of diverging from those desired behaviors.[77] Today, deterrence is widely viewed as the prevailing justification for punishment in almost all criminal systems.[78]

The economic theory of deterrence dates back centuries and has been updated to reflect evolving economic models. Plato asserted a deterrent (and rehabilitative)

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70. Posner, *supra* note 55, at 72.

71. Morris & Rothman, *supra* note 65, at x.

72. Stuntz, *supra* note 45, at 506–07.

73. *See* Rawls, *supra* note 55, at 5.

74. *Id.*

75. Posner, *supra* note 55, at 73–74.

76. *Id.* at 74.

77. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 415 (1999) ("By 'deterrence' I intend to refer broadly to the consequentialist theory, propounded by [English philosopher Jeremy] Bentham and refined by his economist successors, that depicts punishment as a policy aimed at creating efficient behavioral incentives.").

78. *See* People v. Suitte, 455 N.Y.S.2d 675, 680 (1982) ("Deterrence is the primary and essential postulate of almost all criminal law systems.").

theory of punishment: "[H]e who is rightly punished ought either to become better and profit by it, or he ought to be made an example to his fellows, that they may see what he suffers, and fear to suffer the like, and become better."[79] Essentially, society intends to use the fear of punishment to disincentivize other criminal activity.

The most extreme way to scare someone into obeying the law is by threatening their life. But, over time, using the death penalty for all offenses was viewed as inefficient.[80] In eighteenth- and nineteenth-century England, philosopher Jeremy Bentham led a movement to stop applying the death penalty to all felonies and instead insisted that punishment "ought only to be admitted in as far as it promises to exclude some greater evil."[81] Comparing the societal cost of a specific punishment to the societal benefit of preventing future crimes is an early formulation of economics in criminal justice. This version of an efficient economic justification of deterrent punishment is now the primary modern interpretation of deterrence among scholars.[82]

Of the four theories of punishment, deterrence most directly addresses the goal to prevent crime from occurring.[83] The deterrent effect of punishment operates in two forms: general deterrence and specific deterrence. General deterrence uses fear to urge potential criminals to decide against breaking the law, and specific deterrence prevents previously incarcerated individuals from doing anything that would send them back to prison.[84] In either case, the deterrent justification of punishment uses fear to control individuals' behavior.

After even a moderate amount of digging into the theoretical and practical pillars of deterrence, the justification starts to unravel rather quickly. On a theoretical level, the economic assumptions that justify the deterrent justification of punishment do not hold up under scrutiny. These three assumptions are that: (1) criminal offenders act rationally in calculating the risks of their behavior; (2) criminal offenders understand the likelihood that they will be caught and the resulting sentence; and (3) criminal punishment decreases the likelihood of reoffending.[85] These assumptions are likely false (and in some cases actually work in the opposite direction): criminal offenders often believe, and are correct in believing, that they will not be caught, and those that are caught, are actually more likely, not less likely, to reoffend.[86] Without these foundational assumptions, the deterrent justification cannot stand on its own to prevent criminal activity.

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79. Peters, *supra* note 57, at 5. As Plato often did, he wrote this idea speaking through Socrates. *Id.*

80. *See* KADISH, SCHULHOFER & BARKOW, *supra* note 1, at ch. 2.

81. *See id.*

82. *See* McLeod, *supra* note 18, at 1202.

83. Retribution reacts morally to crime; incapacitation prevents specific individuals from committing further crime by reacting to their initial crime; and rehabilitation reacts to crime by treating individual offenders. Deterrence, on the other hand, uses the threat of punishment to prevent criminal activity from occurring in the first place.

84. Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1150 (1990) ("General deterrence is the pressure that the example of one criminal's pain and suffering exerts on potential criminals to forgo their contemplated crimes. Specific deterrence is the pressure that unpleasant memories of incarceration exert on a released convict, which cause him to obey the law.").

85. McLeod, *supra* note 18, at 1202.

86. *Id.* at 1202–03.

Recent research suggests that the proper response to combat mass incarceration is to increase the number of police officers.[87] However, this research relies on inaccurate estimates of the number of police officers in the United States,[88] downplays the societal cost of increased policing,[89] and overemphasizes statistical ratios—police/prisoner[90] and police/homicide[91]—that better reflect issues of over-incarceration and over-availability of guns rather than an issue of under-policing.[92]

On a practical level, people who assert deterrent justifications are often concealing their true incentives for punishment, which are centered around morality and retribution.[93] For example, Justice Oliver Wendell Holmes, Jr., was known to use deterrent rhetoric in his opinions as a way to avoid articulating his hidden moral—and controversial—reasoning.[94] Today, many proponents of decarceration in the United States see deterrent arguments as more politically palatable, and therefore they advocate increasing policing as a tool to deter crime rather than using decriminalization or more lenient sentencing.[95] In both instances—whether advocating for decarceration or secretly advocating for moral policing—deterrence is merely a smokescreen for a hidden agenda.

Scholars and policymakers should cease asserting deterrent theory in name only and instead consider a much broader range of programs to prevent crime.[96] Incarceration is only one tool at society's disposal, and it is far from an optimal one.

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87. *See* Christopher Lewis & Adaner Usmani, *The Injustice of Under-Policing in America*, 2 AM. J.L. EQUAL. 85, 85–86 (2022).

88. Alec Karakatsanis, *A Warning to Journalists About Elite Academia*, ALEC'S COPAGANDA NEWSLETTER (Nov. 3, 2022), https://equalityalec.substack.com/p/a-warning-to-journalists-about-elite? (explaining how the authors of the article deliberately chose to undercount the number of police officers in the United States) [perma.cc/UDQ3-UF6T].

89. *Id.* ("The article presents the main cost of their proposal as 7.8 million more arrests. . . . The professors then dismiss the costs of 7.8 million more people arrested as far outweighed by all the amazing benefits of police.").

90. Lewis & Usmani, *supra* note 87, at 104 (arguing that the United States needs to bring its 3.5 police officers per prisoner ratio closer to the "First World Balance").

91. *Id.* at 89–90 (arguing that the United States is under-policed because it has fewer police officers per homicide than other developed countries).

92. Karakatsanis, *supra* note 88 ("These points are silly because all they show is that the U.S. overincarcerates relative to other countries and that the U.S. is also a violent society with lots of guns. Those denominators say nothing whatsoever about whether there should be more police (i.e. the point of their article).").

93. Kahan, *supra* note 77, at 435 ("They emphasize deterrence arguments nevertheless only to satisfy a social norm against the open expression of contentious moral judgments or to avoid exciting expressively motivated opposition to their own policy positions.")

94. *See id.* at 434–35. Justice Holmes even wrote once, "I don't say all I think in the opinion." *Id.* at 414.

95. Charles Lane, *Why More Police Might be the Key to Real Criminal Justice Reform*, WASH. POST (Nov. 30, 2022, 7:00 AM), https://www.washingtonpost.com/opinions/2022/11/30/police-criminal-justice-reform/ ("Politically, it's probably easier to sell the American public on the 'more cops' part. . . . Once crime rates decline, a confident public might be more willing to support more discriminate sentencing.") [perma.cc/W9JR-4WWC].

96. *See infra* Section III.C.

Because the prison system disproportionately affects Black people,[97] policymakers should address this historical oppression through alternative reactions to criminal activity going forward.[98]

C. *Incapacitation*

Like deterrence, the theory of incapacitation also seeks to prevent criminal activity. Rather than using fear of punishment to deter crime, incapacitation removes a criminal offender from the general population and thus prevents them from committing crimes against people outside of their prison.[99] The idea is to "render[] harmless to society a person otherwise inclined to crime."[100]

Some scholars argue that incapacitation was the original purpose of jails and prisons, protecting the community from known criminals,[101] but others suggest that incapacitation arose out of the failure of general deterrence and rehabilitation to effectively reduce crime.[102] Undoubtedly, the original purpose of jails—before the rise of prisons—was to hold people awaiting trial, preventing them from committing further crimes or fleeing.[103]

One of the most common concerns people have with prison abolition is what to do with people who are too dangerous to be among the general population.[104] Society's fascination with dangerous super-criminals is often a roadblock to support prison abolition. However, if we assume for a moment that "the dangerous few"—a class of people so dangerous that the only option is to lock them up—actually

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97. E. Ann Carson, U.S. DEP'T OF JUST., NCJ 302776, Prisoners in 2020 – Statistical Tables 10 (2021).

98. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 426 (2018) (outlining transformative demands to "address the immediate suffering of Black people," including "an end to the war on Black people; reparations; invest-divest; economic justice; community control; and political power" (footnotes omitted)). Some communities are already taking major steps toward reinvesting in community wellness instead of shifting resources within the punishment system. Alec Karakatsanis, *The Punishment Bureaucracy: How to Think about "Criminal Justice Reform"*, 128 YALE L.J.F. 848, 932–35 (2019) (listing some of the transformational work being done in communities across the country).

99. Morris & Rothman, *supra* note 65, at ix ("At least for the period during which a prisoner is in prison, he is unlikely to inflict criminal harm on those outside the walls."). *But see* McLeod, *supra* note 160, at 1204 ("But prison itself is a place where interpersonal violence, theft, and abuse are rampant and largely unreported. Therefore, incarceration does not necessarily reduce or incapacitate the commission of crime, but rather changes its location." (footnote omitted)).

100. Blecker, *supra* note 84, at 1150.

101. Morris & Rothman, *supra* note 65, at ix ("[T]he original justification for the prison may well have been incapacitation. Whatever else, incarceration serves to remove a potential offender from the community.").

102. Blecker, *supra* note 84, at 1152 n.16 ("By 1850, the penitentiary was failing to accomplish its original goals: retribution and incapacitation replaced rehabilitation and general deterrence as purposes for the penitentiary.").

103. *See id.* at 1187; *see also* DAVIS, *supra* note 8, at 26.

104. Thomas Ward Frampton, The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics, 135 HARV. L. REV. 2013, 2017 (2022).

exists,[105] and that it is possible to identify this class of people,[106] then by imprisoning them, we are merely relocating their criminal activity into a space that is more palatable to the public.[107] In reality, our system is not very effective at locking up "the dangerous few," so it is merely a myth that prisons today protect law abiding citizens from these dangerous criminals.[108]

The effectiveness of relying on incapacitation to prevent crime—even in tandem with deterrence—is very much in doubt. For example, one aspect of the theory of incapacitation is that incarceration prevents convicted criminals from committing crimes during the most violent stages of their lives, which for men peaks in the teenage years and continues through their twenties.[109] However, the science is unclear on whether being incarcerated during this period actually tolls the peak violent stage or simply pushes off the necessary maturing process until after the person is released from prison.[110]

Furthermore, while people often assume that prisons decrease the crime rate, there is little evidence to determine whether incarceration prevents criminal activity, aggravates it, or simply has no effect. Research into incapacitation's effect on criminal careers struggles to consider factors such as the duration of criminal careers and the effects of intervention.[111] According to one study, incarceration causes about

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105. *Id.* at 2032–37 (questioning "the assumption that a stable consensus exists concerning who 'the dangerous few' might be"); *see also* DAVIS, *supra* note 8, at 16 ("We thus think about imprisonment as a fate reserved for others, a fate reserved for the 'evildoers,' to use a term recently popularized by George W. Bush. Because of the persistent power of racism, 'criminals' and 'evildoers' are, in the collective imagination, fantasized as people of color.").

106. Identifying "the dangerous few" has proven to be remarkably difficult, and the United States has a poor record trying to do so. Frampton, *supra* note 104, at 2037–44. But without properly identifying this group, there is no use in categorizing them at all. *Id.* at 2038. ("The category of 'the dangerous few' has utility as an organizing principle only to the extent that we have reliable mechanisms for identifying who is, and who is not, a member.").

107. *Id.* at 2044–48; s*ee also Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (describing the "magnitude of the problem" of violence in prisons); DAVIS, *supra* note 8, at 16 ("The prison therefore functions ideologically as an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers."); Blecker, *supra* note 84, at 1188 ("An inmate who does not escape, however, is not necessarily incapacitated. Incapacitation requires more than confinement. While incarcerated, an inmate must commit no crimes against society. Prisoners inside Central rarely assault visitors, teachers, counselors, or officers, mostly because they fear transfer. But prisoners often kill prisoners.") (footnotes omitted).

108. Frampton, *supra* note 104, at 2048–51; *see also* McLeod, *supra* note 18, at 1203; JACOB KANG-BROWN, VERA INST. JUST., UNDERSTANDING NATIONAL CRIME DATA 4 (2022) ("[M]any experiences of crime are never reported to the police and are therefore not counted in the FBI's statistics. Indeed, this is true for nearly half of serious violent crimes.").

109. Morris & Rothman, *supra* note 65, at x.

110. *Id.* ("The question, then, is whether the prison sentence simply occupies some of this time or whether it merely defers the experiential process of maturing away from criminal behavior.").

111. *See* Alfred Blumstein, *From Incapacitation to Criminal Careers*, 53 J. RSCH. CRIME & DELINQ. 291 (2016).

seven percent of all criminal activity,[112] but this number is likely much higher because of the expansion of prisons in the United States and the initial conservative estimates used in the study.[113] While not definitive, it is at least a close call whether prisons actually generate more crime than they avoid through deterrence and incapacitation.[114]

D. Rehabilitation

The rehabilitation theory of punishment emphasizes "the acquisition of skills or values which convert a criminal into a law-abiding citizen."[115] As opposed to specific deterrence, which uses the threat of reimprisonment to prevent individuals from committing future crimes, rehabilitation prioritizes educating incarcerated people and providing them with in-demand skillsets that will allow them to become active members of society after prison.[116] Rehabilitation also includes the growth of drug courts in the United States, which use the court system to help treat drug addiction in people charged with crimes.[117]

In the mid-twentieth century, rehabilitation was viewed as the primary justification of punishment in the United States.[118] This movement started in the second half of the nineteenth century when the New York Prison Association commissioned the *Report on the Prisons* that proposed a vision for prisons that "prepare inmates for release by allowing them to demonstrate and earn their advance toward freedom by moving through progressively liberal stages of discipline."[119] This perspective fell out of favor in the 1960s and '70s as influential judges and scholars began to reject the concept of indeterminant sentencing, which aimed to release incarcerated individuals after successful rehabilitation.[120] Parole and indeterminant sentencing were intended to give incarcerated individuals opportunities for accelerated release; however, with little demonstratable evidence of reduced recidivism rates, the practice was eventually rejected.[121]

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112. Pritikin, *supra* note 66, at 1082 (estimating that "incarceration causes about 7 percent of total crime: 1 percent because of in-prison crime, 2 percent because of prison-induced recidivism, and 4 percent because of the impact of incarceration on the delinquency of inmates' children").

113. *Id.* at 1082, 1093.

114. *Id.* at 1093 ("Although I am as of yet unable to derive estimates with enough specificity to say whether prisons are actually causing more crime than they are preventing, there is persuasive evidence that it is at least a close call.").

115. Blecker, *supra* note 84, at 1150.

116. *Id.* at 1197 ("Rehabilitation—or reformation—essentially consists of the acquisition of attitudes, values, habits and skills by which an 'enlightened' criminal comes to value himself as a member of a society in which he can function productively and lawfully.").

117. Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L. Q. 1205, 1206–07 (1998).

118. Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1012 (1991).

119. Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 170, 172–73 (Norval Morris & David J. Rothman eds., 1995).

120. Vitiello, *supra* note 118, at 1012.

121. Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1250 (2011). *See* McLeod, *supra* note 18, at 1213

Popular culture in the 1960s and '70s reflected the national dialogue surrounding rehabilitation and reforming prisoners. Take, for example, Anthony Burgess's 1962 novel *A Clockwork Orange*[122] and Stanley Kubrick's 1971 film adaptation of the same name.[123] In the story, Alex, an exceptionally violent teenager, is sentenced to prison following a brutal crime spree.[124] Once in prison, Alex is selected into a program that offers early release if he participates in a form of brainwashing that removes his propensity for violence.[125] The procedure is a success, and government officials use Alex's story for political gain, even though Alex is now left in a vulnerable state, absent of free will.[126] In this story, the procedure is an extreme version of rehabilitation that transforms a violent young man into a docile member of society. The story makes clear that the treatment Alex received did not remedy his past crimes, nor did it truly treat him as a person, but instead manipulated him into a state of submission.[127] The novel and film raise the question of whether rehabilitation can ever be truly effective.

A starting point for analyzing the effectiveness of rehabilitation is considering whether prisons are capable of reforming and reintegrating people into society. In the Supreme Court's decision in *Hudson v. Palmer*,[128] the justices offered different perspectives on this question.[129] In the majority opinion, Chief Justice Burger described incarcerated people as having "a demonstrated proclivity for antisocial criminal, and often violent, conduct"; "a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint"; and "an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others."[130] Rather than focusing on the root causes of this behavior or acknowledging the possibility that prisons breed this type of behavior, Chief Justice Burger suggested that the solution is to surveil incarcerated individuals as much as possible.[131] On the other hand, Justice Stevens, in his concurrence in part, argued that "such an approach undermines the

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("This fetish of finality is grounded in a narrative and background norms-a nomos-that complacently treats the conventional criminal process followed by conviction and prison-based punishment (or killing by the state) as basically moral and just."); *see also* Blecker, *supra* note 84, at 1149 ("By 1984, . . . Congress had rejected rehabilitation as an outmoded philosophy, abolished parole, and established the United States Sentencing Commission to fix sentences for a vast array of federal crimes, based largely on a philosophy of giving each criminal his just deserts.").

122. Anthony Burgess, A Clockwork Orange (1962).

123. A CLOCKWORK ORANGE (Warner Bros. Pictures 1971).

124. *See* BURGESS, *supra* note 122; *see also id.*

125. *See* BURGESS, *supra* note 122; *see also* A CLOCKWORK ORANGE, *supra* note 123.

126. *See* BURGESS, *supra* note 122; *see also* A CLOCKWORK ORANGE, *supra* note 123.

127. Illya Lichtenberg, Howard Lune & Patrick McManimon, Jr., "*Darker than Any Prison, Hotter than Any Human Flame": Punishment, Choice, and Culpability in* A Clockwork Orange, 15 J. CRIM. JUST. EDUC. 429, 432–33 (2004).

128. 468 U.S. 517 (1984) (holding that prisoners do not have a Fourth Amendment protection against unreasonable searches and seizures in their cells because they do not have a reasonable expectation of privacy).

129. *See* O'Hear, *supra* note 121, at 1272.

130. *Hudson*, 468 U.S. at 562.

131. *Id.* at 530.

rehabilitative function of the institution" and that depriving incarcerated individuals of a sense of individuality and value only perpetuates a pattern of violence.[132]

While the retributive theory views crime through a moral lens and the deterrent and incapacitative theories view crime through a preventive lens, rehabilitation is the only popular theory that focuses on the well-being of the criminal offender. Rather than "an eye for an eye," rehabilitation proposes an "eye patch for an eye."[133] Through a rehabilitation lens, a valid purpose of prisons is to reform offenders and prepare them for reentry into society as law-abiding citizens.[134]

To understand the effectiveness of rehabilitation, consideration must be given to whether prisons actually rehabilitate people and prepare them to reenter society; however, criminal law courses today often presuppose that prisons are effective tools for rehabilitation. One issue with rehabilitation theory is that it focuses on how an offender is broken and needs to be repaired.[135] However, in reality, incarceration may increase the likelihood that a person reoffends.[136] This reality is partly because rehabilitative interventions today are often focused on crime control and security, rather than on individual welfare.[137] The combination of living with the "criminal" label, reacting against society's distaste, and being exposed to criminal activity in prison actually exacerbates crime more than it rehabilitates people.[138] Even after being released from prison, the collateral consequences of incarceration so restrict a person's employment, education, and financial opportunities that reintegration into society is never truly possible.[139]

III. PROPOSED CRIMINAL RESPONSE FRAMEWORK

Developing young attorneys in an environment that assumes punishment is both justified and necessary further promulgates a pro-carceral system.[140] Rather than

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132. *Id.* at 552 (Stevens, J. concurring in part).

133. Blecker, *supra* note 84, at 1197.

134. Morris & Rothman, *supra* note 65, at x.

135. John Braithwaite, Restorative Justice: Assessing Optimistic and Pessimistic Accounts, 25 CRIME & JUST. 1, 68 (1999).

136. *See* McLeod, *supra* note 18, at 1203; *see also* Amy E. Lerman, *The People Prisons Make: Effects of Incarceration on Criminal Psychology*, *in* DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM 151, 152 (Steven Raphael & Michael A. Stoll eds., 2009) (highlighting that high-security prisons actually increase feelings of anger and violence in people who had mild criminal histories).

137. *See* David Garland, The Culture of Control: Crime and Social Order in Contemporary Society 175–76 (2001).

138. Pritikin, *supra* note 112, at 1099 ("Even rehabilitation—which is designed to reduce the offender's internal desire to reoffend, as opposed to inciting fear of the threat of external punishment—may have some inherent tendency to exacerbate crime through reactance, labeling, or exposure." (footnote omitted)).

139. *See Collateral Consequences Inventory*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.nationalreentryresourcecenter.org/consequences (providing a database of the thousands of collateral consequences of convictions); *see also Key Findings*, WHO PAYS?, https://www.whopaysreport.org/key-findings/ (revealing the collateral consequences imposed on convicted individuals' families) [perma.cc/L3X5-R697].

140. Ristroph, *supra* note 3, at 1686 (speculating that "legal education indoctrinates new

nurturing a creative space for students to decide *whether* punishment is necessary, criminal law professors often start by asking students *why* punishment is justified in a given situation.[141] If substantive criminal law courses across the country moved away from the "four horsemen"—retribution, deterrence, incapacitation, and rehabilitation—and instead moved toward a modern and holistic view of criminal justice, then law schools would generate more creative and well-informed lawyers. By cold-calling students to justify punishment in each case, criminal law professors take an extremely limited, individualized view of punishment that ignores societal trends and systemic issues.[142]

In the sections below, I propose a new criminal response framework to replace the four justifications of punishment primarily taught today. The new framework includes (1) non-punishment, (2) retributive punishment, (3) preventive justice, and (4) holistic rehabilitation. In this new framework, the first step of analysis is to determine whether punishment is justified at all. If punishment is to be imposed, then it can take either a moral or utilitarian function. Moral punishment can be analyzed through retribution, which has long been a cornerstone of society's moral view of punishment. The new framework requires students to inspect the history of incarceration as retributive punishment and draw their own conclusions on whether it is an inevitable component of criminal justice. From the utilitarian perspective, preventive justice is the combination of deterrence, incapacitation, and noncustodial social programs. It aims to proactively prevent crime from occurring. The final piece of the criminal response framework is holistic rehabilitation, which is a reactive utilitarian response to criminal activity. It includes carceral rehabilitation, but more importantly, it also includes non-carceral rehabilitation and how to address issues of addiction, mental illness, and homelessness.

A. Non-Punishment

The first step in my proposed criminal response framework is to ask whether punishment is warranted at all. This initial question should be asked in individual cases studied in first-year criminal law courses, but it should also be considered in larger societal questions of whether punishment is justified for whole categories of crime and what role punishment should play in our criminal law system. For example, is punishment a purely moral imposition? Or is it a utilitarian tool to achieve certain societal benefits?

As the idea of carceral abolition continues to become a focus of law students and legal scholars,[143] it is essential to directly introduce abolitionist concepts to first-year law students to maintain the credibility of curriculums and law professors. If socially conscious law students view traditional concepts of legality and the four

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lawyers with a set of ideas that make these lawyers more likely to embrace criminal sanctions").

141. *Id.* at 1660 ("Indeed, the appropriateness of punishment is often presented as self-evident; students are asked to consider why punishment is justified, not whether.").

142. *Id.* at 1663.

143. *See* Amna Akbar, *Teaching Penal Abolition*, LPE PROJECT (July 15, 2019), https://lpeproject.org/blog/teaching-abolition/ [perma.cc/HDN8-2KLJ]; Futrell, *supra* note 54, at 163–64 ("Once viewed as an impractical and peripheral idea, carceral abolition has become a provocative and ubiquitous theory of social change.").

theories of punishment as illegitimate,[144] then they will begin to disregard many lessons from substantive criminal law courses. This is not to say that criminal law courses should abandon the idea of justified punishment next semester; instead, I am asserting that criminal law professors should embrace abolitionist concepts in their curriculums. Otherwise, students could miss out on important criminal justice scholarship. Many students will tune out the course altogether if it does not teach the criminal justice system as it actually operates.

In criminal law courses today, professors often presuppose that a convicted person should be put in prison and then ask which of the four theories of punishment justifies the sentence.[145] Before coming to that conclusion, however, criminal law courses should begin with asking whether punishment is necessary in the first place based on the severity and context of the offense and the effects punishment would have on the community.[146] This additional step requires moving away from the idealistic approach to teaching criminal law and instead adopting a more realistic approach that considers how people are convicted and punished for crimes. Prisons are filled with disadvantaged people not because of the individuals' proclivity for crime or the failure of indigent defense; rather, prisons are filled with disadvantaged people because that is what the criminal justice system is designed to do, and it is very successful in that design.[147] Law schools, by teaching justifications for punishment over the last several decades, continue to reinforce the current system with each new class of lawyers. By breaking that cycle and introducing concepts of non-punishment early in law school, schools will start generating more well-rounded lawyers with better perspectives on criminal punishment.

Including non-punishment (or at least non-incarceration) in the criminal response framework provides a much-needed balance and opportunity for creativity that is currently missing in substantive criminal law education.[148] Students are more sophisticated and creative than they are often credited,[149] and it is therefore beneficial to both students and the legal profession to create a space for first-year students to consider and struggle with the implications of locking people up in cages. This approach would focus narrowly on individual cases, but more importantly, it would also consider larger societal impacts of imprisoning significant portions of the population—most often Black men[150]—as opposed to finding other solutions. By taking both a narrow, case-by-case approach and a broad, societal approach, law students will gain valuable insights into the severe impact incarceration has on

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144. *See* Frampton, *supra* note 104, at 2017 (citing Steve Crabtree, *Most Americans Say Policing Needs 'Major Changes'*, GALLUP (July 22, 2020), https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx) ("Younger people especially seem to be asking deep and fundamental questions about criminal law: in July 2020, a Gallup survey reported that thirty-three percent of respondents aged eighteen to thirty-four 'strongly supported' or 'somewhat supported' proposals to 'abolish police departments' (with enthusiasm much higher among nonwhite respondents generally).").

145. *See supra* note 53 and accompanying text.

146. Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 369 (2015).

147. *See* Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 1278 (2013).

148. *See supra* Section I.B.

149. Akbar, *supra* note 146, at 369–70.

150. CARSON, *supra* note 97, at 10.

individual people and families[151] and also the devastating impact on larger communities and the productivity of our country.[152]

B. Retributive Punishment

Under the new criminal response framework, retributive punishment is a purely punitive response to criminal activity. Because of its focus on morality, there is no way to objectively disprove its worthiness as a response to criminal activity. People will continue to use moral justifications for punishing wrongdoers, so it is important to acknowledge it in first-year criminal law courses. However, it should be explicitly stated that a retributivist response to crime is purely a moral punitive punishment, and professors should avoid backsliding into concepts of legality[153] or limiting retributivism,[154] which confuse retributivism as a tool to limit punitive punishment rather than to justify it.

Because retributive punishment is incompatible with abolitionist concepts, we should not try to perform any mental gymnastics to give it an abolitionist justification. Instead, it should be presented as a standalone, moral, and punitive justification for punishment, which means slightly adjusting how retributivism is taught in first-year criminal law courses. For example, analyzing the history of retributive punishment can cast doubt on the inherent legality of punishing criminal offenders and help students understand that there is no divine law in sentencing; instead, a collection of people, typically lawyers, decide who deserves punishment and what that punishment should be.[155] Furthermore, the new criminal response framework would require students to explore how retributive punishment disproportionately impacts certain communities.[156]

Abolitionists recognize the importance of naming a movement,[157] and it is similarly important to name the antithesis of the movement. Once retributive punishment is established as the antithesis of abolition, abolitionist theories can be used to counter the very shallow concepts of retribution[158] that have been taught in law schools for decades. If retribution contends that punishing criminals is a moral good, then first-year criminal law courses should offer the widely recognized counterargument that punishment—especially incarceration—is an inherently violent and immoral activity that should be avoided. And for those who do adopt a

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151. *See, e.g.*, BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014) (telling the stories of multiple incarcerated individuals and the terrible effects on them and their families, including the story of Walter McMillian, who was eventually exonerated).

152. Michael McLaughlin, Carrie Pettus-Davis, Derek Brown, Chris Veeh & Tanya Renn, *The Economic Burden of Incarceration in the U.S.* (Inst. for Advancing Just. Rsch. and Innovation, Working Paper No. AJI072016, 2016) (estimating the aggregate national cost of incarceration—including costs to incarcerated persons, families, children, and communities—to be approximately one trillion dollars).

153. *See supra* notes 43–45 and accompanying text.

154. *See supra* notes 65–69 and accompanying text.

155. *See supra* notes 56–63 and accompanying text.

156. *See* Ristroph, *supra* note 3, at 1677–78 n.218.

157. *See supra* note 22 and accompanying text.

158. *See supra* Section II.A.

retributive justification of punishment, it is important to contemplate what form the punishment should take and whether incarceration is the optimal tool.[159]

C. Preventive Justice

Under the criminal response framework, preventive justice is a proactive utilitarian approach to prevent criminal activity before it occurs. While the old justifications of punishment focus narrowly on preventing criminal activity through deterrence and incapacitation, my proposed criminal response framework uses a broader approach to reduce crime through preventive justice. Professor Allegra McCleod best explains the concept of preventive justice in her article *Prison Abolition and Grounded Justice*.[160] In addition to the breadth of scholarship focused on the injustice of punitive preventive measures such as sex offense registries, McLeod's definition of preventive justice focuses on reducing societal harms "without enlisting criminal law enforcement."[161] In this Note, I describe preventive justice in an even broader context: preventive justice is any societal tool—whether it be punitive or social—that aims to prevent criminal activity from occurring. This definition includes the old theories of deterrence[162] and incapacitation[163] in addition to social programs that eliminate people's incentives to commit crimes in the first place.[164]

Preventive justice in this new criminal response framework can be divided into two parts—punitive and social. *Punitive preventive justice* includes both custodial prevention and noncustodial prevention. Punitive custodial prevention includes using the fear of incarceration to deter crime[165] and the ability to control criminal offenders by removing them from the general population and holding them in jails and prisons.[166] Punitive noncustodial prevention is the use of law enforcement to prevent crime through means other than incarceration—including *Terry*[167] stops and registration requirements.[168] Under either custodial or noncustodial punitive preventive justice, we sacrifice individuals' significant liberty interests, whether through incarceration or other measures imposed before a guilty verdict or even a formal charge.[169]

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159. *See* McLeod, *supra* note 18, at 1235 ("Even if we grant that the relevant ideal justification of punishment is retributive, we should consider what actual retribution will be, rather than some idealized, seemingly unachievable version of it.").

160. *Id.* at 1218–24.

161. *Id.* at 1219.

162. *See supra* Section II.B.

163. *See supra* Section II.C.

164. *See* McLeod, *supra* note 18, at 1218.

165. *See supra* Section II.B (describing both general deterrence and specific deterrence).

166. *See supra* Section II.C.

167. Terry v. Ohio, 392 U.S. 1 (1968).

168. *See* McLeod, *supra* note 18, at 1164 ("These purportedly preventive measures include stop and frisk policing, noncustodial criminal supervision, registration requirements for people convicted of certain crimes (especially sex-related offenses), and preventive detention.") (footnotes omitted).

169. *See id.* at 1165 ("This critical scholarship identifies how these contemporary punitive preventive interventions eviscerate important liberty interests and violate basic criminal rule of law principles, primarily by imposing significant adverse consequences before a

Social preventive justice, on the other hand, focuses on tools outside of law enforcement to reduce crime. Social programs can play a key role in proactively addressing the root cause of most criminal activity.[170] While the concept of preventing crime through investments in social programs, instead of investing in incarceration, is gaining popularity today with the abolitionist movement, it is actually a concept that dates back to the nineteenth century.[171] Today, there are a myriad of proposals to prevent criminal activity—including decriminalization and urban redevelopment—that could be more effective than incarceration at preventing crime and also avoid the horrible violence that incarceration entails.[172]

In my proposed criminal response framework, preventive justice is a much more holistic approach to reducing crime than the old justifications of punishment offered. If the true goal of the deterrent and incapacitative theories of punishment is to reduce crime, then it only makes sense to embrace the modern reconceptualization of preventive justice that aims to accomplish the same goal. By studying punitive and social preventive justice, law students will begin to approach criminal response in a more holistic way that embraces traditional theories of punishment and modern concepts of abolition.

D. Holistic Rehabilitation

The final part of the new criminal response framework is holistic rehabilitation, which enables criminal offenders to acclimate to society in a lasting and meaningful way. It is a reactive utilitarian approach that helps criminal offenders to either reenter society or otherwise receive assistance that will prevent future criminal offenses. Under the new framework, holistic rehabilitation includes both concepts from the carceral rehabilitative theory of punishment[173] and non-carceral measures to rehabilitate criminal offenders who require assistance.

As a carceral response to criminal activity, rehabilitation includes reforming prisons to provide meaningful addiction treatments and opportunities for education. In certain circumstances, prisons—particularly low-security prisons—can be effective at rehabilitating offenders, but that limited success does not wholly justify the need for prisons under the theory of rehabilitation.[174] While certain prison conditions may have a net positive effect on reducing recidivism, prisons are not the

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meaningful, procedurally regular finding of guilt.”).

170. Abolitionist frameworks of investing in social programs—rather than in law enforcement—are the best tools to combat crime and reduce society’s reliance on incarceration. *Invest-Divest*, MOVEMENT FOR BLACK LIVES, (May 30, 2020, 9:29 PM), https://m4bl.org/policy-platforms/invest-divest/ [perma.cc/RME4-TDRQ].

171. *See* McLeod, *supra* note 18, at 1220–21 (exploring Jeremy Bentham’s conception of prevention that was centered around ensuring people’s security and expectation of security in the future).

172. *See id.* at 1224–31.

173. *See supra* Section II.D.

174. McLeod, *supra* note 18, at 1204 (“[R]eformation is an unexceptional purpose of incarceration. But it does not justify the prison.”); Vitiello, *supra* note 118, at 1014 (“To recognize that we punish for purposes other than rehabilitation, however, is not to admit that rehabilitation or transformation of a prisoner is irrelevant to how long we continue to punish that person.”).

most effective tools for rehabilitating individuals.[175] As a non-carceral response to criminal activity, the criminal justice system should not default to incarcerating people who would otherwise benefit from other rehabilitative programs. As Professor McLeod points out, "there is no persuasive evidence that rehabilitative incarceration is more likely to produce desired results than an alternative array of interventions not organized around imprisonment."[176] These alternatives include, but are not limited to, providing free, community-based drug treatment; removing labels such as "criminal" or "felon"; and promoting reparative law over criminal law.[177] By including these non-carceral alternatives for rehabilitation in the criminal response framework, criminal law scholarship will include more tools for a reactive utilitarian approach to crime.

One aspect of rehabilitation is recovery from drug addiction or other mental illnesses. Recovery can be viewed through two lenses—individual recovery and social recovery. Individual recovery takes a micro-level approach to treating individual people. While this is a necessary lens to analyze recovery, it is also essential that we begin to more closely analyze recovery at a societal level.[178] Social recovery emphasizes the importance of social connections and life purpose in treating addiction.[179] While conventional wisdom is that drug addiction is a physical dependency that can only be treated by removing the presence of drugs, new studies suggest that a more effective way to treat and prevent addiction is to provide sufficient alternatives to drug use, such as social connections and meaningful work.[180] Modern rehabilitation practices need to embrace these new studies and work to reintegrate people addicted to drugs into society rather than incarcerating these people, which will only further disconnect them from society and likely worsen the dependency.[181] In fact, some evidence suggests that the best way to treat the societal issue of drug addiction and its harms is to decriminalize drugs altogether.[182]

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175. McLeod, *supra* note 18, at 1204 ("Although there is some evidence that rehabilitative programming in prison reduces recidivism relative to incarceration in harsher, more punitive conditions, this does not demonstrate that imprisonment is more rehabilitative than other modes of social response outside of the prison setting").

176. *Id.* at 1205.

177. DAVIS, *supra* note 8, at 108–09, 112–13.

178. *See* Johann Hari, *Everything You Think You Know About Addiction Is Wrong*, TED CONFERENCES 11:47 (June 16, 2015), https://www.ted.com/talks/johann_hari_everything_you_think_you_know_about_addiction_is_wrong/transcript?language=en [perma.cc/UF4Q-Y75G].

179. See id.

180. *See id.* at 3:30 (describing an experiment in which rats in a lonely cage opt to use and overdose on drugs while rats in "Rat Park" opt not to use drugs); Christine Minhee & Steve Calandrillo, *The Cure for America's Opioid Crisis: End the War on Drugs*, 42 HARV. J. L. & PUB. POL'Y 547, 559–60 (2019) (describing Bruce Alexander's experiment that disproved the chemical hook theory of drug addiction and replacing it with an environmental theory).

181. *See* Hari, *supra* note 178, at 7:26 (arguing that the worst system to treat addiction is one that punishes, shames, and gives criminal records to people addicted to drugs).

182. *See* Caitlin Elizabeth Hughes & Alex Stevens, *What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?*, 50 BRIT. J. CRIMINOLOGY 999, 1017 (2010) (concluding that Portugal's blanket decriminalization of drugs led to reduced illicit drug use among problematic drug users and adolescents, reduced burden of drug offenders on the criminal justice system, increased uptake of drug treatment, and reduction in opiate-related

IV. IMPACT ON THE LEGAL PROFESSION

My proposed criminal response framework would shift the focus of first-year criminal law courses away from justifying punishment and toward a more holistic approach to reducing the societal harms caused by criminal activity. Students will graduate law school with a better understanding of how criminal justice impacts society and a toolkit to treat some of the bugs (and undesirable features) of the criminal justice system. This new class of attorneys will go on to become prosecutors and defense attorneys with a shared concept of what criminal justice can and should be. Some of them will become professors and write textbooks of their own that further develop what is possible in the criminal justice system. Eventually, judges and legislators will use these new views of criminal justice—that started in their first-year criminal law courses and developed throughout their careers—to shape new laws and potentially radically change how society treats criminal offenders.

For decades, criminal legal education has produced attorneys that continue to perpetuate a pro-carceral system.[183] My proposed framework aims to undo this default pro-carceral mindset and instead challenge students (future lawyers) to think critically about the objectives of the criminal justice system and to use creative problem solving to meaningfully transform how we approach criminal punishment. This shift will be an obvious benefit to lawyers in criminal law, but it will also empower lawyers outside of criminal practices. Over time, lawyers will begin to think differently about how our society functions, explore criminal justice through legal scholarship, and eventually create meaningful change as judges, legislators, and executives.

One does not need to search hard for examples of how the four theories of punishment have influenced all three branches of government in promoting a pro-carceral system. Legislators codified the four theories in the factors federal judges must consider during sentencing: (A) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense" (retribution); (B) "to afford adequate deterrence to criminal conduct" (deterrence); (C) "to protect the public from further crimes of the defendant" (incapacitation); and (D) "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner" (rehabilitation).[184] From the executive branch, U.S. attorneys general have echoed the importance of the four theories of punishment in their respective charging and sentencing memoranda.[185] And finally, judges enjoy very broad discretion in

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deaths and infectious diseases); Hari, *supra* note 178, at 8:12 (discussing the same conclusions from Portugal's drug decriminalization strategy as well as the essential steps of creating jobs for people with substance abuse disorders and giving microloans to help people with substance abuse disorders start small businesses). *But see* Hannah Laqueur, *Uses and Abuses of Drug Decriminalization in Portugal*, 40 LAW & SOC. INQUIRY 746, 772 (2015) ("This article posited that although Portugal's 2001 drug reform law was less far reaching than implied by the media attention it received, the elimination of criminal sanctions for drug use was significant because it institutionalized the expectation to provide treatment for and support to drug addicts.").

183. *See supra* Section I.B; *see also* Ristroph, *supra* note 3, at 1634.

184. 18 U.S.C.A. § 3553(a)(2) (West).

185. *See, e.g.*, Att'y Gen. Merrick Garland, *General Department Policies Regarding Charging, Pleas, and Sentencing* (Dec. 16, 2022) (considering "whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general

sentencing decisions,[186] so their legal education on the theories of punishment is likely very influential.

Changing how law school professors approach first-year criminal law courses is not a simple undertaking. The status quo is deeply ingrained in curriculums and law professors.[187] However, generations of lawyers can be influenced by one prominent textbook.[188] Therefore, the most far-reaching way to spread a new criminal response framework would be to incorporate it into new editions of criminal law textbooks in place of the old justifications of punishment.[189] Even before such a book exists, criminal law professors can use the framework in designing their course syllabi.[190] Professors should take this immediate step because the generation of students entering law school today is already skeptical of how the criminal justice system currently operates.[191] Especially for students from minority groups who often have different lived experiences than their majority White classmates, it is important to foster an inclusive environment and ensure all students feel a sense of belonging.[192]

The new framework can also be a tool for law professors in their scholarship. Today, legal scholarship often falls into a pro-carceral trap,[193] and that is unsurprising given the decades of pro-carceral curriculums in criminal law courses. Addressing abolitionist concepts in legal scholarship will serve not only as a counterbalance to the historic bias in favor of the carceral state, but it will also generate more creative and modern approaches to criminal law that have yet to be explored. Because legal scholars are free from the "penal populism" that plagues other leaders in criminal law policy—such as prosecutors, judges, legislators, and certain experts[194]—many people believe the path to meaningful decarceration will likely be paved by these

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deterrence, and rehabilitation"); Att'y Gen. Jeff Sessions, *Department Charging and Sentencing Policy* (May 10, 2017) ("This policy affirms our responsibility to enforce the law, is moral and just, and produces consistency. This policy fully utilizes the tools Congress has given us."); Att'y Gen. Eric Holder, *Department Policy on Charging and Sentencing* (May 19, 2010) ("Charging decisions should be informed by reason and by the general purposes of criminal law enforcement: punishment, public safety, deterrence, and rehabilitation.").

186. *See, e.g.*, Williams v. People of State of N.Y., 337 U.S. 241, 251–52 (1949) (upholding a judge's decision to impose the death penalty despite considering out-of-court information, even though such broad discretion is "susceptible of abuse").

187. *See supra* Section I.B.

188. *See supra* note 36 and accompanying text.

189. *But see* Ristroph, *supra* note 3, at 1679–85 (arguing that the law textbook is not the best tool to create change).

190. Some education scholars argue that professors should create their syllabi in collaboration with their students; however, in first-year (especially first-semester) law school courses, professors are likely better off writing their own syllabi because law school is a completely new educational experience for most students. *See* Gerald F. Hess, *Collaborative Course Design: Not My Course, Not Their Course, but Our Course*, 47 WASHBURN L.J. 367, 379–80 (2008).

191. *See supra* note 144 and accompanying text.

192. *See* Emily Grant, *Belongingness*, 54 CONN. L. REV. ONLINE, 15–17 (2022).

193. *See supra* notes 87–92 and accompanying text (discussing one example of a misleading, pro-carceral academic paper authored by two Harvard professors that has been cited in popular news sources).

194. Seema Tahir Saifee, *Decarceration's Inside Partners*, 91 FORDHAM L. REV. 53, 56–58 (2022).

elite academics.[195] However, a growing competing view is that the movement for decarceration and relevant legal scholarship should be informed by people who have actually experienced incarceration through the criminal justice system.[196] By embracing modern approaches to criminal law—both through my proposed criminal response framework and through relying on the most well-informed experts—legal scholarship can produce more meaningful proposals for decarceration.

CONCLUSION

The four justifications of punishment taught in criminal law courses today are insufficient to analyze our current criminal justice system. Instead of teaching these antiquated theories, first-year criminal law courses should use my proposed criminal response framework and analyze each case and chapter through the lens of these theories. Does the offender morally deserve punishment? Would that punishment benefit or harm society? How could the criminal activity have been prevented to begin with? Would this person (and society) benefit from treatment over incarceration? Asking these questions would generate creative problem solving in classrooms and shift the focus from punitive punishment to how the criminal justice system actually impacts society as whole.[197] After learning this framework in first-year criminal law classes, students will be able to apply the theories in the rest of their courses and later in their own legal practices. Eventually, the theories will be explored further by future legal scholars and meaningful, transformational change will be possible in our criminal justice system.

195. *Id.* at 113–14 ("This approach is grounded in the idea that academics with elite educational credentials who regularly study these issues may be better able to resist 'penal populism,' the tendency to set criminal policy by catering to ill-informed, irrational voters who are driven by emotions, fear, and punitive impulses.").

196. *Id.* at 114–15 (describing a new type of expert as "people in racially and economically marginalized communities who speak from experience about the harms of policing, criminalization, and incarceration"); *see also* Butler, *supra* note 40, at 27–30 (describing the epistemic oppression of people with lived experiences that can better inform criminal law policies and legal scholarship).

197. *See* Harris & Lee, *supra* note 48, at 261–62, 265–66.