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Author
Langer, Maximo

Publication Date
2022-12-22

Peer reviewed

(134 HARVARD LAW REVIEW FORUM (forthcoming 2020))

Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then

By Máximo Langer*

Introduction

Thank you to the Harvard Law Review for inviting me to discuss Professor Dorothy Roberts' thought-provoking article *Foreword: Abolition Constitutionalism*.[1] This gives me an opportunity not only to engage with important work and ideas by a prominent and insightful legal scholar, but also to reflect on my own academic career and personal trajectory between different legal systems. I was exposed for the first time to penal abolitionist authors and discourse when I took Criminal Law as a first-year undergraduate law student at the University of Buenos Aires, Argentina, in 1990.[2] At that time in Argentina, several professors taught penal abolitionism together with theories of punishment at the beginning of the course and penal abolitionism was a common theme in criminal law and criminology discussions. In 1992, while still an undergraduate law student in Argentina, I published my first criminal law/criminology article, critically examining two of the most important penal abolitionist authors at the time.[3] However, when I came to Harvard Law School in 1998 to pursue an LL.M., penal abolitionism was not even mentioned in my Criminal Law class. In fact, to this day, prison abolitionism is not even mentioned in most if not all of the main American criminal law casebooks.[4] I do not remember penal abolitionism being mentioned either here, in the United States, between 1998 and the early 2010s, at any of the tens if not hundreds of criminal law and other workshops I attended and participated in at many U.S. law schools, first as an LL.M. and

* Professor of Law, UCLA School of Law. I would like to thank Rick Abel, Joseph Berra, Jennifer Chacón, Beth Colgan, Sharon Dolovich, Ingrid Eagly, Fanna Gamal, Jonathan Glater, Robert Goldstein, Laura E. Gómez, Jerry López, Allegra McLeod, Herbert Morris, Benjamin Nyblade, Frances Olsen, Andrew Selbst, Seana Shiffrin, Jonathan Simon, David Alan Sklansky, Carol Steiker, David Tanenhaus, Andrew Verstein, Alicia Virani, Noah Zatz, and participants at the UCLA School of Law Summer Faculty Workshop, for feedback on an earlier draft; and Lindsay Greenblatt, Shangching Huitzacua, Caitlin Hunter, and the UCLA School of Law Library for their research assistance. I dedicate this article to the memory of Julio B.J. Maier, *mi Maestro* in Argentina, that taught me about penal abolitionism, minimalist criminal law, and so many other things. He was the most insightful and transformative Latin American criminal procedure scholar of his time and a constant source of personal, scholarly, and public inspiration, of knowledge, and of generous and unconditional support. He passed away on July 13, 2020, as I was working on this piece.

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

2 Unlike the United States, in most of the world law is an undergraduate degree.

3 Hernán Charosky & Máximo Langer, *Crítica destructiva: Por un nihilismo criminológico*, 7 NO HAY DERECHO 32 (1992) (discussing the work of Nils Christie and Louk Hulsman).

4 *See, e.g.*, JOSHUA DRESSLER & STEPHEN P. HARVEY, CRIMINAL LAW: CASES AND MATERIALS (8th ed. 2019) (mentioning abolition of punishment but only in relation to philosophical debates on determinism, not prison abolitionism); SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES (10th ed. 2017); WAYNE R. LAFAVE, CRIMINAL LAW (6th ed. 2017). As prison abolitionism has become more prominent in American legal academia and public discourse, I expect this lack of references to it to change in future casebook editions.

S.J.D. student at Harvard, and then as a professor of law from UCLA. Though this is anecdotal and may be a reflection of my own limitations, I think it also reflected broader trends in American legal academia, including criminal law academia, as others have reported similar experiences.[5] It is only in the last five to ten years or so that penal abolitionism became a theme, sometimes central, most often peripheral, at (some) American law schools and law reviews. The recent symposium on prison abolitionism and Prof. Roberts' *Foreword*, both published at the Harvard Law Review, one of the most influential law reviews in the United States, marks and crowns this recent trend.[6] The recent protests and demands following George Floyd's killing by the Minneapolis police have included proposals and demands to abolish the police and have made prison abolitionism known to even broader audiences.[7]

This is part of a positive trend. The United States is the country that incarcerates the most people per capita in the world,[8] in a way that it is often inhumane, unnecessary, unfair, and disproportionately affects poor, Black, Latino, Native American, female, immigrant and mentally ill people, among other groups.[9] Killings by the police against Black lives and others are much higher in the United States than in other Western democracies.[10] Public discourse, academic work and reform efforts that aim at reducing the scope and humanizing the way we approach a range of social situations that have been called "criminal" are thus welcome developments. The rise of prison abolitionism in the United States has already made contributions in these directions by inspiring the transformation efforts of many of the people and organizations working to change the penal system around the country. This rise has also provided tools and pushed us to rethink many assumptions about the penal system and has helped articulate an ambitious agenda for changes in the penal system and beyond. This is especially timely as communities across the United States are currently discussing how to reimagine public and community safety.

However, it is important to keep a critical eye if we are to fully and meaningfully discuss how to think and what to do about harmful social behavior and decide how to

5 *See, e.g.*, Dan Berger et al., *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration (summarizing in 2017 support to prison abolitionism in radical and mainstream sources, including some legal sources, and stating: "This would have seemed difficult to fathom even just five years ago.").

6 132 HARV. L. REV. 1568 et seq. (2019).

7 On the relationship between police and prisons and their abolition, see, e.g., Eduardo Bautista Duran and Jonathan Simon, *Police Abolitionist Discourse? Why It Has Been Missing (and Why It Matters)*, in THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 85 (Tamara Rice Lave & Eric. J. Miller eds. 2019).

8 World Prison Brief, *Highest to Lowest: Prison Population Rate*, https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All <last visited on July 1, 2020>.

9 *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); JAMES FORMAN JR., LOCKING OUR OWN: CRIME AND PUNISHMENT IN AMERICAN (2017); DAVID W. GARLAND, THE CULTURE OF CONTROL (2001); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2014); JONATHAN SIMON, GOVERNING THROUGH CRIME. (2007); BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2015); LOÏC WACQUANT, PRISONS OF POVERTY (1999); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009).

10 *See, e.g.*, FRANKLIN ZIMRING, WHEN POLICE KILL (2017).

reduce the footprint of and humanize the penal system. In this article, with this critical-eye perspective in mind, I would like to make three contributions to debates about penal abolitionism in the United States and elsewhere.

First, missing from Prof. Roberts's article is any reference to any penal abolitionist authors and movements outside of the United States. My worry is that readers whose introduction to American prison abolitionism is Prof. Roberts's piece will fail to recognize the global movement and dialogue in which American abolitionists have, at times, drawn from and taken part in.[11] Including these non-American penal abolitionists in American debates is important because the prison and other penal institutions like the police exist in most corners of the world. Engaging with the work of non-American penal abolitionists may thus provide insights to understand, discuss and deal with American penal institutions. American prison abolitionists could also engage in a critical evaluation of penal abolitionism elsewhere to enrich their own thinking and transformative potential. In addition, ignoring non-American penal abolitionists risks falling into parochialism, reinforcing the American exceptionalism notion that people in the United States have nothing to learn from peoples and experiences in other countries, and undermining American prison abolitionism's global agenda.[12]

This article's second set of contributions consist of articulating what I consider three of the most important challenges for penal abolitionism—challenges that explain why, despite sharing the goal of eliminating inhumane, unnecessary, unfair and discriminatory penal laws and practices, rather than a penal abolitionist I would consider myself closer to "criminal law minimalism" that states that the penal system still has a role to play in society, but a substantially reduced and redesigned role than the one it has played in the United States.

The first challenge has to do with harmful behavior. For instance, domestic violence, sexual assaults and killings take place around the world; and other harmful, violent and deadly behavior from human beings towards other human beings is part of the reality of world's societies. For reasons that I articulate later in this piece, I find the penal abolitionist proposals to deal with these types of serious harms unpersuasive. These types of harms do not always or necessarily require police intervention, prison or punishment responses from society. But fully discarding police intervention, prison or other potential

[11] Among American prison abolitionist efforts to engage with penal abolitionism outside of the United States or to analyze issues from a more global perspective, see, e.g., Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019) (connecting abolition and resistance struggles in the United States with struggles outside of the United States, including criticism and resistance against U.S. global power); ANGELA Y. DAVIS, FREEDOM IS A CONSTANT STRUGGLE (2016) (discussing prison abolitionism in a broader international context); Angela Y. Davis, *infra* note , at , and *infra* note (referring to the work of Mathiesen and de Haan); Allegra McLeod, *infra* note (explicitly applying Mathiesen's ideas about "the unfinished" to American reality); Allegra McLeod, *Beyond the Carceral State*, 95 TEXAS L. REV. 651 (2017) (Review Essay) (discussing Mathiesen's work and decarceration in Finland and other Nordic countries); MICOL SEIGEL, VIOLENCE WORK: STATE POWER AND THE LIMITS OF POLICE (2018) (analyzing the police from an internationalist framework).

[12] On American prison abolitionism global agenda, see, e.g., Roberts, *Abolition Constitutionalism, supra* note , at 120; Allegra McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1615 (2019) [hereinafter *Envisioning*].

punishments as a possible response to these situations—as penal abolitionist who advocate for "abolishing the police", "a society without prisons" or "a society without punishment" do—can itself be unfair and inhumane, deprive the weak of protection against the powerful, harm the communities and individuals affected by these situations, and enable more of these harmful situations in the future.

Another challenge for penal abolitionists is that even assuming that police and prisons could one day be abolished, power relations and regimes could not. This is because there is no way out of power relations and regimes in human relations and societies. Every society has to structure power relations and regimes somehow. Since the range of possible power relations and regimes is endless, the question is which power relations and regimes are more just than other alternatives. In this regard, it is not clear to me that any of the many possible variations of societies without any prisons—including the ones suggested by various penal abolitionists—would necessarily be more just than a set of societies that would still give to law enforcement, prisons or other forms of punishment a role in addressing harmful behavior.

Another challenge for prison or penal abolitionists is that, for reasons I will discuss, I am not convinced that a fair society would be a society without punishment.

This piece's final contribution will be discussing the notion of "abolition constitutionalism" that constitutes Prof. Roberts' article's main, original and important contribution. After explaining the rich potential of this concept and why I agree with its critique of *Flowers v. Mississippi* and the Batson doctrine, I will articulate the concept of minimal criminal law constitutionalism and make three points that put it in conversation with abolition constitutionalism,. First, Prof. Roberts' critique of *Flowers v. Mississippi* is consistent with both abolition constitutionalism and minimal criminal law constitutionalism and could be powerfully applied to other doctrines besides jury selection such as prosecutorial discretion and plea bargaining—doctrines that arguably affect many more cases subjected to the penal system than jury selection regulations. Second, I will suggest that a strong and renewed principle of "ultima ratio"—which has not been considered a constitutional principle in the United States but is well-known in other legal systems—should be part of minimal criminal law constitutionalism and could supplement the strong anti-subordination principle that animates Prof. Roberts' analysis. Finally, I will suggest that if implementing penal abolitionism's and minimalist criminal law's visions would demand not only a substantial reduction of incarceration and an elimination of arbitrary, discriminatory and violent policing, prisons and punishment, but also a more just society, "abolition constitutionalism" and "minimalist criminal law constitutionalism" would require a constitution and a social pact that include, among others, the right to education, health care, food, work and economic safety, housing, and a healthy environment. Various constitutions around the world have included these rights.

Once again, neither the comparative perspective, nor the challenges I articulate in this article for penal abolitionism deny the urgent need to radically decarcerate the United States and to work towards humane, nondiscriminatory and just policing, criminal processes, punishment and societies in the United States and around the world. The goal

of the piece is rather to provide elements to discuss what would be the best ways and means to advance this agenda.

Before I proceed, it is important to state that there has been a spectrum of positions under the label "prison abolitionism" in the United States that have ranged from the actual abolition of prisons and/or the police to a reimagining of these institutions and a radical reduction of their scope.[13] I would characterize the latter position that call for a reimagination and a reduction of the scope of these institutions as criminal law minimalism. Acknowledging this spectrum of positions and analytically disentangling them may contribute to a constructive and meaningful debate in which the different parties do not talk past each other on what should be the way forward to change the current penal system.

Section I of this article explains some of the origins of European and Latin American penal abolitionism and makes four points about it, including how it relates to criminal law minimalism. Section II articulates three of the main challenges for penal abolitionism. Section III proposes constitutional doctrines that might be part of abolition constitutionalism and that would apply to what I would like to call a "minimal criminal law constitutionalism."

I. European and Latin American Penal Abolitionism

Prof. Roberts states that there are three central tenets that are common to formulations of abolitionist philosophy:

"First, today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained. Second, the expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime. Third, we can imagine and build a more human and democratic society that no longer relies on caging people to meet human needs and solve social problems."[14]

Prof. Roberts says that some activists mark the launch of the current prison abolitionist movement at a conference held at the University of California, Berkeley, in 1998.[15] However, as Angela Y. Davis, one of the intellectual founders and pillars of American prison abolitionism, has said "[t]here are multiple histories of prison abolition."[16] One of

[13] *See, e.g.* Beth Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1548 (2020).
[14] Roberts, *Abolition Constitutionalism*, *supra* note , at 7-8.
[15] *Id.* at 5.
[16] *History is a Weapon. The Challenge of Prison Abolition: A Conversation between Angela Y. Davis and Dylan Rodriguez,* available at http://www.historyisaweapon.com/defcon1/davisinterview.html (last visited June 11, 2020) (hereinafter *History is a Weapon*). Among seminal prisoner movement or prison abolitionist books in the United States in the 1970s, see, e.g., GEORGE JACKSON, SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON (1970); IF THEY COME IN THE MORNING: VOICES OF RESISTANCE (Angela Y. Davis ed. 1971); FAY HONEY KNOPP, INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS (1976). For

these histories had its origins in Scandinavian countries in the 1960s and 1970s. In the second half of the 1960s, the so-called "Parliament of Thieves"—a conference that included ex-inmates, lawyers, psychiatrists, social workers and sociologists that discussed penal and correctional policy—was held.[17] This conference was followed by the creation of associations of penal reform in Sweden, Denmark, Finland, and Norway, between 1967 and 1968.[18] These associations "served as a source of inspirational and organizational rubric for American prisoners."[19] One of these associations, the Norwegian KROM, was also particularly important because it gave the intellectual and political milieu for the publication of what Angela Davis calls the "germinal text" of Thomas Mathiesen, *The Politics of Abolition* (1974).[20]

This work was followed by a robust and lively academic literature that included penal abolitionist articles and books published in the 1970s, 1980s, and early 1990s, by figures such as the Norwegian professor Nils Christie,[21] the Dutch professors Louk Hulsman[22] and Willem de Haan,[23] and Argentinean professor Eugenio Raúl Zaffaroni,[24] to mention just some examples. In 1982, the first International Conference on Penal Abolition was held and continues to meet biannually.[25]

Summarizing all the ideas of this diverse literature here would be impossible.[26] But I would like to make four points about it. First, this literature produced outside of the United States typically refers, in different languages, to "penal abolitionism"[27]—as reflected in the

contemporary historiography on the prisoner movement in the United States in the 1970s, see, e.g., HEATHER ANN THOMPSON, BLOOD IN THE WATER (2017).

17 THOMAS MATHIESEN, THE POLITICS OF ABOLITION 74 (2015) (originally published in 1974).

18 *ID.* AT 77-78.

19 DONALD F. TIBBS, FROM BLACK POWER TO PRISON POWER: THE MAKING OF JUNES V. NORTH CAROLINA PRISONERS' LABOR UNION 118 (2005).

20 *History is a Weapon*, *supra* note .

21 *See, e.g.*, NILS CHRISTIE, LIMITS TO PAIN (1981); Nils Christie, *Conflicts as Property*, 17 THE BRITISH JOURNAL OF CRIMINOLOGY 1 (1977) [hereinafter *Conflicts as Property*].

22 LOUK HULSMAN & JACQUELINE BERNAT DE CELIS, PEINES PERDUES (1982).

23 WILLEM DE HAAN, THE POLITICS OF REDRESS: CRIME, PUNISHMENT *AND* PENAL ABOLITION 1 (1990).

24 EUGENIO RAÚL ZAFFARONI, EN BUSCA DE LAS PENAS PERDIDAS (1989). On penal abolitionism in Latin America, see, e.g., MAURICIO MARTÍNEZ SÁNCHEZ, LA ABOLICIÓN DEL SISTEMA PENAL (1990); EL ABOLICIONISMO PENAL EN AMÉRICA LATINA (Maximiliano E. Postay ed. 2012); Alberto Bovino, *La víctima como preocupación del abolicionismo penal*, *in* DE LOS DELITOS Y DE LAS VÍCTIMAS 261 (Julio B. J. Maier, ed., 1992); John Doe, *Manual del buen abolicionista*, available at http://nohuboderecho.blogspot.com/2006/11/ <last visited on July 12, 2020>; CONVERSAÇÕES ABOLICIONISTAS: UMA CRÍTICA DO SISTEMA PENAL E DA SOCIEDADE PUNITIVA (Edson Passetti & Roberto B. Dias da Silva eds., 1997).

25 *See, e.g.*, Lisa Finateri and Viviane Saleh-Hanna, *International Conference on Penal Abolition: The Birth of ICOPA*, *in* THE CASE FOR PENAL ABOLITION 261 (W. Gordon West & Ruth Morris eds. 2000); *http://www.actionicopa.org* <last visited on July 15, 2020>.

26 For instance, I will not discuss here the work by NILS CHRISTIE, CRIME CONTROL AS INDUSTRY (1993) that explores the relationship between prisons and the penal system and the private sector. This work has been influential on American prison abolitionists and their analysis of the prison industrial complex. *See, e.g.*, DAVIS, ARE PRISONS OBSOLETE?, *supra* note , at 94.

27 *See, e.g.*, DE HAAN, *SUPRA* NOTE (*penal abolition* in the title of the book); HULSMAN & BERNAT DE CELIS, *SUPRA* NOTE , AT 7 (*abolitionniste du système penal*) 48 (*abolir le système penal*); ZAFFARONI, *SUPRA* NOTE , AT 93 (*abolicionismo penal*).

title of this article—rather than to "prison abolitionism" as it has been much more commonly referred to in the United States.[28] The terminological distinction is important. The term "prison abolitionism" puts the emphasis in abolishing a particular institution—i.e., the prison. This institutional emphasis is suggested even if "prison abolitionism" is supplemented with an agenda of "police abolitionism" as it has been proposed in the United States, with new impetus after the killing of George Floyd by the Minneapolis police.[29] Non-American penal abolitionism has included within its agenda and proposals the abolishing of prisons and other institutions, but it has also included the abolition of an area of law and of a way of thinking about social life—i.e., penal (i.e., criminal) law.[30] These penal abolitionists have criticized looking at many social situations as crimes and through the lens of criminal law.[31] For these thinkers, criminal law has an impoverished view of social life and of human beings that distracts "from more serious problems and injustices" and justifies "inequality and relative deprivation."[32]

For instance, if someone punches a friend, penal abolitionists would characterize this situation as a conflict between two people. By looking at this issue through the lens of criminal law and calling this an assault, the state uses "a process where conflicts have been taken away from the parties directly involved and thereby have either disappeared or become other people's property."[33] Viewing the situation this way immediately triggers notions about individual blame and individual victimhood, the intervention of a whole set of institutions and professions—police, office of the prosecutor, defense attorneys, probation departments, courts, etc.—and a set of processes, measures and responses—arrest and booking, charging, diversion, criminal conviction, etc. Penal abolitionists have called for looking at this situation and any other social situations in which there is a conflict between people through broader, kinder and more forgiving lens.[34]

The second point is that European and Latin American penal abolitionism has been animated by a variety of social and political philosophies.[35] According to Prof. Roberts, among the central tenets of (American) abolitionist philosophy are that carceral punishment

[28] *See, e.g.*, DAVIS, ARE PRISONS OBSOLETE?, *SUPRA* NOTE ; Berger et al., *supra* note ; Unprison, *The Resolution. Anti-Prison People's Movement Assembly,* June 24th, 2010, available at https://unprison.com/formerly-incarcerated-peoples-movement/the-resolution/ <last visited on June 23, 2020>.

[29] *See, e.g.*, Episode 29 — Mariame Kaba, AIRGO (Feb. 2, 2016), https://airgoradio.com/airgo/2016/2/2/episode-29-mariame-kaba [https://perma.cc/CG2Y-E4KE]); National Lawyers Guild, Statement in Support of #8toAbolition, June 10, 2020, available at https://www.nlg.org/nlg-statement-in-support-of-8toabolition/ <last visited on June 23, 2020>; The #LetUsBreath Collective, available at https://www.letusbreathecollective.com <last visited on June 24, 2020>.

[30] *See, e.g.*, DE HAAN, *SUPRA* NOTE , at 8-9; CHRISTIE, *SUPRA* NOTE ; HULSMAN & BERNAT DE CELIS, *SUPRA* NOTE ; MATHIESEN, POLITICS, *SUPRA* NOTE ; Christie, *Conflicts as Property*, *supra* note .

[31] *See, e.g.*, DE HAAN, *SUPRA* NOTE , at 9-10; CHRISTIE, *SUPRA* NOTE ; HULSMAN & BERNAT DE CELIS, *SUPRA* NOTE ; Nils Christie, *Conflicts as Property*, *supra* note ; Louk Hulsman, *Critical criminology and the concept of crime,* 10 CONTEMPORARY CRISES 63 (1986).

[32] *See, e.g.*, DE HAAN, *supra* note , at 27.

[33] Nils Christie, *Conflicts as Property*, *supra* note , at 1.

[34] CHRISTIE, *supra* note ; HULSMAN & BERNAT DE CELIS, *supra* note .

[35] On different strands within European penal abolitionism, *see, e.g.*, DE HAAN, *supra* note , at 179; MARTÍNEZ SÁNCHEZ, *supra* note , at 25-32; Gerlinda Smaus, *Gesellschaftsmodelle in der abolitionistischen Bewegung*, 18 KRIMINOLOGISCHES JOURNAL 1 (1986).

can be tracked back to the racial capitalist regime and has been expanded to maintain such a racial capitalist regime.[36] Her underlying social philosophy seems to be thus nurtured by Critical Race Theory and Marxism[37] and it is possible that these theories have been prevalent among American prison abolitionists so far.[38] However, it is important to avoid even the appearance on drawing in just two traditions, when in fact penal abolition can be justified from a large number of intellectual traditions. Non-American penal abolitionists have presented a different range of social theories that have varied from author to author and that have included Marxism,[39] humanist phenomenology,[40] localism combined with a position against professionals and their expertise,[41] and Christian thought and categories.[42] Some non-American penal abolitionists have also argued that abolitionists need to turn not only to social, but also to moral theory to make explicit and improve the quality of their own moral judgements and to discuss whether a just society includes punishment.[43]

This contrast could be an opportunity for a constructive conversation between these varieties of penal abolition.[44] The American prison abolitionist movement might be enriched and benefit from engaging with a different variety of social and political philosophies. At the same time, penal abolitionists and others could also engage in critical analysis of why race has not figured out more prominently in non-American penal abolitionism.[45] In this regard, American penal abolitionism and other critical analyses have powerfully explored the continuities and discontinuities between slavery, Jim Crow and

[36] Roberts, *Abolition Constitutionalism*, *supra* note , at 7-8.

[37] *See, e.g.*, DAVIS, ARE PRISONS OBSOLETE?, *supra* note , at 44-46, 103. For introductions to Critical Race Theory, see, e.g., CRITICAL RACE THEORY (Kimberlé Crenshaw et al. eds. 1995); Devon Carbado, *Critical What What?*, 33 CONNECTICUT LAW REVIEW 1593 (2011); Cheryl Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215 (2002).

[38] *See, e.g.*, Roberts, *Abolition Constitutionalism*, *supra* note , at 46 and 120; DAVIS, *supra* note ; Mariame Kaba & John Duda, *Towards the Horizon of Abolition: A Conversation with Mariame Kaba*, NEXT SYS. PROJECT (Nov. 9, 2017), https://thenextsystem.org/learn/stories/towards-horizon-abolition-conversation-mariame-kaba [https://perma.cc/RJ3Q-P6R4]); Fred Moten & Stefano Harney, *The University and the Undercommons: Seven Theses*, 22 SOC. TEXT 101, 114-115 (2004). Other theoretical trends have also fed recent prison abolitionist analysis in the United States include feminist theory (regarding which the work of Angela Davis is also seminal) and queer theory. *See, e.g.*, LIAT BEN-MOSHE, DECARCERATING DISABILITY. DEINSTITUTIONALIZATION AND PRISON ABOLITION (2020); CHARLENE CARRUTHERS, UNAPOLOGETIC: A BLACK, QUEER, AND FEMINIST MANDATE FOR RADICAL MOVEMENTS (2018); BETH RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE AND AMERICA'S PRISON NATION (2012); EMILY L. THUMA, ALL OUR TRIALS: PRISONS, POLICING, AND THE FEMINIST FIGHT TO END VIOLENCE (2019).

[39] MATHIESEN, POLITICS, *supra* note .

[40] HULSMAN & BERNAT DE CELIS, *supra* note . For interpretation of Hulsman's work in this direction, see, e.g., ZAFFARONI, *supra* note , AT . The perspective can be understood as phenomenological in the sense that it emphasized "… structures of consciousness as experience from the first-person point of view." *Phenomenology*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at https://plato.stanford.edu/entries/phenomenology/ <last visited on July 15, 2020>.

[41] CHRISTIE, *supra* note , Nils Christie, *Conflicts as Property*, *supra* note .

[42] For readings of Louk Hulsman's and Nils Christie's work in this direction, see VINCENZO RUGGIERO, PENAL ABOLITIONISM 105-127 (2010); and Charosky & Langer, *supra* note , respectively.

[43] DE HAAN, *supra* note , at 32-35, 102-129.

[44] Non-American penal abolitionists have been aware of these differences. *See, e.g.*, DE HAAN, *supra* note , at 74.

[45] *See, e.g.*, MATHIESEN, *supra* note , at 2: "Several topics, especially in the US, were not as relevant when the book was published in 1974 …. This especially concerns *gender* and *race* in prisons."

mass incarceration in the United States and possible connections between slavery abolitionism and penal abolitionism.[46] Similar explorations could be pursued in other countries between current penal system practices and institutions and national prior oppressive origins, practices and institutions.

There have also been critiques of non-American penal abolitionism from a feminist perspective.[47] But the American feminist prison abolitionist literature has been particularly rich and could be discussed and applied to new realities outside of the United States.[48] Similarly, the American prison abolitionist literature has analyzed connections between disability and incarceration that could also be explored further in other countries.[49]

Third, non-American penal abolitionism, especially the work by Thomas Mathiesen, offers a theory of political and group action that could help American prison abolitionists think about their own practice. According to Mathiesen, the central challenge for abolitionist organizations as they engage in their political agenda is how to keep their radical positions and their loyalty to relevant social actors such as prisoners, while neither being coopted/"normalized", nor being considered as irrelevant by the authorities and other audiences and groups in their environment. For Mathiesen, one of the answers lies in his concept of "the unfinished."[50] The basic idea is that when pressed for the articulation of alternatives to the existing social order, these groups should resist articulating fully finished—i.e., fully formed or laid out—messages or alternatives because fully formed or laid-out messages or alternatives may be either easily absorbed by the existing system or rejected as too radical. Instead, these abolitionist and other radical groups should articulate "unfinished" messages that contradict the existing order, while not being as easily co-opted or dismissed.[51] For instance, these groups may propose or support the abolition of forced labor for alcoholic houseless people—as KROM did in Norway in the late 1960s/early 1970s—without laying out a fully formed, "finished" proposal about what to do with these people.

There are many other concepts, ideas and distinctions in this theory of political and group action that American prison abolitionists might find useful. Just to give a few illustrative examples, KROM defined itself not as "a kind humanitarian organization"—i.e., one engaged in practical projects giving aid to the individual inmate—but as a political

[46] *See, e.g.*, ALEXANDER, *supra* note . ; DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); DAVIS, ARE PRISONS OBSOLETE?, *supra* note , at 22-39, 94-95; FORMAN, *supra* note ; DAVID M. OSHINKSY, *"WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1996); WACQUANT, *supra* note ; James Forman Jr., *Harm's Way: Understanding Race and Punishment,* BOSTON REV., Jan./Feb. 2011.

[47] *See, e.g.*, Gerlinda Smaus, *Feministiche Beobachtung des Abolitionismus*, 21 KRIMINOLOGISCHES JOURNAL 182 (1989); Rene van Swaaningen, *Feminismus und Abolitionismus als Kritik der Kriminologie,* 21 KRIMINOLOGISCHES JOURNAL 162 (1989).

[48] *See* works cited *supra* note .

[49] BEN-MOSHE, *SUPRA* NOTE .

[50] For use of this concept by an insightful American penal abolitionist, see Allegra McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives,* 8 UNBOUND 109 (2013); McLeod, *Envisioning, supra* note .

[51] MATHIESEN, POLITICS, *supra* note , at 47-61.

organization.[52] According to Mathiesen, defining themselves as a political rather than as a humanitarian organization enabled KROM not to be co-opted by authorities and the existing penal system given the compromises with authorities that humanitarian projects—i.e., projects that provide individual help to prisoners—may entail.[53] Mathiesen also argued that besides an "abolition policy", these groups need a "defensive policy" that "… consists … in working to prevent new systems of the kind you are opposing from being established."[54] For instance, KROM advocated for the abolition of a youth detention center and when in response the authorities redirected their efforts to the construction of a new closed youth prison, KROM adopted a defensive line to stop this new project moving forward.[55]

Mathiesen also criticized the notion of "non reformist reforms" that has been prominent among American prison abolitionists, including Prof. Roberts.[56] According to Berger et al. and Prof. Roberts, non-reformist reforms are "those measures that reduce the power of an oppressive system while illuminating the system's inability to solve the crises it creates."[57] Mathiesen explains that this distinction was introduced by André Gorz to analyze workers' strategies.[58] He finds it theoretically interesting but argues that non reformist reforms—such as reforms to give workers to decide over working conditions—are also not "guaranteed against being absorbed by and consolidating the main system…."[59] Instead, Mathiesen argues for using the previously described concept of "the unfinished". In contrast to Mathiesen, an abolitionist like de Haan has criticized penal abolitionism as too rigid as a political strategy because it denies reformist reforms any significance, except in the maintenance and legitimation of present criminal justice. This would be a mistake because, according to de Haan, a country like the Netherlands had low levels of incarceration after World War II because judges had a negative view of imprisonment based not on abolitionist or radical beliefs, but on mainstream views on theories of punishment. Instead of an abolitionist political strategy, de Haan argued for a pragmatic one, combined with a critique of punishment and a radical theory perspective.[60]

Mathiesen also advocated for action research, as a way to approach the relationship between the production of knowledge by academics and others and political action.[61] According to him, "… *the loyalty is towards the action, and not towards the theory…. What is important here, is the feed-back process from practical/political activity, through a systematic gathering of information, back to the practical/political activity.*"[62] This

[52] *ID.* at 96-99; 112-115.
[53] E.g., *ID.* at 111-115.
[54] *ID.* at 131.
[55] *ID.* at 131-132.
[56] *See, e.g.,* Berger et al., *supra* note ; McLeod, *Envisioning, supra* note , at 1616; *Roberts, supra* note , at 114 et seq. In contrast, Angela Davis has questioned the very distinction between abolition and reform. *See History is a Weapon, supra* note .
[57] Berger et al., *supra* note ; *Roberts, supra* , at 114.
[58] MATHIESEN, POLITICS, *SUPRA* NOTE , at 231 (discussing ANDRÉ GORZ, STRATÈGIE OUVRIÉRE ET NÉOCAPITALISME (1964/1967)).
[59] *ID.* at 231-232.
[60] DE HAAN, *supra* note , at 78-80.
[61] *See, e.g.,* MATHIESEN, POLITICS, *supra* note , at 62.
[62] *ID.* at 63-64.

would mean that for American academic prison abolitionists, the production of knowledge or theory—such as abolition constitutional theory—should inform and give priority to prison abolitionist political action and not produce knowledge for its own sake.

I am not suggesting that any or all the aspects of this theory of political action are correct or that they could or should simply be "cut and pasted" by American penal abolitionists.[63] My point is that this is a rich theory of political action that could be further studied, discussed, criticized, and, when considered appropriate, used and put in practice in the United States.

The fourth point I would like to make about non-American penal abolitionism is that in the 1970s, 1980s and the early 1990s, it was in conversation with and part of a broader set of critical ideas to humanize and reduce the scope of the penal system—that included critical criminology and "criminal law minimalism."[64] The term "minimal criminal law" (*diritto penale minimo* in Italian, *derecho penal mínimo* in Spanish) was articulated by Italian philosopher of law Luigi Ferrajoli and used then to articulate a critical perspective of the penal system that was different from penal abolitionism and from "maximalist" conceptions of criminal law.[65]

For Ferrajoli, minimal criminal law includes, first, a paradigm of meta-theoretical justification of criminal law according to which criminal law is justified if, and only if, it is capable of achieving two goals: deterrence or, at least, the minimization of offenses against fundamental good and rights, and the minimization of arbitrary punishment.[66] In other words, "… it is not enough to justify punishment, which is itself an evil, in terms of the prevention of similar crimes on the part of the offender or others: this would take the form of a 'utilitarianism cut in half'…. Punishment, according to Ferrajoli, '… does not protect only the person harmed by the crime, but also protects the offender from informal public and private reactions'."[67] For Ferrajoli, minimal criminal law would also include a normative model composed by criminal law and criminal procedure principles that would make minimal criminal law the law of the weakest against the law of the strongest. It always protects the weakest: the injured party during the offense, the defendant during the criminal process, and the prisoner during the execution of the prison sentence. This model would be realized and realizable, but as a normative model there would always be a

63 On why concepts may not be "cut and pasted" between different legal systems and social orders, see Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. L.R. 1 (2004).

64 *See, e.g.*, the Italian volumes of the law review *Dei delitti e delle pene* that published articles on abolitionism, critical criminology and minimal criminal law.

65 *See* Luigi Ferrajoli, *Sul diritto penale minimo (risposta a Giorgio Marinucci e a Emilio Dolcini),* 123 IL FORO ITALIANO 125, 126 (2000) (explaining that he coined the phrase "diritto penal minimo" in a debate with penal abolitionism in 1985).

66 *See* LUIGI FERRAJOLI, DIRITTO E RAGGIONE (1989); Luigi Ferrajoli, *Diritto penale minimo,* 3 DEI DELITTI E DELLE PENE 443 (1985); Luigi Ferrajoli, *Crisi della legalità e diritto penale minimo, in* DIRITTO PENALE MINIMO 9, 9-10 (Umberto Curi & Giovanni Palombarini eds. 2002) [hereinafter *Crisi*].

67 TAMAR PITCH, LIMITED RESPONSIBILITIES: SOCIAL MOVEMENTS AND CRIMINAL JUSTICE 68 (John trans. 1995).

narrower or broader gap between the model and reality. Consequently, the normative model could be used to criticize and set a program of changes to existing penal systems.[68]

In the United States, apparently unaware of "minimalist criminal law" positions outside of the Anglo-American world, Douglas Husak has used the term to describe his theory of criminalization that he articulates to criticize and provide a framework to eliminate overcriminalization and contract the infliction of state punishment.[69] According to Husak, for punishment to be legitimate it must criminalize only conduct that produces nontrivial harm, is morally wrongful, and is deserving of punishment.[70] Every person has a right not to be punished that puts the burden of proof on the need to criminalize conduct on those who want to criminalize it.[71] Husak also adds as legitimacy requirements for criminalization that there has to be a substantial government interest in enacting the criminal law, that the law directly advances the government's objective and that is no more extensive than necessary to achieve its purpose.[72]

There are important differences between Ferrajoli's and Husak's conceptions of "minimalist criminal law" that I cannot discuss here and I do not fully agree with either of their theories. For instance, as I will explain later in Section IV, I think that both accounts are incomplete and that "minimal criminal law" should include additional requirements to be applied in the United States and elsewhere. My main points now are showing that 1) there is conceptual and normative space for positions and theories that require a radical humanization and substantial reduction of the footprint of the penal system in the United States, but not its abolition;[73] and 2) these theories have been in conversation with penal abolitionism for a long time, at least outside of the United States.[74]

Going back to the 1970s, 1980s and 1990s outside of the United States—though many, if not most, of these conversations and exchanges took place in Europe even before I became an undergraduate law student in Argentina and there were criticisms between these different schools of thought[75]—my sense as a student from the Argentinean periphery or

[68] *See* sources cited *supra* note , and Luigi Ferrajoli, *Per un programma di direitto penale minimo, in* LA RIFORMA DEL DIREITTO PENAL. GARANZIE ED EFFETTIVITÀ DELLE TECNICHE DI TUTELA (L. Pepino ed. 1993).
[69] HUSAK, *SUPRA* NOTE , AT 60, says that he "gratefully borrow(s)" the term from ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW (4th ed. 2003). The first edition of Ashworth's book from 1991 only mentions "a minimalist system of criminal law" once, while discussing complicity. *See* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 363 (1991). In its most recent edition, "minimalist criminal law" refers to: 1) respect of human rights, including the proportionality principle; and 2) the recognition that punishment may cause great suffering, hardship, and impoverishment and must in most circumstances be a measure of last resort. *See*, JEREMY HORDER, ASHWORTH'S PRINCIPLES OF CRIMINAL LAW 72-74 (9th ed. 2019).
[70] HUSAK, *supra* note , AT 55-1.
[71] *ID.* at 92-103.
[72] *ID.* at 120-177.
[73] For critical discussion of to what extent other theories of criminalization and criminal law would require substantially reducing the scope of punishment and criminal law in the United States, see, e.g., HUSAK, *supra* note , AT 178-206 (discussing law and economics, utilitarianism and legal moralism).
[74] HUSAK, *supra* note , AT 78, also briefly refers to abolitionism.
[75] *See, e.g.*, Massimo Pavarini, *Il sistema di guistizia penale tra riduzionismo e abolizionismo*, 3 DEI DELITTI E DELLE PENE 525 (1985). *See also* Hernán Charosky & Máximo Langer, *Bosquejo para una historia de la historia*, 8 NO HAY DERECHO 16 (1992) (criticizing two of the main critical criminology works as essentialist).

semi-periphery was that penal abolitionists, critical criminologists, and criminal law minimalists saw themselves as simpatico with each other, rather than as ideological or political competitors, opponents or enemies.[76] In our present world of 2020 in which ideological and political intolerance seem to be on the rise and in which it might be tempting to be suspicious, dismissive and even accusatory and aggressive towards those whose ideas do not exactly mirror one's own, it is important to highlight that these approaches share substantial points in their respective agendas.

For instance, American penal abolitionists have proposed, among other measures, the decriminalization or legalization of drug use, the decriminalization of sex workers, the decriminalization of undocumented immigration, the elimination of violence against women (who may otherwise find themselves with no realistic alternative but to kill their abusers), opposition to the expansion of criminal law through the creation of new crimes, stopping the widespread use of stops and frisks to manage communities of color and low-income communities, eradication of cash bail, the repeal of harsh mandatory minimums even for violent crimes, the end of solitary confinement, the abolition of the death penalty, stopping the construction of new prisons, organizing to free people from prison, divesting resources from police and the penal system to education, health, and housing, democratizing political and economic institutions, and the adoption of alternative nonpunitive conflict resolution mechanisms.[77] Criminal law minimalists would also support these proposals.[78]

In the last few years, U.S. prison abolitionists have earned various victories, including slowing down or stopping the construction of new prisons and reimagining conceptions of public and community safety following the killing of George Floyd and others. However, as important as prison abolitionists' social and political organization has been,[79] it's important to recognize that they have not achieved these victories alone. Rather, they have done so through alliances and alignment with other peoples and groups that may not have as their goal a "society without prisons" or "abolishing the police", but agree that the penal system is structurally discriminatory and greatly oversized in the United States.[80]

[76] *See, e.g.*, MARTÍNEZ, *supra* note , 33-39; ZAFFARONI, *supra* note (discussing throughout his book both minimalist criminal law and penal abolitionism); DE LOS DELITOS Y DE LAS VÍCTIMAS (Julio B. J. Maier, ed., 1992) (including abolitionist and criminal law minimalist texts in the collection); Stanley Cohen, *Preface, in* DE HAAN, *supra* note , at xiii, xiv (1990); DE HAAN, *supra* note , at 10 and 75-76.

[77] *See, e.g.*, DAVIS, ARE PRISONS OBSOLETE?, *supra* note , at 20, 108-111, 113-114; Berger et al. , *supra* note ; McLeod, *supra* note , at 1615, 1633-1636; *Roberts, supra* , at 115-116.

[78] *E.g.*, Ferrajoli, *Crisi*, *supra* note , at 11-12, 15, 19; Husak, *supra* note ; HUSAK, LEGALIZE THIS!: THE CASE FOR DECRIMINALIZING DRUGS (2002).

[79] Berger et al., *supra* note .

[80] *See* in this regard ANGELA Y. DAVIS, ABOLITION DEMOCRACY 102-103 (2005) on the "profound lessons" of the 1970s victories in prisoners' campaigns: "The successful coalescence of so many individuals, who came together across all kinds of differences, schism, and borders—racial, class, political, geographical—was quite extraordinary. The creation of communities of struggle remains a major challenge today."

II. Challenges for Penal Abolitionists

There have been various challenges to American and non-American penal abolitionism.[81] In this section, I would like to explore three of the challenges that I find the most persuasive and that explain why, despite considering penal abolitionism a positive and powerful social movement and set of ideas, I would consider myself closer to minimalist criminal law. Before I proceed with this analysis, I would like to make the following points.

First, by criminal law minimalism I mean a theory under which there is still a penal system that has armed public law enforcement, punishment, and for the time being imprisonment as tools to deal with social harm. However, it uses these tools fairly and only when no other tool could advance the goal of preventing or reducing harm. This position would require the United States to radically reduce its confined population, to reimagine and transform law enforcement and incarceration, and to use a panoply of nonpunitive tools to prevent and deal with harm to make the use of criminal law as unnecessary as possible.

Second, the challenges I am discussing in this section do not mean "to trash" or be dismissive of penal abolitionism. Regardless of what one thinks about these challenges, the agendas of changes that criminal law minimalism and penal abolitionism propose substantially overlap as already discussed. But it is important to engage in this type of critical discussions to identify the best way forward to advance public and community safety.

A. Harmful Conduct

The first familiar challenge to penal abolitionism is what to do with harmful conduct without police or other form of armed public law enforcement and prisons or other forms of involuntary confinement or punishment.[82] This conduct includes, first, situations that constitute serious ordinary crime, such as homicides, rape and other sexual assaults, domestic violence, aggravated assaults, home invasions, certain robberies, and arson, just to mention a few possible examples. It may also include other nontrivial harmful behavior.

In some societies, these challenges have also included how to deal with mass atrocities such as those committed in Africa (e.g., the genocide in Rwanda, apartheid in South Africa, etc.), Europe (e.g., the Holocaust, Srebrenica, etc.), Latin America (e.g., with the thousands of "disappeared", tortured and killed, etc.), and elsewhere.[83]

[81] *See, e.g.*, DE HAAN, *supra* note , at 85-87; Nicolas Carrier and Jusin Piché, *Blind Spots of Abolitionist Thought in Academia: On Longstanding and Emerging Challenges*, XII CHAMP PÉNAL 1 (2015); Roger Lancaster, *How to End Mass Incarceration*, Jacobin, 8.18.2017, https://www.jacobinmag.com/2017/08/mass-incarceration-prison-abolition-policing (last visited on June 23, 2020).

[82] *See, e.g.*, Carrier and Piché, *supra* note , at 3 et seq. (referring to this type of challenge as the challenge of the "dangerous few").

[83] *See, e.g.*, STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (2009).

Faced with this first set of challenges, penal abolitionists have engaged in four main types of responses: *backtracking to criminal law minimalism*, *avoiding*, *tackling now*, and *postponing until a new society is created*.

By *backtracking to criminal law minimalism* I refer to a set of penal abolitionists that do not take the ideal of "a society without prisons" all the way down and explicitly or implicitly accept imprisonment as punishment, at least in response to serious crime.[84] In the Argentine context, for instance, this has happened with scholars who have defined themselves as penal abolitionists but have accepted and even advanced punishment for those who have participated in the commission of mass atrocities.[85] This set of people can be understood not actually as penal abolitionists, but as embracing some version of criminal law minimalism.[86] For them, penal abolitionism may be an ethos or a "sensitizing theory",[87] but does not literally mean the abolition of prisons, police and other institutions of the penal system.

I would also put in this category at least some of the penal abolitionists that would respond to the harmful-conduct challenge with an argument like this: "It is not important at this point to decide whether there are certain people who need to be in prison. Maybe there are. But if so, we are talking about a small minority of the people currently behind bars. Let us imagine a future without prisons and start working toward it. If we ever get to a point where prison populations are, say, 10% of what they are today, then we will need to have a conversation about that last 10%."[88] To the extent that some of the people that articulate this response are implicitly acknowledging that involuntary confinement in the form of prisons would still have to play a role regarding this remaining or residual 10%, I would characterize this position as *backtracking to criminal law minimalism*.

If instead people articulating this response are not implicitly granting the possible use of prisons for the remaining cases, I would characterize their position as *avoiding* answering this challenge.[89] By *avoiding* I also refer to a set of penal abolitionists that concentrate in nonserious criminal cases in their analysis and proposals and avoid the serious ones and the questions that they raise.[90] This may include people who may be true penal abolitionists—that, for instance, prefer not to deal with serious criminal cases for political and strategic reasons—or criminal law minimalists.

84 *See, e.g.*,KNOPP ET AL., *supra* note , at 19, 36, 129-30.

85 ZAFFARONI, *supra* note ; Supreme Court of the Republic of Argentina, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc. (Poblete) -causa N° 17.768-", June 14, 2005, *Fallos:* 328:2056, concurring opinion by Justice E. Raúl Zaffaroni (holding unconstitutional amnesty laws that prevented human rights prosecutions).

86 *See, e.g.*, Carrier and Piché, *supra* note , at 3: "… the irresolution of the problem of the 'dangerous few' appears to transform abolitionism into a *de facto* minimalist posture."

87 See, e.g., Sebastian Sheerer, *Towards abolitionism*, 10 CONTEMPORARY CRISIS 5, 10 (1986).

88 I am thankful to David Sklansky for fleshing out this position to me.

89 Or *postponing until a new society is created* that I will discuss later.

90 *See, e.g.*, DE HAAN, *supra* note , at 91: "… the response of most abolitionists to the criticism that their proposals are not feasible … has been a deafening silent."

More interestingly, Mathiesen has partially avoided these challenges by using the previously described concept of the *unfinished*, according to which abolitionists should not fully lay out alternatives that would be considered too radical and thus ignored or would be absorbed by the system. As interesting as this political strategy is, it avoids the challenges to their position about what to do with (seriously) harmful behavior.

By *tackling now*, I refer to penal abolitionists that have addressed what they would do with at least some seriously harmful conduct. For instance, Angela Davis has brought up as an example of a nonpunitive and different way to deal with serious crime the case of Amy Biehl, in which the parents of an American young woman who was killed in South Africa adopted two of their daughter's killers.[91] Nils Christie has said that instead of punishing a commander of a concentration camp in which 1.5 million people were killed during the Holocaust, we should hold a hearing to establish what happened, communicate our repulsiveness to the commander and let him go away in shame.[92] Another example may be the way the #LetUs Breath Collective recently responded to the history of systematic practice of torture by the Chicago police, by appealing neither to criminal prosecution, nor to civil litigation, but by creating a space, "Freedom Square", without police and in which they provided meals, clothing, books, children play spaces, etc.[93] There are also ongoing programs in the United States that use transformative justice—that has been defined as an approach that "seeks to respond to violence without creating more violence and/or engaging in harm reduction to lessen the violence"[94]—to deal with serious crimes such as child abuse and sexual assault.[95]

Without getting into a discussion of these individual examples, I support the creation and expansion of programs and initiatives that may help to prevent and address interpersonal harm without punitive interventions.[96] In the context of mass atrocities, there has been a long-standing discussion on this very issue, with South Africa being a classical example of a country that dealt with mass atrocities with an approach that emphasized truth and reparations rather than imprisonment and punishment.[97]

However, there is a large difference between being open to dealing with some of these situations without imprisonment and other penal interventions and dealing with *all* of these situations this way. Despite penal abolitionists' skepticism about the ability of the penal

[91] DAVIS, ARE PRISONS OBSOLETE?, *supra* note , at 114-115.
[92] Nils Christie, *Peace or punishment?*, *in* CRIME, TRUTH AND JUSTICE 243, 243-244 (George P. Gilligan & John Pratt eds. 2004).
[93] *See, e.g.*, Allegra McLeod, *Envisioning*, *supra* note , at 1613-1614.
[94] Mia Mingus, *Transformative Justice: A Brief Description* TRANSFORM HARM, https://transformharm.org/transformative-justice-a-brief-description/ (last visited June 15, 2020).
[95] https://batjc.wordpress.com and http://www.timetospringup.org.
[96] For a brief guide on some of these programs and efforts, see UCLA School of Law Criminal Justice Program, *What Do We Do After We Defund the Police* (June 2020), https://law.ucla.edu/sites/default/files/PDFs/Academics/What%20Happends%20After%20We%20Defund%20Police--June%202020.pdf (last visited on June 29, 2020). However, it is important to notice that the results of experiments with deformalization, delegalization and decentralization of litigation have been mixed at best, according to some non-American abolitionists. *See, e.g.*, DE HAAN, *supra* note . , at 85-86. For a positive assessment of the empirical studies on restorative justice programs, see Braithwaite, *infra* note .
[97] *See, e.g.*, RATNER ET AL., *supra* note .

system to advance its stated goals,[98] it is hard to imagine, at least for the time being, how one could deal with a whole set of these cases without criminal law, armed public law enforcement and involuntary confinement as one of the possible responses. A justification of why this is necessary should be contextual and grounded in and decided by affected communities.[99] Theories of law enforcement and theories of punishment—rehabilitation, retribution, deterrence, incapacitation, social norms maintenance, and mixed combinations thereof—are just a set of arguments that can be brought up in this discussion, as are different moral and constitutional principles that regulate legislation, criminalization, investigation, prosecution and punishment.[100] There are also discussions about what society members owe to each other and what is society's responsibility in individual harmful incidents or social conflicts.

Given the word limits and goals of this article, this is not the place to discuss these issues and, anyway, this has to be discussed in specific contexts by affected communities and may also require different considerations for different crimes. But since this article is discussing American penal abolitionism at a time in which the United States is grappling with the continuing survival of individual and structural racism, it is important to mention that the lack of criminal law enforcement and criminal punishment may promote racial inequality. For instance, Jill Leovy's book "Ghettoside" suggests how the abysmally low homicide clearance rate in South Central L.A. promotes vigilantism and self-help in the minority communities there.[101] Similar phenomena have been documented, studied and discussed in other places around the world.[102]

It is also important to highlight that the demand for punishment against harmful conduct has been a long-standing demand of many Black leaders and the civil rights movement in the United States that have seen criminal law and criminal punishment, including prison, as a fundamental tool to fight against white rule and white supremacy.[103] This was the explicit demand by Black leaders, intellectuals and civil rights organizations, like Ida B.

[98] See, e.g., McLeod, *supra* note , at 1638-1643.

[99] *See, e.g.,* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011). Affected communities would have legitimacy to discuss these issues as long as these communities are democratic and respect the rights of minorities within them.

[100] For a review of empirical studies on deterrence and law enforcement, higher punishments and labor market opportunities, see Aaron Chalfin and Justin McCrary, *Criminal Deterrence: A Review of the Literature,* 55 JOURNAL OF ECONOMIC LITERATURE 5 (2017).

[101] JILL LEOVY, GHETTOSIDE (2015).

[102] *See, e.g.,* ANGELINA SNODGRASS GODOY, POPULAR INJUSTICE: VIOLENCE, COMMUNITY, AND LAW IN LATIN AMERICA (2006).

[103] *See, e.g.*, FORMAN, *supra* note , at 11: "African Americans have *always* viewed the protection of black lives as a civil rights issue, whether the threat comes from police officers or street criminals."; RANDALL KENNEDY, RACE, CRIME AND THE LAW (1997); LISA L. MILLER, THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL (2008).

Wells-Barnett,[104] W.E.B. du Bois,[105] Al Sharpton,[106] and the American Civil Liberties Union ("ACLU").[107] This demand also underlay the passing of the Civil Rights Act of 1866,[108] of the Reconstruction Amendments in 1865-1870,[109] of the creation of the Department of Justice in 1870,[110] of the Dyer Anti-Lynching Bill supported by the NAACP,[111] of the creation of the Civil Rights Division within the Department of Justice in 1957,[112] of federal prosecutions in the "Mississippi Burning" case, and more recent prosecutions of James Ford Seale, James Bonard Fowler, and many others.[113] This can be interpreted as one of the demands behind the Rodney King riots following acquittals against police officers, and the protests after the killings of Eric Gardner, Michael Brown, Trayvon Martin, and many others.[114] Accountability, criminal prosecution and no impunity have also been among the recent demands by family members, members of Black Lives

[104] IDA B. WELLS-BARNETT, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES 21 (1892) ("The strong arm of the law must be brought to bear upon lynchers in severe punishment ….").

[105] W.E.B. DU BOIS SPEAKS: SPEECHES AND ADDRESSES 1920-1963, at 203 (Dr. Philip S. Foner ed. 1970) (letter published in the New York Times of November 10, 1946): "Five thousand of them in fifty years have been lynched by mobs without trial and no lyncher has been punished; because as the attorney general of the nation admits, the law gives him no adequate ground on which to prosecute."

[106] *Jena 6 and the Role of Federal Intervention in Hate Crimes and Race-Related Violence in Public Schools: Hearing before the H. Comm. on the Judiciary*, 110th Cong. 42-43 (2009) (statement of Reverend Al Sharpton, President, National Action Network). *See also* J. Clay Smith, Jr., *Lynching at Bensonhurst: A Bibliographic Essay*, 4 HOW. SCROLL SOC. JUST. L. REV. 97, 145 (2001).

[107] *Antilynching: Hearing on H.R. 41, H.R. 57, H.R. 77, H.R. 223, H.R. 228, H.R. 800, and H.R. 278 ... H.R. 1709 ... H.R. 3488, H.R. 3618, H.R. 3850, H.R. 4155, and H.R. 4577… H.R. 4528 before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 80th Cong. 99 (1948) (Memorandum presented by Carl W. Berueffy on behalf of the American Civil Liberties Union, New York 10, N.Y., with regard to pending antilynching bills).

[108] Civil Rights Act of 1866, ch. 31, 14 Stat. 27. *See* John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135 (1990).

[109] *See, g.., STUNTZ, supra* note , at 99-128.

[110] *About DOJ*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/about (last visited June 30, 2020) (describing the need for and creation of the department in 1870).

[111] *NAACP History: Dyer Anti-Lynching Bill*, NAACP, https://www.naacp.org/naacp-history-dyer-anti-lynching-bill/ (last visited June 27, 2020).

[112] Senator Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POL'Y REV. 211, 211 (2008); Wan J. Kim, Assistant Attorney General for the Civil Rights Div., Remarks on The Department of Justice's Civil Rights Division: A Historical Perspective as The Division Nears 50 (March 22, 2006), https://www.justice.gov/sites/default/files/crt/legacy/2008/10/21/historical_perspective.pdf (providing a history of the Division and its functions).

[113] *U.S. Department of Justice Civil Rights Division Accomplishments, 2009-2012*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/us-department-justice-civil-rights-division-accomplishments-2009-2012 (last visited June 30, 2020).

[114] John Lewis, *Michael Brown, Eric Garner, and the 'Other America',* THE ATLANTIC (Dec. 15, 2014), https://www.theatlantic.com/politics/archive/2014/12/michael-brown-eric-garner-other-america-john-lewis/383750/ ("in some courts even the worst offenders can go free as long as they wear a badge"); Linda Poon & Marie Patino, *CityLab University: A Timeline of U.S. Police Protests*, BLOOMBERG.COM (June 9, 2020, 10:39 AM), https://www.bloomberg.com/news/articles/2020-06-09/a-history-of-protests-against-police-brutality.

Matter and other groups,[115] and people's protests for the killings of Ahmaud Arbery, Breonna Taylor, and George Floyd.[116]

Other measures and processes are also necessary to bring justice and address the underlying causes that enable harm by the police and private individuals, but these demands have plausibly assumed that law enforcement and punishment, including involuntary confinement, may contribute to bring equal justice under the law, the future protection of the rights and well-being of individuals and communities (including individuals and communities of color), or both.

Outside of the United States, in the context of mass atrocities, those affected by them, human rights groups and many other people have also demanded punishment, typically in the form of involuntary confinement, against those who participated in them. These demands have also plausibly assumed that impunity is in conflict with justice, that punishment may contribute to the future protection of rights, or both.[117] The same reasoning would apply to other crimes committed by the powerful, such as white collar and corruption.[118]

This is a defense neither of anything close to mass incarceration, nor of overusing and overspending on penal responses to social problems, nor of current policing and prisons in the United States, which should be radically different and more humane.[119] This is also not an argument against combining punishment with other nonpunitive approaches to justice in response to harmful conduct or against fully replacing punishment for nonpunitive approaches when certain conditions are met.[120] Rather, it is an argument for why fully discarding criminal law enforcement, involuntary confinement and punishment as social responses to harm may be unfair, inhumane and unprotective of individuals and communities, including individuals and communities of color.

115 *See, e.g.*, Alicia Garza, NYTimes, *A discussion about how to reform policing*, moderated by Emily Bazelon, ("Most immediate, we need accountability for the death of George Floyd. Increasing the charges to second-degree murder for Derek Chauvin, and also charging the other three officers involved, was really important."). Other people and groups within Black Lives Matter have not included criminal prosecution and punishment among their demands and within their agenda. *See, e.g.*, *A Vision for Black Lives: Policy Demands for Black Power, Freedom & Justice*, MOVEMENT FOR BLACK LIVES, https://policy.m4bl.org/ [https://perma.cc/9GJ5-HNKL]; Platform, MOVEMENT FOR BLACK LIVES, https://policy.m4bl.org/platform/ [https://perma.cc/BW55-7Y9V].

116 *See, e.g.*, Sherrilyn Ifill, NAACP Legal Defense Fund, A Late Show with Stephen Colbert, CBS, June 17, 2020 (referring to accountability, criminal indictment, and a "regime of impunity").

117 *See, e.g.*, KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2011).

118 Ferrajoli, *Crisi, supra* note , at 12.

119 For recent critical analyses on policing, see, e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 12 YALE L.J. 2054 (2017); Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOSTON REVIEW, August 1, 2017, https://bostonreview.net/law-justice/tracey-l-meares-policing-public-good-gone-bad. On prisons, *see, e.g.*, Sharon Dolovich. *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 965 (2012).

120 These type of non-punitive approaches to supplement punitive approaches have been common around the world in transitional justice contexts. *See, e.g.*, RUTI TEITEL, TRANSITIONAL JUSTICE (1990).

The final response by penal abolitionists to the challenge of what to do with harmful behavior is *postponing until a new society is created.* I refer here to a set of responses by penal abolitionists that argue that not punishing social harm and abolishing prisons and other institutions are unthinkable or can be only partially implemented today because we need a radically different society. Once this new society is established, the argument goes, harmful conduct would be radically reduced and it would be possible to address it without police, prisons or punishment.[121] I will discuss this argument in the following subsection.

B. There Is No Way to Abolish Every Power Regime

Thirty years ago, my co-author and I raised a second, rarely discussed, challenge to penal abolitionism: even if prisons could be abolished, power regimes cannot.[122] Foucault challenged the notion that the shift from corporal punishment to prisons was a humanizing process because he argued that a society with prisons was a disciplinary society with its own power and knowledge regimes.[123] Similarly, if there were a transition from a society with prisons to a society without prisons, one could then question whether this would necessarily be a humanizing process and ask what the possible power and knowledge regimes of this society without prisons would be.[124]

This does not mean that all power relations are alike since some power relations may be fairer—e.g., more equal, freer, more humane—than others. But it does mean that the "society without prisons" that penal abolitionists call for would have power relations too. The plausibility and appeal of penal abolitionism as a program would thus depend on how fair this "society without prisons", "without punishment" or "without police" would be. I have to admit that even if I share many specific proposals and the broader goal to create fairer societies, I am skeptical about various penal abolitionist proposals in this regard for multiple reasons.

First, a number of penal abolitionists concentrate on penal policy and do not articulate a vision that covers other realms of social life or articulate their vision in such general terms that it is hard to know what to make out of it.[125]

Second, when they articulate such a vision or one can infer it through a close reading of their discourse, the vision has aspects that, at least for me, often sound unrealistic or

[121] *See, e.g.*, DAVIS, ARE PRISONS OBSOLETE?, *SUPRA* NOTE , at 105 et seq.; Moten & Harney, *supra* note , at 114; Arthur Waskow, Institute for Policy Studies, *Saturday Review*, 8 January 1972, quoted in FAY HONEY KNOPP ET AL., *supra* at 15-16 ("… the only full alternative is building the kind of society that does not need prisons.").

[122] Charosky & Langer, *supra* note .

[123] *See, e.g.*, MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1995). Penal abolitionists have relied on the work of Foucault on prisons. But they have generally not engaged with this broader theme of Foucault's work that every social relation is necessarily a power relation and every society presents its own set of power and knowledge regimes.

[124] Charosky & Langer, *supra* note (discussing this issue in Nils Christie's and Louk Huslman's work).

[125] *See, e.g.*, McLeod, *Envisioning*, *supra* note , at 1619: "The question of how precisely to achieve more equitable distribution … necessarily remains only partially described in existing abolitionist accounts."

unattractive. For instance, some abolitionists seem to suggest a return to small communities where everyone knows each other, has extra time, and is committed to spending time and energy to deal with conflicts with other people without intervention by the penal system.[126] But it is unclear in these accounts how we would transition from our mass, socially complex and specialized societies to these small communities. In addition, even if they may rely on the penal system less than larger societies, small communities can be very oppressive and exclusive in their own ways.[127]

Other penal abolitionists have argued for "cop-free" zones. One of the ideas behind is to have zones without surveillance—an understandable reaction given the justified frustration and anger against oversurveillance and overpolicing of vulnerable neighborhoods in the United States.[128] But even if there were restorative and transformative justice processes in these zones, it is not clear to me that these processes would always be better ways to deal with harm, including serious harm, than resorting at times to armed public law enforcement, arresting someone who has killed or seriously injured other human beings, prosecuting them and punishing them.

Another example is the strand of penal abolitionism that is articulated or combined with communist ideals. For instance, in *The Politics of Abolition*, published in the early 1970s, Mathiesen considered (then communist) Albania and China as possible model societies.[129] Mathiesen, who believes that abolition never ends, found them attractive models because, according to him, they had the potential to host radical revolutions that could maintain their radical character over time.[130] But these were authoritarian states that did not respect basic human rights and rule of law standards, did not have high levels of economic development or social justice, and had prisons. For similar reasons, the banner of communism that has been embraced by several prison abolitionists in the United States is not reassuring,[131] even if I readily recognize that many critiques to American capitalism can be fully compatible with a democracy and others forms of capitalism.[132]

I do not mean to dismiss all abolitionist visions of a future society. For instance, the Black Lives Matter Platform—that includes reparations, divestment from the police and investment in Black communities, economic justice, community control, and political

[126] For a close reading of Nils Christie in this direction, see Charosky and Langer, *supra* note .

[127] *See, e.g., id.* at 33-34 (discussing this issue in Nils Christie's work); Sally Merry, *The social organization of mediation in non-industrial societies: implications for informal community justice in the United States, in* 2 THE POLITICS OF INFORMAL JUSTICE 17 (Richard Abel ed. 1982).

[128] On oversurveillance and overpolicing, see, e.g., ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICAN MORE UNEQUAL (2018).

[129] MATHIESEN, POLITICS, *supra* note , at 221.

[130] *ID.* at 221.

[131] *See, e.g.*, Roberts, *Abolition Constitutionalism, supra* note , at 46: "Many abolition theorists … argue that creating a society without carceral approaches to addressing human needs requires radically overhauling the U.S. capitalist economy and replacing it with a … communist system."

[132] On different capitalist models, see, e.g., VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001); DEBATING VARIETIES OF CAPITALISM: A READER (Bob Hancké ed., 2009).

power, and is currently being updated—provides an attractive agenda of discussion and change that is often articulated with penal abolition.[133] But even if attractive versions of this platform were fully implemented, such a society would still have interpersonal harm and would require some sort of armed public law enforcement and punishment—as I will discuss in more detail in the next section.

In addition, given the variety of visions about how a "society without police and without prisons" would look like, another risk for penal abolitionist coalitions is finishing like popular fronts did in the 1930s where leftists and liberals within the same coalitions ended up attacking each other, and authoritarian extreme left and extreme right actors took advantage of these struggles to take over or increase their power.

Another danger is that penal abolitionists may succeed in abolishing institutions, but not being able to replace them with more appealing alternatives. For instance, some advocates of defunding the police will often say: "when we talk about defunding the police, we aren't calling just for the police to go away, we are calling for policing to be replaced with something different, like mobile response by unarmed mental health professionals." One danger here is that we can wind up with just the first half of this, the cutting programs part. It can be like what happened with the deinstitutionalization of mental health. The idea wasn't just to empty out mental hospitals; it was to replace them with community mental health services. But we just got the first part.[134]

As will be clearer later, I am making a plea here neither for superficial criminal justice reform, nor for the economic, political and social status quo.[135] The United States is a country where individual and structural racism are very much alive, of great inequalities and where large sectors of the population do not have access or adequate access to food, health care, education, housing, jobs, economic security, a healthy environment, etc., partly because of how the capitalist system has worked in this country.[136] I am also not "trashing" penal abolitionism. A criminal law minimalist position has to learn from and work with American prison abolitionism by articulating or integrating its agenda about the penal system within a broader economic, political, social and environmental agenda, and it has to think about how to implement its ideas through political action.

My point is rather that proposing or aspiring to "abolish the police" or create "a society without prisons" would require substantial rearrangement of not only the penal system, but other realms of social life like the political system, the economy and civil society. Penal abolitionists have not articulated such a vision or a clear vision for these realms, or when they have, their vision has, at times if not often, not been particularly realistic or attractive, at least for me. There are also risks in pursuing penal abolitionist agendas that, if they

[133] https://m4bl.org/policy-platforms/ (last visited on August 10, 2020).
[134] I am grateful to David Sklansky for fleshing this point out for me.
[135] For critiques of criminal justice reform, see, e.g., Paul Butler, *The System is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016).
[136] *See, e.g.*, MICHAEL CAVADINO AND JAMES DIGNAN, PENAL SYSTEMS: A COMPARATIVE APPROACH 50-61 (2005).

realized, could make us end up with a worse, rather than a better state of affairs than the current one.

C. Does the Ideal Society Not Have Punishment?

Another related but different point is that even if one agreed on an ideal alternative future society that would not rely on prisons, it is not clear that an ideal society would not or should not have punishment—including, at least for the time being, involuntary confinement.

Even if creating a radically different and more just society could substantially reduce harmful behavior, it is hard to imagine that harmful behavior would completely disappear. In addition, science fiction literature and movies like *Minority Report* suggest that the societies that have been imagined with perfect crime prevention and no crime are often dystopias rather than utopias—e.g., totalitarian societies in which there is no room for individual choice and individual liberties.

If harmful social conduct is a feature of social existence, should an ideal society only use responses to it other than punishment?

A first obvious alternative to punishment would be treatment and a public health lens to deal with the situations currently addressed through the category "crime." These are important perspectives that have a role to play in reducing mass incarceration in the United States. For instance, if someone has an addiction issue, it may be better public policy to offer them treatment rather than to punish them.

But it is unclear that a society in which treatment fully replaced punishment would necessarily be fairer than a society that used some punishment.[137] For starters, a treatment ideology considers people not as fully autonomous beings, but as patients. In this regard, a treatment ideology is paternalistic and may be in tension with liberal democratic values. A full replacement of punishment by treatment would also mean a replacement of lawyers by doctors, psychiatrists, psychologists, and other treatment professions, that have historically engaged in their own share of oppression and arbitrariness.[138] It is illustrative and telling in this regard that different literary works have created dystopian societies with treatment and without punishment.[139]

Another alternative to punishment would be "preventive" measures in response to allegedly dangerous people such as proven or suspected terrorists, murderers, or sex

[137] For a classical analysis, see Herbert Morris, *Persons and Punishment,* 52 THE MONIST 475 (1968).
[138] *See, e.g.*, MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (1965).
[139] *See, e.g.*, SAMUEL BUTLER, EREWHON (1872) (in which those who commit a crime receive medication and those who become ill receive punishment). Interestingly, MATHIESEN, *SUPRA* NOTE , AT 36, says: "I don't think I would like to live in Erewhon…. I would prefer the more simple-minded legal approach, but humanized more often than now by medically oriented men and women.""

offenders.[140] These measures might take the form of vastly expanded indeterminate civil commitment, quarantine, curfew, or high-tech surveillance.[141] The vast literature on the preventive justice experiments of the last few decades has showed that this approach conceives of human beings as dangerous-non dangerous instead of as autonomous beings, is in tension with civil liberties, and may be more punitive than formal punishment.[142] Its expansion would only increase these concerns.

Another alternative to criminal law and punishment and the penal system would be using different conceptions of justice and processes different from those of the penal system to deal with harm.[143] According to Allegra McLeod, "[j]ustice, for abolitionists, is grounded in paying careful attention to experienced harm and its aftermath, addressing the needs of survivors, and holding people who have perpetrated harm accountable in ways that do not degrade but seek to reintegrate, while understanding the root causes of wrongdoing and working to address them. Justice grounded in attending to how redress is experienced also aims to change the world as it is so that those affected have greater resources to heal and so that harm is less likely to befall others in the future."[144]

This approach to justice would include measures taken by individuals or the community without participation by the police to prevent harm from taking place or escalating.[145] It could also include variations on restorative justice and participatory justice.[146] It would also involve transformative justice that has been defined as "… a community-based approach to responding to violence or interpersonal harm that works, as Kaba and Kelly Hayes describe, to 'build support and more safety for the person harmed, figure out how the broader context was set up for this harm to happen, and how that context can be changed so that this harm is less likely to happen again'. Transformative justice differs from certain other experiments in restorative justice … in that [they] aspire to work toward broader social, political, and economic change."[147] Examples given of the success and superiority of this approach have included a survivor of sexual assault that rejected criminal prosecution and instead participated with her assaulter and facilitators in a transformative justice process that lasted over a year. At the survivor's request, the assaulter publicly acknowledged what he did and committed to political education on sexual violence and enthusiastic consent, and the collective that both the survivor and

[140] I am grateful to Carol Steiker for bringing this point up to me.
[141] On the line between civil and criminal measures, see, e.g., Jenny Roberts, *Gundy and the Civil-Criminal Divide,* 17 OHIO ST. J. CRIM. L. 207 (2019); Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997).
[142] *See, e.g.,* DIANE WEBBER, PREVENTIVE DETENTION OF TERROR SUSPECTS (2016);; Michael L. Perlin et al., *"On Desolation Row": The Blurring of the Borders between Civil and Criminal Mental Disability Law, and What It Means to All of Us,* 24 TEX. J. ON C.L. & C.R. 59 (2018); Eric Sandberg-Zakian, *Beyond Guantanamo: Two Constitutional Objections to Nonmilitary Preventive Detention,* 2 HARV. NAT'L SEC. J. 491 (2011).
[143] *See* DE HAAN, *supra* note , chapter 6.
[144] McLeod, *Envisioning, supra* note , at 1646.
[145] *Id.* at 1628-1630.
[146] On the tension and possibility of combining punitive and restorative justice approaches, see, e.g., JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION (2002); RESTORATIVE JUSTICE & CRIMINAL JUSTICE: COMPETITING OR RECONCILIABLE PARADIGMS (Andrew von Hirsch et al. eds. 2003).
[147] McLeod, *Envisioning, supra* note , at 1630-1631.

assaulter participated in adopted a curriculum on enthusiastic consent and sexual violence.[148]

There could be promise in these types of programs, and their effectiveness vis-à-vis the penal system should be (further) studied in a range of situations.[149] But even assuming, as I am happy to assume, that these programs are a better response to harm when certain conditions are met, what would communities and societies do with situations in which necessary conditions are not met? What would they do, for instance, if either the harm survivor or the harm inflictor is not willing or able to engage or genuinely engage into these types of processes? What would happen if the power or economic differences between survivors and harm inflictors were so large that one could question whether a survivor's willingness to participate in these processes is truly voluntary? What would communities and society do with situations in which the inflictor of harm has already inflicted harm or keeps inflicting harm to other people? What would happen if after going through these transformative justice processes the different participants are not transformed or are not satisfied with the results?

Again, I am not dismissing these programs, initiatives and experiences that may contribute to reimagining how we think about public and community safety and that are also part of a minimal criminal law agenda. My point here is to suggest that, promising as they might be, these programs are unlikely to fully replace punishment and its associated concepts and institutions. Even if sufficient resources were allocated to them and they could have a large scale, when the conditions listed in the previous paragraph were not present, other responses would still be necessary.

III. Penal Abolition and Criminal Law Minimalist Constitutionalism

The main proposal by Professor Roberts is her "abolition constitutionalism." Some non-American abolitionists have also tried to grapple with what doctrinal implications their abolitionist positions should have.[150] But perhaps due to the importance of constitutional discourse in the United States, American prison abolitionists have long used constitutional argument to advance their cause and Professor Roberts' article adds an important chapter to this tradition.[151]

This theory is original, important and particularly timely. Regardless of whether one embraces a penal abolitionist or a criminal law minimalist position, there is no question

[148] *Id.* at 1631-1632.

[149] For description and discussion of evaluations of restorative justice programs, see, e.g., BRAITHWAITE, *supra* note ; John Braithwaite, *Restorative justice and responsive regulation: the question of evidence*, RegNet Working Paper No. 51, School of Regulation and Global Governance (2016), available at http://johnbraithwaite.com/wp-content/uploads/2016/10/SSRN_2016_BraithwaiteJ-revised-51.pdf.

[150] *See, e.g.*, ZAFFARONI, *supra* note , at 96-99.

[151] On this tradition of relying on the U.S. Constitution by American prison abolitionists, see, e.g., KNOPP ET AL., *supra* note , at 17.

that the elimination of mass incarceration, the dismantling of individual and institutional racism, and more generally advancing a fairer society require a new constitutionalism in the United States. I argue that this includes not only a new constitutionalism by the courts, but also a broader conception of the constitution that encompasses other branches of government, a new popular constitutionalism and new social pact.

In this section, I discuss three sets of principles that, I maintain, would be part of a minimal criminal law constitutionalism. I think that most or all of them could also be part of abolition constitutionalism—though American prison abolitionists could discuss whether this is indeed the case.

A. The Anti-Subordination Principle and the Penal System

Professor Roberts criticizes *Flowers v. Mississippi* and the *Batson* doctrine that it applies. This doctrine limits the way peremptory challenges may be exercised by either party during voir dire in jury selection. By requiring proof of both a discriminatory effect and a discriminatory intent, this doctrine establishes a standard that is hard to meet and assumes an exclusively individualistic conception of discrimination, without leaving room for a systemic or institutional conception, including of systemic or institutional racism. Professor Roberts' account adds to these criticisms a historical-constitutional perspective about the role of all white juries in maintaining racial oppression in the United Sates.

This analysis is also consistent with a minimal criminal law constitutionalism that also embraces a strong anti-subordination principle. Such a principle is a requirement of justice and fundamental to reduce the uneven scope of the penal system in the United States. This principle could be extended to other areas of the penal system.[152] For instance, a natural extension would be to the selective prosecution doctrine where, despite evidence that Blacks are charged more heavily than whites,[153] the United States Supreme Court has also required proof of discriminatory effect and discriminatory intent.[154] This doctrine could have a larger effect on criminal convictions and sentences, since most criminal convictions in the United States are reached through guilty pleas rather than trials by jury.[155]

B. The *Ultima Ratio* Principle

I would also like to argue that a strong anti-subordination constitutional principle like the one Prof. Roberts proposes would only be one element within a criminal law minimalist constitutional law theory—and arguably within a penal abolitionist one. A way to bring this point home is that in the United States the incarceration of non Latinx whites in 2010

[152] *See* Alexandra Natapoff, *Atwater and the Misdemeanor Carceral State,* 133 Harv. L. Rev. F. 147 (2020) (applying it to the Fourth Amendment).
[153] *See, e.g.*, Sonja B. Starr & M.M. Rehavi, *Racial Disparity in Federal Criminal Sentences,* 122 J. POL. ECON. 1320 (2014); Sherod Thaxton, *Leveraging Death,* 103 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 475 (2013).
[154] *See, e.g., United States. v. Armstrong*, 517 U.S. 416; *United States. v. Bass*, 536 U.S. 862 (2002).
[155] On how the United States relies to a larger extent than most nations to reach criminal convictions without trial, see Máximo Langer, *Plea Bargaining, Conviction without Trial, and the Global Administratization of Criminal Convictions,* 4 ANNUAL REV. CRIM. (forthcoming 2021).

was 450 per 100,000.[156] This per capita incarceration rate would have made the United States the fourth most punitive country in the world around that time.[157] In other words, there is no question that there is continuing individual and structural racism and discrimination in the United States and that they affect punitiveness levels against African Americans and other minorities.[158] But the United States has become a very punitive society writ large.[159] This means that a strong anti-subordination principle like the one Prof. Roberts proposes may not suffice to substantially diminish and even less eliminate mass incarceration.

A principle that could be articulated, refined and used in this context as part of minimal criminal law constitutionalism is the principle of *ultima ratio*.[160] (Penal abolitionists could discuss whether this *ultima ratio* principle should also be part of an abolition constitutionalism.) This principle—known in various countries around the world and that has been discussed by a few Anglo-American legal and philosophy scholars—[161] states that criminal law should only be used as a last resort, only when no other social responses or public measures would suffice to adequately advance a legitimate goal, such as addressing harmful behavior.[162] Since punishment (including death and prison in the United States) is the harshest type of public measure or burden that the state may take or impose against an individual and since the state has the duty to consider the rights and interests of all people involved or affected by a situation (including those who cause harm), the *ultima ratio* principle requires that less harmful responses or measures, including noncriminal ones, be

156 https://www.prisonpolicy.org/graphs/raceinc.html.

157 https://www.prisonpolicy.org/global/ (using world data from 2013 because this source does not present 2010 data). On this point, see also Gottschalk, *supra* note , at 4-5.

158 The same source cited *supra* note indicates that while the incarceration rate for whites was 450 per 100,000 people, the rate for Blacks at the time was 2,306, American Indian/Alaska Native was 1,291, Native Hawaiian or Pacific Islander 1,017, and Latinx 831 per 100,000.

159 One could argue that there is such a high level of punitiveness for white males in the United States because once a large penal system is built as a consequence of structural racism, large numbers of no Black people are also going to be caught by such a system. I think that this phenomenon explains at least a portion of the high levels of punitiveness regarding whites in the United States. But even if this is the case, over punishment writ large is conceptually different from disparate punishment and requires normative principles different from anti-subordination to be addressed, such as the principle of *ultima ratio*.

160 *See* FERRAJOLI, DIRITTO E RAGIONNE, *SUPRA* NOTE , at 465 (including a version of this principle in his own conception of criminal law minimalism as a "necessity principle."); HORDER, *supra* note , at 74. HUSAK, *supra* note , at 157-8, has rejected that this principle of last resort is included in his version of criminal law minimalism—which explains one of the ways in which I consider his theory insufficient. In earlier work, Husak, *Last Resort*, *infra* note , at 207, argued that there was a plausible basis for including the last resort principle among the substantive parts of a theory of criminalization, but maintained it was trivial because he considered it unhelpful in reversing the tendency to overcriminalization.

161 *See, e.g.*, JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 26 (1984) (including a version of the last resort principle within his harm principle, but making it play little role in his subsequent 4-volume analysis of criminal law); Douglas Husak, *Criminal Law as Last Resort*, 24 OXFORD JOURNAL OF LEGAL STUDIES 207, 214 (2004) [hereinafter *Last Resort*].

162 I am trying to provide a definition that remains open to different theories of the state, of punishment, of what a legitimate goal is, and of what it means to adequately advance it. On different possible interpretations of the *ultima ratio* principle, including its relationship with different theories of punishment, see *id.* at 216 et seq.

adopted if these responses or measures would adequately advance a legitimate goal, such as addressing harmful behavior.[163]

This *ultima ratio* principle is different from other criminal law principles that would also constitute part of minimalist criminal law constitutionalism such as the harm principle, the wrongfulness principle, the desert principle, and the principle of proportionality of sentences, to mention just a few possibilities.[164] Even if all of these principles were met by a criminal statute and its enforcement, the *ultima ratio* principle would still require that the criminal law statute not be passed and not be enforced once passed, if noncriminal responses or measures were sufficient to adequately advance a legitimate goal, such as addressing harmful behavior.[165]

I cannot fully discuss here the *ultima ratio* or last resort principle of criminal law. But I would like to make the following points about it that should be discussed further elsewhere.

There is debate on whether *ultima ratio* is a constitutional or just a moral or pragmatic principle.[166] According to some criminal law commentators, the constitutions of different countries would not be so "far-reaching" as to include this principle.[167] In fact, Douglas Husak has characterized the application of a last resort principle to the world "as an exercised in *idealized* criminal theory…." and claimed that "[n]o one can pretend that the criminal law incorporates a last resort principle at the present time."[168] But the principle has been given constitutional status by courts and other authorities in a variety of countries such as Colombia,[169] and Finland,[170] and by a range of commentators.[171] The U.S. Constitution has not traditionally been interpreted to include this principle. However, the Eighth Amendment prohibition against cruel and unusual punishment or the Fifth and Fourteenth Amendments' Due Process Clauses could be interpreted as including it.

Since the *ultima ratio* principle sets limits on the legislature, an explicit argument or implicit assumption for why some consider it only a moral or pragmatic, but not a

[163] *See, e.g.*, Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio),* 2 OHIO STATE JOURNAL OF CRIMINAL LAW 521, 522 (2005); Thomas Frøberg, *The Role of the Ultima Ratio Principle in the Jurisprudence of the Norwegian Supreme Court,* 3 OÑATI SOCIO-LEGAL SERIES 125, 128 (2013).

[164] On the relationship between these other principles and minimalist criminal law theories, see, FERRAJOLI, DIRITTO E RAGIONNE, *supra* note , and HUSAK, *supra* note .

[165] For a justification of the *ultima ratio* principle on the basis that the state has the duty to ensure a peaceful co-existence among its inhabitants and a just social order, see, e.g. Constitutional Court of the Republic of Colombia, Sentence C-647/01, at Section 4.

[166] *See, e.g.*, ; Frøberg, *supra* note , at 128; Jareborg, *supra* note , at 521, 522-523.

[167] *See, e.g., id.*

[168] Husak, *Last Resort, supra* note , at 208.

[169] *See, e.g.*, Constitutional Court of the Republic of Colombia, Sentence C-647/01, at Section VI. 4; Constitutional Court of the Republic of Colombia, Sentence C-365/12, Sections 3.3.1 and 3.4.2.1.

[170] Kaarlo Tuori, *Ultima Ratio as a Constitutional* Principle, 3 OÑATI SOCIO-LEGAL SERIES 6, 11 (2013) (describing the recognition of the principle by the Constitutional Law Committee of Parliament in Finland).

[171] For an argument that the *ultima ratio* principle is an instance of a broader constitutional principle of proportionality, see *id*.

constitutional principle, is that courts may not enforce it since they would have to second guess the legislature about the need and other requirements of criminalization. But this is not a strong argument. First, in some countries, courts have applied the principle, what shows that there are ways in which courts can use this principle to assess the criminalization work by legislatures.[172] Second, constitutional theories such as the underenforcement thesis by Lawrence Sager, suggests that even if courts may not be epistemologically or institutionally positioned to second-guess the legislatures in some cases, last resort could still be a constitutional principle that the legislature should abide by.[173]

Another issue is whether the last resort principle applies only to the work of the legislature, as many scholars have suggested.[174] The criminal law minimalist constitutional theory that I am envisioning here could apply it as a maxim of behavior also for law enforcement, prosecutors, courts, and lay people. The extent to which lay people have relied on the police, criminal law and punitive measures to deal with social problems may be one of the factors that has contributed to the extraordinary levels of incarceration and punitiveness in the United States.[175] If the constitution is understood through the lens of popular constitutionalism and as a broader social pact that goes beyond the courts' authority and interpretation, *ultima ratio* could be understood as a maxim of behavior for the population of the United States not to unnecessarily or harmfully call the police, bring charges, etc.[176]

The *ultima ratio* principle could also be a mandate for law enforcement and prosecutors that they should not move forward with a citation, arrest, charging decision, formal diversion program or other punitive measures unless there are no other non-punitive appropriate responses.[177] It could also be a maxim of behavior for courts and juries as they adjudicate criminal cases.[178]

Finally, the conception of the *ultima ratio* principle and minimalist criminal law that I envision would require not only that *criminal law as punishment*, but also that *criminal law as a conception of justice and a way to look at harmful situations* be used as a last resort. As already discussed, criminal law assumes that harmful situations involve individual wrongdoers who are individually responsible and may be punished for their actions against (mostly) blameless victims. Criminalizing behavior thus involves addressing harmful situations not only with punishment and a certain set of institutions, but also with this

[172] *See, e.g., supra* notes and .

[173] *See, e.g.*, LAWRENCE GENE SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

[174] *See, e.g.*, FERRAJOLI, *supra* note , at 464-465 (discussing the principle of necessity within his discussion of when and how to criminalize behavior)—which explains one of the ways I disagree with his account; Frøberg, *supra* note , at 128 (2013); Husak, *Last Resort*, *supra* note , at 208; Jareborg, *supra* note , at 521.

[175] *See, e.g.*, GARLAND, *supra* note ; SIMON, *supra* note .

[176] On popular constitutionalism, see, e.g., LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

[177] On the application of the theory of constitutional underenforcement to prosecutors, see, e.g., Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role,* 45 UC DAVIS L. REV. 1591 (2014).

[178] For application of the principle to the work of criminal courts and specifically judicial statutory interpretation, *see, e.g.*, Frøberg, *supra* note , at 128-132.

conception of justice and this way to look at these situations. Under the conception of minimal criminal law that I envision, this conception of justice and way of looking at harmful situations should also be adopted as a last resort, only when other conceptions of justice and ways to look at these harmful situations would not suffice to adequately address them.

C. An Economic and Social Constitution

A final point I would like to make—that I can only articulate very briefly given the goals and word limits of this piece—is about social and economic rights. American penal abolitionism has argued that it is not possible to eliminate mass incarceration if other realms of social life and public policy are not also transformed.[179] This is an important point that has often been missed by criminal law minimalists, who have often concentrated only on criminal law policy.[180] The elimination of mass incarceration and the reduction of punitiveness in the United States would require the use of other social and public policy tools such as ensuring that people have access to housing, food, education, health care, jobs and economic security, a healthy environment, etc.

A criminal law minimalist constitutionalism—and arguably also an abolition constitutionalism—may thus have to go beyond renewing the interpretation of criminal law and criminal procedure constitutional protections. It may also have to include a social and economic constitutionalism. The constitutions of various countries explicitly include these types of rights.[181] But, regardless of whether these rights are explicitly included in constitutional text, a renewed constitutionalism could encompass or expand these rights in the United States.[182]

V. Conclusion

This article has analyzed American prison abolitionism from a comparative perspective and articulated three of the main challenges for penal abolitionism in the United States and beyond. The article has also introduced criminal law minimalism as an alternative theory, discussed it from a comparative angle, put it in conversation with penal abolitionism, and sketched a minimal criminal law constitutionalism. Criminal law minimalism would require a radical reduction and a reimagining and redesigning of current penal systems in the United States, but, unlike penal abolitionism, it would still give a role to the penal system in the prevention and reduction of harm and in the protection of rights.

[179] *See, e.g.*, DAVIS, ABOLITION DEMOCRACY, *supra* note .
[180] However, Ferrajoli has explored these issues in his work. *See, e.g.*, LUIGI FERRAJOLI, DERECHOS Y GARANTÍAS (Perfecto Andrés Ibáñez trans. 1999); LUIGI FERRAJOLI, MANIFESTO POR LA IGUALDAD (Perfecto Andrés Ibáñez trans. 2020).
[181] *See, e.g.*, Constitution of the Republic of South Africa, Chapter 2: Bill of Rights.
[182] *See, e.g.*, KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS (2012).