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# ARTICLES

## The Dissociative Theory of Punishment

SHIRIN BAKHSHAY*

*The American public has complex views on criminal punishment. They are driven primarily by retributive motivations. But they have other justice considerations, such as restoration and rehabilitation, that can be activated in different ways. Laypersons are also motivated to psychologically distance and dissociate from those they perceive to be criminal "others" and to see punishment itself as a kind of dissociation, embodied by the prison form. The psychological processes that produce these beliefs lead to an insistence on prison as a necessary criminal justice outcome, despite reservations about its effectiveness and concerns about the state of mass incarceration and punitive penal policy more generally.*

*This Article builds on the psychology of punishment literature to offer a deeper understanding of the dissociative theory of punishment and how it produces the belief in the necessity of prison. Drawing on original, qualitative focus group data and analysis, this Article identifies the specific psychological mechanisms that motivate dissociation, explains the role of the belief in retributive justice as part of this process, and offers nuanced insights into the contours of the dissociative theory and the way people psychologically reason about criminal punishment.*

*Identifying the components of the dissociative process and those beliefs that are malleable has important practical and normative implications. It also suggests the possibility of a different approach to criminal punishment. Leveraging insights from focus group analysis as well as original experimental work, this Article suggests a normative approach—restorative punishment—that is more responsive to lay psychology. This Article discusses strategies consistent with this approach that may be effective in disrupting dissociation and building support for alternatives to incarceration, including bridging connections with criminal actors, reframing alternatives to incarceration in ways that better align with the retributive motivations of the public, and activating other conceptions of justice that*

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*are not well served by the imposition of a prison sentence. It then explores two specific criminal justice policies through this normative lens—restorative justice diversion and second look resentencing—and discusses their psychological appeal. This Article ends by offering an empirical agenda to test the mechanisms that drive dissociation and explores the potential for a restorative punishment approach to criminal justice policy.*

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## INTRODUCTION

Despite tremendous efforts to reform the criminal justice system,[1] America remains the most punitive society in the Western world.[2] And despite a general sense among the lay public that the system is too punitive and mass incarceration is a problem,[3] there is still a deeply entrenched resistance to decarceral reforms

1. *See, e.g.*, First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified in scattered sections of 18, 21, and 34 U.S.C.); Tim Lau, *Historic Criminal Justice Reform Legislation Signed into Law*, BRENNAN CTR. FOR JUST. (Dec. 21, 2018, 1:10 PM), https://www.brennancenter.org/our-work/analysis-opinion/historic-criminal-justice-reform-legislation-signed-law [https://perma.cc/3H3D-8BE6] (describing how the First Step Act shortens sentences and enables retroactive resentencing of thousands of inmates, proving the potential for bipartisan criminal penal reform); *see also* DENNIS SCHRANTZ, STEPHEN T. DEBOR & MARC MAUER, THE SENT'G PROJECT, DECARCERATION STRATEGIES: HOW 5 STATES ACHIEVED SUBSTANTIAL PRISON POPULATION REDUCTIONS 5 (2018), http://arks.princeton.edu/ark:/88435/dsp013b591c63 [https://perma.cc/E22M-77ML] (describing state-level criminal justice reforms); Michael Campbell, Heather Schoenfeld & Paige Vaughn, *Same Old Song and Dance? An Analysis of Legislative Activity in a Period of Penal Reform*, 22 PUNISHMENT & SOC'Y 389, 390 (2020) (same).

2. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/4KAQ-BYVX].

3. *See* Press Release, Vera Inst. of Just., New Poll Finds that Urban and Rural America Are Rethinking Mass Incarceration (Apr. 19, 2018) (available at https://www.vera.org/newsroom/new-poll-

and criminal justice outcomes that do not align with the public's expectations of punishment.[4]

The American public's views on criminal punishment are complicated and nuanced, but social psychology offers a way to make sense of them. Psychology has consistently found that people are motivated primarily by retributive concerns in their punishment determinations.[5] That is, they are most concerned with the moral magnitude of the crime and the moral culpability of the criminal actor when thinking about whether and how much to punish them.[6] And for many members of the lay public, retribution is mainly synonymous with justice. The idea that a criminal actor deserves justice is supplanted by the idea that they deserve retribution.

However, my research, consistent with other studies in psychology, has found that the lay public has other justice considerations as well, including restoration, rehabilitation, and accountability.[7] When prompted to consider justice more fully or given time to reason about what an appropriate criminal justice outcome would look like, many people articulate a range of justice concerns. These conceptions are somewhat elastic and can be primed or prioritized depending on different factors and, importantly, how members of the public are asked about their beliefs.[8]

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finds-that-urban-and-rural-america-are-rethinking-mass-incarceration [https://perma.cc/QJ94-PM2C]) (finding that 40% of American adults believe incarceration rates are too high); Press Release, ACLU, 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds (Nov. 16, 2017, 10:15 AM) (available at https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds [https://perma.cc/MFM7-FAVU]); *cf.* ALL. FOR SAFETY & JUST., TOWARD SHARED SAFETY: THE FIRST-EVER NATIONAL SURVEY OF AMERICA'S SAFETY GAPS 34–38 (2020), https://allianceforsafetyandjustice.org/wp-content/uploads/2020/09/NatlSafetyGaps-Report-PREVIEW-20200908-1751.pdf [https://perma.cc/AGF8-LNE3] (finding that a majority of American voters support public safety investments over funding prisons and jails). "Mass incarceration" here refers to the lay understanding of mass incarceration—a critique of the number of people incarcerated as opposed to a structural critique of the system. For more on this distinction, see generally Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018).

4. *See* Shirin Bakhshay, Satisfying the Urge to Punish: Exploring Attitudes Towards Restorative Justice as an Alternative to Incarceration 66 (Dec. 2020) (Ph.D. dissertation, University of California, Santa Cruz) (on file with author); Julian V. Roberts, *Public Opinion and the Nature of Community Penalties: International Findings*, *in* CHANGING ATTITUDES TO PUNISHMENT: PUBLIC OPINION, CRIME AND JUSTICE 33, 34 (Julian V. Roberts & Mike Hough eds., Routledge 2011) (2002).

5. *See* Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCH. 284, 284 (2002); Kevin M. Carlsmith, *The Roles of Retribution and Utility in Determining Punishment*, 42 J. EXPERIMENTAL SOC. PSYCH. 437, 446 (2006); John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 LAW & HUM. BEHAV. 659, 671, 676 (2000). For an overview of the main studies on the psychology of retribution and motivations to punish, see generally Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice*, *in* 40 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 193 (Mark P. Zanna ed., 2008).

6. *See* Darley et al., *supra* note 5, at 671, 676–77.

7. *See infra* Part II; *see, e.g.*, Dena M. Gromet, Tyler G. Okimoto, Michael Wenzel & John M. Darley, *A Victim-Centered Approach to Justice? Victim Satisfaction Effects on Third-Party Punishments*, 36 LAW & HUM. BEHAV. 375, 386 (2012).

8. *See* Dena M. Gromet & John M. Darley, *Punishment and Beyond: Achieving Justice Through the Satisfaction of Multiple Goals*, 43 LAW & SOC'Y REV. 1, 25–26 (2009); *see also* Loretta J. Stalans, *Frames, Framing Effects, and Survey Responses* (discussing the importance of how survey questions are

For the most part, current penal policy and dominant sociocultural scripts that provide a map for how many people think about punishment prioritize retributive concerns, and to a lesser extent incapacitative ones, over and often to the exclusion of other concerns.[9] The consequence of this prioritization is that most people intuitively think about retribution as meeting the definition of justice and prison as embodying both retribution and justice.

Psychology and criminal legal scholarship also provide the foundation for understanding the lay public's attitudes toward punishment through a dissociative lens.[10] Many people who consider themselves to be law-abiding members of society are motivated to psychologically distance from and ultimately dissociate from those they perceive to be criminal "others."[11] They also come to view punishment itself as a type of dissociation, embodied by the prison form. Once someone has been deemed criminal, they are dissociated and severed from the rest of society—removed and contained in a carceral institution far from the daily concerns of everyday people. In some instances, this process is exacerbated by racial bias and stereotyping.[12]

This dissociative process elevates retribution as a justification for punishment—it centers retributive concerns and results in the conflation of justice with punishment and, ultimately, prison.[13] And many people are psychologically motivated to engage in dissociation. It provides a distinct psychological benefit in elevating their sense of identity and status as part of the moral community.[14]

This Article builds on and extends this line of research. Drawing on original, qualitative focus group data, it identifies the specific psychological mechanisms that drive dissociation, explains the role of the belief in retributive justice as part

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asked), *in* HANDBOOK OF SURVEY METHODOLOGY FOR THE SOCIAL SCIENCES 75, 75–76 (Lior Gideon ed., 2012).

9. Cassia Spohn, Commentary, *Twentieth-Century Sentencing Reform Movement: Looking Backward, Moving Forward*, 13 CRIMINOLOGY & PUB. POL'Y 535, 537 (2014); Kathleen Auerhahn, *Selective Incapacitation and the Problem of Prediction*, 37 CRIMINOLOGY 703, 704 (1999); *see also* Craig Haney, *Politicizing Crime and Punishment: Redefining "Justice" to Fight the "War on Prisoners,"* 114 W. VA. L. REV. 373, 388–89 (2012) (discussing the shift from rehabilitation to retribution); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 458 (1992) (discussing the emphasis on incapacitation).

10. *See infra* Section II.A.

11. *See infra* Section II.A.1.

12. *See infra* Section II.A.2. *See generally* JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO (2019) (discussing the way that bias leads to othering).

13. This Article is concerned with people's attitudes toward prison as a punishment for crime specifically, as opposed to pretrial detention or even postconviction detention in a jail. The theory advanced is specific to the lay understanding of prison, as distant, remote, and housing serious criminal actors. Although many members of the public do not appreciate or understand the difference between prison and jail, and may use the terms interchangeably, the theory advanced here and the data referred to throughout this Article are specific to prisons.

14. *See* Julian M. Rucker & Jennifer A. Richeson, *Toward an Understanding of Structural Racism: Implications for Criminal Justice*, 374 SCI. 286, 286 (2021); Anna King & Shadd Maruna, *Is a Conservative Just a Liberal Who Has Been Mugged? Exploring the Origins of Punitive Views*, 11 PUNISHMENT & SOC'Y 147, 148 (2009).

of this process, and provides a deeper understanding of the contours of the dissociative theory and the way people psychologically reason about criminal punishment. Understanding these psychological mechanisms offers significant insights not just into how the public thinks about criminal punishment and what motivates their insistence on prison outcomes, but into the ways in which their views are malleable and responsive to different institutional factors and goals.

The elastic, complex, and nuanced nature of people's views on justice complicates the notion of what criminal punishment should look like. It suggests opportunities for criminal justice policy to better and more fully respond to people's psychological beliefs. This Article leverages the insights from the dissociative theory and the qualitative data presented to suggest a new normative approach to criminal punishment, restorative punishment, that validates the deep-seated psychological belief in retributive justice while activating other justice concerns and gesturing toward other criminal justice outcomes. The dissociative theory suggests that laypersons believe severing criminal actors from their community, society, and humanity will resolve the problems that they pose. By offering an alternative approach that meets the definition of punishment while emphasizing a criminal actor's obligations and ongoing connections to society, it may be possible to build support for diversionary practices and decarceral reforms, even in the face of growing punitive political rhetoric.

The public's views on punishment and their endorsement of prison as meeting the definition of punishment have important practical and normative implications. From a practical standpoint, criminal justice policy and the legal actors and politicians responsible for setting it are somewhat beholden to public views on just punishment. Criminal justice is a perpetual hot-button issue and reforms must be seen as having some measure of popular support to be enacted and sustained.[15] Many politicians fear being seen as soft on crime,[16] which limits their desire to enact penal policies that do not seem to be resoundingly supported by the public. And policies that do not attend to the lay psychology of the public risk failure because of potential backlashes and changes in political whims.

Psychology is different from and deeper than public opinion. It seeks to understand individual cognitions, attitudes, and behaviors and how they are affected by social context, social groups, and social and legal institutions.[17] It determines the way many laypersons think about crime and punishment, which affects their support for legal and penal institutions and their attitudes toward change.[18] Policies

15. *See* Justin T. Pickett, *Public Opinion and Criminal Justice Policy: Theory and Research*, 2 ANN. REV. CRIMINOLOGY 405, 418–19 (2019); PETER K. ENNS, INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD 28 (2016).

16. Historically, there has been no more potent political weapon than accusing a rival of being soft on crime. *See* Tim Newburn & Trevor Jones, *Symbolic Politics and Penal Populism: The Long Shadow of Willie Horton*, 1 CRIME MEDIA CULTURE 72, 73 (2005); ENNS, *supra* note 15.

17. *See generally* NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 2 (1st paperback ed. 2001) (examining the psychology behind commonsense notions of justice and fairness).

18. *See generally, e.g.*, PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (Routledge 2018) (1995); Tracey L. Meares, Neal Katyal

and a criminal justice approach that are responsive to people's psychology—what they believe at a deep, symbolic level and what resonates with their sense of justice—are more likely to withstand shifts in political tides and fluctuations in public opinion.[19]

From a normative standpoint, the criminal law is fundamentally about conveying social meaning about what is right and wrong and is meant to reflect the public's beliefs about appropriate behavior. The criminal law expresses our shared moral and social values, and punishment is meant to reflect the community's judgment about the proper response to a violation of those values.[20] In this way, it should matter deeply that our criminal laws and, importantly, our system of punishment align with people's psychological intuitions and beliefs.

This Article proceeds in three Parts. Part I provides an overview of the psychology of punishment and the research focused on retributive motivations. It also emphasizes the importance of psychology to address issues in criminal justice policy and suggests that attending to the psychology of punishment may create opportunities for rethinking the dominant justifications for criminal punishment. Part II is the theoretical and empirical heart of the Article. Drawing on prior research on the psychology of punishment, it lays out the dissociative theory of punishment, explaining the psychological foundations for the distancing and dissociation of criminal others and the sociopsychological understanding of punishment itself as a type of dissociation. It identifies the specific cognitive mechanisms that motivate dissociation and considers the role of the belief in retribution as furthering the dissociative process. And it theorizes that racial bias plays a mediating role in this process—exacerbating distancing and separation from those seen as criminal others. Part II interweaves original, qualitative data from focus group discussions to demonstrate how the theory operates in the real world, elevating the voices of participants to provide nuanced insights and a richer description of the theory's components.

Identifying the components of the dissociative process and those beliefs that are malleable and responsive to different types of information also creates possibilities for alternative criminal justice outcomes. Part III leverages the insights

& Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171 (2004); Tom R. Tyler, Phillip Atiba Goff & Robert J. MacCoun, *The Impact of Psychological Science on Policing in the United States: Procedural Justice, Legitimacy, and Effective Law Enforcement*, 16 PSYCH. SCI. PUB. INT. 75 (2015).

19. *See* Arie Freiberg, *Affective Versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice*, 3 PUNISHMENT & SOC'Y 265, 265 (2001); Tom R. Tyler & Renee Weber, *Support for the Death Penalty; Instrumental Response to Crime, or Symbolic Attitude?*, 17 LAW & SOC'Y REV. 21, 40, 43 (1982) (describing criminal justice beliefs as symbolic and durable).

20. *See* RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS 13 (2015) (outlining four types of expressive claims about the law); EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 102 (Steven Lukes, ed., W.D. Halls trans., Free Press 2014) (1893) (considering the interplay between the individual and society); DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 162–63 (1990) (summarizing Foucault's description of modern punishment as a model of social control); *see also* Jasmine R. Silver & Eric Silver, *Why Are Conservatives More Punitive than Liberals? A Moral Foundations Approach*, 41 LAW & HUM. BEHAV. 258, 267 (2017) (examining the moral foundations underlying people's ideological and punitive attitudes).

from the dissociative theory as well as original experimental data to suggest the possibility of a new normative approach to criminal punishment—restorative punishment. It sketches the contours of a restorative punishment approach, which may be able to disrupt dissociation and build support for a broader range of criminal justice outcomes. This approach emphasizes building connections with people accused or convicted of crime, reframing alternatives to incarceration in ways that better align with the retributive motivations of the public, and activating other conceptions of justice that are not well served by the imposition of a prison sentence. In addition to these broad strategies, Part III explores two specific policies, restorative justice diversion and second look resentencing, through this normative lens. It argues that restorative justice diversion and second look resentencing meet the criteria to garner public support and discusses the aspects of these policies that are psychologically resonant. The Article concludes by briefly outlining an empirical research agenda to test the mechanisms that drive dissociation and explore the potential for a restorative punishment approach to criminal justice policy.

## I. THE PSYCHOLOGY OF PUNISHMENT

Criminal justice policy and specific penal outcomes are the product of a legal and institutional regime influenced by political, economic, and social considerations, among others. These forces shape the goals and ideological commitments of the experts, legal actors, politicians, and public responsible for setting criminal justice policy. Sociopsychological forces also play a significant role in determining policies and outcomes, and psychology provides another lens through which to understand these decisions and how they connect to people's stated goals and internal motivations.[21]

In the current landscape, the lay psychology of punishment interacts with political incentives and institutional dynamics in ways that perpetuate mass incarceration. There is a cyclical nature to the relationship between lay attitudes and policy. Lay attitudes toward penal policy are in part a function of the political rhetoric and machinations of the last several decades, but they also shape the politics and social ecology that have given rise to the current policy climate.[22] Psychology is just one piece of the puzzle, but it is an important piece.

Utilizing a psychological lens to examine criminal justice developments enhances understanding of policy at a high level and individual attitudes at a more granular level. Psychology helps make sense of public sentiment by

21. Social psychology has been particularly informative in the realms of procedural justice, legitimacy, and policing. *See* Meares et al., *supra* note 18, at 1193–97; Roseanna Sommers, *Experimental Jurisprudence*, 373 SCI. 394, 394–95 (2021) (discussing the way psychology can inform the law in general). *See generally, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); Tracey L. Meares, Tom R. Tyler & Jacob Gardener, *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. L. & CRIMINOLOGY 297 (2015); Tyler et al., *supra* note 18.

22. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 77–78 (1997); Pickett, *supra* note 15, at 421.

identifying its conceptual origins and the precise cognitive mechanisms that produce specific attitudes and beliefs. This approach enables a legal and policy response at various levels—at the level of deep psychological belief that produces specific attitudes or at the attitude level itself. Psychology can help distinguish between an individual's stated aims and actual motivations, and can uncover gaps between the two that can be addressed with more responsive policy. If criminal justice reform is considered to be merely a political or policy issue with a political or policy solution, it risks misunderstanding or sidelining people's psychological needs in ways that can undermine legal or policy goals. Moreover, understanding lay beliefs about criminal punishment has important normative implications. It can help ensure that the legal doctrine and justification for punishment reflects the public's beliefs and accurately communicates the expressive goals of punishment.[23]

Although psychology has much to contribute to the debates regarding penal reform—both its substance and the manner of achieving it—it has been eclipsed by other concerns.[24] And although there is a rich literature on the psychology of punishment,[25] much of it focuses on individual motives for punishment broadly understood.[26] The literature has not focused on how those motives translate into a deep belief in the necessity of prison as a specific penal outcome and how psychology might inform a different normative approach.

### A. THE RETRIBUTIVE NATURE OF PUNITIVENESS

Social psychologists inquire into lay beliefs about punishment to understand if they match up with the law, glean insights into improving penal policy, and determine ways to increase the credibility and legitimacy of the criminal justice system.[27] A large body of research concerns lay beliefs about the purpose of

23. *See generally* MCADAMS, *supra* note 20 (demonstrating the expressive influence of law on behavior).

24. Political scientists and criminologists have done a lot of work exploring the relationship between public opinion and criminal justice policy. This work argues that public opinion is a key driver of criminal justice policy; it is not focused on the psychological mechanisms that produce these attitudes and opinions. *See, e.g.*, Pickett, *supra* note 15; ENNS, *supra* note 15.

25. *See generally, e.g.*, SOCIAL PSYCHOLOGY OF PUNISHMENT OF CRIME (Margit E. Oswald et al. eds., 2009); CRAIG HANEY, CRIMINALITY IN CONTEXT: THE PSYCHOLOGICAL FOUNDATIONS OF CRIMINAL JUSTICE REFORM (2020); Timothy F Hartnagel & Laura J Templeton, *Emotions About Crime and Attitudes to Punishment*, 14 PUNISHMENT & SOC'Y 452 (2012); Tom R. Tyler & Robert J. Boeckmann, *Three Strikes and You Are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 LAW & SOC'Y REV. 237 (1997); Neil Vidmar, *Retribution and Revenge*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 31 (Joseph Sanders & V. Lee Hamilton eds., 2001); Mona Lynch, *The Social Psychology of Mass Imprisonment*, *in* THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY 242 (Jonathan Simon & Richard Sparks eds., 2013); Meares et al., *supra* note 18.

26. *See generally* sources cited *supra* note 5.

27. *See generally* ROBINSON & DARLEY, *supra* note 18; Julian V. Roberts & Loretta J. Stalans, *Restorative Sentencing: Exploring the Views of the Public*, 17 SOC. JUST. RSCH. 315 (2004); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003); Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement*, 20 PSYCH., PUB. POL'Y & L. 78 (2014); Tyler et al., *supra* note 18; Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox*

punishment and the psychological drivers for punishing criminal acts. This research has documented that most laypersons are primarily motivated by retributive, as opposed to instrumental, concerns in assessing an appropriate punishment for criminal behavior.[28] Such attitudes prevail despite people's inclination to suggest an instrumental rationale for punishment, such as deterrence.[29] In a series of experimental, policy-capturing studies, psychologists John Darley and Kevin Carlsmith and legal scholar Paul Robinson found that: (1) participants' default judgments reflected just-deserts considerations, (2) the amount of punishment assigned to criminal actors varied as a function of the seriousness of the crime and the degree of moral outrage it provoked, and (3) participants' punitive responses were sensitive to information bearing on retributive concerns, such as motive, but not utilitarian ones, such as future risk or deterrence.[30] Additional studies documented that, in the absence of information, participants are most concerned with learning details relevant to retributive considerations, such as the seriousness of the crime and the criminal actor's intent, in making punishment assessments.[31] In other work, they found that even if participants explicitly endorse utilitarian punishment goals, their individual-level punishment decisions reflect retributive, not utilitarian, concerns.[32] These findings hold despite differences in ideology and demographic variables, as well as other behavioral correlates.[33]

Another related line of research documents the correlation between racism or racial resentment and punitive attitudes. Many of the ills of the criminal justice system stem from racism, both explicit instances of racial prejudice and the more subtle forms of bias that characterize the way contemporary racism operates.[34]

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*of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173 (2008) (finding that disproportionate incarceration rates in minority communities decrease the credibility of the criminal justice system in those communities).

28. *See, e.g.*, Livia B. Keller, Margit E. Oswald, Ingrid Stucki & Mario Gollwitzer, *A Closer Look at an Eye for an Eye: Laypersons' Punishment Decisions Are Primarily Driven by Retributive Motives*, 23 SOC. JUST. RSCH. 99, 99 (2010); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 8 (2007); Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 267 (2012). *See generally* Carlsmith, *supra* note 5 (finding that punishment is primarily based on retribution); Darley et al., *supra* note 5 (finding that a "just deserts" mentality was the primary motivator for sentencing); Carlsmith et al., *supra* note 5 (same).

29. Carlsmith et al., *supra* note 5, at 295.

30. *Id.*; Darley et al., *supra* note 5.

31. Carlsmith, *supra* note 5, at 444–46.

32. Carlsmith et al., *supra* note 5, at 295.

33. *See* Devon Johnson, *Anger About Crime and Support for Punitive Criminal Justice Policies*, 11 PUNISHMENT & SOC'Y 51, 61 (2009); King & Maruna, *supra* note 14, at 150. Although it is true that, on average, people who identify as politically conservative, older, or white are more punitive than those who identify as politically liberal, younger, or Black, across all of these metrics people are generally more focused on retributive concerns than utilitarian or reparative ones. Brian K. Payne, Randy R. Gainey, Ruth A. Triplett & Mona J.E. Danner, *What Drives Punitive Beliefs?: Demographic Characteristics and Justifications for Sentencing*, 32 J. CRIM. JUST. 195, 197, 202 fig.1 (2004).

34. *See* Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371, 371 (2022). *See generally* Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM

Contemporary racism[35] is one of the strongest predictors of punitive sentiment, along with political ideology and social dominance orientation.[36] Disproportionate criminal justice outcomes continue to be a means of subordinating racial minorities, particularly Black and Latinx people, and are justified, in part, by contemporary racism and racial resentment.[37] Racial resentment reflects the belief that people of color have equal opportunities to succeed in society but fail to comply with social and cultural norms for advancement.[38] This leads those who harbor racial resentment to believe disproportionate criminal justice outcomes are the fault of the individual person, not systemic racism, and to find them morally culpable and deserving of punishment.[39] Moreover, implicit racial bias is correlated with a desire for retribution.[40]

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CTR. J. 75 (describing the ways in which racially unjust policies are central features of the criminal justice system); EBERHARDT, *supra* note 12 (examining the origins and impacts of anti-Black bias).

35. Contemporary racism, sometimes called subtle or aversive racism, refers to the way some people hold subconscious negative beliefs about other racial groups, often Black people, while simultaneously endorsing formal equality. It is contrasted with explicit bias or bigotry and is used to explain some people's aversion to things like affirmative action and other policies that try to correct for historical injustice. *See, e.g.*, Samuel L. Gaertner & John F. Dovidio, *Understanding and Addressing Contemporary Racism: From Aversive Racism to the Common Ingroup Identity Model*, 61 J. SOC. ISSUES 615, 617–18 (2005); Adam R. Pearson, John F. Dovidio & Samuel L. Gaertner, *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 3 SOC. & PERSONALITY PSYCH. COMPASS 314, 314 (2009).

36. *See, e.g.*, Justin T. Pickett, Daniel Tope & Rose Bellandi, *"Taking Back Our Country": Tea Party Membership and Support for Punitive Crime Control Policies*, 84 SOCIO. INQUIRY 167, 181 (2014) (finding a strong relationship between racial resentment and punitiveness); James D. Unnever & Francis T. Cullen, *The Social Sources of Americans' Punitiveness: A Test of Three Competing Models*, 48 CRIMINOLOGY 99, 115 (2010) (finding that "racial resentment . . . significantly predicts greater support for a punitive approach to crime and the death penalty"); Elizabeth K. Brown & Kelly M. Socia, *Twenty-First Century Punitiveness: Social Sources of Punitive American Views Reconsidered*, 33 J. QUANTITATIVE CRIMINOLOGY 935, 948, 957 (2017) (finding a significant correlation between racial resentment and severity of sentences); R.C. Morris & Ryan Jerome LeCount, *The Value of Social Control: Racial Resentment, Punitiveness, and White Support for Spending on Law Enforcement*, 63 SOCIO. PERSPS. 697, 711 (2020) (finding racial resentment significantly correlated with "white self-reported support for spending on police/law enforcement"); Jasmine R. Silver & Justin T. Pickett, *Toward a Better Understanding of Politicized Policing Attitudes: Conflicted Conservatism and Support for Police Use of Force*, 53 CRIMINOLOGY 650, 650 (2015) (discussing how racial attitudes predict positive punitive sentiment and support for aggressive policing and excessive use of force); Jasmine R. Silver, *Moral Foundations, Intuitions of Justice, and the Intricacies of Punitive Sentiment*, 51 LAW & SOC'Y REV. 413, 413–14 (2017) (discussing racial resentment as a predictor of punitive sentiment or punitiveness); Hutchinson, *supra* note 34, at 378.

37. *See* Hutchinson, *supra* note 34, at 403; *see also* Bennett Capers, *Free-ing Criminal Justice*, 120 MICH. L. REV. 999, 1006–07 (2022) (book review) ("[T]he criminal system has always been entangled with race—indeed, has been a means of maintaining racial hierarchies in general and Black precarity in particular . . . ."); Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S, 88S–90S (2011).

38. J. Scott Carter & Mamadi Corra, *Racial Resentment and Attitudes Toward the Use of Force by Police: An Over-Time Trend Analysis*, 86 SOCIO. INQUIRY 492, 494, 507 (2016); Hutchinson, *supra* note 34, at 403.

39. Hutchinson, *supra* note 34, at 403.

40. Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 879 (2019) (analyzing results from a study involving an Implicit Association Test and finding "a significant implicit association" between Black faces and words associated with retribution); *see also* Justin D. Levinson, Huajian Cai &

The well-documented retributive nature of lay beliefs about and motivations for punishment provides an important foundation for understanding why the public continues to support prison, despite countervailing evidence that suggests prison is less effective in reducing crime than some alternatives.[41] But retribution and racial bias without more cannot explain this tension, and a focus solely on the public's retributive intuitions or racist attitudes risks ignoring the other processes that lead to the conflation of retribution and prison in the public mind and missing opportunities to advance reform policies that may be broadly popular and that tap into other psychological considerations that are latent for many people. The psychology of punishment is undertheorized insomuch as it fails to identify the specific mechanisms that result in the public commitment to prison as a necessary penal outcome. Filling this gap has important explanatory value and normative implications. A more complete understanding of the psychology of punishment and its nuances may provide greater theoretical insight into how to effectively pursue reforms.

### B. TOWARD A RESTORATIVE PUNISHMENT APPROACH

The tension in public attitudes regarding mass incarceration suggests the possibility of a new normative approach to criminal punishment. This approach would both validate the deep psychological need for retributive justice and punishment while also emphasizing restoration and reintegration of criminal actors as crucial goals endorsed by the public. This approach can be articulated as restorative punishment, a consequence that accords with lay understandings of punishment but which emphasizes the successful reintegration of a criminal actor, over and above pure punishment. Restorative punishment suggests that the punitive dimension of criminal justice outcomes cannot be completely eliminated, but that some outcomes can be reframed to move beyond prison as the default understanding of punishment in American society. And, importantly, restorative punishment highlights those dimensions of punishment, including accountability, behavior change, expressions of remorse, and an emphasis on victim satisfaction, that are not well served by the imposition of a prison sentence alone. This normative approach is an attempt to bridge different strains of thinking about the proper goals of criminal law and punishment, while being cognizant of the psychological needs of the lay public. The dissociative theory of punishment described below provides a theoretical and empirical basis for understanding these strains and a foundation for addressing criminal legal doctrine and penal policy issues.

## II. THE DISSOCIATIVE THEORY OF PUNISHMENT

The dissociative theory of punishment theorizes that the concept of prison, as understood by the lay public and reinforced in media representations, is doing

Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 190, 207 (2010).

41. *See, e.g.*, RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 41 (2019).

something more than simply responding to instrumental concerns about safety or retributive concerns about justice. Prison is the symbolic and physical embodiment of punishment that severs criminal others from the rest of society. It reflects the detachment of lawful individuals from criminal actors, the disconnection imposed on prisoners from their lives and broader society, and the message that criminal actors deserve to suffer in a state of deprivation and isolation. This psychological dissociation is a necessary part of the criminal justice response to crime because it provides members of the public with a sense of separateness that reaffirms their identity and status in society, gives them something tangible yet distant to focus on when they feel anxious about crime, and validates the moral basis for punishing criminal others who deserve to be removed. The public derives a distinct psychological benefit from prison that goes beyond satisfying their retributive impulses. The dissociative process that leads to the endorsement of prison as a necessary outcome can therefore be both status affirming and system legitimizing.[42] People may want to distance themselves from those who commit crime to reaffirm their place in society and to feel that their place in society is deserved. Laypersons are thus motivated to engage in this dissociative process to both distance themselves from criminal others and validate their moral worth.

Dissociation from criminal actors is not intentional nor born of animus, although racial- and class-based bias often plays a mediating role in the dissociative process.[43] Rather, it is the result of multiple, overlapping psychological phenomena that reinforce the notion of crime as something distinct from everyday behavior, criminal actors as fundamentally different from law-abiding citizens, and punishment as a form of cognitive, moral, and physical separation from society.

The dissociative theory of punishment presented in this Part draws on existing psychological research and theory to identify and explain the specific psychological mechanisms that motivate dissociation and the role of the belief in retributive justice as part of this process. It is also informed by a qualitative focus group study I conducted as part of a large multi-method study to better understand lay attitudes toward punishment[44] that, although limited, provides important insights for theory building, thereby contributing to a deeper, more nuanced understanding of the contours of the dissociative theory and the way people psychologically reason about criminal punishment.

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42. Rucker & Richeson, *supra* note 14 (delineating the ways in which hierarchy-maintaining and system-justifying beliefs operate).

43. *See infra* Section II.C.

44. The focus group study is part of a large, multi-method doctoral study, which received Institutional Review Board approval from UC Santa Cruz (IRB protocol #HS3285). This study, funded in part by the American Psychology–Law Society, the American Psychological Foundation, and the Society for the Psychological Study of Social Issues, seeks to better understand, among other things, lay attitudes toward punishment and, specifically, restorative justice as an alternative to traditional custodial sentences. *See generally* Bakhshay, *supra* note 4. For a full description of the focus group and qualitative analysis methodology, see *infra* Appendices A through E.

Qualitative analysis of focus group discussions is a well-established method in social psychology.[45] It is best suited to theory generation and identifying the psychological mechanisms and cognitions that produce specific beliefs. It is often undertaken as a precursor to survey or experimental work.[46] The value of focus group discussions is in the interactive, social dynamics of the discussion and the exploration of interactional and sociocognitive mechanisms in making sense of one's beliefs. Participants reveal their attitudes and beliefs through discussion about topics that are often part of social debate or cultural discourse and are able to articulate the perceived basis of those beliefs and respond to counterarguments. In this way, the statements and ideas communicated are produced organically and are not simply reactive to a set of stimuli. This allows for more detailed and varied responses from participants and enables the moderator to probe ideas more deeply, explore ambiguities, and identify the underlying cognitive mechanisms motivating participant responses.[47] Focus group methodology is often used in the consumer or marketing context, but it is also an increasingly common technique for studying attitudes about complex social issues.[48] For this reason, it is an ideal method for the study of punishment, which is both a complex socio–legal construct and a well-known social phenomenon that laypersons come to understand, in part, through social interaction with others, cultural and historical touchstones, and media representations. The focus group methodology is also ideal for understanding potential recommendations and informing a normative approach to

45. *See, e.g.*, Andrew Parker & Jonathan Tritter, *Focus Group Method and Methodology: Current Practice and Recent Debate*, 29 INT'L J. RSCH. & METHOD EDUC. 23, 23 (2006); Michael X. Delli Carpini & Bruce Williams, *The Method Is the Message: Focus Groups as a Method of Social, Psychological, and Political Inquiry*, *in* 4 RESEARCH IN MICROPOLITICS: NEW DIRECTIONS IN POLITICAL PSYCHOLOGY 57, 57 (Michael X. Delli Carpini et al. eds., 1994); Lia Figgou & Vassilis Pavlopoulos, *Social Psychology: Research Methods*, *in* 22 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 544, 544 (2d ed. 2015); Melina A. Throuvala, Mark D. Griffiths, Mike Rennoldson & Daria J. Kuss, *Motivational Processes and Dysfunctional Mechanisms of Social Media Use Among Adolescents: A Qualitative Focus Group Study*, 93 COMPUTS. HUM. BEHAV. 164, 166 (2019). *See generally* 16 DAVID L. MORGAN, FOCUS GROUPS AS QUALITATIVE RESEARCH (2d ed. 1997).

46. *See* Figgou & Pavlopoulos, *supra* note 45; Laetitia Ricci, Jean-Baptiste Lanfranchi, Fabienne Lemetayer, Christine Rotonda, Francis Guillemin, Joël Coste & Elisabeth Spitz, *Qualitative Methods Used to Generate Questionnaire Items: A Systematic Review*, 29 QUALITATIVE HEALTH RSCH. 149, 153 (2019). *See generally* RICHARD A. KRUEGER & MARY ANNE CASEY, FOCUS GROUPS: A PRACTICAL GUIDE FOR APPLIED RESEARCH (5th ed. 2015) (providing an overview of the uses of focus groups).

47. *See* MICHAEL BLOOR, JANE FRANKLAND, MICHELLE THOMAS & KATE ROBSON, FOCUS GROUPS IN SOCIAL RESEARCH 5, 8 (2001); Ivana Acocella, *The Focus Groups in Social Research: Advantages and Disadvantages*, 46 QUALITY & QUANTITY 1125, 1128 (2012); Figgou & Pavlopoulos, *supra* note 45.

48. *See, e.g.*, Kim-Pong Tam, Angela K.-y. Leung & Susan Clayton, *Research on Climate Change in Social Psychology Publications: A Systematic Review*, 24 ASIAN J. SOC. PSYCH. 117, 136 (2021) (finding that some recent studies have used focus group methodology to examine attitudes toward climate change); Sabine Caillaud & Uwe Flick, *New Meanings for Old Habits? Representations of Climate Change in France and Germany*, 26 REVUE INTERNATIONALE DE PSYCHOLOGIE SOCIALE 39, 46–47 (2013) (using focus group methodology to explore attitudes toward climate change); Eleni Andreouli, David Kaposi & Paul Stenner, *Brexit and Emergent Politics: In Search of a Social Psychology*, 29 J. CMTY. & APPLIED SOC. PSYCH. 6, 7 (2019) (using focus group methodology to examine attitudes toward Brexit).

punishment because it offers participants a format for thinking through their own suggestions and exploring the implications of their initial reactions and intuitions.

The original, qualitative focus group data I collected and analyzed both complements and illustrates the dissociative theory of punishment, identifies the specific psychological mechanisms that drive dissociation, and offers suggestions regarding an alternative approach to criminal punishment. The explanation of the theory and its components is interspersed with illustrations from my participants, allowing for a thicker theoretical description of the psychological processes involved. Although the qualitative findings are limited in terms of generalizability,[49] they speak to how the particular community sampled as part of the study engages with the issues of punishment and criminal justice reform and provide insights into how the dissociative theory of punishment operates in the real world. And despite their limitations, there is good reason to believe that these findings can be extrapolated more broadly. The theory builds on well-established psychological processes, and the sample includes the kinds of people who are politically engaged and motivated yet who are shielded from many of the realities of the criminal justice system. The participants are more liberal and have higher levels of educational attainment than the average American[50]—demographic characteristics typically associated with support for penal reform.[51] Nevertheless, they insist that prison is a necessary criminal justice outcome. It is this group of people who are distant from both crime and criminal actors, yet want to maintain their distance through the policies and practices they endorse. These findings therefore help shed light on the local dynamics of criminal justice reform while informing a more robust theoretical account of how the lay American public reasons about these issues.

The first part of the theory is to distance, and in some cases dehumanize, those who commit crime, enabling members of the lay public to dissociate from and condemn them to something known to be painful and dehumanizing—prison. The second part of the dissociative theory is to activate the sociopsychological

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49. This Article and the theory it presents draw upon several of the findings from the focus group part of the doctoral study and highlights the voices of the participants. The focus group findings and selected quotations are not intended to be representative of the public in general, or even the public in San Mateo, California, where the study was based. Rather, they exemplify the themes that emerged within and across the focus groups, are generally consistent with and additive to previous research on public attitudes toward punishment, and illustrate aspects of the dissociative theory.

50. Participants were somewhat diverse, although whiter (62%) than the national average of 59.3% and more educated (roughly 75% had at least a bachelor's degree) compared to the national average of 33.7%. *QuickFacts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045222 [https://perma.cc/XA8S-SMAD] (last visited May 21, 2023) (detailing data from July, 2022). Participants also leaned more liberal (66% identified as Democrats) compared to the state as a whole (47% of California registered voters are Democrats) and the national average (27% identify as Democrat, while 40% of independents identify as Democrat or Democrat-Leaning). *California Voter and Party Profiles*, PUB. POL'Y INST. OF CAL., https://www.ppic.org/publication/california-voter-and-party-profiles/ [https://perma.cc/J4MX-AE9G] (last visited June 10, 2023); *Party Affiliation*, GALLUP, https://news.gallup.com/poll/15370/party-affiliation.aspx [https://perma.cc/DY7A-VYKZ] (last visited June 10, 2023). See *infra* Table 1 in Appendix A for a full report of participant demographics.

51. *See, e.g.*, Payne et al., *supra* note 33, at 197.

understanding of prison as severing criminal actors from society and to conflate the idea of prison with the penological goals of safety and justice, and thereby obscure its harmful and criminogenic effects. The following Sections identify the motivating cognitions in greater detail and explain how they produce the belief in the necessity of prison. I use quotations from my qualitative data to illustrate how the concepts and constructs play out in conversation and how typical ways of thinking about criminal actors perpetuate distance and ultimately lead to dissociation.

### A. DISSOCIATION FROM CRIMINAL OTHERS

The dissociative theory has two main components. The first psychological process is the dissociation of "law-abiding" members of society from criminal others through distancing, dehumanization, and the belief that criminal actors either cannot or do not want to change. Most people who consider themselves to be law-abiding see criminality through a narrow lens that facilitates distancing. They perceive those who engage in crime as defined by their criminal acts, making them unrelatable and fundamentally other. In more extreme cases, they are dehumanized or perceived to be irredeemable, rendering them worthy of condemnation and containment. This dissociative process also reaffirms those who see themselves as lawful individuals as members of the moral community who deserve to be protected, validating their identity as distinct from and superior to people who choose to commit crime and providing a distinct psychological benefit which motivates this process.[52]

The perception of criminal actors as distant others has three important consequences for their legal treatment. First, they are seen as so different as to be inhuman, allowing the penal system to treat them inhumanely. Second, they stand in contrast to those members of society who see themselves as law-abiding, justifying the prioritization of law-abiding members' safety and sense of justice over the needs and well-being of those who commit crime. Third, they are divorced from their full emotional capacity, which renders them irredeemable criminals in the eyes of the public and justifies their incarceration in an institution that is likely to damage them and that lacks any obligation to engage seriously in rehabilitation.[53]

52. *See* Rucker & Richeson, *supra* note 14, at 286, 288; JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION (1999) (discussing the beliefs that define social dominance orientation, including endorsing social hierarchies across groups and protecting social status).

53. Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 941 (2016) ("Implicit in American punishment is the idea that serious or repeat offenses mark the offenders as morally deformed people rather than ordinary people who have committed crimes."); Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315, 345 (2021) (documenting the way in which the legal system often determines someone is irredeemable).

1. Psychological Distancing

For many people, acts of bodily harm against individual victims represent the prototypical crime, and the perpetrator of these acts is the prototypical criminal.[54] These perpetrators are seen as fundamentally different, portrayed as one-dimensional, homogeneous bad actors by the entertainment and news media.[55] They are divorced from any context, defined simply by their criminal acts.

For large swaths of Americans, these media portrayals may provide the only insight into how criminal actors operate, flawed as they may be.[56] These representations fuel what social psychologist Craig Haney has termed the "crime master narrative," wherein criminal actors are seen as categorically different, as well as mostly homogeneous in terms of personality and demographic traits.[57] Crime is thought to be caused by individual actors, either as a product of their free, autonomous choice, or some defect in their personality. As a result, the criminal actor is thought to be "solely responsible, completely morally blameworthy, and entirely deserving of the sentence imposed upon him."[58]

The crime master narrative is the dominant cognitive schema—a mental framework that serves to organize information about how the world works into a coherent pattern and which guides the categorization and interpretation of new information according to this framework[59]—for understanding criminality in

54. *See* Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCH. 857, 861 tbl.1, 868–69 (1991) (finding that jurors draw on their pre-existing, naïve understandings of crimes); Dan M. Kahan, *Lay Perceptions of Justice vs. Criminal Law Doctrine: A False Dichotomy?*, 28 HOFSTRA L. REV. 793, 793 (2000) (same); Vicki L. Smith & Christina A. Studebaker, *What Do You Expect?: The Influence of People's Prior Knowledge of Crime Categories on Fact-Finding*, 20 LAW & HUM. BEHAV. 517, 517 (1996) (finding that jurors are "more susceptible to misleading information that is perceived to be typical of the crime in question than misleading information that is atypical").

55. CRAIG HANEY, REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT 94 (2006); Craig Haney, *Media Criminology and the Death Penalty*, 58 DEPAUL L. REV. 689, 690, 704 (2009).

56. Shirin Bakhshay & Craig Haney, *The Media's Impact on the Right to a Fair Trial: A Content Analysis of Pretrial Publicity in Capital Cases*, 24 PSYCH., PUB. POL'Y & L. 326, 327 (2018). Research documents that many people rely on news coverage for most of their information about crime. *Id.*; *see also* BECKETT, *supra* note 22, at 76–78 (describing media complicity in promoting a tough-on-crime response to drug use in the 1980s); Luzi Shi, Yunmei Lu & Justin T. Pickett, *The Public Salience of Crime, 1960–2014: Age–Period–Cohort and Time–Series Analyses*, 58 CRIMINOLOGY 568, 570–71 (2020) (documenting that news coverage demonstrably shapes concern about crime).

57. HANEY, *supra* note 25, at 3. Numerous studies have documented the pervasiveness of this narrative in the public mind, finding that people have predominantly internal attributions for crime, and that people believe that serious criminals are unlikely to be rehabilitated. *See, e.g.*, Hartnagel & Templeton, *supra* note 25, at 467; Johnson, *supra* note 33, at 54–55; Alexander L. Burton, Francis T. Cullen, Velmer S. Burton, Jr., Amanda Graham, Leah C. Butler & Angela J. Thielo, *Belief in Redeemability and Punitive Public Opinion: "Once a Criminal, Always a Criminal" Revisited*, 47 CRIM. JUST. & BEHAV. 712, 712–14 (2020). *See generally* BERNARD WEINER, SOCIAL MOTIVATION, JUSTICE, AND THE MORAL EMOTIONS: AN ATTRIBUTIONAL APPROACH (2005) (providing a summary of research on attribution theory and the effect of internal attributions on justice-related beliefs).

58. Craig Haney & Susan Greene, *Capital Constructions: Newspaper Reporting in Death Penalty Cases*, 4 ANALYSES SOC. ISSUES & PUB. POL'Y 129, 146 (2004).

59. Robert Axelrod, *Schema Theory: An Information Processing Model of Perception and Cognition*, 67 AM. POL. SCI. REV., 1248, 1249 (1973); David L. Hamilton & Donal E. Carlston, *The Emergence of*

American society.[60] Seeing criminality according to this schema leads to what Haney calls the "empathic divide," "the cognitive and emotional distance" between criminal actors and the lay public,[61] which is exacerbated by racial bias.[62]

Often, this one-dimensional view takes on a sensational quality that reinforces badness and a proclivity for harm as the defining trait of a criminal actor. Those individuals accused or convicted of crime are referred to by the shorthand labels "bad," "evil," "monster," or "superpredator."[63] Even less extreme labels associated with criminality—criminal or felon—can have a powerful effect on the way criminal actors are perceived by the public.[64] Labeling theory describes the way externally imposed labels affect individual self-perception, identity, and behavior.[65] Labeling theory also explains the impact of labels on how others see us, the expectations they come to hold, and the effect these perceptions have on individual behavior.[66] Research on labeling theory has found that changing terminology or using a different descriptive frame can alter people's perceptions, judgments, and influence their behavior.[67]

Many of my focus group participants[68] described those who commit crime as "bad seed[s]," "evil," "sociopaths," "psychopaths," and "serial killers" who "just

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*Social Cognition*, *in* THE OXFORD HANDBOOK OF SOCIAL COGNITION, 16, 18–19 (Donal E. Carlston ed., 2013); Bertram F. Malle, Steve Guglielmo & Andrew E. Monroe, *Moral, Cognitive, and Social: The Nature of Blame*, *in* SOCIAL THINKING AND INTERPERSONAL BEHAVIOR 313, 313 (Joseph P. Forgas et al. eds., 2012) (discussing how cognitive schema affect judgments and attributions for blame).

60. HANEY, *supra* note 25, at 32.

61. Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1582 (2004).

62. *Id.* at 1582–83; Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 LAW & SOC'Y REV. 69, 72–73 (2011).

63. *See, e.g.*, Bakhshay & Haney, *supra* note 56; Carroll Bogert & LynNell Hancock, *"Superpredator": How Media Coverage Affected Juvenile Justice*, MARSHALL PROJECT (Nov. 20, 2020) [https://www.themarshallproject.org/2020/11/20/superpredator-the-media-myth-that-demonized-a-generation-of-black-youth] [https://perma.cc/YL67-VPFM].

64. For example, it is typical for news stories to refer to a person accused of a crime by the type of crime—for example, "murderer"—in articles from the moment the crime occurs and oftentimes before a suspect is identified or apprehended. This serves to label them as "criminal" before anything else is known, and they are then seen through that criminal lens. *See* Bakhshay & Haney, *supra* note 56.

65. *See, e.g.*, Giza Lopes, Marvin D. Krohn, Alan J. Lizotte, Nicole M. Schmidt, Bob Edward Vásquez & Jón Gunnar Bernburg, *Labeling and Cumulative Disadvantage: The Impact of Formal Police Intervention on Life Chances and Crime During Emerging Adulthood*, 58 CRIME & DELINQ. 456, 458 (2012).

66. *See, e.g.*, *id.* at 460–62 (outlining the impact of labeling in crucial areas of life, such as education).

67. *See* Dylan B. Jackson & Carter Hay, *The Conditional Impact of Official Labeling on Subsequent Delinquency: Considering the Attenuating Role of Family Attachment*, 50 J. RSCH. CRIME & DELINQ. 300, 301 (2013); Paul H. Thibodeau & Lera Boroditsky, *Metaphors We Think With: The Role of Metaphor in Reasoning*, PLOS ONE, Feb. 2011, at 1, 1; *see also* Stephanie A. Fryberg, Nicole M. Stephens, Rebecca Covarrubias, Hazel Rose Markus, Erin D. Carter, Giselle A. Laiduc & Ana J. Salido, *How the Media Frames the Immigration Debate: The Critical Role of Location and Politics*, 12 ANALYSES SOC. ISSUES & PUB. POL'Y 96, 98 (2012) (analyzing the effects of the media's framing of an anti-immigration bill).

68. I do not provide the absolute numbers or percentages of participants who expressed certain beliefs or viewpoints because of the nature of focus group methodology. Not every participant weighed in on each question or issue during our discussions. Therefore, any attempt to provide a true numeric

feel nothing,"[69] exemplifying the reductionism that typifies some lay thinking about criminal actors. My focus group participants commonly used these sensationalist labels even though our discussions were specifically oriented around a robbery with the threat of violence,[70] not a heinous murder—serious, certainly, but not a crime rising to the level of serial murder. Despite the instruction to consider someone who committed a serious crime that did not result in any bodily harm, the specter of the truly bad criminal actor loomed in the background and captures the way thinking about crime in general activates sensationalist criminal stereotypes.

Invoking one-dimensional stereotypes of criminal actors facilitates the process of psychological distancing, or "othering,"[71]—a common method of creating moral space between law-abiding people and those funneled into the penal system. The following quote from Julia,[72] a 50-year-old Asian-American woman, about a hypothetical criminal actor illustrates this process: "[Y]ou know that this person is just a bad seed, and nothing good is gonna come of it, prison. I mean you want to protect the community, and I would say that the community outweighs what this guy thinks should be justice for him."[73]

Julia is both defining the hypothetical criminal actor as fundamentally bad, and simultaneously casting that individual out of the moral community. Her comment acknowledges that putting this person in prison is not in the interest of helping them—"nothing good is gonna come of it, prison."[74] But the interests of the moral community trump the interests of the criminal actor, who has already been severed from Julia's understanding of "the community."[75]

Othering is one of the forms of moral disengagement commonly used to enable otherwise good, ethical people to treat human beings in inhuman ways. Moral disengagement theory[76] has been used to explain the prevalence of prisoner abuse,

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value to correspond to certain beliefs would be of limited utility. Instead, I have provided an analysis of commonly expressed views and themes and noted where a participant expressed a unique viewpoint that is, nevertheless, important and generative.

69. Bakhshay, *supra* note 4, at 130–34. Participants used these terms throughout our discussions, suggesting a pervasive perception of people who engage in crime as amoral and dangerous. *Id.*

70. *See generally id.* The hypothetical scenario we discussed was an armed robbery near an ATM, involving the possession, but not use, of a gun. *See infra* Appendix C. In the California Penal Code, this is categorized as a felony robbery and carries a three- to nine-year prison sentence. CAL. PENAL CODE §§ 211, 213. I asked participants to focus on this type of crime throughout our discussions.

71. Othering is a form of psychological distancing that relies on negative, mostly homogenous perceptions of members of marginalized outgroups and justifies discriminatory or harmful treatment. *See* S. Alexander Haslam, Penelope J. Oakes, John C. Turner & Craig McGarty, *Social Identity, Self-Categorization, and the Perceived Homogeneity of Ingroups and Outgroups: The Interaction Between Social Motivation and Cognition*, *in* 3 HANDBOOK OF MOTIVATION AND COGNITION: THE INTERPERSONAL CONTEXT 182, 184 (Richard M. Sorrentino & E. Tory Higgins eds., 1996).

72. All names of participants have been changed to pseudonyms to protect the privacy and anonymity of the participants.

73. Bakhshay, *supra* note 4, at 131.

74. *Id.*

75. *Id.*

76. Moral disengagement theory is most closely associated with Albert Bandura. *See generally* ALBERT BANDURA, MORAL DISENGAGEMENT: HOW PEOPLE DO HARM AND LIVE WITH THEMSELVES (2016).

wartime atrocities, and how ordinary citizens are able to condemn some to death in their role as capital jurors with apparently cold rationalization.[77] By distancing and othering criminal actors, laypersons place them beyond the sphere of moral inclusion, where the normal rules of civil behavior do not apply and their interests are relegated.[78] The theoretical components of moral disengagement are at play too when thinking about more run-of-the-mill, albeit serious, criminality. Through the subtle use of distancing language, incarcerated individuals are transformed into a different category, enabling "law-abiding citizens" to subject criminal others to a different form of treatment. For the majority of white people, othering is built into the dynamics of the criminal justice system.[79] The racial bias and "implicit racialized crime associations" that shape many people's response to crime are reinforced by institutional factors and a lack of feedback that perpetuate and legitimize these associations.[80] But even outside the formal system, through sociocultural associations and language, othering plays a role in enabling dissociation.

During the focus group discussions, it was common for my participants to use distancing language to describe criminal actors, even when they were not invoking sensationalist portrayals. Becca, a 33-year-old Latinx woman, talked about monitoring individuals participating in rehabilitation programs, remarking: "[I]f they're getting this chance, I wanna make sure that they're actually following through and doing everything that they're supposed to do to prove that they can, you know, live in society and *function like the rest of us*, you know."[81] Later in the conversation, she continued, stating: "I think for people who are repeat offenders, obviously there's something that, you know, is not clicking with them. . . . [O]bviously something is not right, you know. *They're not able to conform to social norms.*"[82] Ty, a 31-year-old white man, made a similar comment, questioning whether a hypothetical criminal actor is "fitting into society."[83] These examples illustrate the subtle, almost invisible way that many people commonly distance themselves from criminal actors without explicitly condemning them. Through the use of "us versus them" language, they cast criminal actors as

77. Joanna Weill & Craig Haney, *Mechanisms of Moral Disengagement and Prisoner Abuse*, 17 ANALYSES SOC. ISSUES & PUB. POL'Y 286, 295 (2017) (prisoner abuse); Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1448–49, 1452 (1997) (wartime atrocities and capital jurors); *see also* Tess M.S. Neal & Robert J. Cramer, *Moral Disengagement in Legal Judgments*, 14 J. EMPIRICAL LEGAL STUD. 745, 747–48 (2017).

78. Susan Opotow, *Drawing the Line: Social Categorization, Moral Exclusion, and the Scope of Justice*, *in* CONFLICT, COOPERATION, AND JUSTICE: ESSAYS INSPIRED BY THE WORK OF MORTON DEUTSCH 347, 348 (Barbara Benedict Bunker & Jeffrey Z. Rubin eds., 1995).

79. *See* HANEY, *supra* note 55, at 95–98.

80. Rucker & Richeson, *supra* note 14, at 288; *see also* B. Keith Payne & Jason W. Hannay, Opinion, *Implicit Bias Reflects Systemic Racism*, 25 TRENDS COGNITIVE SCIS. 927, 927 (2021) (arguing that implicit bias is a "cognitive reflection of systemic racism").

81. Bakhshay, *supra* note 4, at 120 (emphasis added).

82. *Id.* at 135–36 (emphasis added).

83. *Id.* at 109.

something different and outside the bounds of the community. Of course, there are more explicit examples of distancing as well. At one point during a focus group conversation, Sharon, a 69-year-old white woman said, "*You can't help these people* once they get to a certain point. Whether it is a criminal, or whether it is a homeless person."[84]

2. Dehumanization

Distancing criminal actors does not just create a sense of separation from them, it can lead to the belief that they are no longer human, transforming them into "monsters" or something so evil or morally deformed as to be inhuman.[85] Dehumanization is a well-established psychological process that strips people of relatable traits, severs them from their humanity, and transforms them into something else—typically something mechanistic, animalistic, monstrous, or alien.[86] It can be subtle, such as reducing an athlete to a list of physical traits, or explicit, like referring to someone as an animal, but the process deprives people of their full humanity, with consequences in their treatment.[87] Infrahumanization refers to a specific form of dehumanization where a person is denied the ability to experience uniquely human emotions,[88] such as remorse and compassion.

Psychological distance from the objects of dehumanization is both a precursor and prerequisite of dehumanization.[89] Typically, those who perceive themselves as socially superior engage in the dehumanization of marginalized or subjugated groups, although this process is not intentional.[90] It is the consequence of holding other beliefs about certain categories of people—racial minorities, immigrants, and criminal actors, for example—that reduces them to one or two undesirable traits, sees them as mostly homogeneous, and reinforces the perception of them as inhuman. The underlying psychological processes that lead to dehumanization can vary, but the result of dehumanizing individuals is a tendency to devalue them as people and treat them accordingly.[91] By transforming certain categories of people into inhuman entities, they are seen as less entitled to the same rights and less capable of experiencing the same emotions or of suffering from the same kinds of harms as the rest of society.[92] Stripping people of their emotional capacity through infrahumanization has particularly profound consequences in

84. *Id.* at 136, 157 (emphasis added).

85. *See* Kleinfeld, *supra* note 53, at 994.

86. *See* David M. Markowitz & Paul Slovic, *Social, Psychological, and Demographic Characteristics of Dehumanization Toward Immigrants*, 117 PROC. NAT'L ACAD. SCI. 9260, 9260 (2020); Nick Haslam, *Dehumanization: An Integrative Review*, 10 PERSONALITY & SOC. PSYCH. REV. 252, 253–54, 257–58 (2006).

87. *See* Nour S. Kteily & Alexander P. Landry, *Dehumanization: Trends, Insights, and Challenges*, 26 TRENDS COGNITIVE SCIS. 222, 227–28 (2022).

88. Markowitz & Slovic, *supra* note 86, at 9261.

89. *Id.* at 9261–62.

90. *Id.* at 9268; Kteily & Landry, *supra* note 87, at 231.

91. Kteily & Landry, *supra* note 87, at 235.

92. *Id.* at 223, 231; *see also* Omar Sultan Haque & Adam Waytz, *Dehumanization in Medicine: Causes, Solutions, and Functions*, 7 PERSPS. ON PSYCH. SCI. 176, 176–77 (2012) (describing the consequences of dehumanization in medical settings).

the criminal justice realm, where this affects perceptions regarding a criminal actor's culpability, sincerity, and potential for rehabilitation and growth.

Dehumanization also leads to deindividuation of those who are dehumanized, so they come to be viewed as a category devoid of distinctive traits and needs.[93] This process then facilitates harsh and degrading treatment, like that typical of the prison system.[94] In fact, psychology research has demonstrated that the dehumanization of Black people is related to support for punitive criminal justice policy that disproportionately impacts Black people.[95]

The process of dehumanization is both constituted and reinforced by the use of dehumanizing language, metaphors, and comments that strip away one's capacity for emotion. Several focus group participants used dehumanizing language, in both explicit and more subtle ways. For example, Margaret, a 77-year-old white woman, made a comment linking her perception of some criminal actors as devoid of humanity to her stance on how they should be treated.[96] She said: "I think there're crimes so vicious—I believe in the death penalty. I think the only thing you can do is kill the animal. . . . Those people are not salvageable. They're—those people should be put to death. Nothing is going to save them. Make them turn around."[97] This is an extreme characterization and was an outlier in tone, but it demonstrates how the process of dehumanization works to render certain types of people inhuman and how that perception affects judgments and outcomes.

The example quoted above does not explicitly mention race, but it is consistent with the way African-American and Latinx individuals accused or convicted of crime are often described using animalistic metaphors by the media.[98] The use of animalistic or monstrous metaphors is a common part of the racialized code that acts as a shorthand for criminal threats and which signals the race of the criminal actor to the broader public.[99] One of the most harmful terms of the 1990s was "superpredator," used to describe African-American boys.[100] The "superpredator"

93. *See* Nour S. Kteily & Emile Bruneau, *Darker Demons of Our Nature: The Need to (Re)Focus Attention on Blatant Forms of Dehumanization*, 26 CURRENT DIRECTIONS PSYCH. SCI. 487, 487 (2017).

94. *See* Haslam, *supra* note 86, at 258; Milica Vasiljevic & G. Tendayi Viki, *Dehumanization, Moral Disengagement, and Public Attitudes to Crime and Punishment*, *in* HUMANNESS AND DEHUMANIZATION 129, 137 (Paul G. Bain et al. eds., 2014).

95. *See* Ktiely & Bruneau, *supra* note 93, at 490; Ashley Jardina & Spencer Piston, *The Effects of Dehumanizing Attitudes About Black People on Whites' Voting Decisions*, 52 BRIT. J. POL. SCI. 1076, 1095 (2022); Phillip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams & Matthew Christian Jackson, *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCH. 292, 294 (2008).

96. Bakhshay, *supra* note 4, at 156.

97. *Id.*

98. *See, e.g.*, Goff et al., *supra* note 95; Markowitz & Slovic, *supra* note 86.

99. *See, e.g.*, Goff et al., *supra* note 95.

100. Bogert & Hancock, *supra* note 63; Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality?*, 33 WAKE FOREST L. REV. 727, 727–28 (1998). For a discussion of the origin of the "superpredator" term and how it was wielded by the media and the criminal justice apparatus in the 1990s, see Lara A. Bazelon, Note, *Exploding the Superpredator Myth: Why Infancy Is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 165–68 (2000). This term was coined by criminologist

label capitalized on and reinforced the notion of dangerous, Black criminality and normalized the extreme punishment that was doled out to boys during the height of the penal harm movement.[101] Describing them as "superpredators" functionally removed their humanity, enabling prosecutors and other legal actors, as well as the general public, to sidestep the normal concerns and sympathies that attach to treatment of young people.

Even when not used in the context of dehumanization, pervasive race- and class-based stereotypes play a role in how many members of the public think about crime. The following quote from Sharon demonstrates the kind of racial stereotypes some people hold in connection with criminal actors and the way racial bias amplifies the dissociation between law-abiding people and "criminals":

> You know, I think it was—I've heard them say that back in the 1960s, the black people - black people had 25 percent of the children born out of wedlock. Now, it's 75 to 80 percent. So, there's nobody at home. They're just having children, and *they become the criminals of tomorrow*.[102]

These stereotypes and perceptual biases reinforce distancing and dehumanization; they link racial "others" and criminal "others" in the lay mind. The prototypical criminal is perceived as a young man of color, from a disadvantaged neighborhood.[103] The longstanding connection between Black men and danger, intentionally constructed and reinforced over centuries,[104] affects how even the most well-intentioned members of society think about crime and the threat posed by those who commit it.

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John Dilulio in 1995. *Id.* at 165 n.21. He later admitted he was wrong and submitted an amicus brief arguing against juvenile life-without-parole sentences in *Miller v. Alabama*. Brief of Jeffrey Fagan et al. as *Amici Curiae* in Support of Petitioners at 18, 19 & n.26, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9647, 10-9646).

101. Bazelon, *supra* note 100, at 165–67.

102. Bakhshay, *supra* note 4, at 156 (emphasis added). These statistics are inaccurate. *See* Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RSCH. CTR. (Apr. 25, 2018), https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-unmarried-parents/ [https://perma.cc/BSL7-S7XY] (noting that 28% and 42% of single parents are Black and white, respectively, and that 13% and 55% of cohabiting parents are Black and white, respectively).

103. *See* Leslie R. Knuycky, Heather M. Kleider & Sarah E. Cavrak, *Line-Up Misidentifications: When Being 'Prototypically Black' Is Perceived as Criminal*, 28 APPLIED COGNITIVE PSYCH. 39, 39 (2014); Ted Chiricos, Ranee McEntire & Marc Gertz, *Perceived Racial and Ethnic Composition of Neighborhood and Perceived Risk of Crime*, 48 SOC. PROBS. 322, 322–23 (2001); Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOCIO. 717, 721 (2001).

104. *See* Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 J. CONTEMP. CRIM. JUST. 276, 276–77 (2007); Travis L. Dixon & Keith B. Maddox, *Skin Tone, Crime News, and Social Reality Judgments: Priming the Stereotype of the Dark and Dangerous Black Criminal*, 35 J. APPLIED SOC. PSYCH. 1555, 1564 (2005); Sara Steen, Rodney L. Engen & Randy R. Gainey, *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing*, 43 CRIMINOLOGY 435, 441 (2005). Pervasive cultural scripts linking Black men and criminality date back to the late 1800s. *See* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 3–5 (2010).

As a consequence of these biases, people who commit crime are often viewed through different lenses based on race, with different repercussions. One blatant example of the racial bias that plagues perceptions of who is a criminal is the characterization of the January 6th Capitol rioters as "law-abiding" by Republican Senator Ron Johnson.[105] Senator Johnson told a radio host that he was not afraid of the Capitol rioters, despite their use of force, illegal acts, and violence that ultimately resulted in five deaths, because "[he knew] those are people that love this country, that truly respect law enforcement, would never do anything to break the law, so [he] wasn't concerned."[106] He went on to say had the rioters been members of Black Lives Matter or antifa he would have been concerned.[107] The police response to Kyle Rittenhouse, a white 17-year-old armed with an assault rifle—telling him, "We appreciate you guys"[108]—captures the same sentiment. His race immediately signaled to police that he was not a threat even though his actions resulted in the deaths of two men.[109] While these are particularly disturbing examples of how expectations of danger and criminality are conditioned by racial bias, they are no less typical in everyday beliefs about crime. The longstanding association of criminality with dangerous Black men accounts for many of the racial disparities in criminal justice outcomes we see today.[110] And even amid the racial reckoning now underway, this association still dominates many people's snap judgments, a form of heuristic processing that relies on stereotypes and facilitates psychological distancing from the "typical" criminal actor.

3. Intractable Criminality

Intractable criminality refers to the belief that some people will always commit crime if given the chance. This belief, not just of proven recidivists but abstracted and generally applied to all but the most sympathetic juvenile or first-time criminal actors, is an essential component of the dissociative theory of punishment. It reflects a generalized fear of the danger posed by "criminals" that is often detached from any real criminal threat. But it also speaks to the cultural

105. Amy B. Wang, *GOP Sen. Johnson Says Capitol Rioters Didn't Scare Him — but Might Have Had They Been Black Lives Matter Protesters*, WASH. POST (Mar. 14, 2021, 11:01 AM), https://www.washingtonpost.com/politics/2021/03/13/gop-sen-johnson-says-capitol-rioters-didnt-scare-him-might-have-had-they-been-black-lives-matter-protesters/.

106. *Id.*

107. *Id.*

108. Zack Beauchamp, *Why Police Encouraged a Teenager with a Gun to Patrol Kenosha's Streets*, VOX (Aug. 27, 2020, 4:20 PM), https://www.vox.com/2020/8/27/21404117/kenosha-kyle-rittenhouse-police-gun-populism [http://perma.cc/5FWC-THMB].

109. *See id.*; Jennifer Carlson, *Revisiting the Weberian Presumption: Gun Militarism, Gun Populism, and the Racial Politics of Legitimate Violence in Policing*, 125 AM. J. SOCIO. 633, 660 (2019) ("[G]un populism as a racial frame of legitimate violence . . . is evident in the willingness of police chiefs to align themselves with putatively law-abiding gun-owning Americans, who are often implicitly (though not exclusively) imagined as white and middle class.").

110. *See* MUHAMMAD, *supra* note 104; Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 784–85 (2018).

understanding of criminality in America as one of immutability and of people who are truly bad or evil, and to the cognitive process of denying someone the capacity for change.[111] If criminality is innate and unchangeable, it absolves society of responsibility for better rehabilitation and reintegration of criminal actors and undermines the important role that criminogenic circumstances play in causing crime. This belief is a central part of the dominant sociocultural script for criminality and is perpetrated in media depictions of crime and criminal actors.

The belief in the intractable nature of criminality was reflected in the focus group discussions. For example, while Steven, a 67-year-old white man, thought rehabilitation was an important goal, he did not believe it could be the primary focus of punishment because some criminal actors were beyond help: "I mean I—I just—I think there's—I think there's evil people, and I think there's people who couldn't be less interested in rehabilitation if you—if you will."[112] He went on to say that we too often talk about criminal actors as those who lack resources, but "there's a group out there that are evil and are bad and are incorrigible."[113]

Through ongoing socialization, exposure to media accounts that reinforce the crime master narrative, endorsement of internal attributions for crime, and infrahumanization, many people come to believe that intractable criminality is pervasive. This belief then becomes part of the cognitive script that dictates how many members of the lay public come to make criminal punishment decisions. The fear of criminal actors as an uncontrollable threat justifies their incarceration in service of broader public safety goals.[114]

Many focus group participants talked about the ongoing threat posed by criminal actors who were not incarcerated, divorced from considerations of risk or future dangerousness. Julia said: "How do you—then you're just letting someone victimize yet another person, and then how is that justice for a community?"[115] Her concern regarding ongoing victimization came from her pre-existing beliefs about criminal actors as perpetual threats, not any specific information we were discussing at the time. Another participant, Lisa, a 64-year-old white woman, linked intractable criminality to biology:

> [W]hen you kind of really wrap your head around that type of person and fully understand that they aren't capable of change, period. They just can't change the way they think. Their brains are wired the way they're wired. They're always—they're never gonna ever feel remorse for anything. They just don't have that capability. Well, if they are set free, they will again repeat, right?[116]

111. *See* Bennett & Plaut, *supra* note 110, at 759.

112. Bakhshay, *supra* note 4, at 128, 133.

113. *Id.* at 133.

114. *See* Jonathan Simon, *Dignity and Risk: The Long Road from* Graham v. Florida *to Abolition of Life Without Parole*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 282, 293 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) (discussing "total incapacitation" as a way to respond to any perceived risk).

115. Bakhshay, *supra* note 4, at 131.

116. *Id.* at 132, 134.

Lisa's comment reflects both a belief in biological criminality and a belief that criminal actors cannot experience certain emotions, consistent with infrahumanization.[117] Again, her concerns were not responding to a specific person or to a discussion about recidivism in particular, but reflected her general understanding regarding the types of people who commit crime.

Intractable criminality does not just fuel fears about crime, it provides an outlet for the expression of other concerns. Psychology research documents the way criminal punishment can be a proxy for addressing anxieties and fears unrelated to crime.[118] In this way, directing anger and punishment toward dangerous, criminal others who pose an ever-present risk is a socially conditioned and socially acceptable response to economic, social, and generational anxiety.[119] And these amorphous threats become conflated and fluid in the public mind, further feeding the narrative of persistent criminal danger.

The belief in intractable criminality also absolves society more generally of responsibility for trying to address crime through rehabilitation and restoration—making those penological goals worthwhile but so unattainable that they do not warrant a sincere policy response. Lay perceptions of irredeemable criminals who will commit crime if given the chance contribute to the morally justified abdication of responsibility for rehabilitating or restoring criminal actors. It is the justifying cognition for prison over rehabilitation. These "bad seed[s],"[120] which haunt the lay imagination, are thought to be either incapable of or uninterested in changing and becoming law-abiding members of society. Their persistent criminality is proof of their unwillingness to change and makes rehabilitation seem unlikely and unworthy of pursuit.

Focus group discussions that centered on what happens when someone fails to rehabilitate when given the chance illustrate this phenomenon. Even when participants were more open to rehabilitative or restorative options, they focused on the consequences of failure and seemed to believe failure to rehabilitate reflected a moral deficit—a choice not to do better—worthy of further penalization. For example, Steven made a comment regarding a hypothetical situation where a criminal actor was given a chance to participate in a rehabilitation program, but then recidivated.

> Maybe your punishment is X, but we'll put you in this program. And if you violated, if you . . . [recidivate] or whatever with—with your crime, then it's 2X. Then you go in for 2X or whatever. So maybe . . . if there were a feeling

117. *See* Markowitz & Slovic, *supra* note 86, at 9261.

118. *See* Tyler & Boeckmann, *supra* note 25, at 255–56; King & Maruna, *supra* note 14. *See generally* KATHLYN TAYLOR GAUBATZ, CRIME IN THE PUBLIC MIND (1995) (discussing the results of an interview study that found a relationship between individual-level punitiveness and feelings of anxiety about the pace of social and cultural change as well as the displacement of negative feelings about certain social groups onto criminal actors).

119. *See* Hartnagel & Templeton, *supra* note 25, at 452.

120. This quote is attributed to Julia and was recorded during a focus group led by the author on February 19, 2019. Bakhshay, *supra* note 4, at 131.

> that, if we give this person a chance, and they blow it, they pay for that somehow. . . . [B]ut—but yeah, so we gave you a chance. We offered this opportunity. Uh, you didn't—you didn't take it, so—.[121]

Sharon expressed a similar view: "You give 'em one chance. If they don't take that chance, and they don't make something of themselves, then, that's [it]. . . . If they come back again, then, you know, all bets are off. Because they're - they've, you know, blown it. They didn't wanna do it."[122] And Bridgitte, a 56-year-old white woman, made the point in connection with a conditional endorsement of restorative justice diversion:

> For me, it's-it's monitoring and enforcing, you know, and with-with some pretty swift consequences if somebody does not follow ... the mutually agreed upon program 'cause I will be frustrated if then ... —you know, a year in, or whatever— ... let's say it's a five-year restoration program. Let's say, a year in, somebody's "fallin' off the wagon", and then they get, you know—then they get kinda put into the system, and then it's another year. They don't hear and blah, blah, blah, blah, blah. I would—I would wanna know like, no, you don't get three s—you don't get three chances to do the re— this restorative justice program. You get one chance, if you don't, then you're...[123]

The consequences for "blow[ing]" one's chance reflect the belief that rehabilitation is the individual criminal actor's responsibility and has little to do with social, economic, or institutional forces. Participants endorsed more severe consequences for these types of failures, suggesting that the penalty for taking advantage of leniency without successfully rehabilitating and reintegrating should be harsher punishment. Failure to rehabilitate is further evidence of irredeemability and reflects the criminal actor's innate badness and ongoing desire to commit crime. It confirms the perception of intractable criminality and reinforces this belief as part of the cognitive schema for crime.

As with many foundational precepts about crime, the belief in intractable criminality is perpetuated by media accounts that focus disproportionately on serious

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121. *Id.* at 125. This is a clear endorsement of a policy similar to that enshrined in three strikes laws. Three strikes laws are punitive sentencing laws that target recidivism with increased penalties for repeat offenders. In most cases, these laws impose a life sentence on a criminal actor for a third felony conviction. These laws proliferated in the 1990s and led to many life sentences for relatively minor crimes, such as theft of negligible amounts of money. California's Three Strikes Law, enacted in 1994, was one of the most notorious, although it has been reformed several times over the last two decades. *See* Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1718 (2006); Autumn D. McCullogh, *Three Strikes and You're in (for Life): An Analysis of the California Three Strikes Law As Applied to Convictions for Misdemeanor Conduct*, 24 T. JEFFERSON L. REV. 277, 277–78 (2002). The focus group participants in general did not endorse the California Three Strikes Law because they thought it was overly punitive. However, many of their comments, as illustrated here by Steven, reflect an intuitive sense that there should be harsher punishment for recidivist conduct. *See* Bakhshay, *supra* note 4, at 125.

122. Bakhshay, *supra* note 4, at 125, 136 (alteration in original).

123. *Id.* at 125.

criminal recidivists, such as serial rapists or serial killers. These types of criminals loom large in the public mind, particularly when considering punishment, although they are relatively rare.[124] The perception that these types of extreme criminals are ubiquitous and pose a persistent threat was espoused by my focus group participants. For example, Juan, a 52-year-old Latinx man, stated: "How do you weed out the true socio and psychopaths, who are gonna be dangerous until the moment they're put in the ground? You know this serial child rapist kind of people."[125] Mabel, a 71-year-old white woman, remarked: "I totally get the Charles Manson thing, totally get that, uh, and there are other people besides him that are exactly the same and need to just be put away [laughter] 'cause they will wreak havoc no matter what. That's just their psyche."[126]

Although most people know that the average person who commits a crime is nothing like Charles Manson, who suffered from delusions and engaged in horrific acts of violence,[127] my participants expressed a profound fear of people like him and a belief that there are other people who pose the same kind of unmanageable threat. This fear operates at a deeper level of cognition, but is easily activated by stories in the media and other, more general anxieties.[128] The lay perception of extreme, violent criminal actors influences the way all people who commit crime are perceived, particularly when thinking in the abstract. The atypical, extreme criminal actor is precisely the type of criminal actor the public wants to dissociate and sever from society. Although participants were more sympathetic to low-level, first-time criminal actors and willing to take a chance on a non-custodial sentence for them, it is the fear and concern around these bogeymen of crime, the Charles Mansons, that came most readily to mind and informed participants' desire to detach and remove criminal actors from society.

Beyond the role of media socialization, the belief in intractable criminality is also a consequence of decades of penal policy that targeted recidivism and political rhetoric suggesting that if people cannot make good on their second chances,

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124. *See* BEHAV. ANALYSIS UNIT-2, FBI, SERIAL MURDER: MULTI-DISCIPLINARY PERSPECTIVES FOR INVESTIGATORS 2 (Robert J. Morton & Mark A. Hilts eds., 2008), https://www.fbi.gov/stats-services/publications/serial-murder [https://perma.cc/K2HU-LSPH]; Scott Bonn, *5 Myths About Serial Killers and Why They Persist [Excerpt]*, SCI. AM. (Oct. 24, 2014), https://www.scientificamerican.com/article/5-myths-about-serial-killers-and-why-they-persist-excerpt/ [https://perma.cc/J9RS-RRGF]; Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 495–96, 507 (2015).

125. Bakhshay, *supra* note 4, at 134.

126. *Id.* at 131, 135.

127. Charles Manson is a high-profile, atypical criminal that was raised numerous times by the focus groups participants. *See id.* at 162. These mentions support the notion that these types of anomalous crimes and criminal personalities dominate the minds and imaginations of the general public. *See* Bakhshay & Haney, *supra* note 56; Haney, *supra* note 55, at 689, 704 (noting that "violent criminality is often central to popular fiction"). For a full discussion of the ongoing media attention the Manson case received, see HADAR AVIRAM, YESTERDAY'S MONSTERS: THE MANSON FAMILY CASES AND THE ILLUSION OF PAROLE (2020).

128. *See* Bakhshay & Haney, *supra* note 56.

it is their own fault.[129] A deep commitment to individualism, self-improvement, and bootstrapping serves to further penalize those individuals caught in the criminal justice system and absolve systemic, structural, and social forces from responsibility. These sociocultural forces reify the beliefs and processes producing a deep, stable idea about intractable criminality.

There is also a counternarrative to that of inherent badness, typically relegated to academic and activist circles, which focuses on criminogenic risk factors and the socioeconomic causes of crime and that offers a more nuanced, sympathetic account of criminal actors.[130] Yet this narrative has limited applicability when picked up by mainstream outlets. Often those individuals who benefit from this account benefit from other biases as well—racial, gender, and socioeconomic privilege, for example.[131] But for the majority of criminal actors who come from difficult backgrounds that predispose them to criminality, the crime master narrative and belief in individual responsibility places a firm limit on the extent of empathy people feel and how much it affects their judgments about punishment.

Moreover, the focus on criminal actors as a product of criminogenic circumstances can backfire, suggesting that although it may not be their fault, they are beyond rehabilitation. In advancing the 1994 Omnibus Crime Bill, then-Senator Joe Biden made a representative comment. In advocating for one of the most punitive criminal justice bills in history, he said, "We have predators on our streets that society has in fact, in part because of its neglect, created . . . . They are beyond the pale many of those people, beyond the pale . . . . And it's a sad commentary on society. We have no choice but to take them out of society."[132] President Biden was simultaneously invoking the specter of "predators," a sensational depiction of criminal actors, acknowledging that social forces likely contributed to their criminal behavior, and arguing that they are beyond redemption

129. See, for example, laws targeting recidivists, such as three strikes laws. *See* BARKOW, *supra* note 41, at 72, 75; Barkow, *supra* note 121.

130. *See, e.g.*, Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 836–37 (2008).

131. *See, e.g.*, Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 LAW & HUM. BEHAV. 481, 493–94 (2009); Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 574 (discussing findings that Black capital defendants do not benefit from mitigating evidence in the same way as white capital defendants); Russ K.E. Espinoza & Cynthia Willis-Esqueda, *The Influence of Mitigation Evidence, Ethnicity, and SES on Death Penalty Decisions by European American and Latino Venire Persons*, 21 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 288, 294–95 (2015) (discussing a simulated juror study that found that mitigation evidence was evaluated differently depending on the capital defendant's race and socioeconomic status, with high socioeconomic status, European-American defendants benefitting more from the presentation of mitigation evidence than low socioeconomic status, Latino defendants).

132. Andrew Kaczynski, *Biden in 1993 Speech Pushing Crime Bill Warned of 'Predators on Our Streets' Who Were 'Beyond the Pale,'* CNN (Mar. 7, 2019, 11:43 AM), https://www.cnn.com/2019/03/07/politics/biden-1993-speech-predators/index.html [https://perma.cc/3RLB-CJ8A]; *see also* Sheryl Gay Stolberg & Astead W. Herndon, *'Lock the S.O.B.s Up': Joe Biden and the Era of Mass Incarceration*, N.Y. TIMES (June 25, 2019), https://www.nytimes.com/2019/06/25/us/joe-biden-crime-laws.html ("'It doesn't matter whether or not they're the victims of society,' Mr. Biden said in 1993, adding, 'I don't want to ask, "What made them do this?" They must be taken off the street.'").

and need to be removed from society. Although he acknowledged the social, criminogenic forces that provide the context for much criminal behavior, that understanding was limited by the desire to remove and dissociate from "predator[y]" elements to keep everyone else safe. Focus group participant Jonathan, an 83-year-old white man, echoed a more tamped-down version of President Biden's characterization of criminal actors who are incapable of change.[133] He said, "[S]ome people are so angry, they've been brought up in such malignant environments that anger and violence is built into their psyches. And how do you deal with people like that? Many of them aren't capable of remorse."[134] Although it is true that President Biden has walked back many of these sentiments,[135] they still dominate much of the discourse regarding crime in America. And, in fact, the most recent election cycle saw a resurgence of tough-on-crime rhetoric and attack ads, resonating with large swaths of the electorate.[136]

A corollary to the idea that some people are incapable of change because they are too damaged or innately criminal is the belief that some people simply do not want to change. This belief frustrates reforms that focus on rehabilitation and reintegration because it raises the possibility that these criminal personalities will abuse any services or programs they are provided. A recent comment by California Assemblymember Carlos Villapudua exemplifies this type of thinking. Villapudua sponsored a prison reform bill, AB 2730, that would introduce some Norwegian-style rehabilitative measures into California's prison system, including a campus focused on life skills and job training.[137] While discussing the bill, Villapudua stated: "People always think reform is a bad word. . . . The key is to separate folks who know they made a mistake and know they're going to be normal citizens again, not being in there faking it. If you fake it, you go back to general population."[138] While Villapudua's bill is commendable, his comments reflect the type of thinking about criminal actors that continues to impede widespread reform efforts—that some incarcerated individuals have no interest in rehabilitation and would be disingenuous in their efforts to change.

Again, this sentiment surfaced in comments from focus group participants. Bridgitte expressed her concern that some criminal actors would exploit the opportunity to participate in a restorative justice proceeding to avoid prison: "Yeah. Yeah, I was with you, that I would have a hard time believing, uh, that your

133. Bakhshay, *supra* note 4, at 103.

134. *Id.* at 138.

135. *See* Arlette Saenz, *Biden: 'I Haven't Always Been Right' on Criminal Justice*, CNN (Jan. 21, 2019, 2:39 PM), https://www.cnn.com/2019/01/21/politics/joe-biden-criminal-justice/index.html [https://perma.cc/5V2V-A6TX].

136. *See, e.g.*, Michelle L. Price & Jesse Bedayn, *GOP Steps Up Crime Message in Midterm's Final Stretch*, ASSOCIATED PRESS (Oct. 7, 2022), https://apnews.com/article/2022-midterm-elections-gun-violence-new-york-race-and-ethnicity-campaigns-dfba652ac7409c64311efcd7c908ed08 [https://perma.cc/3T9Z-ZZDG].

137. A.B. 2730, 2022 Reg. Sess. (Cal. 2022); *accord* Nigel Duara, *Prison Rehab: Can California Learn Anything from Norway?*, CAL MATTERS (June 10, 2022), https://calmatters.org/justice/criminal-justice/2022/06/prison-rehabilitation-norway-model/ [https://perma.cc/3MWA-TQDH].

138. Duara, *supra* note 137.

commitment, you know, the criminal sitting at the table, they'd be willing to say anything and agree to anything—um, to avoid jail or prison time."[139] Sarah, a 57-year-old white woman, worried that some criminals are convincing liars.[140] She said:

> [W]hen you have somebody who is a sociopath, and they know that they can get away with it by just saying the right words, they can say the right words and get away with it. And those are the people, I think, that are very high-risk of repeating the same behavior again.[141]

Becca and Juan tapped into the same concern in a separate exchange:

> Becca: Like how do you—how can you tell like a sociopath? You know. They're really good at, you know, acting like, "Oh I am sorry."
>
> Juan: Manipulative. Yeah.[142]

Seeing those who engage in serious crime as fundamentally different, and mostly irredeemable, is a key part of the dissociative process. "Law-abiding" individuals psychologically sever themselves from the category of "criminals," who they are then able to condemn to the prison system. And "law-abiding" individuals understand themselves and those in their moral circle as worthy of prioritization, unlike the criminal actors who are dehumanized and devalued. Prison is notoriously harmful and so is appropriate only once someone has been defined as existing outside the bounds of the moral community. And because of the widespread belief that criminal actors are unlikely to change and will almost certainly recidivate, there is no need for a genuine commitment to their rehabilitation or well-being while they are in prison.

### B. PRISON AS SEVERING THE CRIMINAL FROM SOCIETY

The second aspect of the dissociative theory of punishment is the sociopsychological understanding of prison both as the definition of punishment and as severing the criminal actor, both symbolically and physically, from society. This understanding conflates prison with the penological goals of public safety and justice, although it is not particularly effective at achieving either of these goals,[143] at least not in the way the public intends. But because of the dissociative process, it is sufficient from a psychological perspective that prison stands for these things and represents both justice and safety in an abstract, detached way.

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139. Bakhshay, *supra* note 4, at 137.
140. *Id.* at 134.
141. *Id.*
142. *Id.* at 137.
143. *See* BARKOW, *supra* note 41, at 46–47; HANEY, *supra* note 25, at 36; DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 7 (2019) (demonstrating that incarceration has not made America safer).

1. The Sociopsychological Meaning of Prison

Prison has clear cultural significance as the embodiment of criminal punishment in American society. The desire to punish is arguably inherent.[144] But the manifestation of punishment as prison with little thought to what comes after is the product of social, cultural, and psychological forces that are in many ways unique to America. Prison is a ubiquitous feature of contemporary American society. For decades, America's "exceptional" status as the most prolific incarcerator in the Western democratic world has been one of its defining features.[145] The belief in retributive justice is a bedrock theoretical principle in most Western democratic societies, and most of them similarly view prison as an appropriate response to crime.[146] But these societies neither have the draconian prison terms that are a common feature of the American penal system nor rely on prison as heavily.[147] In these societies, punishment is not necessarily a form of dissociation; people who commit crimes are expected to return to their communities. There is an emphasis on the successful rehabilitation and reintegration of criminal actors that is absent from the dominant American punishment narrative.[148] For many Americans, the concern with appropriate punishment begins and ends with the imposition of a prison sentence. And this is due, in part, because of the role of prisons in American culture.

America's prisons have long dominated the media landscape and the public imagination. In the same way that Americans consume content regarding crime and criminal actors, they also consume content, much of it inaccurate, regarding prisons and jails. Countless shows, documentaries, true crime series, and exposés take America's carceral institutions as their subject matter.[149] The effect of all this attention is a deep sociopsychological association of punishment with prison and a culturally driven cognitive process that equates punishment with prison. During one of the focus groups, Sam, a 25-year-old white woman,[150] articulated this belief and framed it as an obstacle to thinking more broadly about punishment. She stated: "I'm like fundamentally struggling with the concept of

144. *See supra* Section I.A.

145. *See* ROY WALMSLEY, INST. FOR CRIM. POL'Y RSCH., WORLD PRISON POPULATION LIST: ELEVENTH EDITION 2 (2015), https://prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf [https://perma.cc/DB6H-4W48]; Sawyer & Wagner, *supra* note 2; MUGAMBI JOUET, EXCEPTIONAL AMERICA: WHAT DIVIDES AMERICANS FROM THE WORLD AND FROM EACH OTHER 194 (2017).

146. *See* JOUET, *supra* note 145, at 201–02.

147. *Id.*

148. *See, e.g.*, Bill Muth, Kevin Warner, Laura Gogia & Ginger Walker, *A Critique of the Prison Reentry Discourse: Futurity, Presence, and Commonsense*, 96 PRISON J. 392, 397 (2016). *See generally* Thomas Ugelvik, *Prisons as Welfare Institutions?: Punishment and the Nordic Model*, *in* HANDBOOK ON PRISONS 388 (Yvonne Jewkes et al. eds., 2d ed. 2016).

149. These include *Orange is the New Black* (Netflix 2013), *Oz* (HBO 1997), THE SHAWSHANK REDEMPTION (Castle Rock Entertainment 1994), and *Locked Up in America* (PBS television broadcast Apr. 2014), to name a few.

150. Bakhshay, *supra* note 4, at 130.

punishment without incarceration. . . . [I]t's so embedded into not just our society, but like human society at this stage. It's probably been done since forever."[151]

This culturally determined belief drives individuals to endorse prison as the only sufficiently punitive outcome, according to their a priori understanding of prison as punishment. Combined with susceptibility to default bias—the tendency to privilege the status quo and perceive the default choice to be better than the alternatives[152]—this belief elevates prison over less visible or well-known options. Most individuals struggle to conceive of any other outcome as an appropriate criminal justice response to serious crime. Few alternatives carry the same sociocultural association with punishment as prison. Probation is a more frequent criminal justice outcome,[153] yet most people do not think of probation when they think of punishment. They envision a person behind bars. Thus, although prison has not always been the default mode of punishment in American society, it is virtually synonymous with punishment today.

Beyond its equation with punishment, prison conveys a deeper sociopsychological message about the dissociation of criminals from the rest of society. Prisons are both metaphorically and geographically removed from everyday life.[154] They are symbols of security, with fences, armed guards, and giant concrete walls emanating the impression of impenetrability. They are "those places" where the "bad guys" go to be contained, far away and out of sight.[155] Sandy, a 61-year-old white woman, encapsulated this view in an exchange with other focus group members explaining why she felt more comfortable when alternatives to incarceration were described in more punitive terms: "For somebody that may think like me, that felt a more, uh, comfort zone with a fence up . . . with some protection . . . for my community. . . . Um, it did make a big difference when you say it the way you did . . . because I felt like—I felt safer . . . ."[156]

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151. *Id.* at 143. The belief that incarceration has been used as punishment since time immemorial, which many of my participants expressed, is false. *See generally* ASHLEY T. RUBIN, THE DEVIANT PRISON: PHILADELPHIA'S EASTERN STATE PENITENTIARY AND THE ORIGINS OF AMERICA'S MODERN PENAL SYSTEM, 1829–1913 (2021) (detailing the history of nineteenth-century prison administration and discussing the establishment of the first American prisons). Many of my participants' comments were based on inaccurate information about the penal system. But the goal of this project was not to educate or correct people, but to listen to and analyze their feelings and beliefs based on the information they already had.

152. Thomas de Haan & Jona Linde, *'Good Nudge Lullaby': Choice Architecture and Default Bias Reinforcement*, 128 ECON. J. 1180, 1180 (2018).

153. Sawyer & Wagner, *supra* note 2.

154. *See* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 14 (2007).

155. *See* Feeley & Simon, *supra* note 9, at 470 (discussing the treatment of incarcerated individuals as a form of "waste management"); *see also* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 141–76 (2007) (examining the phenomenon of mass imprisonment, including the "warehouse-like" qualities of prison identified by Feeley and Simon); Mona Lynch, *Waste Managers? The New Penology, Crime Fighting, and Parole Agent Identity*, 32 LAW & SOC'Y REV. 839, 839 (1998) (testing Feeley and Simon's "waste management" model of the "new penology" in a parole field office).

156. Bakhshay, *supra* note 4, at 123–24.

Here, Sandy invokes both the psychological and physical dimensions of prison, noting that the idea of punishment brings her a sense of comfort—the same comfort she feels from the physical security of a fenced-in prison. For her and many members of society, prisons as punishment represent both a psychological and physical separation from the rest of society.

For most people in America, prisons are geographically remote.[157] They are often located hours from large cities or on the edges of rural areas.[158] And this distance is not merely physical. Prisons are ubiquitous, yet many people have only a vague understanding, mainly based on media accounts, of what happens inside.[159] Many aspects of prison life are invisible and intentionally opaque, governed by the corrections bureaucracy and cloaked from outside view. Although most people can describe a prison physically, prisons take on a quasi-mythical quality that reinforces the perception of them not only as places of violence and deprivation, but also as important bastions to keep everyday people separate and safe.[160]

Many of the focus group participants tapped into the conception of separation and removal in their definition of punishment. Jeff, a 52-year-old white man, said punishment was about "protecting– *removing negative elements from society* until they pay their debt to society."[161] Brian, a 48-year-old Asian-American man, echoed this sentiment, clarifying that he was referring to criminal actors who posed a risk: "Yeah, if it's a repeat—like if they appear to be a danger to society, then incarceration, and some point of *separating from society* . . . is gonna be appropriate."[162] Vicky, a 65-year-old white woman, stated, "Well, it is tricky. Because . . . in my mind, the major purpose [of punishment] is to just *get them out of society* . . . ."[163] She later added: "I think that person does have to be *removed*, at least for a while, from society. Because . . . they're really a danger."[164] And Mabel added, "I think that's why you have prisons. . . . *There are some people that need to be separated.*"[165] Sandy expressed the sense of comfort she got from thinking that a serious criminal actor was "away" in prison, stating: "But I mean, they are off the streets. *And they are away*. And they're in their little cells for 23 hours a day. And, for me, I'm - I'm very happy with that."[166] These focus

157. Robert Johnson, *Brave New Prisons: The Growing Social Isolation of Modern Penal Institutions*, *in* THE EFFECTS OF IMPRISONMENT 255, 255 (Alison Liebling & Shadd Maruna eds., Routledge 2011) (2005); GILMORE, *supra* note 154, at 22. Of course, in prison towns, the daily lives of the prison, its inhabitants, its workforce, and its citizens bleed into one another. *See* SARAH LAWRENCE & JEREMY TRAVIS, URB. INST., THE NEW LANDSCAPE OF IMPRISONMENT: MAPPING AMERICA'S PRISON EXPANSION (2004); John M. Eason, Danielle Zucker & Christopher Wildeman, *Mass Imprisonment Across the Rural-Urban Interface*, 672 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 202 (2017).

158. *See* GILMORE, *supra* note 154, at 22.

159. Michelle Brown, *Penal Spectatorship and the Culture of Punishment*, *in* WHY PRISON? 108, 108–09 (David Scott ed., 2013).

160. *See generally id.*

161. Bakhshay, *supra* note 4, at 103 (emphasis added).

162. *Id.* at 103, 109 (emphasis added).

163. *Id.* at 103 (emphasis added).

164. *Id.* at 131 (emphasis added).

165. *Id.* (emphasis added).

166. *Id.* at 135 (emphasis added).

group members articulated the belief that severance and separation of criminal actors from "society" are essential to communicate moral condemnation, to satisfy the instrumental goal of public safety, and to achieve the retributive goal of justice.

The process of dissociation enables members of the lay public to first experience a sense of relief from the imposition of a prison sentence for criminal conduct, and then to mentally disengage from the reality of what that sentence entails. This disengagement is critical—it facilitates the decision to lock up scores of people and then enables them to be treated as out of sight, out of mind. The psychological distancing from those who commit crime is mirrored by a psychological distance from the punishment imposed. In this way, crime, criminals, and prison are all pervasive in American culture—in media representations, political discourse, and in the public mind—yet simultaneously dissociated from, cabined off, and ignored.

2. Conflation of Prison with Penological Goals

The lay public typically agrees that penal policy should address public concerns around safety, risk, and rehabilitation. However, those legitimate goals are often subsumed by the idea of prison, without understanding whether prison can actually achieve those goals. The conflation of prison with people's legitimate penological concerns is an important aspect of the dissociative theory of punishment. Criminal punishment is meant to meet a number of objectives—deterrence, incapacitation, retribution, rehabilitation, and restoration (or denunciation) are typically considered to be its primary goals.[167] The goals of incapacitation, as necessary for public safety, and retribution, as necessary for justice, stand out as the most central and the most closely linked with prison in the public mind. Prison is confused and conflated with both of these goals in a way that leads people to endorse it without engaging in its reality, enabling people to sever the goals of punishment from known prison outcomes.[168]

My focus group participants espoused all the typical punishment goals in various forms. Many participants also acknowledged that prisons fail to meet these instrumental goals—evincing an understanding that the goals of punishment are mostly divorced from its effects. For example, Peter, a 55-year-old white man, discussed prison as a deterrent, remarking: "But there would have to be a minimum kind of a something—prison sentence or, um, incarceration that serves as a deterrent."[169] But he later offered a serious critique of prison's effectiveness: "Um, I think the problem is that, once criminals get into prison or jail, it becomes like the-the Disneyland for criminals, and they learn a lot more once they get in there. And so, it's not actually a very good deterrent."[170] Other participants who

167. Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70, 73 (2005) (delineating the commonly articulated purposes of punishment); Spohn, *supra* note 9; CASSIA C. SPOHN, HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 2–3 (2d ed. 2009) (discussing restoration as an additional punishment goal).

168. *See* HANEY, *supra* note 25, at 33; BARKOW, *supra* note 41, at 46.

169. Bakhshay, *supra* note 4, at 105, 118.

170. *Id.* at 105.

endorsed prison because of its instrumental utility likewise doubted its ability to deter crime or prevent recidivism. Brian noted prison is actually a risk factor for recidivism: "[P]utting them in prison almost guarantees recidivism at this rate, or there's a higher chance that they're going to commit crimes by going the current incarceration route."[171] Juan offered a descriptive account of why he thought the system was ineffective at reducing crime:

> You know, they call it the gladiator academy. Or you know they call it, you know, where people go into prison, and they come out worse criminals than when they went in. Now they're, you know, they're working out. They're bigger. They're stronger. And on top of that, they've been, um, you know, they've been—what is that line from the movie Blow? He says, "I went in with a masters in weed and I came out with a PhD in cocaine."[172]

Despite their insights into the failures of prison as it currently exists in America, both of these participants also expressed the belief that prison was still necessary to pursue these goals.

The public understandably desires deterrence and incapacitation, and the public's safety and justice concerns should be a top policy priority. But there is a problem when prison becomes a stand-in for these goals, supplanting a commitment to pursue a more inclusive and effective version of public safety, focused on prevention, de-escalation, and drug and mental health treatment, for example. And there is a problem when prison supplants a less destructive and more holistic version of justice that includes greater emphasis on victim restitution and abating the justice system's collateral impacts on families and communities.[173] Although prison serves a clear function, particularly as a way to incapacitate criminal actors, it is not a complete solution to the problems caused by crime and exacerbates many of the conditions that lead to criminal behavior.

*a. Prison and Public Safety*

Although prisons have existed in essentially their modern form for over two centuries, over the last sixty years, the notion of incarceration has become deeply tied to a communal sense of safety. If dangerous, criminal behavior can be rooted out and contained[174]—in a prison or jail cell—the public can breathe a collective sigh of relief.

Many focus group participants focused on the relationship between prison and public safety. Jonathan described the purpose of prison as "*protection of society* at large from people who would do—give society ill, do people in the community ill."[175] For Sharon, the purpose of punishment includes "getting the person off the

171. *Id.* at 142.
172. *Id.*
173. *See* BARKOW, *supra* note 41, at 47.
174. *See, e.g.*, SIMON, *supra* note 155, at 148, 153.
175. Bakhshay, *supra* note 4, at 103 (emphasis added).

street so that he or she does not do whatever it was that they did to someone else *to protect the rest of us*."[176] Brian said he thought of prison as "we're *protecting*, as you said, society at large from these actors or these actions."[177] Embedded in this idea of protection is distance between criminal actors and "society at large" or "the rest of us."

Katerina, a 50-year-old white woman, articulated the feeling of safety that accompanies the detachment from and removal of criminal actors:

> So the feeling of safety comes from the fact that you know the person who let's say, um, robbed and killed a shopkeeper is not amongst us anymore. Or for a period of time, . . . he's not gonna be around us. And we kind of get this temporarily collective feeling of yeah, things are okay. He's been locked up.[178]

Many people think only prison can sufficiently meet the goal of public safety because of their belief that criminality is immutable, and their fear that criminal actors will continue to commit crime if they are not incapacitated in a prison. Hence the concepts of removal and containment have supplanted other notions of safety that have more to do with de-escalation, crisis management, and treatment. More than addressing the root causes of criminal conduct or intervening before a crime occurs, safety means removing bad, criminal elements from society. This attitude prevails even among those sheltered from crime and those who know incarceration often generates more serious criminal behavior.[179] Safety is understood through a narrow lens focused on separation from those perceived to be dangerous or uncontrollable. And prisons have become synonymous with the containment of threat[180]—the phrase "lock 'em up" has abiding psychological resonance because it communicates not just condemnation but also security.

Yet public safety concerns extend only to those within the moral sphere of inclusion, not criminal others. Members of the public focus on public safety as grounds to incarcerate those convicted of a crime, with no apparent concern for the danger incarcerated individuals may face in prison, even though prisons have notoriously high rates of crime and violence, and incarcerated individuals face an elevated risk of victimization.[181] These individuals have already been condemned and cast out. Several focus group discussions explicitly acknowledged the harms

176. *Id.* (emphasis added).

177. *Id.* (emphasis added).

178. *Id.* at 106.

179. *See generally* HANEY, *supra* note 25.

180. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 30 (2001); *see also* GARLAND, *supra* note 20 (noting the Foucauldian "depiction of punishment as a technology of power").

181. *See* Emily Widra, *No Escape: The Trauma of Witnessing Violence in Prison*, PRISON POL'Y INITIATIVE (Dec. 2, 2020), https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/ [https://perma.cc/55FT-ABHR]; Nancy Wolff, Cynthia L. Blitz, Jing Shi, Jane Siegel & Ronet Bachman, *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM. JUST. & BEHAV. 588, 588 (2007).

prison inflicts on incarcerated individuals. Katerina expressed her view that prison is both ineffective and harmful:

> If we go with the traditional, what happens is, it's really—like we're shooting ourselves [i]n the foot. Because we send them, we pay for them. They come out, zero effect most of the times [sic]. Again, we're not talking about exceptions. They- they come out to the society more damaged than back in the prison.[182]

Vicky's comment suggests that she is aware of the risks incarcerated individuals face inside of prisons: "[T]he problem is, you go into prison, and if you weren't a great criminal when you went in, you often are a better one when you get out. And a[n] angrier one if you've been raped, or beat up, and all the bad things that happen in prison."[183]

The same participants who acknowledged the harms of incarceration also insisted on the necessity of prison to keep the rest of society or the community safe. This was true even after we discussed the high rates of recidivism for people who serve time in prison and the ways in which incarceration can be criminogenic. Even with this knowledge, my participants still insisted that prison was necessary.[184] My participants' understanding of public safety therefore reflects a sense of distance from criminal actors—both physical distance from the prisons where they are warehoused and psychological distance from criminal actors who do not deserve the benefits of protection and safety.

The reliance on incarceration as the only way to feel safe is mostly misplaced.[185] With respect to many people who are currently incarcerated, there is no clear benefit to public safety.[186] Incarceration typically does not address the root causes of criminality; it is a temporary solution and applicable only in cases where the criminal perpetrators are caught.[187] Moreover, many common types of crimes that fuel lay safety concerns—such as gang- or drug-related crimes—are plagued by the problem of replacement; when one criminal actor is locked up,

182. Bakhshay, *supra* note 4, at 141.

183. *Id.* at 143.

184. *Id.*

185. *See* HANEY, *supra* note 25, at 9; *see also* Thomas Ward Frampton, Essay, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2049 (2022) (discussing police incompetence at criminal apprehension). Conceptualizing safety more broadly and as inclusive of prevention and de-escalation strategies could go a long way toward increasing public safety. *See* Tom R. Tyler, *From Harm Reduction to Community Engagement: Redefining the Goals of American Policing in the Twenty-First Century*, 111 NW. U. L. REV. 1537, 1549 (2017) (discussing a focus on social engagement in the policing context).

186. Frampton, *supra* note 185, at 2020; *see* James Austin, Lauren-Brooke Eisen, James Cullen, Jonathan Frank, Inimai Chettiar & Cornell William Brooks, *How Many Americans Are Unnecessarily Incarcerated?*, 29 FED. SENT'G REP. 140, 142–43 (2016).

187. *See* Shima Baradaran Baughman, *How Effective Are Police? The Problem of Clearance Rates and Criminal Accountability*, 72 ALA. L. REV. 47, 55–56 (2020).

another steps in to take their place.[188] And for many people living outside significant metropolitan areas, the incarceration of someone from the city has no impact on their day-to-day safety.

But the belief in incarceration as crucial to an individual sense of safety highlights that for many people who do not live in high-crime areas or regularly face the risk of victimization, safety and security are abstract concepts.[189] The symbolism of separation and containment represented by the prison meets their security needs.[190] Psychological and criminological surveys have documented the importance of a perceived sense of safety to the public.[191] For example, psychologists Tom Tyler and Robert Boeckmann found that participants' support for California's Three Strikes Initiative was driven more by their concerns about social change and social cohesion than instrumental safety concerns.[192] So while many people may understand that incarcerating someone in another location does little to keep them safer, it has a deeper symbolic value and has become an outlet for anxiety and abstract social concerns.[193]

Several focus group members commented on the importance of prison for a symbolic sense of safety. Juan said, "It's just a community sense. If we don't have law and order, people don't feel safe."[194] Likewise, Katerina stated:

> Yeah, I think [prison is] also psychological for the collective cautiousness [sic]. . . . And [the rules] might not always work, and they're in fact if there's a guarantee that it won't always work. But that they will work most of the time. And for the average person, it gives peace of mind and peace of—you know, it gives the community a sense of security and of order.[195]

188. *See* Thomas J. Miles & Jens Ludwig, *The Silence of the Lambdas: Deterring Incapacitation Research*, 23 J. QUANTITATIVE CRIMINOLOGY 287, 288, 291 (2007).

189. But for many Black communities that do live in high-crime areas, both their understanding of safety and their safety concerns are very different. *See* Amaka Okechukwu, *Watching and Seeing: Recovering Abolitionist Possibilities in Black Community Practices of Safety and Security*, 18 DU BOIS REV. 153, 155–56 (2021); Monica Bell, *Black Security and the Conundrum of Policing*, JUST SEC. (July 15, 2020), https://www.justsecurity.org/71418/black-security-and-the-conundrum-of-policing/ [https://perma.cc/3346-8XXD]; *see also* SERED, *supra* note 143, at 4–5 (noting people who have been victimized often feel differently about punishment than those who have not).

190. *See* GARLAND, *supra* note 20, at 164.

191. *See* Tyler & Boeckmann, *supra* note 25, at 255. *See generally* King & Maruna, *supra* note 14 (replicating Tyler and Boeckmann's study to find that social cohesion, economic anxiety, and generational anxiety drove punitive attitudes among participants from the United Kingdom); GAUBATZ, *supra* note 118 (documenting the results of qualitative interviews on lay perceptions of crime, finding that participants were more concerned about expressive and symbolic factors like social displacement and social change).

192. Tyler & Boeckmann, *supra* note 25, at 255.

193. *See* Johnson, *supra* note 33 (discussing the possibility that public support for punitive policies is, in part, driven by anger and anxiety); Freiberg, *supra* note 19 (advocating for criminal justice policies that address the "emotional or affective dimensions of crime"); King & Maruna, *supra* note 14, at 161–62 (discussing the role of generational anxiety in predicting punitive views).

194. Bakhshay, *supra* note 4, at 107.

195. *Id.* at 106.

Later in the discussion, Katerina acknowledged that "lock[ing]" a criminal up is important "[e]ven *for the illusion of safety and order*."[196] Another participant, Sam, was even more direct about the performative role she believed prison plays in allowing average Americans to operate without fear. She said: "It's to show the rest of society that justice has been served. 'Look. They're locked up. You don't have to worry about them anymore. We did the thing. You can go on feeling good about your day.'"[197] This last remark encapsulates an important symbolic aspect of incarceration—locking up those convicted of crimes both conveys a sense justice has been done and relieves the burden of worrying about one's own safety, even when one bears no direct relationship to the crime.

These comments illustrate how prison provides both a real and a metaphorical separation between good, law-abiding citizens and those who are dangerous and amoral. Without regard for information about localized crime rates or the actual risk of victimization, the knowledge that someone, somewhere, has been put in prison can be comforting. The individual need for a sense of safety is met even in the absence of a known danger. The persistent threat posed by criminals as an abstract class is contained, and the reality of whether incarceration effectively deters future crime or rehabilitates specific criminal actors is essentially moot, because they are likely to reoffend and are beyond redemption. Thus, there is a disconnect between the stated goals of punishment and how to achieve those goals—one that is mediated by the sociocultural and psychological meaning of prison in the public mind as a place to contain criminal elements.

*b. Prison and Retributive Justice*

Another key aspect of the dissociative theory of punishment is the conflation or supplantation of the concept of justice with prison. Lay understandings of criminal justice typically refer to retributive justice or "just deserts."[198] Although previous empirical work has consistently found that people are motivated by retributive concerns,[199] even when they do not acknowledge these motives,[200] many of my focus group members were explicit that justice, by definition, is retributive. Jonathan struggled with this conflation, stating, "[t]he problem with the term justice is you can't get away from the idea that, when you talk about justice, by definition, in my concept of it, there's a retribution component of it."[201] Although not every participant used the term "retribution," many articulated concepts that are consistent with a belief in retributive punishment. Steven called it "payback."[202] Jeff referred

196. *Id.* (emphasis added).
197. *Id.* at 107.
198. *See generally* Darley et al., *supra* note 5.
199. *See id.* at 676.
200. *See id.*
201. Bakhshay, *supra* note 4, at 111.
202. *Id.* at 104–05.

to it as "like for like."[203] Still other participants touched on core theoretical elements of retribution, such as proportionality.[204]

Many people believe a prison sentence alone can fulfill the goal of justice, understood from a retributive perspective. My focus group participants widely shared this sentiment. For example, when asked about the meaning of justice, Sandy said, "justice would be a-a sentencing, to me."[205] For many, prison is understood to be the only consequence that adequately conveys the moral message that the criminal actor has done something wrong and therefore must suffer. Sam encapsulated this view:

> I think if - if someone were to commit an armed robbery, and be told, "You can go home, but wear an ankle monitor, and we're gonna help you there," I don't think that *carries the message* that, "You messed up. You made a bad choice. And you have to atone for that."[206]

Sharon expressed a similar sentiment, dismissing a rehabilitation-focused alternative by stating, "then again, they still—you've still gotta be incarcerated,—because otherwise, you know, they think, 'Oh, no big deal. Just blow it off, and go out, and do it again.'"[207]

The insistence on the necessity of prison exemplifies the power of the deep adherence to retributive justice and the sociocultural association of punishment and prison. Once activated, the cognitive script for punishment dictates that prison, understood in the abstract, is the only consequence that can satisfy the need for justice. The public focuses on the idea of a prison sentence, not its reality. There is little concern for the location, the facility's security level, or the programming available there. "Doing one's time," regardless of the content of that time and instrumental concerns around risk and rehabilitation, is synonymous with justice. This sentiment came up in a number of ways in the focus group discussions. For example, Dorothy, a 63-year-old white woman, discussed potentially hiring someone who was formerly incarcerated: "But you can't ask people about if they have a felony or not. It's like, if they're out of jail, they've served their time, and it's none of our business."[208] In this example, former prisoners "serv[ing] their sentence" satisfied Dorothy's interest in seeing justice done, regardless of any other factors.[209]

The focus on doing one's time relates in part to the deeply held belief that retributive justice must entail some sort of pain or suffering. Although the drive to

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203. *Id.* at 128. Jeff also noted that "in some parts of our country," justice is defined as "an eye for an eye." *Id.*

204. Steven stated, "[j]ustice would be, um, a consequence commensurate with the crime, consistent, proportionate." *Id.* at 112, 128. Janice, a 52-year-old Asian-American woman, described justice as "an appropriate consequence for their behavior." *Id.* at 112.

205. *Id.* at 128.

206. *Id.* at 130 (emphasis added).

207. *Id.* at 118.

208. *Id.* at 136–37.

209. *Id.* at 136.

punish is typically based on a determination of moral culpability and deservingness—which often includes an assessment of inappropriate extralegal factors related to race, socioeconomic status, and gender—the substance of the punishment must be painful to accord with people's retributive impulses.[210] Across a number of focus group discussions, several participants endorsed the view that justice must be "painful."[211] Bridgitte said:

> I have not been or my loved ones than [sic] the victim of a violent crime, but if I even try to put myself in those shoes, *I would need there to be some kind of pain*—and something, and whether that's—maybe it doesn't have to be for life, but it should be s—and-and that reveals my character—[*Laughing*] . . . .[212]

Jeff shared this perspective even while distancing himself from it:

> I could imagine, I come from the Midwest, just sort of different from the general vibe out here, and I'm thinking about the people I grew up with would take a fairly dim view, I believe, of restorative justice, because it's not punitive enough, for example, *they want more pain in there*.[213]

Vicky described her vision of justice, stating: "There needs to be *sacrifice*. How's that? . . . I don't like the word punishment either, but there needs to be some kind of sacrifice."[214]

People tend to believe that those who commit crime should be punished because they deserve to be.[215] But they also believe that that punishment should inflict pain, carry the sting of judgment, and deprive the criminal actor of liberty or environmental comforts. Contemporary American prisons meet all these demands. They inflict pain in a multitude of ways—denying liberty, imposing austerity, shrinking options and surroundings, subjugating status, deploying real and threatened violence, and severing ties with family, friends, and community. One important dimension of this pain is in being cut off, dissociated from one's life.

People come to believe that because prison is painful, it can satisfy the need for retribution. In fact, because it is painful, it is the only outcome that can satisfy this need. But lay notions of justice complicate this understanding. Lay notions of justice include more than pain; they include accountability, atonement, and behavior change. But these conceptions require more time and cognitive energy to think through and are the product of deliberative reasoning, as opposed to quick, intuitive reactions.

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210. *See* Carlsmith, *supra* note 5, at 446–47; Darley et al., *supra* note 5, at 659–60; Carlsmith & Darley, *supra* note 5, at 211.

211. Bakhshay, *supra* note 4, at 114, 128–29.

212. *Id.* at 129 (emphasis added).

213. *Id.* (emphasis added).

214. *Id.* (emphasis added).

215. *See supra* Section I.A.

Expressions of accountability and remorse are integral to many people's notion of justice, particularly retributive justice. Remorse conveys that criminal actors accept responsibility for their conduct, understand their wrongs and the harm they have done, and feel the sting of conscience when confronting the consequences of their actions. The following focus group discussion among Jeff, Brian, and Christy, a 21-year-old Asian-American woman, touched on this relationship and its importance to justice:

> Jeff: I was trying to decompose justice in my head and there were three things that came out real quickly. One of them has to do with remorse or regret, which could be seen as a kind of pain perhaps, a learning of a lesson, you know, acknowledging that that was a wrong choice of action . . . .
>
> Christy: I think that [remorse] is kind of necessary, so you see what you did wrong, you see the pain, like inflicted, which in turn would be painful probably.
>
> Jeff: - yeah, to their own awareness, right? Sort of righting the wrong.
>
> Brian: Yeah, that's what—I was gonna say that. You could include that in a broad sense of punishment. It may not involve physical pain, but some sense that that person sees what he or she did wrong and how he or she wronged society, and is sorry for it.[216]

A separate focus group discussion between Julia and Lisa addressed the value of remorse and forgiveness to the parties involved in a crime, complicating the understanding of what people want from the criminal justice system:

> Julia: [I]t could be the moment that changes that person's trajectory. . . . [I]t's one thing to feel sorry. It's another to actually say it to the person that you injured out loud with witnesses around.
>
> Lisa: With witnesses and—
>
> Julia: That's a huge psychological thing. Like you don't even know you're carrying a burden until you express it, and then it all shifts,
>
> Lisa: 'Cause that's the other outcome is forgiveness, and that's huge, too, especially if you're the person, the guilty party.[217]

Juan criticized the absence of forgiveness in the traditional criminal justice system, emphasizing its role in providing the parties with closure:

> One of the things that I was gonna say is [restorative justice] allows for forgiveness to actually occur. Whereas, the current system seems like, well,

216. Bakhshay, *supra* note 4, at 113–14.
217. *Id.* at 115–16.

> you're just gonna get punished. You're never gonna see this victim again, . . . and there's no chance of any kind of forgiveness or closure or anything like that with the two parties involved. And that step in the healing process really is a big deal. The ability to forgive and the ability to be forgiven is huge when it comes to these kinds of things, any kind of slight, really. [*Laughter*] So with the system as it is now, there's no chance for that . . . .[218]

Considering justice more wholistically, as involving not just retribution and "pain," but also accountability, remorse, and forgiveness, exposes prison sentences as wanting. A prison sentence mostly fails to translate into accountability on the part of the criminal actor, who is not required to take responsibility for their criminal conduct and instead typically experiences prison passively, as something done to them that requires nothing of them.[219] Prison sentences reliably realize only the punitive dimension of justice.

Punishment in other spheres—the family, school, or workplace—is understood differently. In these spheres, punishment is deeply connected to accountability and personal growth. Punishment is focused on behavior change; it promotes taking responsibility for one's actions and acknowledging the wrongs of one's behavior. But for criminal actors who have been severed from the larger social group through psychological distancing and dehumanization, prison is both necessary and sufficient to meet the demands of punishment. Moreover, alternatives to incarceration—such as community-based interventions and mandated counseling and treatment programs—are seen as therapeutic, which is anathema to the public's idea of criminal punishment.

For example, Sandy discounted restorative justice as a criminal justice outcome, stating: "I think it's a form of therapy—a form of, um—justice would be a- a sentencing, to me—I mean, in-in thinking about it. Um, where restorative justice is just a matter of, uh, therapeutic [sic]."[220] She later added that restorative justice felt like "you're doing the criminal a favor."[221] In a later focus group exchange, Shawn, a 44-year-old Asian-American man, characterized restorative justice as "almost too nice."[222] Shawn elaborated on his thinking, stating, "I believe in restorative justice, but I . . . also believe in punishment, um, or at least let the criminal understand some what's ahead of 'em. [*Chuckles*]."[223] According to this version of justice, alternative outcomes that may facilitate rehabilitation, such as restorative justice, might be effective, but they are not punitive. Criminal actors must have their "just deserts" before they can focus on rehabilitation and successful reentry, or other factors related to long-term public safety.

The conflation of prison with pain, punishment, and public safety is partly a function of the way sociocultural narratives link prison and punishment in the

218. *Id.* at 115.
219. *See* SERED, *supra* note 143, at 91, 96, 107.
220. Bakhshay, *supra* note 4, at 128.
221. *Id.* at 123.
222. *Id.* at 105, 123.
223. *Id.* at 128.

collective mind. But these narratives misrepresent reality, or at least represent only a fraction of reality. "Doing one's time" has come to mean that someone is toiling away, serving their prison sentence. But "doing one's time" conveys little of what it means and how it feels to the person sentenced to prison. There is often talk of "paying the price" for criminal conduct, but there is no reckoning of what the price is. Sentence length is a function of a complex system of guidelines and discretionary judgments beyond the public's knowledge.[224] The sentence imposed may seem lenient, excessive, or arbitrary depending on one's baseline for comparison. But regardless of sentence length, the insistence on prison as a stand-in for retribution is constant.

### C. RACE AND DISSOCIATION

The dissociative theory is not simply useful in explaining how laypersons understand punishment; it also suggests how race factors into the propensity to punish. Although it is well-documented that racial bias and racial resentment predict punitive outcomes, it is less clear what role they play in the dissociative process. I propose that racial bias acts as a partial mediating variable,[225] activating negative racial stereotypes and implicit racialized crime associations that exacerbate the dissociation of those who see themselves as law-abiding from those they see as "criminal."[226] For people who have more salient racial bias toward racial minorities, this bias likely strengthens their drive to dissociate from the people they view as "criminals."

Dissociation is a separate psychological phenomenon from racial bias, but the two may work together to exacerbate the negative consequences of each. Racial bias and the implicit association of crime with racial minorities may prime the dissociative response. For those who associate race with criminality or for whom the prototypical criminal actor is a Black man, thinking about Black criminal actors may prime the motivated impulse to dissociate and distance from them. But the psychological processes involved in dissociation can also explain differences among people who hold similar views regarding race. Moreover, the psychological processes involved in seeing punishment as a form of dissociation are

224. *See* Mona Lynch, *The Narrative of the Number: Quantification in Criminal Court*, 44 LAW & SOC. INQUIRY 31, 40 (2019); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1752–53 (1999).

225. A mediating variable refers to a variable that explains the relationship between an input variable and an output variable. Depending on the type of theoretical model, it may fully explain a causal relationship or explain some amount of variance in causation. Reuben M. Baron & David A. Kenny, *The Moderator–Mediator Variable Distinction in Social Psychological Research: Conceptual, Strategic, and Statistical Considerations*, 51 J. PERSONALITY & SOC. PSYCH. 1173, 1176 (1986).

226. Studies have documented that race can activate stereotypes regarding criminal propensity, culpability, and dangerousness. *See* Bennett & Plaut, *supra* note 110, at 785; Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 526 (2014); Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 876 (2004).

likely influenced by racial bias and racial stereotypes. But, when not primed to think about race, these processes are still driving the dissociative response.

Although racial discrimination is a factor in many people's attitudes regarding crime and punishment, it does not explain why people endorse prison outcomes specifically. Racial bias and outright racial animus often form part of why some people are more punitive than others and show less concern for those in the criminal justice system.[227] But, as an explanatory variable, racial prejudice does not account for why many people insist on prison as a necessary criminal justice outcome. Part of this may be due to people's lack of awareness regarding alternatives to incarceration or lack of imagination. But the dissociative process described above explains both the initial dissociation from people seen as criminal others, even absent racial bias, and the deep cultural and sociopsychological understanding of punishment as prison that leads people to endorse it as a specific, necessary outcome. In other research, my coauthor, Joanna Weill, and I found that subjective and objective measures of social distance from currently and formerly incarcerated individuals predicted punitive attitudes and lack of support for prison reform measures.[228] Modern racism was a powerful mediating variable, but it did not fully mediate the relationship between social distance and punishment attitudes.[229] So although racial bias and resentment play an important role in explaining attitudes regarding the criminal justice system and specific punishment judgments, other factors, including the desire to distance oneself from those seen as categorically different and fundamentally "criminal," motivate lay support for prison outcomes.[230] And, importantly, the drive to dissociate from those seen as criminal others is likely strengthened by feelings of racial bias and resentment. A crucial implication of the dissociative theory is that a penal policy that aims to be just must account for both racism and dissociation.

The outcome of the dissociative theory of punishment is a deep commitment to prison as the symbolic and physical manifestation of punishment. Prison reflects a dissociation, both of the criminal actor from society and of the goals of punishment from its effects and outcomes. Separating criminal actors from society and warehousing them in prisons keeps "everyone else safe." And sentencing criminal actors to prison sends the appropriate message that society condemns their actions and their character. But delving more deeply into the lay psychology of

227. *See* Kevin M Drakulich, *The Hidden Role of Racial Bias in Support for Policies Related to Inequality and Crime*, 17 PUNISHMENT & SOC'Y 541, 549–50 (2015) (discussing the role of implicit racial bias in supporting punitive crime policy); Eva G.T. Green, Christian Staerklé & David O. Sears, *Symbolic Racism and Whites' Attitudes Towards Punitive and Preventive Crime Policies*, 30 LAW & HUM. BEHAV. 435, 435 (2006) (same); Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCH. SCI. 1949, 1949 (2014) (finding that exposure to information about racial disparities in the criminal legal system led to greater support for punitive policies).

228. Shirin Bakhshay & Joanna Weill, Social Distance, Public Attitudes, and Prison Reform 24 (2022) (unpublished manuscript) (on file with author).

229. *Id.* at 19–20, 24.

230. *Id.*

punishment reveals that prison does not fully meet the public's needs or their expectations regarding punishment. Prison may not be the most effective way to safeguard the public, prevent crime, and reduce recidivism. And it may not send an effective message to criminal actors, who need not take responsibility for their actions or meaningfully atone and who may reject both the process and outcomes as illegitimate.[231] Rather, prison allows members of the lay public to dissociate from criminal actors, who are labeled and convicted and sent away, cordoned off from the rest of society, affording the public a sense of relief and temporary reprieve. But dissociation does not address the other psychological needs the public has when it comes to crime and punishment. And dissociation also leads to undesired outcomes, among them overincarceration and alienation from the system, as well as disproportionate outcomes that are the product of racial bias. Leveraging these lessons, the next Part sketches a new normative approach to criminal punishment that both validates the public's psychological intuitions while disrupting dissociation and breaking the conceptual link between punishment and prison in the lay mind.

## III. RESTORATIVE PUNISHMENT: A PSYCHOLOGICALLY RESPONSIVE APPROACH

The dissociative theory of punishment has important implications for criminal justice policy and may offer insights into how best to reconcile the lay public's competing justice concerns. Many people want a criminal justice system that is not unnecessarily punitive and does not treat people unfairly. But they also want to feel that justice is being done and that there are meaningful consequences for criminal behavior. The dissociative theory of punishment provides one explanation for why many Americans support prison as a necessary criminal justice outcome. It also helps explain why the American penal system is so much harsher, with more widespread use of prison and longer prison sentences, than other Western democracies that have similar historical and ideological penal traditions.[232] Although the belief in retribution is not uniquely American,[233] the finality of the dissociation from criminal others in American society is. Many other Western societies, and particularly Scandinavian countries known for their humane criminal punishment systems, focus on reintegrating criminal actors, who remain members of the broader community during their punishment.[234] There is a shared sense of community and a focus on what kind of person the broader society wants returning.[235] Although dissociative factors are likely at play in the way people in other Western societies psychologically reason about

231. Fagan & Meares, *supra* note 27, at 173–74; *see also* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2054 (2017) (advancing the theory of legal estrangement as a way of understanding the problem of illegitimacy).

232. JOUET, *supra* note 145, at 194–95.

233. *Id.* at 201.

234. Muth et al., *supra* note 148. *See generally* Ugelvik, *supra* note 148 (noting that the Nordic model's rehabilitative goals align with the broader welfare state).

235. Muth et al., *supra* note 148.

crime and punishment, the complete severance of criminal others is not common and in fact runs counter to the restorative and reintegrative emphasis of their penal systems.[236] This crucial difference, combined with the insights from the dissociative theory of punishment detailed in the prior Section, suggests an approach to criminal punishment that can more fully respond to the public's psychological beliefs.

In this Part, I suggest the potential of a restorative punishment approach that intervenes at various points in the dissociative process and responds to the psychological demands of the public. This approach has two dimensions that are intended to address and bridge the seemingly conflicting beliefs of the public. The first dimension tries to counter the psychological beliefs that lead people to dissociate from criminal actors using empathy and intergroup contact. It suggests that activists, academics, and legal actors can focus on humanizing individuals who are accused or convicted of crime and highlighting their connections to the broader community. These steps can counter the psychological distancing and dehumanization that dissociates criminal actors from the lay public. Empathy is the counterpoint to the crime master narrative and a proven strategy for closing the psychological distance between ingroup and outgroup members.[237] Empathy is also mostly absent from the traditional criminal justice system, where many of the procedural and evidentiary rules prevent a complete portrayal of criminal defendants and their relationship to their family and community.[238]

The second dimension works with people's psychological beliefs to activate their reintegrative, as opposed to dissociative, impulses by reframing alternatives to incarceration in ways that highlight their retributive dimensions.[239] It suggests that policy experts and legal actors can relabel criminal justice outcomes to better align with the retributive impulses of the public. Here, the aim is to broaden the

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236. *See id.*

237. *See* Haney, *supra* note 61, at 1582–83, 1585–86; Eric J Vanman, *The Role of Empathy in Intergroup Relations*, 11 CURRENT OP. PSYCH. 59, 60 (2016); John F. Dovidio, James D. Johnson, Samuel L. Gaertner, Adam R. Pearson, Tamar Saguy & Leslie Ashburn-Nardo, *Empathy and Intergroup Relations*, *in* PROSOCIAL MOTIVES, EMOTIONS, AND BEHAVIOR: THE BETTER ANGELS OF OUR NATURE 393, 393 (Mario Mikulincer & Phillip R. Shaver eds., 2010); C. Daniel Batson & Nadia Y. Ahmad, *Using Empathy to Improve Intergroup Attitudes and Relations*, 3 SOC. ISSUES & POL'Y REV. 141, 141 (2009); GORDON W. ALLPORT, THE NATURE OF PREJUDICE 250–67 (1954) (setting out the contact hypothesis and the foundation for intergroup contact theory).

238. Although it is possible to consider evidence and information about a criminal defendant that would help humanize them, the combination of plea bargaining and evidentiary rules at trial means that these stories are typically not told. The exception is the capital-sentencing context, where the presentation of a capital defendant's social history is part of the mitigation evidence expressly included at trial. *See* Haney, *supra* note 61, at 1576–82; Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337, 338 (2000); *see also* John B. Meixner Jr., *Modern Sentencing Mitigation*, 116 NW. U. L. REV. 1395, 1395 (2022) (examining which types of mitigation evidence are effective in federal felony sentencing); Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 41 (2013) (advocating for mitigation evidence to be presented in noncapital cases).

239. *See, e.g.*, Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 685 (2019) (articulating the need for a reintegrative approach to criminal justice).

conceptual meaning of justice beyond the dominant sociocognitive script that defines punishment as severance from society and to tap into the other dimensions of justice the public is concerned with. Calling something criminal immediately alters how it is perceived—once deemed "criminal," behaviors that in one context would not provoke much response take on a new, value-laden significance.[240] Calling something punishment also casts it in a different light, one more recognizable to the public. Drawing on labeling theory, some criminal justice outcomes can be recast to accord with the public's deeply ingrained sense of what is just punishment.

I also interweave discussion of two specific decarceral policies—restorative justice diversion and second look resentencing—that exemplify this approach to criminal punishment and meet the criteria to be successful. The suggestions offered here are meant as a starting point for a discussion that seriously considers the psychology of punishment and moves the normative debates on criminal justice policy forward. Each suggestion may face criticism on both sides—either as too lenient or as co-opting the language of punishment in ways that may alienate those most committed to reform. The goal is not to delineate a precise formula, but rather gesture toward an approach that can address the public's psychology and lay the foundation for a broader conception of justice.

### A. BRIDGING THE DISTANCE WITH PEOPLE IN THE SYSTEM

One place to interrupt dissociation is at the point of distancing and dehumanization, using interaction, intergroup contact, and empathy to bridge connections.[241] Empathy in particular is key to emphasizing rehabilitation and reintegration of criminal actors over punishment alone because it provides a counternarrative to the belief in innate or intractable criminality.[242] Many of the biases and problematic stereotypes that lead to psychological distancing of criminal actors are exacerbated by a lack of contact with, and empathy toward, individuals thought of as "criminals." When people are defined exclusively by their criminality, it is easy to incarcerate them and treat them inhumanely because they are perceived as different and dangerous, divorced from the things that render them human and relatable. But when people are defined by something else—their familial relationships or their connections to their community, for example—and given more context, it disrupts the cognitive connection between the perception of a criminal other and the fear of how they might behave, opening the door for outcomes other than prison. Yet empathy is rarely cultivated during the criminal justice process.

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240. Lopes et al., *supra* note 65.

241. *See* Batson & Ahmad, *supra* note 237; Thomas F. Pettigrew, *Intergroup Contact Theory*, 49 ANN. REV. PSYCH. 65, 80 (1998); Ananthi Al Ramiah & Miles Hewstone, *Intergroup Contact as a Tool for Reducing, Resolving, and Preventing Intergroup Conflict: Evidence, Limitations, and Potential*, 68 AM. PSYCH. 527, 528 (2013); Haney, *supra* note 61, at 1585–86; *see also* Gohara, *supra* note 238, at 46 (arguing that mitigation evidence can increase empathy in the sentencing process).

242. *Cf.* Dena M. Gromet, *Restoring the Victim: Emotional Reactions, Justice Beliefs, and Support for Reparation and Punishment*, 20 CRITICAL CRIMINOLOGY 9, 9 (2012) (discussing the factors which lead people to adopt restorative, as opposed to punitive, "justice mindsets").

1. The Case for Empathy

Cultivating empathy toward criminal actors offers one way to intervene in the dissociative process. The social science research on capital decision-making consistently demonstrates that the presentation of humanizing, contextual mitigation evidence about a capital defendant's life makes capital jurors more empathetic and more lenient.[243] For example, in a simulated jury experiment, mock jurors who were presented with mitigation evidence tended to vote for life without the possibility of parole, rather than death.[244] Research on the effect of empathy on punishment decisions outside the capital context is comparatively limited.[245] Still, several studies indicate that including information about individuals' backgrounds and circumstances, unrelated to their crimes, can influence sentencing decisions and sway participants toward leniency in their punishment attitudes.[246]

My experimental data likewise document that even small pieces of information about a criminal actor can affect feelings of empathy and punishment outcomes. In an experimental survey study conducted via Qualtrics, I tested the impact of learning mitigating background information about a hypothetical perpetrator on participants' feelings of empathy and their punishment determinations (a three-year prison sentence or restorative justice conference).[247] Participants[248] were randomly assigned to either read a description briefly summarizing the criminal

243. *See* Lynch & Haney, *supra* note 62, at 75; Lynch & Haney, *supra* note 238, at 356; Haney, *supra* note 61, at 1587.

244. *Cf.* Haney, *supra* note 61, at 1585–87 (analyzing the application of mitigation evidence by juries by race and proposing steps to make the death-sentencing process fairer and more reliable).

245. *But see* Miriam Gohara, *Narrating Context and Rehabilitating Rehabilitation: Federal Sentencing Work in Yale Law School's Challenging Mass Incarceration Clinic*, 27 CLINICAL L. REV. 39, 39 (2020) (focusing on the practical impact of providing contextual information about noncapital criminal defendants). There is also a large body of research on psychology and empathy more generally that provides support for empathy as a tool for overcoming prejudice. *See, e.g.*, Travis J. Pashak, McCall A. Conley, Drew J. Whitney, Samuel R. Oswald, Stephanie G. Heckroth & Evan M. Schumacher, *Empathy Diminishes Prejudice: Active Perspective-Taking, Regardless of Target and Mortality Salience, Decreases Implicit Racial Bias*, 9 PSYCH. 1340, 1340 (2018); Elizabeth A. Segal, *Social Empathy: A Model Built on Empathy, Contextual Understanding, and Social Responsibility That Promotes Social Justice*, 37 J. SOC. SERV. RSCH. 266, 266 (2011). *See generally* Judith A. Hall & Rachel Schwartz, *Empathy Present and Future*, 159 J. SOC. PSYCH. 225 (2019) (providing a meta-analysis of the term "empathy" in the literature); C. Daniel Batson, Johee Chang, Ryan Orr & Jennifer Rowland, *Empathy, Attitudes, and Action: Can Feeling for a Member of a Stigmatized Group Motivate One to Help the Group?*, 28 PERSONALITY & SOC. PSYCH. BULL. 1656 (2002) (finding increased empathy for a group based on empathy for an individual belonging to that group).

246. *See, e.g.*, BECCA CHAPMAN, CATRIONA MIRRLEES-BLACK & CLAIRE BRAWN, HOME OFF. RSCH., DEV. & STAT. DIRECTORATE, IMPROVING PUBLIC ATTITUDES TO THE CRIMINAL JUSTICE SYSTEM: THE IMPACT OF INFORMATION 26 (2002); JULIAN V. ROBERTS, LORETTA J. STALANS, DAVID INDERMAUR & MIKE HOUGH, PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES 212 (Michael Tonry & Norval Morris eds., 2003); Julian Roberts, Mike Hough, Jonathan Jackson & Monica M. Gerber, *Public Opinion Towards the Lay Magistracy and the Sentencing Council Guidelines: The Effects of Information on Attitudes*, 52 BRIT. J. CRIMINOLOGY 1072, 1082 (2012). Of course, this creates the possibility that some may benefit more from these considerations than others, potentially introducing other inequities back into the system. *See generally* sources cited *supra* note 131.

247. Bakhshay, *supra* note 4, at 44–45.

248. Participants ($N = 189$) were part of a Qualtrics panel and were paid for their participation. *Id.* at 46–47.

perpetrator's childhood and adolescence followed by a short description of the crime (felony robbery) or only a short description of the crime with no background information.[249] After reading through the experimental stimuli, "participants were told that the criminal perpetrator had been arrested, charged, and convicted of the crime."[250] They were then provided with a short description of various punishment options and were asked to select the punishment they believed to be appropriate and complete the rest of the survey, which included scales to assess empathy, among other variables.[251] The data were analyzed using binomial regression and analysis of variance (ANOVA) techniques.[252]

The results indicate that participants who read background information about the criminal perpetrator were more likely to choose a restorative justice option than those participants who received no background information.[253] A second analysis found that participants who learned some background information about the perpetrator were also more likely to choose a combined sentence—including a one-year prison sentence and restorative justice conference—than a prison sentence alone.[254] Importantly, participants who learned about the perpetrator's social history felt more empathetic toward him and thought he was more likely to be rehabilitated than those who learned nothing about his background.[255]

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249. *Id.* at 48–49. Vignettes are included in Appendix D, *infra*.

250. *Id.* at 49.

251. *Id.*

252. *Id.* at 56.

253. *Id.*

> The logistic regression model was statistically significant, $\chi^2(2) = 16.73$, $p < .001$. The model explained 11.9% (Nagelkerke $R^2$) of the variance in sentence outcome and correctly classified 68.3% of cases. Those who did not receive any social historical information about the criminal perpetrator were less likely to choose the restorative justice outcome, with an odds ratio of .267, 95% CI [.137, .518], Wald $\chi^2(1) = 15.26$, $p < .001$.

*Id.* at 58.

254. *Id.* at 58–59.

> The logistic regression model was statistically significant, $\chi^2(2) = 15.12$, $p = .001$. The model explained 20.6% (Nagelkerke $R^2$) of the variance in sentence outcome and correctly classified 71.0% of cases. Those who did not receive any social historical information about the criminal perpetrator were less likely to choose the restorative justice outcome than the prison sentence, with an odds ratio of .172, 95% CI [.068, .436], Wald $\chi^2(1) = 13.75$, $p < .001$.

*Id.*

255. *Id.* at 60. There was a significant main effect of social history on empathy state scores. "Participants who received social historical information ($M = 3.78$, $SD = 1.53$) scored significantly higher on the empathy state scale than participants who did not receive any social historical information ($M = 2.62$, $SD = 1.42$), $F(1, 185) = 28.79$, $p < .001$, $\eta_p^2 = .135$." *Id.*

> There was [also] a significant main effect of social history on empathy towards the criminal perpetrator. Participants who received social historical information ($M = 2.98$, $SD = .98$) scored significantly higher on my empathy towards the criminal perpetrator measure than participants who did not receive any social historical information ($M = 1.86$, $SD = 1.26$), $F(1, 185) = 47.13$, $p < .001$, $\eta_p^2 = .203$.

*Id.*

This study used a relatively weak experimental manipulation. The social historical information presented about the perpetrator was truncated—far less than the robust presentation of mitigation evidence during capital proceedings. Yet even limited information yielded important causal effects on participants' feelings toward the criminal perpetrator and what punishment they thought was appropriate. The results offer a compelling case for small tweaks in how criminal actors are portrayed and the kinds of evidence that should be considered in criminal proceedings.

Focusing on a person's relationships with others likewise lessens psychological distancing and the tendency to infrahumanize them. Understanding criminal actors as fully embedded in a relatable social life— as children, parents, siblings, or coworkers—can break down the psychological barriers to seeing them as whole persons. Similarly, emphasizing other people's connections to criminal actors, so they have some sense that criminality touches more than just the narrow swath of people portrayed by the media, can further bridge the gap. As the number of people incarcerated in jails and prisons has skyrocketed, so has the number of people who know someone who has been incarcerated.[256] Despite this reality, incarcerated and formerly incarcerated individuals typically are stigmatized, legally and socially.[257] But given the number of people who know someone who has been incarcerated or who have been incarcerated themselves, this status could become normalized in ways that make discourse and, ultimately, connection easier. This connection can both bridge the distance and provide a filter through which to see criminal actors as people who have made mistakes, instead of immutable "monsters."[258]

One of the most visible of the recent criminal justice reforms arose from a personal connection to someone in the criminal justice system. Jared Kushner was a significant proponent of criminal justice reform during the Trump Administration

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> [And] [t]here was also a significant main effect of social history on participants' assessment of the criminal perpetrator's potential for rehabilitation. Participants who received social historical information ($M = 3.75$, $SD = 1.07$) scored significantly higher on the belief in the criminal perpetrator's rehabilitative potential than participants who did not receive any social historical information ($M = 3.11$, $SD = 1.02$), $F(1, 185) = 17.50$, $p < .001$, $\eta_p^2 = .086$.

*Id.* at 60–61. There were no significant effects of race on the outcome variables. *Id.*

256. *See Half of Americans Have Family Members Who Have Been Incarcerated*, EQUAL JUST. INITIATIVE (Dec. 11, 2018), https://eji.org/news/half-of-americans-have-family-members-who-have-been-incarcerated/ [https://perma.cc/U3BX-HZ28].

257. *See* Zoe R. Feingold, *The Stigma of Incarceration Experience: A Systematic Review*, 27 PSYCH., PUB. POL'Y & L. 550, 550 (2021); Danya E. Keene, Amy B. Smoyer & Kim M. Blankenship, *Stigma, Housing and Identity After Prison*, 66 SOCIO. REV. MONOGRAPHS 799, 799 (2018); Loïc Wacquant, *Prisoner Reentry as Myth and Ceremony*, 34 DIALECTICAL ANTHROPOLOGY 605, 613 (2010) (critiquing the bureaucratic hurdles faced by formerly incarcerated individuals and noting that they are seen as "tainted" and afflicted by "judicial stigma"). *See generally* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937 (2003) (describing employment outcomes for formally incarcerated individuals).

258. *See* Gohara, *supra* note 238, at 46 (discussing the effect that presentation of mitigation evidence has on noncapital sentencing outcomes).

and helped usher the First Step Act into law.[259] Kushner openly allowed that his father's time in federal prison motivated his desire to work on the legislation.[260] And for many who saw Kushner as a peer, his personal connection motivated their support and willingness to engage on the issue of criminal justice reform.[261] Whether personal and concrete or more abstract, generating connections with those in the criminal justice system can help disrupt the dissociation that characterizes how many people feel toward criminal actors and create space for criminal justice responses aside from prison.

2. Rounding Out Criminal Others Through Redemption Narratives

Empathy and context are arguably intentionally missing from traditional criminal justice processes but could be addressed in restorative justice processes. A criminal trial may include reams of witness testimony and piles of other evidence, but almost none of it goes beyond the details of the crime, aside from prior bad acts and convictions. Because defendants rarely testify in their own defense,[262] their voices and stories do not figure in the case. Plea bargaining allows even less attention to rounding out the parties and less formal participation by defendants and victims.[263] The sentencing guidelines that operate at the federal level and inform many state sentencing regimes double down on this—they employ a crime severity categorization framework that relies almost exclusively on the underlying criminal conduct, its nature and seriousness, and any past criminal behavior to determine an appropriate sentence.[264] This exclusion of context perpetuates the crime master narrative and deepens the "empathic divide,"[265] further constricting the narrow, one-dimensional portrayal of criminal actors. This divide is widened when the judge or juror is of a different race than the criminal defendant.[266]

By contrast, restorative justice processes,[267] which focus on repairing harm and healing the parties affected by a crime, aim to foster mutual understanding between victims and perpetrators. Restorative justice processes provide avenues

259. *See* Annie Karni, *The Senate Passed the Criminal Justice Bill. For Jared Kushner, It's a Personal Issue and a Rare Victory.*, N.Y. TIMES (Dec. 14, 2018), https://www.nytimes.com/2018/12/14/us/politics/jared-kushner-criminal-justice-bill.html.

260. *Id.* Sentenced in 2005, Kushner's father spent fourteen months in an Alabama federal prison. *Id.* Van Jones described Jared's motivation as: "Jared is committed in a way you can only be when you've seen your daddy hurt." *Id.*

261. *Id.*

262. *See* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1459 (2005); Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 397 (2018).

263. Stephanos Bibas & Richard A. Bierschbach, Essay, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 140–41 (2004) (describing how the structure of guilty plea hearings excludes victims entirely and only provides defendants with minimal opportunities to speak).

264. Lynch, *supra* note 224.

265. Lynch & Haney, *supra* note 62, at 92; Haney, *supra* note 61, at 1582–83.

266. *See* Lynch & Haney, *supra* note 62, at 92; Haney, *supra* note 61, at 1582–83.

267. Restorative justice is a broad term encompassing different formal and informal processes across domains—schools, community and neighborhood fora—and the criminal legal system. Although the details of how it is practiced may vary, the goal of restorative justice—"bringing together those who have a stake in a particular offense to repair the harms caused by crime and promote restoration and reconciliation, to the extent possible, between victim, offender, and community"—is consistent.

for presenting an alternative, nuanced portrait of a criminal actor that goes far beyond what is presented during traditional criminal proceedings. During a restorative justice conference, the parties can engage with one another more fully and learn about each person's past, embedding the crime and the harm it has caused in this context and in the relational dynamics that define both the victim and the perpetrator. This process does not just enable the criminal actor to provide details of their life and backstory that may help the parties involved understand and relate to them but also allows for questions, back-and-forths, and connection building. And it encourages participation by all the affected parties, broadly conceived, including victims and family members. Participation by the criminal actor's family enables victims and the general public to see the criminal actor as a whole person, defined by something other than their criminal conduct.[268] Restorative justice is unique in its focus on providing context and fostering dialogue and empathy between the parties, partly because the procedural strictures that govern criminal proceedings do not apply.[269]

It is true that the normal biases and prejudices may be at play during restorative justice proceedings, as they are during traditional criminal justice processes, limiting the appeal of a restorative approach.[270] Yet, with careful attention to protecting against bias in the process, restorative justice provides an opportunity for the types of contact and connection that have been shown to reduce bias among groups holding discriminatory or prejudicial attitudes toward one another.[271] In this way, restorative justice is a promising way to disrupt the dissociative process and challenge the crime master narrative.

Second look resentencing policies, by offering real-world examples of incarcerated individuals who have rehabilitated themselves and no longer pose a threat to society, provide another way to disrupt the public's dissociation from criminal actors.[272] Second look resentencing refers to the constellation of laws and policies that allow for judges to revisit a sentence after a substantial amount of time has been served and reduce that sentence based on the individual's conduct in prison and the demands of justice.[273] These laws apply to serious, often violent criminal

Shannon M. Sliva & Carolyn G. Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, 14 J. POL'Y PRAC. 77, 82 (2015).

268. *See id.* at 79.

269. Some scholars have raised serious procedural justice concerns regarding restorative justice. *See, e.g.*, Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635, 635 (2021); M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 125 (2016).

270. *See* Dena M. Gromet & John M. Darley, *Retributive and Restorative Justice: Importance of Crime Severity and Shared Identity in People's Justice Responses*, 61 AUSTRALIAN J. PSYCH. 50, 53 (2009).

271. *See* Pettigrew, *supra* note 241; Al Ramiah & Hewstone, *supra* note 241.

272. *See* Renagh O'Leary, *Compassionate Release and Decarceration in the States*, 107 IOWA L. REV. 621, 628 (2022) (discussing the need for models of decarceral strategies for those who have been convicted of violent crime).

273. For example, some laws apply to those convicted at an early age and recognize the underdevelopment, and so reduced culpability, of "emerging adults" in allowing for a second look after a set amount of time has passed. NAZGOL GHANDNOOSH, SENT'G PROJECT, A SECOND LOOK AT

perpetrators and provide a meaningful way to address extremely long sentences.[274] Having gained momentum in the last few years,[275] second look resentencing could help alter the narrative of the irredeemable criminal and recast criminal others as contributing members of society.

Second look resentencing is about redemption for those incarcerated individuals who both deserve another chance and present little risk to the public.[276] This approach is psychologically and emotionally appealing on various levels.[277] Those eligible for second look resentencing are, by definition, individuals serving extremely long sentences who will have served a substantial amount of time—typically ten to fifteen years—before being considered for resentencing.[278] To the extent the lay public is concerned with criminal actors getting away with their crimes unscathed or receiving a punishment that fails to convey the moral force of their wrongdoing, that concern is assuaged. Because they do not address front-end sentencing policy, they do not frustrate the retributive drive to punish serious crime.[279] At the same time, for those serving long sentences, these laws offer a meaningful chance of early release.

Second look resentencing can also provide successful redemption stories to counter the narrative of intractable criminality that so often dominates mainstream discourse.[280] Media accounts of criminal actors who are treated leniently and then go on to commit more crime evidence a media bias favoring sensationalism and

INJUSTICE 22–23 (2021), https://www.sentencingproject.org/publications/a-second-look-at-injustice/ [https://perma.cc/4TRV-TZ6A]. Other laws target incarcerated individuals over a certain age who have served a set amount of time, based on research demonstrating that older inmates typically age out of crime. *Id.* at 29–33.

274. *See, e.g.*, *id.* at 30.

275. A number of states have enacted some version of second look resentencing provisions, which allow prosecutors to review long sentences and recommend resentencing under the provisions of state bills. *Id.* at 21. There is also a second look resentencing component to the Federal First Step Act, which operates similarly. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified in scattered sections of 18, 21, and 34 U.S.C.). The Model Penal Code was revised in 2017 to include a second look process. *See* Kevin R. Reitz & Cecelia M. Klingele, *Model Penal Code: Sentencing—Workable Limits on Mass Punishment*, 48 CRIME & JUST. 255, 256–57 (2019).

276. *See generally* Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83 (2019) (discussing resentencing practices).

277. *But see* BARKOW, *supra* note 41, at 75 (discussing the endowment effect and opposition to resentencing measures).

278. *See* GHANDNOOSH, *supra* note 273, at 9.

279. Critics might argue these laws are simply a band-aid that do not address punitive penal policies. Of course, the criticisms of these laws from reform advocates and activists could impact their success and overall impact. One such criticism of resentencing policy is that it legitimizes unduly long, harsh sentences in the first place. There is a real trade-off between building short-term support for policies that are an improvement upon the current state of the system, and which could appreciably affect the lives of those involved in the justice system now, and potentially alienating more progressive allies or hurting the long-term goal of moving away from incarceration altogether. There are serious concerns that require thoughtful consideration as reformers try to capitalize on recent successes, while building a pathway toward a re-envisioned theory of justice.

280. *See generally, e.g.*, Carter et al., *supra* note 53 (discussing the importance of redemption for incarcerated individuals and the lack of redemption pathways in most of the United States, and calling for a right to redemption under the Eighth Amendment).

fear baiting.[281] These stories reinforce the narrative of intractable criminality and can have an outsized impact on public attitudes as well as real consequences for penal policy.[282] Normalizing rehabilitation success stories instead of portraying them as exceptional outliers can help them become part of the sociocognitive schema for punishment.[283]

The psychological shift toward the perception of those incarcerated for serious crime as capable of change is a prerequisite for disentangling the association between prison and public safety. Simply contextualizing and providing a story to accompany a sentencing reform proposal can help change the way the public perceives penal laws—not as distant outcomes that affect those other people but as an integral part of society affecting everyone. This strategy has been successfully used in "tough-on-crime" campaigns opposing reform and "soft-on-crime" politicians.[284] The same psychological principles can work in favor of policies that stress rehabilitation and redemption, such as restorative justice diversion and second look resentencing laws.

### B. REFRAMING PUNISHMENT AND ITS DIMENSIONS

There are alternatives to incarceration that arguably further its intended goals more effectively, among them restorative justice. Restorative justice diversion could be made accessible for a larger category of crimes and criminal actors through legislative action, funding, and clear support for discretionary diversion by prosecutors and judges. But increased use of restorative justice diversion faces a great deal of opposition because it is not seen as punitive and therefore risks being perceived as an illegitimate criminal justice outcome.[285] Reframing restorative justice to accord with lay understandings of punishment and broadening the meaning of punishment more generally to include dimensions not met by prison alone are strategies that could provide workable alternatives and disrupt the sociopsychological definition of punishment as severing a criminal actor from society.

Just as labels and rhetorical frames affect how we view individuals, they can affect how we perceive policies. Rhetorical frames and cues powerfully influence lay perceptions and judgments, and both create and play off of existing biases to

281. *See, e.g.*, Newburn & Jones, *supra* note 16, at 76.

282. One particularly egregious case arguably drove the recall of San Francisco District Attorney Chesa Boudin. *See* Marisa Lagos, *The Troy McAlister Case Is a Flash Point in the Drive to Recall SF DA Chesa Boudin. Should It Be?*, KQED (May 18, 2022), https://www.kqed.org/news/11914457/how-the-troy-mcalister-case-became-a-flashpoint-in-the-drive-to-recall-sf-da-chesa-boudin [https://perma.cc/T95W-QN8G] (describing the media focus on Troy McAlister in the Chesa Boudin recall election).

283. An important corollary to this suggestion is to provide incentives to prosecutors to support second-look resentencing in individual cases or to remove these petitions from the adversarial process altogether. If prosecutors see it in their interest to contest these, they may devolve into a battle of empathy—pitting victims against those seeking resentencing, as often happens in parole hearings. *See* BARKOW, *supra* note 41, at 145–46.

284. *See* sources cited *supra* note 16.

285. *See supra* Section II.B.2.

elicit support or dismissal.[286] Hence referring to a policy proposal as "progressive" can immediately alienate an audience that is not receptive to progressive politics. Similarly, penal policies framed as nonpunitive can alienate those who view punishment, understood as severance from society through containment in prison, as necessary to justice. But legal experts and advocates can leverage the insights of labeling theory to disrupt this dissociative response. They can borrow from the language of punishment to couch policy suggestions in terms that put the lay public at ease and that speak to their sociopsychological understanding of punishment. At the same time, advocates can help alter the definition of punishment and reframe it—both literally, such as including outcomes other than incarceration, and conceptually, such as including other dimensions like accountability, remorse, and attending to the needs of all affected parties.

1. Restorative Justice as Punishment

Restorative justice typically is seen as something other than a criminal punishment, which limits its mainstream appeal. It is often defined not just as a different process but as a different conception of justice,[287] one at odds with the current criminal justice system and its fixation on incarceration and incapacitation. Both restorative justice advocates and the lay public view restorative justice as something outside the sphere of the traditional criminal justice system. My focus group participants echoed these perceptions. Even when they supported the use of restorative justice, they saw it as "a form of therapy" or "a favor,"[288] not a true criminal justice outcome.

There are longstanding theoretical and historical reasons why many restorative justice practitioners and advocates want to differentiate restorative justice processes from the criminal justice system. For many, the entire purpose of restorative justice is at odds with a retributive penal system, and any affiliation with the current system undermines the goals of the restorative justice movement, which seeks to heal and repair.[289] As restorative justice has become a larger part of the traditional legal system, there has been considerable criticism of the ways the process is being compromised and co-opted.[290] There are also important grassroots and local efforts that explicitly try to unseat the deeply held belief in retribution and upend traditional discourse around criminal punishment. These approaches are part of the work of localized movements interested in transforming their

286. Fryberg et al., *supra* note 67.

287. Dena M. Gromet, *Psychological Perspectives on the Place of Restorative Justice in Criminal Justice Systems*, *in* SOCIAL PSYCHOLOGY OF PUNISHMENT OF CRIME 39, 42 (Margit E. Oswald et al. eds., 2009).

288. Bakhshay, *supra* note 4, at 123, 128. These quotes are attributed to Sandy and were recorded during a focus group led by the author on February 21, 2019. *Id.*

289. *See, e.g.*, Lode Walgrave, *Restorative Justice in Severe Times: Threatened or an Opportunity?*, 22 NEW CRIM. L. REV. 618, 635 (2019); Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States*, 104 MINN. L. REV. 889, 889–90 (2019).

290. *See* Cohen, *supra* note 289, at 924–25; *see also* Arnett, *supra* note 239, at 650–53 (discussing how supposedly decarceral reforms like electronic monitoring and other "smart decarceration" tactics serve to reinforce social subordination of the individuals under surveillance).

community's relationship to the criminal justice and penal systems.[291] But defining restorative justice in complete contrast to retributive justice or as outside the criminal justice system entirely makes it hard to advocate for diversion from custodial sentences, particularly for more serious crime. Moreover, restorative justice as it is currently practiced does have aspects that are punitive.[292] Given its growing use across states and localities and its increasing convergence with the traditional criminal justice system,[293] it would better accord with the public's sensibilities and expectations to reframe restorative justice as within the criminal punishment sphere.

One focus group exchange offers insight into how labels affect receptivity toward alternatives to incarceration. John, a 71-year-old Latinx man, suggested a way to increase support for restorative justice practices: "[M]aybe they should rebrand it as restorative punishment."[294] Sandy replied, "Psychologically, yes. That makes a big difference."[295] In her remarks, Sandy acknowledged that there was no change in what would happen during a restorative justice conference, but the new label gave her a sense of comfort and a feeling of security.[296] Though she characterized herself as someone who is more comfortable "with a fence up," changing the description from "restorative justice" to "restorative punishment" made Sandy feel safer and more likely to endorse restorative justice approaches—in practice if not in name.[297] Many other members of this focus group agreed that framing alternatives to incarceration as punitive would bring them more in line with the penal responses the public expects and assuage the anxiety people may feel about them.[298] The focus group was supportive of this idea and returned to it several times.[299] In a separate focus group discussion about the use of restorative justice in place of prison, Jeff remarked, "[I]t would probably help its case if it were made to look as maximally punitive as possible," reflecting a similar sentiment.[300] These examples highlight how restorative justice, as generally understood,

291. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 813–24 (2021); Monica C. Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 DU BOIS REV. 197, 209–10 (2019); *see also* Okechukwu, *supra* note 189, at 154 (discussing local approaches to building safety and community well-being without involving formal state actors).

292. *See, e.g.*, Hanan, *supra* note 269, at 131 (discussing the coercive nature of some restorative justice diversion); Christian B.N. Gade, *Is Restorative Justice Punishment?*, 38 CONFLICT RESOL. Q. 127, 127 (2021) (arguing that some cases of restorative justice may constitute punishment along certain theoretical dimensions).

293. *See* Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1149.

294. Bakhshay, *supra* note 4, at 118, 122. John's suggestion was specifically to rename restorative justice practices. My use of the term "restorative punishment" relates to a general approach to criminal punishment and is not meant to indicate a specific criminal justice policy, but rather an alternative vision of justice.

295. *Id.* at 122.

296. *Id.* at 122–24.

297. *Id.*

298. *Id.* at 124.

299. *Id.* at 124–25.

300. *Id.* at 122 (alteration in original).

does not match lay expectations and beliefs about the appropriate consequences for criminal conduct. This mismatch limits the potential for restorative justice and other diversionary practices or community-based alternatives to play a larger role in the system, despite their comparative success in reducing recidivism and increasing victim satisfaction.[301]

Reframing restorative justice to seem "as punitive as possible" is likely going too far, but the sentiment behind it reflects a valid concern impeding its widespread acceptance. Suggesting that the public, and victims in particular, should not be focused on punishing criminal actors risks both minimizing the harm caused and invalidating people's legitimate psychological and emotional response to crime. But framing restorative justice practices as a form of criminal punishment and highlighting those aspects that are punitive and that require something of criminal actors—be it a clear acknowledgement of responsibility or the pain of knowing the harm they caused—may alter how it is perceived and address concerns that it is too lenient or does not sufficiently communicate moral condemnation of the criminal conduct. By reframing restorative justice and simultaneously redefining the scope of criminal punishment as inclusive of alternatives to incarceration, it may be possible to generate a new narrative and sociopsychological understanding of punishment.

I do not advocate that restorative justice practices be renamed or propose that any of its foundational tenets be abandoned to appease the law-and-order crowd. My own use of the term "restorative punishment" to describe this normative approach is not meant to refer to a specific criminal justice policy, such as restorative justice. Rather, the term restorative punishment captures the dualism of what some lay people want—a true punishment that is less harmful than a prison sentence and which elevates the role of rehabilitation and reintegration in the interest of the common good. It is meant to gesture toward a conception of criminal punishment that can meet both of these goals.

Prison is understood to be inherently painful—because of the nature of the liberty deprivation that defines it and the violent, austere, and degrading conditions that characterize many prisons and, importantly, many of the most visible media portrayals of modern prisons. But although deeply painful, prison asks little of its residents. Prison can be harsh and communicates the expressive message of

301. *See* Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 161, 164 (2007); *see also* MARK AUSTIN WALTERS, HATE CRIME AND RESTORATIVE JUSTICE: EXPLORING CAUSES, REPAIRING HARMS 53 (2014) ("[T]he growing body of research now strongly suggests that [restorative justice] practices provide both material and emotional reparation to a greater percentage of victims when compared to those whose cases go to court."). One important caveat is that restorative justice typically requires voluntary participation from victims and perpetrators, which affects the generalizability of findings on victim satisfaction. *See generally* HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE: REVISED AND UPDATED (2015); Steve Kirkwood, *A Practice Framework for Restorative Justice*, 63 AGGRESSION & VIOLENT BEHAV. 1 (2022). *But see* González, *supra* note 293, at 1163 (finding that victim participation is always voluntary, but participation by criminal actors is sometimes mandated in the United States).

condemnation of and dissociation from those inside it.[302] But it is unidirectional, requiring nothing of those in prison other than that they persist,[303] and the message that what someone did was wrong and deserves to be punished can be rejected or misconstrued.[304] In this way, prison is deficient as a criminal justice outcome. By contrast, restorative justice demands much more from its participants. It does not just require that criminal actors take responsibility for and explain their actions—although those are necessary and critical parts of the process. [305] It is focused on behavior change and often includes active steps that criminal actors must take to meet their obligations. It is ideally punishment in the same vein as that in schools and homes—focused on rehabilitation but never on expulsion and dissociation.

In order for a diversionary practice like restorative justice to be considered a form of punishment, it is critical to frame it as a true consequence for criminal conduct—one that is painful or includes an element of sacrifice. That is certainly how those who go through the process experience it.[306] Restorative justice practices already incorporate aspects that are arguably punitive in ways similar to other criminal justice outcomes. They involve the exercise of state authority and power differentials.[307] They can involve shaming.[308] And restorative justice conferences typically result in externally imposed restrictions and mandated restitution—all elements associated with punitive consequences. When restorative justice agreements involve meaningful, tailored restitution, it demonstrates a "cost" to the criminal actor and some return to the victim. Most notably, the core premise of modern American restorative justice practices—the focus on accountability—demands more of criminal actors than the traditional criminal justice

302. *See* David Garland, *Punishment and Social Solidarity*, *in* THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY 23, 29 (Jonathan Simon & Richard Sparks eds., 2013). The expressive theory of punishment is loosely based on Durkheim's social theory of punishment and states that punishment serves a symbolic, as opposed to instrumental, function. *See* DURKHEIM, *supra* note 20, at 89–90; *see also* GARLAND, *supra* note 20, at 162. The theory suggests that punitiveness is a socioemotional reaction to the abstract concerns specific to late modernity—such as economic insecurity, anxiety regarding social change, and the decay of traditional values. *See generally* King & Maruna, *supra* note 14; Tyler & Boeckmann, *supra* note 25. Other research consistent with this theory has found that people are more punitive when they perceive crime as either a sign or cause of the dissolution of the dominant moral order and when they have concerns about social or moral decline. *See* Silver & Silver, *supra* note 20, at 258.

303. Even this is questionable given rates of homicide and suicide.

304. SERED, *supra* note 143, at 92–93 (discussing the way that incarceration divorces individuals from their conduct and insulates them from seeing its impact, writing, "[f]or all the ravages of prison, it insulates people from the human impact of what they have done").

305. *See id.* at 96–99.

306. *See id.* at 101–03.

307. *See* Shirin Sinnar & Beth A. Colgan, *Revisiting Hate Crimes Enhancements in the Shadow of Mass Incarceration*, 95 N.Y.U. L. REV. ONLINE 149, 155, 163 (2020).

308. JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 55 (1989) (outlining reintegrative shaming theory as an articulation of restorative justice); *see also* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 650 (1996) (arguing that shaming can satisfy public demands for condemnation). *But see* Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2076 (2006) (retracting the argument that shaming is an effective sanction in favor of restorative justice).

system and can be extremely difficult and painful as subjectively experienced by the criminal actor.[309] Thus, although it is important to highlight success stories from restorative justice proceedings, documenting the ways in which criminal actors take responsibility for their actions, atone, and move forward, it is equally important to highlight the difficulty of the process from the subjective viewpoint of the criminal actor and to describe those aspects of the process that are truly demanding to bring it within the dominant sociopsychological understanding of punishment.

Moreover, restorative justice is "painful" in a way that comports with lay understandings of pain. Restorative justice proceedings are reported to be challenging by the criminal actors who participate in them.[310] Some criminal actors who have successfully gone through the process, including bearing witness to the harm they have caused and atoning for their actions, describe the process as difficult, painful, and the "scariest shit [they] ever did."[311] Although the pain of incarceration is something that is done to you, mostly without your control and almost always without consent, the pain of admitting your part in a criminal act and owning up to harming someone requires more on the part of the criminal actor. This process of confrontation, listening to victims and their proxies, and then responding with some explanation and apology, is an emotionally wrenching one—particularly if the crime was violent.[312] Participation in a restorative justice process therefore can be painful in a truer sense than prison and can meet the public demand for retribution. Firsthand accounts of the challenges faced by criminal actors during the process can repackage restorative justice in the public eye. Reframing restorative justice could move it out of the periphery, debunking it as a "fairy tale[],"[313] and demonstrate that it is a realistic criminal justice outcome that feels like punishment for those who experience it, rendering it consistent with the dominant sociopsychological understanding of punishment and more palatable to the general public.

The language, labels, and descriptions used in conjunction with sentencing and penal policy proposals can play a key role in setting expectations and generating broad, public support. Subtle changes in the way policies are described and publicized can have profound effects on how they are viewed[314] and whether they are immediately written off as too lenient or too theoretical. Of course, labels and frames alone cannot determine whether a policy will pass or fail. But they can go a long way in delineating the contours of the debate around the proposal.

309. SERED, *supra* note 143, at 101–06.

310. *Id.* at 101.

311. *Id.* at 102–03.

312. *See id.* at 103.

313. This quote is attributed to Margaret and was recorded during a focus group led by the author on February 21, 2019. Bakhshay, *supra* note 4, at 140.

314. Fryberg et al., *supra* note 67.

2. Expanding the Meaning of Punishment

According to the dissociative theory, punishment is retributive and severs criminal others from society through condemnation and expulsion. This conception of punishment is the result of the sociopsychological processes and cultural associations described in Part II. But people are also interested in other justice goals. A restorative punishment approach taps into dimensions of punishment that members of the public are already interested in, but which are not well served in the current system. Although the lay public is deeply invested in retributive justice, empirical studies have found that the lay public is also interested in rehabilitation and restoration.[315] Other research has highlighted the value of remorse to the lay public.[316] My focus group participants echoed these concerns, focusing on the importance of accountability, responsibility, and expressions of remorse, revealing a broader, varied understanding of justice.[317]

The public wants not just to punish, but also to see that the judgment and attendant punishment have had some effect on their target. But because accountability and remorse cannot be compelled, they are not part of the cognitive schema for punishment in the same way as expulsion and containment. They are nevertheless important to how members of the public view criminal actors and whether they are seen as immutable or capable of change. This is part of why, despite research documenting the self-preservation motives behind presenting a stoic front during criminal proceedings, many members of the lay public decry the behavior of criminal defendants who do not appear sad and remorseful in court.[318] The public wants to know that criminal actors regret their behavior and sympathize with the plight of their victims and the victims' families. They want to see that punishment has some impact, which is best conveyed through accepting responsibility and demonstrating remorse.[319]

Yet expressions of regret, remorse, or sympathy toward victims are rare in most criminal cases because the procedural and evidentiary rules and conventions of courtroom proceedings make expressions of remorse or regret difficult.[320] Criminal defendants are expressly told, and typically intuitively understand, that to express remorse is to admit guilt, which can be perilous and lead to unintended consequences.[321] The rules of evidence typically do not allow testimony or documents that may speak to the defendants' motives and feelings but are deemed irrelevant to the crime at issue.[322] The system disincentivizes admissions of guilt

315. Gromet et al., *supra* note 7, at 375.

316. *See, e.g.*, Susan A. Bandes, *Remorse and Criminal Justice*, 8 EMOTION REV. 14, 14 (2016); M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 302, 305 n.17 (2018).

317. *See generally* Bakhshay, *supra* note 4.

318. Hanan, *supra* note 316, at 317–18.

319. Bandes, *supra* note 316, at 16; Hanan, *supra* note 316, at 304–06.

320. *See supra* Section III.A.2.

321. *See* SERED, *supra* note 143, at 92.

322. *See* Natapoff, *supra* note 262, at 1459–62 (citing FED. R. EVID. 404(b), which does allow the government to present evidence of the person's prior acts if relevant to something other than character, such as motive, intent, or knowledge).

or responsibility for the most part. And there is no attempt to educate criminal defendants on how to effectively communicate their feelings or facilitation by the legal actors—attorneys or judges.[323] Thus, the system deprives victimized parties and the public of the justice they crave.

It is true that some criminal proceedings focus on expressions of remorse. In the capital context, for example, demonstrating remorse for one's actions qualifies as a type of mitigation evidence that suggests a life sentence, as opposed to death, is more appropriate for the repentant individual.[324] At sentencing hearings, defendants often profess remorse as the judge's gavel is about to fall. And at parole hearings, board members may demand a full and unqualified acceptance of responsibility for one's actions and remorse for harms caused.[325] But these proceedings often occur outside the public eye or at the extreme end of the criminal spectrum or in circumstances that make protestations of remorse seem performative and contrived. In most criminal cases, a clear and genuine statement of responsibility and remorse is never given.

More prevalent use of practices that emphasize accountability, like restorative justice diversion, can address this gap and provide the psychological scaffolding to shift how the public thinks about criminal punishment as a multifaceted construct. Restorative justice begins with personal accountability; it is a cornerstone of the process.[326] Criminal actors are encouraged to provide an explanation for their actions—not an excuse or justification, but the "why" that is typically missing from traditional processes and that can be important to healing and closure. Restorative justice therefore has a sociopsychological advantage over the traditional system, which minimizes the criminal defendant's active role in the process. Typically, criminal defendants have two options—to engage in a plea arrangement or go to trial. In plea deals, the lawyers negotiate details, and criminal defendants often plead to charges they would not otherwise accept as a term of the plea. They are discouraged from speaking or explaining what happened because of the risk that doing so may affect the judge's ruling on the plea arrangement.[327]

In the trial context, there is even less emphasis on personal responsibility. Only about half of criminal defendants take the stand to testify about their version of

323. *Id.* at 1461–62.

324. *See* Lynch & Haney, *supra* note 62, at 89.

325. When parole-eligible incarcerated individuals go before a parole board, admitting responsibility and expressing remorse for one's crime are practically prerequisites before parole will be granted. *See* Nicole Bronnimann, *Remorse in Parole Hearings: An Elusive Concept with Concrete Consequences*, 85 MO. L. REV. 321, 335, 343 (2020); *see also* Kathryne M. Young & Hannah Chimowitz, *How Parole Boards Judge Remorse: Relational Legal Consciousness and the Reproduction of Carceral Logic*, 56 LAW & SOC'Y REV. 237, 237 (2022) (examining how parole board members assess remorse). Even then, parole is rarely granted. *See* German Lopez, *Prisoners Rarely Get Released on Parole, Even When They're No Longer a Threat. Here's Why.*, VOX (July 13, 2015, 1:00 PM), https://www.vox.com/2015/7/13/8938061/parole-boards-politics [https://perma.cc/BY7T-RYUC].

326. *See* SERED, *supra* note 143, at 96–98.

327. Natapoff, *supra* note 262, at 1466.

events.[328] Indeed they are often explicitly counseled against speaking during trial. If they do testify at trial, evidentiary rules can make them vulnerable to examination about their past criminal conduct.[329] If found guilty, many defendants still withhold a statement of responsibility to preserve their right to appeal and maintain claims of innocence. Thus, in a criminal trial, victims, families, and communities almost never hear an acceptance of responsibility and admission of wrongdoing from the defendant. There is no expectation that the defendant actively participates in any accountability measures or exhibits demonstrable behavior change. By contrast, in restorative justice proceedings victims and community members can hear directly from the person who committed the crime and witness acceptance of personal responsibility for the harm caused.

A restorative punishment approach to penal law and policy could provide opportunities for more widespread proliferation of alternatives to incarceration and broaden the understanding of punishment beyond pain and dissociation to include accountability and reintegration. Changes to sentencing law, including more second look resentencing provisions and additional avenues for restorative justice diversion, along with procedural and evidentiary changes that allow and encourage active participation from criminal defendants, could help transform the understanding of criminal punishment and incorporate accountability and remorse as common aspects of the criminal justice process. Penal policies that offer more opportunities for redemption and rehabilitation can incentivize criminal actors to take responsibility for their conduct and broaden expectations around punishment in the public mind.

3. Widening the Scope of Justice

Not only can the meaning of punishment be expanded to include dimensions beyond retribution, but the concept of criminal justice can be understood to apply more broadly, to all parties involved in and affected by crime. The current system treats justice as something attained for victims through the imposition of punishment on the criminal actor by the state.[330] But this framework assumes that the victim is satisfied purely by the imposition of punishment on the criminal actor, when in reality, victims are often marginalized by the process. Thinking about justice not just as something done to a criminal actor but as serving the victim, the community, and the family of the criminal actor, is another way to reconceptualize it and create space for outcomes other than prison.

Opportunities for victim engagement in traditional criminal justice processes are remarkably limited.[331] Victims often testify at trial, although doing so is

328. Bellin, *supra* note 262, at 397 & n.7.

329. For example, the Federal Rules of Evidence § 405 allows for discussion of specific instances of past conduct on cross-examination, and § 609 allows for the past convictions of testifying witnesses to be introduced. FED. R. EVID. 405, 609.

330. *See* Gabriel S. Mendlow, *The Moral Ambiguity of Public Prosecution*, 130 YALE L.J. 1146, 1161 (2021).

331. *See* Erin Ann O'Hara, *Victim Participation in the Criminal Process*, 13 J.L. & POL'Y 229, 239 (2005); Jo-Anne Wemmers, *Where Do They Belong? Giving Victims a Place in the Criminal Justice*

potentially fraught and can be unsatisfying.[332] Testimony is confined to issues deemed legally relevant. Because procedural rules impose a rigid question-and-answer format, victims may not freely tell their stories at trial or express how they feel.[333] Victim testimony can also be triggering or traumatic, especially upon cross-examination.[334] Perhaps most importantly, opportunities for victims to take the stand are rare given the infrequency of criminal trials.[335] There have been several recent high-profile examples of victims delivering emotional, heart-wrenching testimony during criminal proceedings, providing victims with some agency in the process.[336] But these are exceptions to the rule and do not characterize the typical victim's experience with the criminal justice system. Victims can also speak or submit Victim Impact Statements during sentencing proceedings.[337] These statements, although useful and cathartic, are unidirectional and limited in scope and utility.[338] They do not require or even allow a response from perpetrators and are relevant only during the sentencing phase of a criminal case, typically in support of a harsher sentence.[339] Beyond these opportunities, victims are mostly shut out of the process.[340]

Several studies have documented that victims who participate in restorative justice proceedings have on average a higher sense of satisfaction and feel a greater sense of closure than those who do not.[341] Research also has found that knowledge of a victim's satisfaction with a restorative justice outcome attenuates

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*Process*, 20 CRIM. L.F. 395, 397–99 (2009); Francis D Boateng & Gassan Abess, *Victims' Role in the Criminal Justice System: A Statutory Analysis of Victims' Rights in U.S.*, 19 INT'L J. POLICE SCI. & MGMT. 221, 221 (2017).

332. *See* Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 457–58 (2006); Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 308 (2019).

333. *See* Mills, *supra* note 332, at 483.

334. *Id.* at 471.

335. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 7 (2011) (noting that 95% of criminal convictions come from guilty pleas).

336. Recent high-profile examples include Larry Nassar and Ghislaine Maxwell. *See* Believed, *Larry Nassar's Survivors Speak, and Finally the World Listens — and Believes*, NPR (Dec. 10, 2018, 6:01 AM), https://www.npr.org/2018/12/07/674525176/larry-nassars-survivors-speak-and-finally-the-world-listens-and-believes [https://perma.cc/W3YX-9PM5]; Lauren del Valle & Eric Levenson, *4 Women Testified at Ghislaine Maxwell's Trial that They Were Sexually Abused. Here's What They Said*, CNN (Dec. 29, 2021, 8:19 PM), https://www.cnn.com/2021/12/15/us/ghislaine-maxwell-trial-accusers/index.html [https://perma.cc/LN83-5KJZ].

337. *See* Hugh M. Mundy, *Forgiven, Forgotten? Rethinking Victim Impact Statements for an Era of Decarceration*, 68 UCLA L. REV. DISCOURSE 302, 302, 313 (2020). Victim Impact Statements are a controversial part of the criminal justice process. *See, e.g.*, Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 611–12 (2009); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 398 (1996).

338. *See* Mundy, *supra* note 337, at 314.

339. *See* Cassell, *supra* note 337, at 626.

340. *See* Mills, *supra* note 332, at 458 ("Contemporary approaches circumscribe victim participation in the prosecution of the victimizer to acting in the narrow role of a trial witness, and later, to delivering a victim impact statement at sentencing.").

341. *See* Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 278 (2005). Although, these findings are limited given the constraints on the use of restorative justice as

the desire to impose a harsher punishment on the criminal actor.[342] Although these findings are relatively limited, they suggest that focusing on the subjective satisfaction of victims and other affected parties with restorative justice processes can influence how restorative justice is perceived and broaden its appeal.[343] Trumpeting restorative justice practices as victim-centered and emphasizing the emotional catharsis and healing that victims experience as a result of participating in them[344] can be effective advocacy tools and counter previous attempts to tie victims' rights to harsher punishments. At the same time, focusing on the current experience of victims can highlight the failures of the traditional system to deliver justice in a meaningful way, gesturing toward the need for an alternative account of punishment that emphasizes consequences, redemption, and the needs of victims and the broader community.

## CONCLUSION

This Article describes the dissociative theory of punishment and how it leads to the unyielding belief in the necessity of prison using concepts from psychology and illustrative qualitative data. It argues that the dominant way of understanding punishment in America is as a form of dissociation. Psychological distancing and dehumanization of criminal others sever them from the rest of society. The socio-psychological understanding of punishment reflects this dissociation—prisons remove criminals from society, where they are forgotten behind prison walls. Members of the public come to understand that prisons make them safe and that the interests of justice—specifically retribution—are served through the imposition of prison sentences. Belief in prison as the only way to achieve these legitimate penological goals leads to its endorsement despite evidence that prison is harmful and a proven risk factor for recidivism. This Article also suggests a normative approach that incorporates both retributive and reintegrative elements as a way to better address public concerns around justice. It offers two specific policies—restorative justice diversion and second look resentencing—that embody this approach and that can intervene in the dissociative process and address overly punitive aspects of the penal system.

The dissociative theory and concept of restorative punishment build upon prior psychology theory and research on attitudes toward punishment, and are informed by original qualitative focus group data and experimental survey results. Three avenues for future empirical work can test the mechanisms I have

well as the voluntary nature of restorative justice and the selection bias that affects the process. *See* Menkel-Meadow, *supra* note 301, at 174; WALTERS, *supra* note 301.

342. Gromet et al., *supra* note 7, at 387.

343. *Id.*

344. Toran Hansen & Mark Umbreit, *State of Knowledge: Four Decades of Victim-Offender Mediation Research and Practice: The Evidence*, 36 CONFLICT RESOL. Q. 99, 102–04 (2018) (documenting high levels of victim satisfaction with restorative justice proceedings); Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 180.

identified and lend support for a restorative justice approach or gesture toward different interventions.

First, experimental research can establish the causal or mediational relationship between components of the dissociative theory and the insistence on prison as a necessary criminal justice outcome. The theory hypothesizes a causal relationship, but future studies can test the strength of this relationship and uncover which components are most determinative of individual attitudes regarding the necessity of prison. Prior research has found that empathy predicts support for more lenient criminal justice outcomes. But is the reverse true? That is, does psychological distancing or dehumanization lead to the endorsement of a dissociative view of punishment, as opposed to a reintegrative one? Does psychological distance from criminal actors predict support for prison, while closeness and familiarity predict support for alternatives? Experimental survey studies could help answer these questions and provide broader support for the generalizability of the theory.

Second, future research should provide a clear account of the relationship between race and dissociation. Current data suggest that racial bias mediates dissociation. This hypothesis can be tested with surveys that inquire specifically about racial attitudes and employ regression techniques to determine the strength of racial bias as a mediating variable. It is also important to analyze the findings according to the racial and ethnic identity of participants to uncover any meaningful differences in how various groups think about punishment and dissociation. Moreover, additional qualitative work with diverse participant groups that focuses explicitly on racial/ethnic, cultural, and gender differences in attitudes and beliefs can bolster the theory's explanatory power and offer insight into how dissociation may operate differently based on these factors.

Third, future research can focus on further developing the restorative punishment framework and testing the efficacy of the proposed interventions. My experimental data confirm the importance of empathy in assessments of criminal actors and sentencing decisions. The next question ripe for experimental analysis is whether different frames and labels can affect lay support for restorative justice diversion. Does framing restorative justice as "punitive" as compared to purely "restorative" increase public support? Does describing restorative justice in ways that highlight accountability, expressions of remorse, and active engagement on the part of the criminal actor affect levels of public support? I suspect the answer to these questions is yes, but the exact nature of reframing should be based on psychology studies that test for a causal link and determine which strategies have the most pronounced effect on attitudes and judgments.

There are many potential avenues of inquiry related to the psychology of punishment and the future of criminal justice. What remains central is to take seriously the public's psychological beliefs when trying to craft solutions to address overincarceration and punitive sentencing policy. The current moment—when fear about violent crime and social disorder has ratcheted up and "tough-on-crime" rhetoric is on the rise—is a potent reminder that criminal justice policy is

always in flux and responsive to both political and psychological demands. During this time of uncertainty, criminal others are easy targets. For those who are dissociated from criminal actors and view the penal system as removed and detached from their everyday lives, it is both reflexive and comforting to condemn criminal actors to prison. Adherence to the dissociative theory of punishment leads to the assumption that severing criminal actors from society will address the problems they pose. Intervening in this dissociative process by building connections and reframing alternatives is therefore necessary to change this perspective.

## APPENDICES

### A. APPENDIX A

### Focus Group Methodology

The data presented in this Article are part of a multi-method study focused on attitudes toward punishment and support for alternatives to incarceration, including restorative justice diversion.[345] One component of the study consists of in-depth qualitative analysis of focus groups discussions with a sample of jury-eligible Californians from San Mateo County,[346] conducted in winter 2019. I conducted five focus groups, consisting of twenty-nine participants.[347] The focus group format enabled me to mimic the way that discussion and debate regarding the criminal justice system occurs in the real world and to analyze the way that participants reacted to each other's perspectives, providing valuable insights into how dominant strains of thinking can sway and provoke others in the group.[348] Participants were recruited via social media and flyers, as well as in-person at various outdoor locations in San Mateo County. They completed a screening questionnaire to determine eligibility and then were scheduled for one of the focus groups.[349]

The focus groups lasted between ninety minutes and two hours. They were semi-structured so that each focus group was asked the same questions, but allowed for the conversation to go in different directions based on the intentions of the participants.[350] Each focus group was audio-recorded and transcribed.

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345. The study received Institutional Review Board approval from UC Santa Cruz (IRB protocol #HS3285). This study, funded in part by the American Psychology-Law Society, the American Psychological Foundation, and the Society for the Psychological Study of Social Issues, seeks to better understand, among other things, lay attitudes toward punishment and, specifically, restorative justice as an alternative to traditional custodial sentences.

346. San Mateo County is a populous, relatively diverse California county (approximately 769,545 residents), with 38.9% white, 30.1% Asian, 24.3% Hispanic or Latinx, and 2.7% African-American residents as of July, 2018. *QuickFacts: San Mateo County, California*, U.S. CENSUS BUREAU: AM. CMTY. SURV. (Oct. 27, 2019), https://web.archive.org/web/20191027160611/https://www.census.gov/quickfacts/sanmateocountycalifornia [https://perma.cc/TBF9-M5R7]. The median household income in 2017 was $105,667 and the percentage of the population with a bachelor's degree or higher is 48.5%. *Id.* San Mateo County has a lower crime rate than the state of California for both violent (249.5 versus 450.7) and property crime (1,959.1 versus 2,491). *Crime Rates in California*, PUB. POL'Y INST. CAL., https://www.ppic.org/?attachment_id=16576 [https://perma.cc/ALU2-W9TW] (last visited May 22, 2023) (access data by viewing permalink). Participants were somewhat diverse, although whiter (62%) and more educated (roughly 75% had at least a bachelor's degree) compared to the national average. Bakhshay, *supra* note 4, at 98. Participants also leaned more liberal (66% identified as Democrats), *id.* at 99, compared to the state as a whole and the national average. For information on the California and national averages, see *supra* note 50.

347. See *infra* Table 1 for a full breakdown of participant demographic information.

348. *See* Sue Wilkinson, *Focus Group Methodology: A Review*, 1 INT'L J. SOC. RSCH. METHODOLOGY 181, 185 (1998); Acocella, *supra* note 47; *see also* RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS 20 (Henry E. Brady & David Collier eds., 2d ed. 2010).

349. See *infra* Appendix B for the screening questionnaire.

350. I utilized a protocol with each focus group to ensure that the same questions were asked of each group and the conversation followed the same course over the two-hour timeframe. However, the semi-structured format meant that I allowed participants to drive the conversation and ask questions of me and

They were then coded using thematic analysis and qualitative content analysis approaches.[351] I developed a codebook and then reviewed and coded all the transcripts, as did two research assistants. We used consensus coding to ensure internal reliability of the results.[352] My analysis revealed a remarkable amount of thematic consistency across focus groups and provided key insights into their views on criminal actors, the purpose of punishment, and the meaning of prison.

each other, creating a fluid, organic conversation. See *infra* Appendix C for the focus group interview protocol.

351. *See, e.g.*, Virginia Braun & Victoria Clarke, *Using Thematic Analysis in Psychology*, 3 QUALITATIVE RSCH. PSYCH. 77, 77 (2006); Victoria Clarke & Virginia Braun, Commentary, *Thematic Analysis*, 12 J. POSITIVE PSYCH. 297, 297 (2017). *See generally* CARLA WILLIG, INTRODUCING QUALITATIVE RESEARCH IN PSYCHOLOGY (3d ed. 2013); THE SAGE HANDBOOK OF QUALITATIVE RESEARCH (Norman K. Denzin & Yvonna S. Lincoln eds., 5th ed. 2017); MARGRIT SCHREIER, QUALITATIVE CONTENT ANALYSIS IN PRACTICE (2012). I created two codebooks to guide the coding of the transcripts in their entirety. The codebook creation process ensured that the study had a high degree of internal validity and that the themes we coded for were accurately and consistently defined.

352. Consensus coding involves regular discussion about the qualitative findings among all coders. We met as a team weekly. Whenever there was disagreement about how to interpret the data, we discussed the issue, came to an agreement, and edited the codebook to reflect our consensus. This method of consensus coding is one way to ensure the findings have a high degree of internal reliability. *See* Heidi M. Levitt, Michael Bamberg, John W. Creswell, David M. Frost, Ruthellen Josselson & Carola Suárez-Orozco, *Journal Article Reporting Standards for Qualitative Primary, Qualitative Meta-Analytic, and Mixed Methods Research in Psychology: The APA Publications and Communications Board Task Force Report*, 73 AM. PSYCH. 26, 37 (2018).

**Table 1. Demographic Characteristics of Focus Group Participants (N = 29)**

| **Demographic Variable** | | ***n*** | **%** |
|---|---|---|---|
| Gender | Female | 18 | 62% |
| | Male | 11 | 38% |
| Race or ethnicity | White or European-American | 18 | 62% |
| | Asian-American | 7 | 24% |
| | Latinx | 3 | 10% |
| | Prefer not to answer | 1 | 3% |
| Education | Postgraduate or professional degree | 13 | 45% |
| | Bachelor's degree | 9 | 31% |
| | Some college but no degree | 5 | 17% |
| | High school diploma or GED | 2 | 7% |
| Parental status | Identify as parent or guardian | 18 | 62% |
| Marital status | Married or long-term partnership | 18 | 62% |
| | Single | 7 | 24% |
| | Divorced | 2 | 7% |
| | Widowed | 2 | 7% |
| Political affiliation | Democrat | 19 | 66% |
| | Independent | 6 | 21% |
| | Republican | 3 | 10% |
| | Prefer not to answer | 1 | 3% |
| | | *M* | *SD* |
| Age (in years) | | 56.1 | 14.6 |

B. APPENDIX B

Focus Group Screening Questionnaire

**Welcome page:**

You are invited to take part in a research study conducted by Shirin Bakhshay from the department of Psychology at the University of California, Santa Cruz. We would like to ask you a few questions to see if you might be eligible for our research study. We are holding a series of conversations with residents of San Mateo County to learn more about the community's thoughts on the criminal justice system, opinions regarding justice and punishment, and ideas or suggestions for reforms.

It is very important to the success of this research that we get input from a wide variety of people. If you are eligible and volunteer to participate in this study, you will be asked to participate in a 1 ½ hour group conversation with other community members and a UCSC research team, where we will guide a conversation about the criminal justice system and reforms. Participants will receive a $30 gift card. Snacks will be provided at the focus group.

You may not be contacted for participation in the study based on your answers. If you are not eligible for the study, we will not contact you again for this project. If you are not eligible, your responses will be deleted.

The screening will take less than five minutes. We will ask you basic demographic questions like how you identify in terms of age, race, and gender. You do not have to answer any questions you do not wish to answer or are uncomfortable answering, and you may stop at any time. Your participation in the screening is voluntary. If you decide to decline, there will be no penalty or loss of benefits to which you are otherwise entitled.

Precautions will be taken to protect the confidentiality of your response. However, breaches of confidentiality are always a risk. Although unlikely, potential breaches of confidentiality include inadvertent disclosure of identifiable participant information through data loss or theft.

Your answers will be confidential. No one will know your answers except for the research team. When you submit your answers, they will be assigned a code number. The list connecting your name to this code will be kept in on a secure UCSC Google Drive account. Only the researcher will have access to the list. When the study is completed and the data have been analyzed, the list will be destroyed.

There is no direct personal benefit to you from completing this screener. However, if you are invited to participate in a focus group, your comments may benefit the community by helping to provide insights into community members' thoughts on the criminal justice system.

If you have questions about this research, please contact Shirin Bakhshay at sbakhsha@ucsc.edu. If you have any questions regarding your rights as a research participant, please contact the Office of Research Compliance Administration at the University of California at Santa Cruz at 831-459-1473 ororca@ucsc.edu.

If you are interested in completing the screening survey, please fill out the following pages.

If you are not interested in completing the screening survey, we thank you for your time and interest.

Please click "next" if you consent to fill out the screening questionnaire.

**Please fill in answers or check a response to the following demographic questions.**

1. What is your age?

_____

2. Are you over 18 years old?

☐ Yes
☐ No

3. What is your gender?

☐ Man
☐ Woman
☐ Gender non-binary
☐ Other (fill in)_____

4. How do you identify your race/ethnicity? (choose all that apply)

☐ Asian American or Pacific Islander
☐ Black/African-American
☐ Latinx/Hispanic
☐ Native American, Indigenous, or Alaskan Native
☐ White/European American
☐ Other (fill in)_____

5. What is your highest level of education?

☐ No high school diploma or GED
☐ High school diploma or GED
☐ Some college
☐ Associate's degree
☐ Bachelor's degree
☐ Graduate/professional degree

6. Are you a resident of San Mateo County?

☐ Yes
☐ Unsure
☐ No

7. Are you in the field of law enforcement or corrections?

☐ Yes
☐ No

**Please provide the following contact information:**
**Name:**
**Phone number:( ) -**
**Email address:**

**Please indicate the best times for you to participate in a focus group by checking the box(es).**

- ☐ Weekdays during the day (from 9 to 5)
- ☐ Weekdays during the evening (after 5 pm)
- ☐ Weekends during the day (from 9 to 5)
- ☐ Weekends during the evening (after 5 pm)

**Is it okay if we keep your contact information to invite you to participate in future studies?**

- ☐ Yes
- ☐ No

Thank you for answering the screening questions. We will review your responses and contact you if you are eligible to confirm your interest in participating and set up a time to schedule the focus group. If you are not eligible for the study, we will not contact you again for this project.

If you have questions about this research, please contact Shirin Bakhshay at sbakhsha@ucsc.edu. If you have any questions regarding your rights as a research participant, please contact the Office of Research Compliance Administration at the University of California at Santa Cruz at 831-459-1473 or orca@ucsc.edu.

### C. APPENDIX C

## Focus Group Protocol

Thank you so much for sharing your perspective with us - we value your time and opinions. We are holding a series of conversations, like this one today, to learn more about community perspectives regarding the criminal justice system, specifically the way we punish criminals.

After all of our conversations are completed, we will identify common patterns and themes from your responses. This information will be used to inform future research papers and presentations.

*Before getting started*:

- This conversation will last about 1 ½ to 2 hours.
- We value everyone's perspectives and want everyone to feel comfortable sharing as little or as much as they want to. You can skip any question that you want to but if we haven't heard from you, I may check in to see if there is anything you'd like to share. To make sure that everyone has a chance to talk, I might ask you to wait if you've already shared.
- I may interrupt you if we need to move on, change topics, or in order to ensure everyone has a chance to share their perspective. I have a set list of questions I plan to ask you and want to ensure that we get through all of them, so I may have to direct the conversation a bit and ask that we switch topics at certain points.
- There are no right or wrong answers. Feel free to share your view even if it differs from what someone else has said. Everyone's perspectives are important and we are interested in hearing diverse opinions, not reaching a consensus.
- You can skip any question that you want to and stop participating at any time. Regardless of how many questions you answer or whether or not you complete the discussion, you will receive a $30 gift card.
- We will record the audio of our conversation, which will be transcribed, and will be taking notes to help us remember everything, but no one's real names will be used. The voice recordings will not be published. Quotes from this focus group might be used in reports, but they will not be associated with your real name.
- This conversation is confidential and private. We ask that you respect the confidentiality of everyone here by not repeating what is discussed outside this room.

We will be discussing your views on the criminal justice system, specifically the legal punishments we impose on people convicted of committing crimes (hereinafter "criminals"). Before we delve into our discussion, let's just go over some basic information so we are all on the same page.

1) Basic sentencing information
   a. Difference between probation, jail, and prison
   b. Different types of sentences: term, life, LWOP, death penalty
   c. Quick stats
2) Information regarding community-based alternatives and restorative justice
   a. Define/describe restorative justice
   b. Currently, restorative justice procedures are used at the local level in several jurisdictions in California for low-level, non-violent crimes for both juveniles and adults – Alameda, Fresno, Los Angeles, Sonoma, San Francisco, Yolo
   c. Diversion
   d. Part of sentencing
   e. Post-sentencing contexts
   f. In legislation in 32 states
   g. Other community-based alternatives
   h. Counseling; drug/alcohol treatment
   i. Vocational and education programs
   j. Work release
   k. Home detention; electronic monitoring
   l. Community service
   m. Fines
3) Before we move on, does anyone have any questions?
4) Quick ice-breaker
   a. Please introduce yourself and tell us how long you have lived in San Mateo County and if there is anything in particular you really like about this community.
5) Attitudes regarding punishment practices
   a. What do you think the purpose of legal punishment is? What do you think it should be?
      i. Officially?
         1. How can this purpose be best accomplished?
      ii. From your own perspective, what should it be?
         1. How can this purpose be best accomplished?
   b. Do you think there are alternatives to prison or jail that would satisfy that purpose?
   c. What makes a punishment fair?
6) Factors that might impact the fairness of punishment?
   a. Social historical information
      i. Do you think a criminal actor's background is relevant to their punishment?
      ii. Do you think it matters if a criminal actor has a spouse or children? How so?
      iii. Do you think it matters if a criminal actor has ties to his/her community? How so?

b. Motive
   i. Does the reason for the crime matter?
c. The victim's wishes
   i. Should the victim's wishes matter in terms of punishment?
   ii. Should they have a formal say in what happens to a criminal actor? Why?

7) Exploring alternatives to incarceration
   a. Can you think of something other than incarceration that would be an appropriate response to a serious crime, such as robbery or assault?
      i. What about [fines, home detention, mandatory treatment, public apology, community service]?
      ii. What are some reasons why these options might be good?
      iii. What are some of your concerns?
   b. What do you think about restorative justice approaches?
   c. Do you think that participation in restorative justice is a form of punishment? Why or why not?
   d. What do you think about restorative justice as part of a punishment that includes prison (split sentence)?
   e. What do you think about restorative justice as replacing incarceration?
      i. What are some of the reasons why this would be a good idea?
         1. Because they attempt to rehabilitate the offender
         2. Repair the financial harm
         3. Restore the dignity of the victim
         4. Promise public safety
      ii. What are some of your concerns?
   f. Are these alternatives "punitive" enough? Are they severe enough?
   g. What are the limits to using alternatives to incarceration as punishment for crime?
      i. Do you think there are too many people in prison? Too few? The right amount?
      ii. Why do you think people should be sent to prison or jail?
      iii. Do you think it is fair to send people to prison or jail? Why?
      iv. Are there some crimes for which incarceration is unnecessary? Why?
      v. Are there some crimes for which incarceration is necessary? Why?
      vi. Are there some types of people who should not be incarcerated? Why?
      vii. Are there some types of people who should be incarcerated? Why?

8) Reconceptualizing justice
   a. What does justice, in the criminal context, mean to you?
   b. What does justice look like?
      i. For victims?
      ii. For criminal actors?
      iii. For communities?
      iv. For society as a whole?

   c. Is there a way to get justice without inflicting pain/harm on criminal actors?
      i. Why?
      ii. What would that look like?

9) Attitudes regarding penal reforms
   a. In recent years, California has passed a number of criminal justice reforms, including diverting more people from prison to jail and probation. Are you familiar with some of these reforms?
   b. Are you comfortable with these reforms?
   c. Do you think there is a need for change in how we punish convicted criminals?
   d. What should that change look like?
   e. Do you think community members like yourselves should play a role in determining penal policy?
      i. Why?
      ii. What should that role look like?
   f. Do you think community members like yourselves should play a role in reintegrating criminal actors?
      i. Why?
      ii. What should that role look like?

10) Resistance to reform
   a. What are some concerns you have about penal reform and specifically putting fewer people in prison?
   b. Or using restorative justice more frequently?
   c. Is there a way to address these concerns?

11) Suggestions for improving restorative justice processes
   a. Do you have any suggestions for how to improve upon restorative justice processes?
      i. To increase public support?
      ii. To increase efficacy?
      iii. To satisfy the demand for punishment?

12) Do you have any questions for me? Is there anything else on these topics you would like to share?

Thank you so much for your participation!

## D. APPENDIX D

### Experimental Vignettes

**Condition #1**

You are going to read a description of a crime that recently occurred. Then, you will be asked a series of questions about the perpetrator's punishment and your feelings and beliefs about crime, perpetrators, and related social issues. Below is some brief information about the crime.

Jake is a 25-year old white man living in San Francisco, California. Last March, Jake was hanging around near an ATM in downtown San Francisco around 7 pm. He saw Kevin, a man in his mid-30s who was wearing a business suit, walk up to the ATM. He watched Kevin take a sizable amount of cash out of the ATM.

As Kevin began walking back to his car, Jake approached him and said, "Gimme all your money." When Kevin hesitated, Jake drew a handgun from his pocket and repeated his demand, saying, "Gimme all your money now." Kevin quickly handed him the cash and Jake turned and ran away down the street. Kevin headed to his car and called the police.

The police were able to apprehend Jake a few blocks away and discovered the gun and $500 in cash on him. Jake was charged and convicted of felony robbery.

**Condition #2**

You are going to read a description of a crime that recently occurred. Then, you will be asked a series of questions about the perpetrator's punishment and your feelings and beliefs about crime, perpetrators, and related social issues. Below is some brief information about the perpetrator and the crime.

Jake is a 25-year old white man living in San Francisco, California. As a child, Jake was raised by a single, working mother. She tried her best but was rarely home for dinner and often worked late nights, leaving Jake to fend for himself and his younger sister. They often went hungry. Jake's mother sometimes had to choose between paying the rent and groceries.

Jake and his family were forced to move several times after being evicted from their apartment and he had a hard time adjusting to his new schools, which were in low-income, high-crime areas. When he was 12, Jake's mother remarried a man who was physically abusive to both his mother and him. Jake tried to protect his mother, but would often get yelled at, hit, and threatened by his stepfather. By 15, Jake had moved out on his own. He struggled in school and eventually dropped out without completing high school.

Last March, Jake was hanging around near an ATM in downtown San Francisco around 7 pm. He saw Kevin, a man in his mid-30s who was wearing a

business suit, walk up to the ATM. He watched Kevin take a sizable amount of cash out of the ATM.

As Kevin began walking back to his car, Jake approached him and said, "Gimme all your money." When Kevin hesitated, Jake drew a handgun from his pocket and repeated his demand, saying, "Gimme all your money now." Kevin quickly handed him the cash and Jake turned and ran away down the street. Kevin headed to his car and called the police.

The police were able to apprehend Jake a few blocks away and discovered the gun and $500 in cash on him. Jake was charged and convicted of felony robbery.

**Condition #3**

You are going to read a description of a crime that recently occurred. Then, you will be asked a series of questions about the perpetrator's punishment and your feelings and beliefs about crime, perpetrators, and related social issues. Below is some brief information about the crime.

Jamal is a 25-year old African American man living in San Francisco, California. Last March, Jamal was hanging around near an ATM in downtown San Francisco around 7 pm. He saw Kevin, a man in his mid-30s who was wearing a business suit, walk up to the ATM. He watched Kevin take a sizable amount of cash out of the ATM.

As Kevin began walking back to his car, Jamal approached him and said, "Gimme all your money." When Kevin hesitated, Jamal drew a handgun from his pocket and repeated his demand, saying, "Gimme all your money now." Kevin quickly handed him the cash and Jamal turned and ran away down the street. Kevin headed to his car and called the police.

The police were able to apprehend Jamal a few blocks away and discovered the gun and $500 in cash on him. Jamal was charged and convicted of felony robbery.

**Condition #4**

You are going to read a description of a crime that recently occurred. Then, you will be asked a series of questions about the perpetrator's punishment and your feelings and beliefs about crime, perpetrators, and related social issues. Below is some brief information about the perpetrator and the crime.

Jamal is a 25-year old African American man living in San Francisco, California. As a child, Jamal was raised by a single, working mother. She tried her best but was rarely home for dinner and often worked late nights, leaving Jamal to fend for himself and his younger sister. They often went hungry. Jamal's mother sometimes had to choose between paying the rent and groceries.

Jamal and his family were forced to move several times after being evicted from their apartment and he had a hard time adjusting to his new schools, which

were in low-income, high-crime areas. When he was 12, Jamal's mother remarried a man who was physically abusive to both his mother and him. Jamal tried to protect his mother, but would often get yelled at, hit, and threatened by his stepfather. By 15, Jamal had moved out on his own. He struggled in school and eventually dropped out without completing high school.

Last March, Jamal was hanging around near an ATM in downtown San Francisco around 7 pm. He saw Kevin, a man in his mid-30s who was wearing a business suit, walk up to the ATM. He watched Kevin take a sizable amount of cash out of the ATM.

As Kevin began walking back to his car, Jamal approached him and said, "Gimme all your money." When Kevin hesitated, Jamal drew a handgun from his pocket and repeated his demand, saying, "Gimme all your money now." Kevin quickly handed him the cash and Jamal turned and ran away down the street. Kevin headed to his car and called the police.

The police were able to apprehend Jamal a few blocks away and discovered the gun and $500 in cash on him. Jamal was charged and convicted of felony robbery.

### E. APPENDIX E

### Sentence Descriptions

Now that you have read about the crime, please read about the possible criminal sentences for felony robbery. Afterwards, you will be asked what sentence you believe the perpetrator should receive.

**Prison/jail sentence:** A prison or jail sentence involves involuntary confinement in a state or local county correctional facility for a set period of time.

**Restorative justice conference:** Restorative justice is a community-based alternative to incarceration in prison or jail. It involves a third-party facilitator, the victim, and the perpetrator. During the conference, the perpetrator and victim meet with the facilitator, where the victim is given the opportunity to describe the harm that they have suffered as a result of the perpetrator's actions. The perpetrator listens, takes responsibility for their actions, and offers an apology. The parties then come to a mutually agreed upon plan for how the perpetrator can repair the harm done to the victim and society more broadly, which usually involves repayment of any stolen money or goods and community service.

**Split sentence:** A split sentence is a mix of incarceration and restorative justice. It involves involuntary confinement in a state or county correctional facility for a reduced amount of time AND participation in a restorative justice conference and completion of the agreed upon terms of the conference.

Please read the following sentence options and select the option you believe the perpetrator in this case should receive.

1. 3-year prison sentence
2. 1-year jail sentence AND restorative justice conference, resulting in agreement to repay $500, attend a non-violence workshop once a week for 3 months, and perform 100 hours of community service.
3. Restorative justice conference, resulting in agreement to repay $500, attend a non-violence workshop once a week for 3 months, and perform 100 hours of community service. No prison or jail sentence.