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ARTICLE

RECONSTRUCTIVISM: THE PLACE OF  
CRIMINAL LAW IN ETHICAL LIFE

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## RECONSTRUCTIVISM: THE PLACE OF CRIMINAL LAW IN ETHICAL LIFE

Joshua Kleinfeld\*

*Criminal law has a distinctive role to play in the social world — a function that makes it different from other areas of law. Where wrongdoing tears the social fabric, it is criminal law's task to restitch it. A diverse set of lawyers, sociologists, and philosophers have discussed this function in their own ways, but because they have not been systematically aware of one another and of the intellectual tradition to which they belong, the existence and character of their common view has been unclear. This Article pieces together that intellectual tradition and sets forth the core of the common view, which proves to be a theoretical alternative to both of the dominant foundational accounts of criminal law today: retributivism and utilitarianism. This Article terms the view "reconstructivism," and the function it sees criminal law as performing, "normative reconstruction." Reconstructivism holds, first, that shared normative ideas, practices, and institutions are part of what constitute and sustain social life — that every society, to be a society, requires a measure of solidarity around an embodied ethical life. Second, reconstructivism views crimes as communicative attacks on embodied ethical life: crimes threaten social solidarity by undermining the ideas, practices, and institutions at the foundation of social solidarity. Third, reconstructivism holds that punishment is a way of reconstructing a violated social order in the wake of an attack. If, for example, Person A steals Person B's property, the nature of the wrong is not just the tangible harm to Person B, but also the message that property rights in this jurisdiction are insecure, together with the message that people like Person B can be abused. Punishment declares that the right to property still holds and re-establishes the social status of Person B. Criminal law is thus an enterprise in normative reconstruction, the protector of the shared normative ideas on which a society's way of life is based — the society's embodied ethical life.*

### INTRODUCTION

Some intellectual traditions consist in a body of ideas held in common and passed down over time within a group of people who are conscious of one another and of building something shared. The theory of justice in the wake of John Rawls is an intellectual tradition of this kind. What I will call the "reconstructive tradition of criminal theory" is an intellectual tradition of another sort, in which multiple people address the same thing in their own ways, some influenced by one another, some not, but all producing similar or complementary

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\* Associate Professor of Law, Northwestern Law School; Affiliated Faculty, Northwestern Department of Philosophy. Two people have profoundly influenced my understanding of embodied ethical life as a source of normative theory and as an intellectual tradition: Axel Honneth and Andrew Koppelman. My thanks to them both. Thanks as well to five good friends who were there at this Article's earliest stages and whose thoughtfulness and insight made it better than I could have made it without them: Vincent Chiao, Chad Flanders, Neha Jain, Gabriel Mendlow, and John Morley.

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ideas because they are driven by a common object of interest. Theories of interpretation — from legal theory to literary theory to philosophy of language to Biblical hermeneutics and beyond — are an example. The theorists in such cases constitute a tradition only in the sense that those who follow them can assemble the ideas they severally produced into a unitary body of thought. The reason to do this is because the ideas in question are stronger together than apart, and because seeing the points of intersection may in some cases, as here, bring to light a sort of ur-argument whose steps are at the foundation of all thought of the type.

The reconstructive tradition of criminal theory is an offshoot of a broader reconstructive tradition, handed down from Hegel to philosophical sociologists like Weber and Durkheim to contemporary sociological philosophers like Axel Honneth, Michael Walzer, and Charles Taylor.<sup>1</sup> The central theme of this line of thought is that our social practices and institutions are constituted as they are in part because of values that are implicit, immanent, instantiated, or embodied in them — that there is some organic link between, say, the practice of voting and the value of equality, the practice of jazz improvisation and the values of spontaneity and individuality, the practice of modern science and the values associated with evidence-based reason. A society's form of life (the whole of which those practices and institutions are the parts) is thus an *embodied ethical life*, or what Hegel termed *Sittlichkeit* (pronounced ZIT-lich-kite). In turn, an important object of normative philosophy is to bring the immanent values that make up this embodied ethical life to light, to render them explicit. That is, the role of philosophy is not chiefly to define and defend some set of abstract or a priori ideals, which are then applied to the world to dictate how it should be ordered, but to rationally reconstruct the normative order already at work in the world in order to see that normative order more clearly and critique it. The philosopher thus stands in an interpretive rather than a concept-application relationship to the social world.

It happens that several of the most prominent figures engaged with questions of embodied ethical life, particularly Hegel and Durkheim, wrote at length about criminal law, and on the other side it happens that a number of important criminal theorists have written about criminal law in ways that (unconsciously in most cases) echo themes from the literature on embodied ethical life. It is not obvious why this should be so: the idea of embodied ethical life is not in any direct way an idea about crime and punishment. What then is the link?

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<sup>1</sup> See AXEL HONNETH, *FREEDOM'S RIGHT: THE SOCIAL FOUNDATIONS OF DEMOCRATIC LIFE* 1–11 (Joseph Ganahl trans., Polity Press 2014) (2011).

This Article's purpose is to uncover that link. My view in essence is that, once one focuses on and valorizes embodied ethical life, as Hegel and Durkheim did, one begins to understand it as a fragile social good that wrongdoing attacks and threatens and that punishment defends and reinforces — thus implying a special place in the world for criminal law. Approaching the matter from the opposite direction, once one theorizes crime and punishment as, for example, an outgrowth of culture or an expression of social norms, one is led to the idea of a normatively laden social fabric worth defending and reinforcing — that is, to the idea of embodied ethical life. In other words, *the function of criminal law has everything to do with embodied ethical life*, and a diverse array of scholars and lawyers working on different questions with different methodologies have seen the connection. From Hegel to James Fitzjames Stephen to Nietzsche to Durkheim to Lord Patrick Devlin to Foucault to Henry Hart to contemporaries like Jean Hampton, Jeffrie Murphy, David Garland, Antony Duff, Dan Kahan, Paul Robinson, Nicola Lacey, and Günther Jakobs, they have seen the connection — and of those, as I will argue, Hegel, Durkheim, Hampton, and Duff have seen it best.<sup>2</sup> When many minds working

<sup>2</sup> These writers can be grouped into discussion silos or mini-traditions. Critics of John Stuart Mill's harm principle sometimes work their way into reconstructive ideas because the harm principle as conventionally interpreted — with its libertarian individualism and exclusion of culture from the concept of "harm" — is one of criminal theory's great repudiations of reconstructive thinking. See, e.g., 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 79–81 (London, MacMillan & Co. 1883) ("[Criminal law] operates not only on the fears of criminals, but upon the habitual sentiments of those who are not criminals." *Id.* at 80. "[T]he sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. . . . [T]he infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence . . . ." *Id.* at 81.); Lord Devlin, *Law, Democracy, and Morality*, 110 U. PA. L. REV. 635, 638–39 (1962) ("What makes a society is a community of ideas." *Id.* at 638. "The morals which [criminal law] enforces are those ideas about right and wrong . . . which are necessary to preserve [the society's] integrity." *Id.* at 639.). Devlin is a problematic figure in the reconstructive tradition. He was undoubtedly onto some major reconstructive ideas, but his understanding of the content of ethical life was so sentimental, conventional, and rigid, and he so exaggerated the risk of change, that he helped convince generations of scholars and students to reject the whole idea of using criminal law to protect the social fabric. Where reconstructivism should be Burkean (as I argue in section III.A, pp. 1552–55), Devlin's was reactionary. I also think his conceptualization of reconstructivism's subject matter — the status of "morals legislation" and the enforcement of "morality," where that term is taken to mean something like "sex and gambling" but not "rape and murder" — although sadly common, obscures the real issues and steers the debate off course.

Connected to these harm-principle critics, but distinct enough to form a second silo, is a group of communitarian criminal theorists who answer the basic questions of criminal law (e.g., why punish? why criminalize?) in terms of collective needs or values. See, e.g., R.A. Duff, *Responsibility, Citizenship, and Criminal Law*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 125, 139 (R.A. Duff & Stuart P. Green eds., 2011) (arguing that criminal law has reason to criminalize "wrongdoing that violates the polity's defining values" and therefore "concern[s] us all as citizens"); Nicola Lacey, *Penal Theory and Penal Practice: A Communitarian Approach*, in

from many directions come independently to a similar conclusion, as they have in this case, there is reason to think the conclusion might be true. But as these scholars and lawyers have not been systematically aware of one another and of the tradition to which they belong, they have not seen their way to the bottom of the connection.

What is it they almost saw? What is at the bottom of this connection?

The essential thought is this: criminal law has a distinctive role to play in the social world, a function that gives it a different center from other areas of law, because criminal law is the primary legal institution by which a community reconstructs the moral basis of its social order, its ethical life, in the wake of an attack on that ethical life. To say that is not to deny that criminal law may have additional functions or operate under additional constraints, such as controlling more tangible

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THE USE OF PUNISHMENT 175 (Seán McConville ed., 2003). Duff's complex and important relationship to the reconstructive tradition is discussed *infra* note 40 and accompanying text.

The debate over the harm principle and communitarianism is largely Anglo-American (or just Anglo — Stephen and Devlin were English judges, Mill an English philosopher, Duff and Lacey English lawyer-philosophers). A third silo or mini-tradition, largely German, involves criminal theorists self-consciously developing Hegelian ideas. *See, e.g.*, GÜNTHER JAKOBS, DERECHO PENAL: PARTE GENERAL 18–19 (1995), as reprinted in LUIS E. CHIESA, SUBSTANTIVE CRIMINAL LAW § 2.03 (2014) (“[T]he infraction of the norm [by a crime] communicates a message that threatens to delegitimize the norm. . . . [Punishment’s] real purpose is to reaffirm the legitimacy of the norm that was infringed. . . . Punishment thus secures that the norm that was infringed is still looked at by the general citizenry as an adequate point of reference for organizing their conduct.”); *see also* ALAN BRUDNER, PUNISHMENT AND FREEDOM, at ix–xi (2009) (expressly developing a Hegelian theory of criminal law, albeit one that emphasizes Hegel’s conception of freedom more than it does his conception of *Sittlichkeit*).

A fourth silo, directly indebted to Durkheim, comes from the sociological tradition and in particular the Durkheimian concept of “deviance.” *See, e.g.*, DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 23–46 (1990) (“[Punishment] ensures that, once established, the moral order will not be destroyed by individual violations which rob others of their confidence in authority. Punishment is thus a way of limiting the ‘demoralizing’ effects of deviance and disobedience.” *Id.* at 42.); *see also* MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975) (portraying punishment as a technique, albeit an oppressive and sinister one, by which modern societies use power to normalize values).

A fifth silo, native to American law schools, grows out of (related) lines of scholarship on “law and social norms,” “legal expressivism,” and “law and society.” *See, e.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597–98 (1996) (“The distinctive meaning of criminal wrongdoing is its denial of some important value, such as the victim’s moral worth.” *Id.* at 597. “By imposing the proper form and degree of affliction on the wrongdoer, society says, in effect, that the offender’s assessment of whose interests count is wrong.” *Id.* at 598.); *see also* JOEL FEINBERG, *The Expressive Function of Punishment*, in DOING AND DESERVING 95, 95–98 (1970); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 370–74 (1981); PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW 175–212, 248–49 (2008).

Finally, Henry Hart’s famous essay, *The Aims of the Criminal Law*, though it appears to come from nowhere, intuitively so many reconstructive ideas so well that it deserves special mention. *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 402–04 (1958) (“What do we mean by ‘crime’ and ‘criminal’?” *Id.* at 402. “What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.” *Id.* at 404.).

harms or respecting norms of individual desert. Nor is it to deny that other departments of law and other social institutions have their own roles to play in building and maintaining society's normative order. It is simply to say this: certain wrongs do not just fall short of or breach society's normative order but performatively deny that order. Such wrongs are an inevitable feature of social life. The question therefore arises of what to do *after* such wrongs occur. Condemnatory punishment with the community's backing is how societies typically do and must respond if their normative orders are to be maintained. It is this task of reaffirming and rebuilding on a cultural level, on the level of shared ideas, that gives criminal law its constitutive *telos*. Ethical life is broad: it is not just a set of moral imperatives (thou-shalts and thou-shalt-nots) but also rights, values, teleologically structured social institutions and practices, conceptions of good and bad character and good and bad lives, normatively laden social roles and social structures, evaluative understandings and outlooks, and more. If we take the term "norm" broadly, as encompassing this variety, we may encapsulate the position by saying that criminal law is an instrument of *normative reconstruction*.<sup>3</sup> The theoretical perspective that so views it, a perspective that never has been given an adequate name, may be termed *reconstructivism*. The reconstructive view is both a descriptive one about how criminal law functions in most societies most of the time and a normative one about what it means for criminal law to function well.

Think, by way of analogy, of a classroom.<sup>4</sup> A classroom is a thick ethical space. It has normatively laden social roles (the role of the teacher, the role of the student), values (intelligence, curiosity), evaluative understandings (what it means to show respect, what it means to succeed or fail), customary practices (the lecture, the directed discussion), and above all a *telos* (education). Imagine now an attack on the normative order of a classroom, that is, not just conduct that falls short of the classroom's normative order (unprepared students, for example) or even breaches it (an unprepared teacher) but performatively

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<sup>3</sup> The term "normative reconstruction" is already in use in social theory as the name for a certain methodology: social theorists who take embodied ethical life as their object and try to render its implicit normative order explicit commonly describe themselves as engaged in "normative reconstruction." See *supra* note 1 and accompanying text. I'm borrowing the term for a new purpose — to clarify the proper function of criminal law — which admittedly risks confusion. But the term fits as a description of what I think criminal law ought to be doing better than any alternative. And the fact that the term is shared underlines the connection between the socio-theoretic methodology and the substantive view of criminal law, which is that the two care about the same thing: embodied ethical life.

<sup>4</sup> This was the example and allegory Durkheim used at the end of his life to understand many aspects of the social world, including crime and punishment. See EMILE DURKHEIM, MORAL EDUCATION 165–66 (Everett K. Wilson ed., Everett K. Wilson & Herman Schnurer trans., Free Press 1961) (1925) [hereinafter DURKHEIM, MORAL EDUCATION].

denies it — students cheating, for example. What would happen if the cheating were known and carried on over time but went uncondemned and unpunished, and the students in question prospered? Surely the normative order of the classroom would be damaged or altered. Perhaps it would simply “fail, go dead, lose its grip,”<sup>5</sup> become an educational order in name but not in fact, or become an educational order functioning at half-strength, unable to fully achieve its goals or inspire belief and attachment in its participants, like a church that sells absolutism or a government that operates on bribery. Or perhaps the classroom’s normative order would not break down in that sense but would change, become reconstituted as a new normative order with a new *telos*, oriented perhaps not to education but purely to instrumental advantage (getting a degree). But if the normative order of the classroom is something we treasure, something we want to uphold in the wake of cheating, condemnatory punishment in the community’s name is the tool for the job. To punish cheating is to reconstruct the normative order of the classroom. That task of reconstruction is a matter of urgent importance if we value the classroom’s normative order, or solidarity around some sort of normative order, or both.

Why is it worth our while to get to the bottom of this theoretical viewpoint? Why is the reconstructive tradition of criminal theory valuable? There are two reasons.

First, reconstructivism offers the field a theoretical perspective that doesn’t start from the harm principle, that is neither retributive nor utilitarian, and that has something to say about what criminal law is *for*. Normative reconstruction is thus a distinctive voice in the field, with the potential to offer novel perspectives on a variety of issues both theoretical and practical, normative and descriptive. Consider what are arguably the two organizing questions of criminal theory: what conduct ought to be criminalized and what norms ought to govern punishment. In very broad (maybe cartoonishly broad) strokes, one might say that retributivism focuses on moral wrongness to answer the first question and desert to answer the second;<sup>6</sup> pure utilitari-

<sup>5</sup> ROBERT P. PIPPIN, *HEGEL’S PRACTICAL PHILOSOPHY* 6 (2008) (“[A]ny given social world is also a nexus of common significances, saliences, taboos, and a general shared orientation that can also either be sustained or can fail. Indeed one of the most interesting aspects of such a social condition, shared meaningfulness, or intelligibility, is that it can fail, go dead, lose its grip, and a very great deal of what interests Hegel is simply what such shared practical meaningfulness must be that it could fail . . . (His general name for the achievement and maintenance of such a form of intelligible life is ‘*Sittlichkeit*’ . . .).”)

<sup>6</sup> See, e.g., Michael S. Moore, *Liberty’s Constraints on What Should Be Made Criminal*, in *CRIMINALIZATION: THE POLITICAL MORALITY OF THE CRIMINAL LAW* 182, 191 (R.A. Duff et al. eds., 2014) [hereinafter Moore, *Liberty’s Constraints*] (“A retributive theory of punishment demands that criminal punishment be imposed on all and only those who deserve it. . . . Retributivism so construed leads to legal moralism — the theory that all and only moral wrongs should

anism focuses on happiness-diminishing conduct to answer the first and some mixture of crime and cost control (focused on deterrence, incapacitation, and rehabilitation) to answer the second;<sup>7</sup> and liberal utilitarianism focuses on the harm principle to answer the first and again some mixture of crime and cost control, with justice-based side-constraints, to answer the second.<sup>8</sup> Reconstructivism looks to moral culture to answer the first and a form of expressivism to answer the second. It thus answers the basic questions of the field differently than do the leading theories; it follows that it is distinct from the leading theories.

Another point of difference is that reconstructivism's lodestar normative concept is not desert, happiness, or liberty; it is *solidarity*. Reconstructivism sees criminal law as the defender of a shared moral culture that is important in substantial part because it is shared, rather than solely because it is right (though many within the tradition would stress that it is more likely to be right, and certainly more likely to be

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be prohibited by the criminal law — as its theory of legislation.”); *see also* MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 69–74 (1997).

<sup>7</sup> *See* R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 4 (2001) (characterizing consequentialist theories in criminal law as aiming ultimately at “final good(s),” like happiness, and intermediately at “nonfinal goods,” of which “crime prevention is the obvious candidate” and cost is an additional concern).

<sup>8</sup> “Liberal utilitarianism” is meant to capture the hybrid of Bentham and Mill that has emerged as one of the dominant views in American criminal theory. It is not the same as pure utilitarianism because pure utilitarianism responds to a single principle, utility maximization, while liberal utilitarianism responds to both the utility principle and a set of liberal values that are taken to inform and constrain the utility principle. In particular, the harm principle implies a more restricted conception of criminalization — indeed, a more restricted conception of the state — than pure utilitarians would generally endorse. (It could be otherwise: if “harm” were defined as “disutility,” then pure utilitarianism and liberal utilitarianism might merge. But advocates of the harm principle generally do not use the term in that open-ended a way.) My goal above is not to set out a logically exclusive taxonomy of criminal theories, but to capture with extreme brevity what I take to be the three most important competitors on the contemporary criminal theory scene. Mill created the liberal-utilitarian hybrid by fusing the harm principle to his Benthamite utilitarianism 150 years ago. *See* JOHN STUART MILL, *ON LIBERTY* 81 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) (announcing the harm principle and saying of its relation to utilitarianism: “I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being”); *see also* H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 28–89 (2d ed. 2008) (carrying Mill’s tradition forward by defending the harm principle with respect to criminalization and utilitarianism with respect to punishment); NICOLA LACEY, *A LIFE OF H.L.A. HART* 190–91 (2004) (“[In *Punishment and Responsibility*] Herbert mapped out the *liberal, restricted utilitarianism* which was the hallmark of his criminal law theory.” (emphasis added)); Moore, *Liberty’s Constraints*, *supra* note 6, at 191 (“Whether Mill’s theory of criminal legislation can in fact be derived from his theory of punishment is thus somewhat in doubt. But surely that kind of showing is the right move if one is generally a utilitarian about punishment and is a Millian liberal about the proper motives for criminal legislation.”). The issues here are bigger than criminal law, of course. Utilitarianism and liberalism are both complements and competitors in Enlightenment political thought generally.

functional, in virtue of winning a community's assent over time).<sup>9</sup> Solidarity was at the very foundation of Hegel's and Durkheim's thought. Hegel argued that core features of being human, such as the capacity for moral agency, rationality, freedom, and even conceptual consciousness, could not be achieved outside of a social context.<sup>10</sup> Those are difficult contentions to understand, but more modestly, Hegel also thought that individual human flourishing could not be secured outside of society and that any society, to be a society, must have a form of life based on shared normative ideas — an embodied ethical life, a *Sittlichkeit*.<sup>11</sup> Durkheim too thought this state of affairs necessary for human well-being, but his starting point was more empirical: he observed that human beings everywhere carry out their lives in societies, which makes sociality simply a fact as basic for the sociologist as the atom is for a physicist, and observed further that societies everywhere rely on normatively laden practices and institutions to sustain them — again, an embodied ethical life, what Durkheim called a “collective consciousness” (*conscience collective*).<sup>12</sup>

These are sweeping ideas, but the root insight is actually a modest one. If an assemblage of individuals is to form or sustain a society that can secure the benefits of social coordination and mitigate the risks of social conflict, those individuals must come into some degree of pragmatic agreement, mutual intelligibility, and fellow feeling. Securing the benefits of social coordination and mitigating the risks of social conflict is utterly essential to individual well-being. Thus social solidarity matters because human flourishing matters. Now, solidarity is a complex phenomenon, built on linguistic, historical, aesthetic, and economic foundations as well as moral ones. Criminal law concerns one part of solidarity, what might be called “normative alignment” — that is, alignment at the level of normative ideas. But as normative

<sup>9</sup> One could also say that reconstructivism is *communitarian*, as Duff does. But “solidarity” tallies better with the reconstructive tradition and also jettisons some of the political baggage — the antimarket tendencies, for example — that the term “communitarian” often connotes.

<sup>10</sup> See generally PIPPIN, *supra* note 5.

<sup>11</sup> See generally *id.* To say that solidarity advances individual flourishing is to give an instrumental justification for solidarity. That might strike some Hegel scholars as problematic because Hegel famously resisted the sort of methodological or metaethical individualism that accounts for societies' intelligibility or value in individualistic terms. But in my view, Hegel did not deny the value of societies for individuals; he only insisted that there is something an individualistic account leaves out and sometimes went to rhetorical excess in making that point. It is useful in this regard to remember that Hegel — especially the young Hegel — was highly influenced by Aristotle and followed Aristotle in three core beliefs: that flourishing is the goal of moral life, that human beings are by nature social, and that flourishing therefore requires a *polis*. See AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION* 7–30 (Joel Anderson trans., MIT Press 1996) (1994).

<sup>12</sup> See Lewis A. Coser, *Introduction* to EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY*, at xiii–xiv, xix (W.D. Halls trans., Free Press 1984) (1893) [hereinafter DURKHEIM, *DIVISION OF LABOR*].

alignment is necessary for solidarity and solidarity for flourishing, criminal law is necessary for those things as well. Political philosophy too often overlooks normative alignment. The field's siren song is the belief that the only norms worthy of respect are those that are ultimately right or just: "Justice is the first virtue of social institutions, as truth is of systems of thought. A theory . . . must be rejected or revised if it is untrue; likewise laws and institutions . . . must be reformed or abolished if they are unjust."<sup>13</sup> But to think that is to undervalue the *sharing* of ideas, regardless of whether they are wholly right or just, for it is only with shared ideas that we can function socially. Now, to value solidarity this highly raises many questions: What about shared values that are immoral? What about diverse societies in which relatively few values are shared? I will address some of these questions later on, albeit in the context of criminal theory rather than general philosophy. The point for now is just to see why the socio-theoretic tradition has valued solidarity so very, very highly, for it is by first appreciating solidarity that we can then appreciate reconstructivism. Criminal law as reconstructivists see it has a distinctive role to play in protecting the basis of solidarity.

The second reason to value reconstructivism is because its concepts and values speak to urgent policy issues in American criminal justice today. In particular, there is *no* concept with more critical purchase on what is wrong with the contemporary American criminal system — and the system is in crisis, as is widely recognized<sup>14</sup> — than solidarity. Consider the greatest problem in the system: the mass incarceration of young black men. The typical charge against mass incarceration is about social justice — that it is racist — and the typical rejoinder is about individual justice — that those imprisoned, with exceptions to be sure, committed crimes for which imprisonment is warranted.<sup>15</sup> But to argue in these terms is to miss the most important point, which is not about justice at all, but about sociology. By making black Americans feel that the most visible and oppressive part of the legal

<sup>13</sup> JOHN RAWLS, A THEORY OF JUSTICE 3 (1971).

<sup>14</sup> See WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 1 (2011) ("Among the great untold stories of our time is this one: the last half of the twentieth century saw America's criminal justice system unravel."); see also J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1101 (2014) ("It is an article of faith among the legal intelligentsia that criminal justice is almost a contradiction in terms. The indictment of our criminal justice system contains a staggering number of charges . . .").

<sup>15</sup> Compare John McWhorter, *No More "Conversations,"* NEW REPUBLIC (July 20, 2013), <http://www.newrepublic.com/article/113966/barack-obama-trayvon-martin-statement-most-significant-race-statement> [<http://perma.cc/WQH2-LTVP>] ("[T]he poisonous relationship between young black men and law enforcement is the prime manifestation of racism in modern America."), with Michael R. Bloomberg, *"Stop and Frisk" Is Not Racial Profiling*, WASH. POST, Aug. 19, 2013, at A19 ("Ninety percent of all people killed in our city — and 90 percent of all those who commit the murders and other violent crimes — are black and Hispanic.").

system does not belong to them, mass incarceration's sociological product is *alienation*. The alienation begins between black Americans and the criminal system but then fans out beyond the criminal system into the relationship between black Americans and the state and society as a whole — inflaming the country's racial tensions and creating problems of democratic governance with far-reaching and unpredictable political effects.<sup>16</sup> The racial conflict surrounding the most publicized incidents — Rodney King, O.J. Simpson, Trayvon Martin, Michael Brown, Eric Garner, on and on — are case studies in alienation. And they are only the occasional conflagrations; they don't begin to capture the daily diet of social and political dysfunction caused or aggravated by mass racial incarceration.<sup>17</sup> The country just can't function well with this level of alienation, and if this diagnosis is right — if alienation is at the core of America's crime/race problem — then solidarity is the right medicine. Solidarity is alienation's obverse. Consider the reverse situation: a high degree of injustice with minimal solidaristic implications. This would occur if, for example, the system had a high baseline of false convictions that targeted no particular group. Such a situation would be a problem in need of repair, to be sure, but it would not injure the body politic in the way mass racial incarceration does.

To see this relationship between mass racial incarceration and solidarity is to shift from a debate about justice into a different register: even if each individual instance of arrest, conviction, and imprisonment of a black man were nonracist and just, the situation would still be a disaster, because it is a *solidaristic* disaster. The criminal system is tearing Americans apart when its function, on a reconstructive view, is precisely to knit them together. Something similar could be said about criminal law's treatment of homosexuals before 2003<sup>18</sup> or Irish

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<sup>16</sup> Others have noted the delegitimizing effects of mass racial incarceration in ways that gesture toward alienation, but have generally treated the issue as one of criminal law compliance rather than something bigger than criminal law altogether. See, e.g., STUNTZ, *supra* note 14, at 286 (arguing that many black Americans have come to see the criminal system as “an alien force that does not have [their] communities' best interests at heart,” which “prompt[s] resistance” to the criminal law's commands and makes criminal punishment “at best, a weak deterrent”). Paul Robinson argues generally that criminal law must be consistent with social norms if it is to maintain the “moral credibility” necessary to secure compliance. ROBINSON, *supra* note 2, at 175–212, 248–49. Both Stuntz and Robinson are writing — here and elsewhere in their work — along reconstructive lines, but without the full theoretical picture. The issue isn't just compliance; the issue is one of social solidarity beyond the borders of criminal law.

<sup>17</sup> Alienation affects scholarly work as well as social movements. See, e.g., Paul Butler, *Black Jurors: Right to Acquit?*, HARPER'S MAG., Dec. 1995, at 11 (arguing that black jurors should use jury nullification to subvert the American criminal system).

<sup>18</sup> Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding laws that criminalized homosexual sex), with *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding the criminalization of homosexual sex to be unconstitutional).

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and German immigrants during Prohibition.<sup>19</sup> Citizens in a democracy should generally not be alienated from their law because part of what it means to live in a democracy is to have a nonalienated relationship to the law. But they should especially not be alienated from their criminal law. Criminal law fails its solidaristic social function, becomes oppressive and undemocratic, and destabilizes politics when the members of a community feel it does not belong to them.

Contrast this response to mass racial incarceration with the other major options criminal theory has put on the table. What does retributivism, for example, have to say about mass racial incarceration? To simply recite that wrongs should be punished to the extent deserved is unresponsive, and to simply focus on individual justice is to miss the sociological point. (Even to focus on social justice would misunderstand the solidaristic point.) Indeed, retributivism is so individualistic that the very problem of mass racial incarceration is in a sense *invisible* to it. The theory can only ask if, in each particular case of incarceration, the crime was in fact a wrong and the punishment proportional to its wrongness. If the answers are yes but the effect socially devastating, retributivism can see nothing wrong with the situation. In the face of the central criminal justice problem of our time, retributivism lacks the conceptual resources even to recognize the problem as a problem. And what does utilitarianism have to say about mass racial incarceration? Presumably that the incarceration is justified to the extent the benefit — in terms of deterrence, incapacitation, and rehabilitation, or in terms of the good generally — is worth the cost. But to focus on deterrence, incapacitation, and rehabilitation is to think of the problems solely in terms of crime prevention, which misses the point, and to refer to the good generally is empty: it opens the door to a discussion of costs and benefits, but tells us nothing about how to think about costs and benefits in the crime and race context, or where to look for them. It also characteristically fixates on tangible (usually physical or financial) costs and benefits, which overlooks precisely the cultural considerations that reconstructivism brings into focus.

My point is not to sort out these complex theoretical and policy problems in a few paragraphs. The critique of traditional theories and the defense of reconstructivism just given are obviously and admittedly compressed and oversimplified. The point is to see reconstructivism's potential — to see that it answers cardinal questions of criminal law and policy differently than the leading theories in the field do, and that it is therefore a distinct view with far-reaching im-

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<sup>19</sup> See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 134 (1993) ("When Irish and German immigrants poured into the country, strong drink also became associated with the foreign underclass. The temperance movement, which began as a movement of 'moral suasion,' moved into politics, and a drive began to pass restrictive laws.").

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plications. It is indeed a candidate for fundamental theory. This Article is about theoretical foundations; the normative work is mostly downstream. But the theoretical foundations are necessary to secure that downstream normative work.

Thus in the pages that follow I attempt to assemble the shards of this fragmented tradition in criminal thought. Part I presents the basic building blocks of the reconstructivist view. Part II situates reconstructivism within the broader realm of criminal and legal theory. Part III addresses reconstructivism's latent Burkeanism and objections to that Burkeanism from the standpoint of social reform and cultural diversity. I conclude with a word on the emotional roots of reconstructive thought.

## I. THE RECONSTRUCTIVE TRADITION OF CRIMINAL THEORY

### A. *The Point of Departure*

The belief that the justification of punishment is the beginning and organizing question of criminal theory has become, it is not too much to say, a convention. George Fletcher's classic, *Rethinking Criminal Law*, for example, opens with the words: "Criminal law is a species of political and moral philosophy. Its central question is justifying the use of the state's coercive power against free and autonomous persons."<sup>20</sup> The casebooks used to teach law students inaugurate the subject with that same question.<sup>21</sup> This point of departure gives criminal theory a libertarian cast, as it makes state power the field's foremost concern; the question is like a slot into which Mill's harm principle or something like it can slide. The focus on punishment's justification also gives criminal theory an almost wholly normative orientation: the purpose of the enterprise is not in the first place to *understand* punishment as a social phenomenon (nor to understand crime as a social phenomenon), but firstly and mainly to identify grounds on which to *support* or *oppose* punishment.<sup>22</sup>

This fixation on justifying punishment also lends criminal theory a certain Enlightenment-humanist emotional flavor, for its spiritual root is revulsion at suffering — all suffering, even that of offenders, or per-

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<sup>20</sup> GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW*, at xix (1978).

<sup>21</sup> See, e.g., JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 29–91 (6th ed. 2012); SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 82–124 (9th ed. 2012); JOHN KAPLAN ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 21–77 (7th ed. 2012).

<sup>22</sup> There are exceptions of course; to say that it is conventional to focus normatively on justifying punishment is not to say that it is universal. See, e.g., Nicola Lacey, *Normative Reconstruction in Socio-Legal Theory*, 5 *SOC. & LEGAL STUD.* 131 (1996) (endorsing socio-theoretic approaches over purely normative ones, see *supra* note 3).

haps especially that of offenders, as their suffering is inflicted by deliberate social choice. Bentham so hated suffering that he saw even deserved punishment as a defeasible evil — indeed, so hated suffering that he thought morality itself had no purpose but to reduce it.<sup>23</sup> Beccaria's rationalistic arguments against the death penalty were, as any reader can sense, second to his revulsion at its violence.<sup>24</sup> There are other ways of thinking about moral life than this; the moral and political thinkers of the ancient world, for example, would never have thought *pain* to be of such overwhelming moral importance. But the spirit of the field is Bentham's and Beccaria's: criminal theory is filled with their longing for a gentler social world and their spirit of activist rationalism in trying to create such a world. Punishment is naturally the central issue if one begins from that longing and spirit, because to punish is deliberately to inflict suffering.<sup>25</sup>

The reconstructive tradition begins, not with the justification of punishment, but with the nature of wrongdoing. What is a wrong — that is, how are we to understand wrongdoing itself? And how are we to live in a world in which others wrong us — that is, how are we rationally to cope with, come to terms with, and above all respond to wrongdoing? If one thinks of crime and punishment as an ordered sequence (which of course they are), reconstructivism starts its work at an earlier point in the sequence than punishment theory. The analytic structure is this: as crime is ordinarily a species or special case of wrongdoing,<sup>26</sup> the question of how to understand crime is one part of a larger question about how to understand wrongdoing in general. To understand wrongdoing is to learn something about the response wrongdoing calls for, which in turn implies a position as to what punishment is and what it is for. The foundational theorists of the reconstructive tradition all work within this structure.

In Hegel's case, this point of departure is quite clear, for the bulk of secondary work adumbrating his “theory of punishment” centers on a

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<sup>23</sup> Utilitarianism can usefully be regarded as moral philosophy for people who think suffering is the most important feature of the moral world. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (London, T. Payne & Son 1789) (“Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do . . . .” *Id.* at i. “[A]ll punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.” *Id.* at clxvi.).

<sup>24</sup> CÆSAR BONESANA, MARQUIS BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 104 (Edward D. Ingraham trans., Phila., Philip H. Nicklin 1819) (1764) (“The punishment of death is pernicious to society, from the example of barbarity it affords.”).

<sup>25</sup> Rehabilitative punishment might be thought of along different lines, but most criminal theorists agree that “hard treatment” is a component of punishment as such. See, e.g., DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 57 (2008).

<sup>26</sup> I say “ordinarily” because criminal law also encompasses *malum prohibitum* offenses, which are not special cases of wrongdoing.

single chapter of *The Philosophy of Right* that is explicitly about wrongdoing; the chapter's very title is "Wrong."<sup>27</sup> The chapter's central idea is related to the central idea animating all of *The Philosophy of Right* and indeed all of Hegel's mature work: that moral concepts take shape in a fully specified way, become contentful, and are able to play their proper part in advancing individuals' dignity and flourishing, only when they are *actualized* in social life, and that therefore the proper focus of moral and political philosophy is not *abstract* concepts but *instantiated* concepts — concepts as realized in forms of life.<sup>28</sup> Hegel's views of wrong, right, crime, and punishment, which I will explicate at more length below, play out against this backdrop. Suffice it to say here that, as actualization is central to his concerns, he takes wrong and right to be linked along an axis of *de-actualization* and *re-actualization*: wrongdoing's key feature is that it renders that which is right "a semblance,"<sup>29</sup> making the right, not conceptually false, but false as a description of social reality. For example, the norm requiring that people respect one another's physical security is de-actualized when one person assaults another: though no less valid as an abstract, conceptual matter, the norm no longer holds as a description of actual social arrangements. Punishment, in turn, re-actualizes the right, making it something "fixed and valid"<sup>30</sup> in the wake of a wrong. (Hegel also thinks, more radically, that the right is established in the first place by the negation of wrongdoing.) The point for now is not to understand these claims to the bottom but simply to see that, by their very architecture, they make the nature of wrongdoing and crime conceptually prior to the theory of punishment — prior, that is, not only

<sup>27</sup> See G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 82, at 115 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821) [hereinafter HEGEL, PHILOSOPHY OF RIGHT]. Focusing exclusively on the "Wrong" chapter can lead Hegelian criminal theory in the wrong direction, as he touches again on criminal law in a less abstract, more jurisprudential and sociological vein later in *Philosophy of Right*. See *id.* §§ 182–255, at 220–73. He also developed a different, more recognition-oriented theory of criminal law in his early Jena writings. See LEO RAUCH, HEGEL AND THE HUMAN SPIRIT, 128–32, 145–46 (1983) (containing Rauch's translation of Hegel's 1805–1806 Jena lectures on the "philosophy of spirit").

<sup>28</sup> See HEGEL, PHILOSOPHY OF RIGHT, *supra* note 27, § 1, at 25 ("Philosophy has to do with Ideas and therefore not with what are commonly described as *mere concepts*," where a "mere concept" is a noumenal thing and an "Idea" is a "concept . . . and its actualization."). This notion of concepts actualized, instantiated, or realized in a form of life is the deep foundation for the notion of *Sittlichkeit*, of an embodied ethical life. Actualized concepts are the bricks, *Sittlichkeit* the structure built from them. Now, in fairness, there is another thematic idea at work throughout Hegel's mature work, including his thought on crime: the idea of *freedom*. I confess that my interpretation of Hegel in this Article tends to emphasize *Sittlichkeit* and deemphasize freedom, which would be a problem if my goal were purely exegetical. But pure exegesis is not my goal. I am trying to get to the roots of one way of thinking about crime and punishment, and interpreting Hegel to that end.

<sup>29</sup> *Id.* § 83, at 116.

<sup>30</sup> *Id.* § 82, at 116.

rhetorically, as a matter of how the argument unfolds, but also analytically. One cannot understand punishment as re-actualizing a norm unless one first understands crime as de-actualizing the norm.

Durkheim did not write one single tract about criminal law laying out his views with finality; he developed his views in a variety of places and always in the context of some other or larger project. Yet the basic structure of his theory never wavered: it begins from the tremendous value Durkheim attached to social solidarity. That we feel bonded to one another and that we substantially share views of right and wrong, good and bad, is necessary if a collection of individuals is to form a society, he thought, and a functioning society is a moral achievement of profound importance to human welfare. *The Division of Labor in Society*, for example, probably the work in which Durkheim sets forth his views on crime and punishment most completely, opens with three ideas: that the division of labor is *the* fundamental sociological fact of modernity; that the division of labor not only makes us more economically productive but also tends to stitch society together in ways that create social solidarity; and that law, as the external manifestation of social solidarity, offers clues into how society's solidaristic processes work.<sup>31</sup> The question for any particular department of law, then, is how it reflects or advances the project of social solidarity. It is in this context that Durkheim takes up crime and punishment. His opening question is "what in essence . . . crime consists of."<sup>32</sup> His argument, in brief (I return to it below), is that crime is that which offends, threatens, and undermines a community's shared norms and the community's members' sense of being bonded to one another. The usual metaphor here is of a social fabric: crime is a tearing of the social fabric, and punishment is a restitching of that torn social fabric. As with Hegel, this view of punishment does not make sense without the prior view of crime.

Jean Hampton also develops her views in successive works, but the most important is her book-length dialogue with Jeffrie Murphy, *Forgiveness and Mercy*.<sup>33</sup> Her project at the relevant point in the book is to explain, contra Murphy, how one can forgive without thereby minimizing the magnitude of the wrong one is forgiving. In the course of working out an answer, she arrives at a simple question that becomes the leitmotif of everything else she says in the book and much else she would say in the remainder of her career: "What is it that really bothers us about being wronged?"<sup>34</sup> Her answer, as I will show, has to do

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<sup>31</sup> See DURKHEIM, DIVISION OF LABOR, *supra* note 12.

<sup>32</sup> *Id.* at 31.

<sup>33</sup> JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988).

<sup>34</sup> Jean Hampton, *Forgiveness, Resentment, and Hatred*, in MURPHY & HAMPTON, *supra* note 33, at 35, 43.

with the ways in which wrongs degrade the person wronged, but for now the point is the question; it is the question that shows us her point of departure. When in later work she expressly sets herself the task of laying out a theory of punishment, she circles back to this question. If we are to understand punishment, she argues, we must “link[] . . . punishment to that which makes the wrongful action wrong.”<sup>35</sup> That is, “we need . . . a good theory of the wrongfulness of punishable conduct.”<sup>36</sup> We need to answer the question: “What is a wrong?”<sup>37</sup>

Normative unstitching and restitching is thus the architectonic within which each of the three leading members of the reconstructive tradition works in his or her own way. Reconstructive criminal theory starts with wrongdoing. That is not to say that nonreconstructive criminal theory is silent as to wrongdoing: contemporary criminal theory does address the nature of wrongdoing to some extent, generally under the rubric of what should be criminalized. Michael Moore, for example, has recognized the tripartite linkage from wrongdoing to criminalization to punishment,<sup>38</sup> as has Douglas Husak.<sup>39</sup> There has indeed been a recent flurry of interest in criminalization, pushed forward, not coincidentally, by the leading reconstructivist alive today: Antony Duff.<sup>40</sup> But what is striking here is how late this interest

<sup>35</sup> Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1661 (1992) [hereinafter Hampton, *Correcting Harms*] (emphasis omitted).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See Moore, *Liberty's Constraints*, *supra* note 6.

<sup>39</sup> See HUSAK, *supra* note 25, at 57, 87.

<sup>40</sup> Over the last five years, Duff has edited four volumes of work (collecting his own writings and those of others) on criminalization: THE BOUNDARIES OF THE CRIMINAL LAW (R.A. Duff et al. eds., 2010); THE STRUCTURES OF THE CRIMINAL LAW (R.A. Duff et al. eds., 2011); THE CONSTITUTION OF THE CRIMINAL LAW (R.A. Duff et al. eds., 2013); and CRIMINALIZATION, *supra* note 6. His view of the matter is clearly reconstructive, *see* Duff, *supra* note 2, at 139 (arguing that criminal law's concern is wrongdoing that “violates the polity's defining values”), as is his view of punishment, *see* R.A. Duff, *Towards a Modest Legal Moralism*, 8 CRIM. L. & PHIL. 217, 230 (2014) (“[Punishment] displays our commitment to the values that the wrong violated.”), and even procedure, *see* 3 ANTONY DUFF ET AL., THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL 3 (2007) (arguing that “a criminal trial [is] a communicative process that calls the defendant to answer” for violating community values). There is no question that Duff is in the reconstructive family. He is one of the major figures in the family. But he is a distinctive member of the family, for it is Duff's mission to make these ideas compatible with political liberalism. His view of criminalization is illustrative. He suggests two restrictions on criminal law's scope. One I have mentioned: the reconstructive concern for wrongs that “violate[] the polity's defining values.” Duff, *supra* note 2, at 139. The second sounds within the liberal tradition but is not the harm principle: “[T]he criminal law is, I believe, properly concerned not (even in principle) with every kind of moral wrongdoing, but only with wrongs that should count as ‘public’ rather than ‘private’ . . . .” Duff, *supra*, at 222. “[I]ts concern is with wrongdoing that figures in the public realm of our political or civic life — not with moral wrongdoing as such . . . .” *Id.* at 222–23. As the public/private distinction is as much a part of liberalism as the harm principle, Duff thus plants a communitarian flag within the liberal tradition (or vice versa).

comes in the maturation of the field and how small it is relative to the massive attention given to punishment. As Husak wrote in 2008: “I find the lack of scholarly interest in the topic of criminalization to be baffling. . . . [N]o contemporary theorist in the United States or Great Britain is closely associated with a theory of criminalization.”<sup>41</sup> That might have been too strong even in 2008: the harm principle is a theory of criminalization (or at least can be taken as a theory of criminalization; Mill proposed it as a limitation on all government), and Joel Feinberg has examined it in exquisite detail,<sup>42</sup> as have others. But Husak’s broad point is right: the theory of criminal wrongdoing is a pinprick relative to the theory of punishment.

This disproportion is important, not just because it leaves a stone unturned, but because it shows that the field has generally treated criminalization and punishment as conceptually separate. The idea of a “crime,” until the recent flurry of interest, has usually served as a placeholder in debates about punishment; that is how the debate about criminalization can be so much smaller and younger than the debate about punishment. To a reconstructivist, this is like heart surgery without cardiovascular theory, for it is reconstructivism’s contention that the nature of crime and the grounds of punishment are conceptually connected. In fact, the claim is stronger still (and this is where reconstructivism departs even from Moore and Husak): a theory of crime is conceptually *prior* to a theory of punishment, because it is only by understanding the nature of crime that we can see why and how we should punish. There cannot be a normative restitching without a normative unstitching.

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I both admire this approach and have misgivings about it. One problem is that reconstructivism in its more elemental form — unfused with liberalism — has more descriptive power than Duff’s built-up version: reconstructivism as described in this Article can shed light on criminal law generally, even in illiberal societies. Second, Duff does not, in my view, ever fully identify the foundations of the tradition of which he is a part: he knows he is a communitarian, but he doesn’t know he is a reconstructivist. That has consequences, for it means his writing does not make clear where he is echoing general themes and where he is adding something of his own; it therefore also does not make clear where one might get off the particular bus he is driving. Third, I am uncomfortable with Duff’s wholly *political* understanding of criminal law (criminal law as the protector of public life), rather than a broadly *cultural* understanding of criminal law (criminal law as the protector of embodied ethical life). The latter, it seems to me, may be less liberal but more democratic — or, put another way, reconstructivism comes in Burkean as well as liberal varieties. See *infra* section III.A, pp. 1552–55.

Working out the details — figuring out precisely where Duff stands within the reconstructive tradition — would require an article-length treatment. Suffice it to say here that I think Hegel, Durkheim, and Hampton are more useful for getting at reconstructivism’s basic structure. Duff comes in at a later point in building the theory.

<sup>41</sup> HUSAK, *supra* note 25, at 58, 60.

<sup>42</sup> See 1–4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* (1984, 1985, 1986, 1988).

The focus in mainstream criminal theory on how to justify punishment, absent a starting point in the theory of wrongdoing, is a consequential one. It has, by ignoring or minimizing the question of what crime and wrongdoing are, deprived itself of the resources by which to answer its own question — for if reconstructivism is right, understanding punishment depends on understanding crime and wrongdoing. The focus on punishment alone has also made the issue of state power loom excessively large; the socio-theoretic question is why social groups punish, not the proper limits of the state. The focus furthermore has caused criminal theory to lose track of what makes crime and punishment so culturally riveting — the magnetism of the subject, its hold on the public imagination from the *Oresteia* through *Law & Order* — which obviously does not arise from proto-libertarian concerns about state power. The focus has made the theory of punishment excessively normative — that is, made it normative without first understanding the phenomenon being judged, without good philosophical description — and that sort of untethered normative theory is often unreliable and unsound.<sup>43</sup> Finally, the focus on punishment alone has made criminal theory unduly insular, concerned with a question that even in philosophy constitutes a discrete and isolated subfield: “the theory of punishment.”

The wrongdoing-redress structure is not a matter for a discrete and isolated subfield; it is a basic feature of human social organization. It is not even in the first place a matter of law or the state, though it acquires new and interesting features when it becomes a form of law enforced by the state. Reconstructivism thus connects criminal theory to the main part of political philosophy — as it was connected for Hegel and Durkheim. They did not think of crime and punishment as discrete and isolated parts of political philosophy; crime and punishment get significant attention in both *The Philosophy of Right* and *The Division of Labor*, both of which are addressed to general matters of society and morality.<sup>44</sup> Anyone who wants to understand ethical life or social organization has a stake in criminal theory if reconstructivism is

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<sup>43</sup> See HONNETH, *supra* note 1, at 1 (“One of the major weaknesses of contemporary political philosophy is that it has been decoupled from an analysis of society, instead becoming fixated on purely normative principles.”).

<sup>44</sup> One could add Foucault’s *Discipline and Punish* and Nietzsche’s *Genealogy of Morality* to this list. See FOUCAULT, *supra* note 2; FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY (Keith Ansell-Pearson ed., Carol Diethe trans., Cambridge Univ. Press 1994) (1887). The *Genealogy* is not ordinarily thought of as a book about crime and punishment, but much of Essay II (which comprises fully a third of the book) is very much about crime and punishment. *Discipline and Punish* — the one book about criminal law from the second half of the twentieth century to become truly famous — treats criminal punishment as a microcosm in which to see the role of power in modernity itself. And while neither Nietzsche nor Foucault are straightforwardly reconstructivists, they recognize the same basic truth about the social world that reconstructivists recognize: that crime and punishment are culture-creating.

right. Contemporary criminal theory has shrunk because it has become fixated on the wrong question.

*B. The Nature of Crime*

The “expressive theory of punishment” is well known. It turns on noticing that punishment has expressive characteristics — that it is a kind of symbolic communication. Reconstructivism agrees with the expressive view of punishment, but adds to the mix a second claim: that crime is expressive too. Wrongdoing is *communication*, and understanding what it communicates is key to understanding what it is that punishment must express in response. In other words, reconstructivism sees crime and punishment as an *exchange of meanings*. We begin here with the crime side of that exchange. Hegel, Durkheim, and Hampton were not perfectly aligned with regard to what crime expresses, and each of them, in my view, made theoretical missteps. But they were roughly aligned and their separate accounts can be combined into something greater than any of them had individually.

Durkheim argued that the concept of harm is inadequate to any sociologically realistic account of crime. Societies criminalize conduct that is not tangibly harmful all the time, like “[t]he act of touching an object that is taboo, or an animal or man who is impure or consecrated, of letting the sacred fire die out, of eating certain kinds of meat, of not offering the traditional sacrifice on one’s parents’ grave, of not pronouncing the precise ritual formula, or of not celebrating certain feasts, etc.”<sup>45</sup> And even when a criminalized act does cause harm, it is not solely the degree of harm that drives its punishment: “In the penal law of most civilised peoples murder is universally regarded as the greatest of crimes. Yet an economic crisis, a crash on the stock market, even a bankruptcy, can disorganise the body social much more seriously than the isolated case of homicide.”<sup>46</sup> None of this rebuts the normative contention that criminal law *should* be restricted to harm, of course, as Durkheim well knew, but it does mean the harm principle cannot explain *why* societies criminalize. There is something in certain acts that alarms societies enough to use criminal law in response. What is that something? That was Durkheim’s question. If his examples are correct — and they seem correct to me — the answer is not “harm.” Harm may or may not mark out the normative limits of criminalization, but it cannot explain crime’s nature; social life is operating according to something other than the harm principle.

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<sup>45</sup> DURKHEIM, DIVISION OF LABOR, *supra* note 12, at 32.

<sup>46</sup> *Id.* at 33.

One might think crime has no unifying characteristic, no nature at all, unless it is expediency; crime is just the grab-bag of acts that societies have addressed, where pragmatic considerations warranted, by means of the instrument most likely to spur compliance.<sup>47</sup> Durkheim denied this too. He did not claim that we will find the same things prohibited in every society, for “if there are acts that have been universally regarded as criminal, these constitute a tiny minority.”<sup>48</sup> Further, the concerns or purposes motivating criminalization “have varied infinitely, and can vary again. Nowadays it is altruistic sentiments that manifest this characteristic most markedly. But at one time, not at all distant, religious or domestic sentiments, and a host of other traditional sentiments, had precisely the same effect.”<sup>49</sup> Nonetheless, amidst the variety of prohibitions and purposes, the “species of crime have something in common . . . some common basis.”<sup>50</sup>

That common basis, Durkheim argued, was that crime breaks the bonds of social solidarity by violating the norms on which social solidarity rests. Crime is offense to embodied ethical life:

The totality of beliefs and sentiments common to the average members of a society forms a determinate system with a life of its own. It can be termed the collective or common consciousness. . . . [A]n act is criminal when it offends the strong, well-defined states of the collective consciousness.<sup>51</sup>

Durkheim is often at pains to emphasize “that crime disturbs those feelings that in any one type of society are to be found in every healthy consciousness”<sup>52</sup> and that crime is “condemned by the members of each society,”<sup>53</sup> and he sometimes appears to argue that these responses define crime itself: crime is whatever happens to disturb the feelings of and spur condemnation by ordinarily socialized members of a community. But the whole picture is something more like this: ordinarily socialized members of a community find that which threatens solidaristic bonds disturbing and respond with condemnation and punishment, for they understand at some level that they depend for their welfare and identity on their membership in a group and that the act in question tears at the bonds on which the group is based. The mark or evidence of such a threat is that it disturbs feelings and spurs condemnation, but disturbance and condemnation don’t define crime so much as en-

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<sup>47</sup> Stuntz argues that “American criminal law’s historical development has borne no relation to any plausible normative theory — unless ‘more’ counts as a normative theory.” William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001).

<sup>48</sup> DURKHEIM, DIVISION OF LABOR, *supra* note 12, at 32.

<sup>49</sup> *Id.* at 34 (footnote omitted).

<sup>50</sup> *Id.* at 31.

<sup>51</sup> *Id.* at 38–39.

<sup>52</sup> *Id.* at 34.

<sup>53</sup> *Id.* at 33–34.

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able us to detect it, just as physicists might detect a particle by measuring the effects it has on the system around it. We know that an act offends the ideas on which a community's social organization is based because well-socialized members of that community react to the act with revulsion, anger, and condemnation. But the nature of the act is that it attacks the ideals on which social organization is based. It is such acts that societies typically make criminal.

Durkheim generally emphasizes the ways in which crime *offends* ethical life. I think he makes too little, at least in *Division of Labor*, of the ways in which crime might also endanger — genuinely endanger — ethical life. He recognizes the jeopardy more clearly in his posthumous *Moral Education*, which is, though superficially an account of classroom discipline, in fact (and as David Garland has emphasized<sup>54</sup>) one of Durkheim's major works on crime and punishment:

With the child as with the adult, moral authority is a creature of opinion and draws all its force from opinion. Consequently, what lends authority to the rule in school is the feeling that the children have for it, the way in which they view it as a sacred and inviolable thing quite beyond their control; and everything that might attenuate this feeling, everything that might induce children to believe that it is not really inviolable can scarcely fail to strike discipline at its very source. To the extent that the rule is violated it ceases to appear as inviolable . . . .<sup>55</sup>

Coupling this argument with the one in *Division of Labor*, we may say this: crime not only offends the norms on which social solidarity is based but, by showing that those norms can be violated, saps them of authority. A crime declares: "The norm against what I have just done is for fools and suckers. It does not hold." An assault says, "The right to physical security does not hold"; a theft says, "The right to property does not hold"; a murder says, "The right to life does not hold." What effect that message has on the capacity of society to maintain itself will depend on particular conditions — how many people violate the norm, how tempting it is to violate the norm, what attitudes accompany the norm's violation, how likely punishment is, etc. — but my own view is that society's normative structures are fragile; crime really does threaten them. If students start cheating on their exams and see that teachers, who could do something about it, turn a blind eye, the norm against cheating will dissolve and dissolve quickly — and likewise if citizens are known to frequently cheat on their taxes or spouses on one another. If providing information to the police is seen as "snitching" and condemned and punished, the very conduct that might have been seen as brave and loyal will be seen as cowardly and traitorous.

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<sup>54</sup> See GARLAND, *supra* note 2, at 28, 41–46.

<sup>55</sup> DURKHEIM, *MORAL EDUCATION*, *supra* note 4, at 165.

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Norms change by action; the jeopardy is real. Seeing that jeopardy is important to motivating reconstructivism.

What is missing in all of Durkheim's work on the nature of crime is an understanding of what crime expresses about victims (tabling for the moment the issue of victimless crimes). He was so oriented to society as a collective that he did not see the individual victim's position as one of special significance; that aspect of meaning was lost upon him. But it is exactly here that Hampton — herself blind to many of the social dimensions of wrongdoing on which Durkheim focused — makes her distinctive contribution. (I should say "their" contribution in this case, because Hampton's co-author, Jeffrie Murphy, contributed to this insight as well.) Hampton and Murphy, like Durkheim, begin by emphasizing the inadequacy of the concept of harm: the trouble with wrongdoing "is not simply that wrongdoings threaten or produce physical or psychological damage, or damage to our careers, interests or families," because "[h]owever much we may sorrow over our bad fortune, when the same damage is threatened or produced by natural forces or by accidents, we do not experience that special anger" associated with having been wronged.<sup>56</sup> But at that point they swerve, bringing to light a second dimension of expressive meaning in wrongdoing, namely, what wrongdoing communicates about the individual victim of the wrong. Per Murphy:

One reason we so deeply resent moral injuries done to us is not simply that they hurt us in some tangible or sensible way; it is because such injuries are also *messages* — symbolic communications. They are ways a wrongdoer has of saying to us, "I count but you do not," "I can use you for my purposes," or "I am here up high and you are there down below." Intentional wrongdoing *insults* us and attempts (sometimes successfully) to *degrade* us — and thus it involves a kind of injury that is not merely tangible and sensible. It is moral injury, and we care about such injuries.<sup>57</sup>

As Hampton puts the point: "When someone wrongs another, she does not regard her victim as the sort of person who is valuable enough to require better treatment."<sup>58</sup> To wrong someone is to make a statement about her worth, to devalue her, and the victim resents that statement potentially as much or more than she does the harm.

In Murphy's and Hampton's hands, this point is largely one about individual psychology, about what wrongdoers believe or impliedly believe when they act and how victims feel when they are acted upon. It seems to me that neither Hampton nor Murphy ever saw the sociological side of their claims. To Hampton's mind, if the victim resists the

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<sup>56</sup> Hampton, *supra* note 34, at 43–44.

<sup>57</sup> Jeffrie Murphy, *Forgiveness and Resentment*, in MURPHY & HAMPTON, *supra* note 33, at 14, 25.

<sup>58</sup> Hampton, *supra* note 34, at 44.

communication, although she is “*demeaned* in the sense that she has been forced to endure treatment that is too low for her,”<sup>59</sup> she suffers “*no literal degradation* as a result of the wrongdoing.”<sup>60</sup> To Murphy, the social significance of the degradation is that it hurts our self-respect:

Most of us tend to care about what others (at least *some* others, some significant group whose good opinion we value) think about us — how much they think we matter. Our self-respect is *social* in at least this sense, and it is simply part of the human condition that we are weak and vulnerable in these ways.<sup>61</sup>

The problem with these views is that they fail to see the respects in which ill-treatment really does degrade, no matter how strong the individual victim’s psychology is, because the issue is not just self-respect but social status, and social status is not a matter of individual psychology; it is intersubjective.

To see the full picture — to see what wrongdoing means for victims beyond harming them — we need to introduce a distinction that neither Hampton, nor Murphy, nor Durkheim fully saw. The distinction differentiates *self-respect*, a psychological state; *ultimate human dignity*, that quasi-mystical core of worth that human beings are thought to have in virtue of being human; and *social status*, the sociological phenomenon of having a position within the social hierarchy — a rank, a way of being regarded and valued by one’s fellows, a kind of *social dignity*.<sup>62</sup> Self-respect depends finally on one’s own psychology. Ultimate human dignity depends, let us say, on one’s humanity or personhood. But social status is a socially given thing. When white men in the Jim Crow South called black men “boy” and went uncorrected and echoed by their fellows, a social hierarchy was *accomplished*, however much the degradation left (as it could not but leave) black men’s true dignity untouched, and even if it had left black men’s sense of self-worth untouched. At the time that one is made a victim, a proposal is made within the social world: “This person is of lowered social status.” The proposal is presented not just to the victim but to society as if a question: “Will this lowering be affirmed or disaffirmed?” Society and victim are in a liminal space. Society will decide by its response how that proposal will be answered. A striking feature of this call-and-response is that, because the proposal is about a social fact — something true insofar as others in the society treat it as true, something true insofar as it describes social life — society’s response is not just an

<sup>59</sup> *Id.* at 45.

<sup>60</sup> *Id.* at 44.

<sup>61</sup> Murphy, *supra* note 57, at 25.

<sup>62</sup> Hegel called this sort of social dignity “recognition”; his early political philosophy was devoted to it. See HONNETH, *supra* note 11, at 3–64.

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expression of agreement or disagreement. Society's response makes the proposal, as a claim about the social world, true or false.

This concern for victims is why reconstructivism, no less than retributivism, is a *dignitary* theory of criminal law. And it is why Hampton, because of the intensity of her focus on victimhood, is a foundational figure in the tradition (even if, as I said, she did not get sufficiently past individual psychology). Reconstructivism gives theoretical authorization to the idea that punishment redeems, honors, or affirms society's commitment to the victim. This is one of reconstructivism's important advantages over pure utilitarianism, for utilitarianism's bureaucratic rationality — bureaucratic rationality all the way down — cannot account for the dignity of victims. This dignitary affirmation of victims is also one of the reasons reconstructivism is a theory of criminal *law*. Law has a special place in upholding the social fact of our worth; it is in a unique position to express and uphold our sociological dignity. Finally, this dignitary affirmation of victims gets at something very important about the kind of wrongdoing with which criminal law is most concerned: violence. Violence is about more than the body. Violence is one of the primary mechanisms — it might be historically the original mechanism — by which social hierarchies of domination and coercion are established. Criminal law focuses on violence not only because people prize their physical well-being extremely highly, but also because, if violence is not decisively answered, wrongful hierarchies take hold in social life.

Putting the Durkheim and Murphy/Hampton threads together, we might say this: wrongdoing challenges two parts of the social fabric of moral life. It says of the abstract norm, "This norm does not hold," and of the victim, "You — and those like you — are degraded." The moral order that sustains social life consists in equal measure of a system of abstract norms or rights and a socially approved status structure or hierarchy;<sup>63</sup> societies must protect the one no less than the other. Wrongdoing offends and puts into jeopardy both parts of that moral order.

It is Hegel who sees all parts of this equation most clearly, though also, characteristically, Hegel who expresses it most opaquely. Wrongdoing is, in the first place, he says, "an infringement of the right."<sup>64</sup> That sounds on the level of abstract norms, rather than victims. But,

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<sup>63</sup> "Status" and "hierarchy" should not be regarded in this context as dirty words, implying exploitation or domination. Some status structures or hierarchies are wrongful abuses of power and some are not. Often, societies' status structures and hierarchies are sociologically intricate and morally complex in ways that resist a simplistic thumbs-up or thumbs-down. But every society will have status arrangements of some kind and must be prepared to defend them if that society wishes to maintain itself.

<sup>64</sup> HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 27, § 97, at 123.

as he also says, “a wrong committed against [the right] is a force directed against the *existence . . . of my freedom*,”<sup>65</sup> which undercuts “the universal and infinite element in the predicate ‘mine’ — i.e. my *capacity for rights*.”<sup>66</sup> That is to say, wrongdoing is at once a claim to the effect that “the right does not hold here” and a claim to the effect that “this person, the victim, is not a free person entitled to have his or her rights respected.” Hegel makes the same point more clearly in the precursor to the *Philosophy of Right*, his *Lectures on Natural Right and Political Science*:

Crime is the infinite judgment whereby right is infringed as right and what is mine is assailed, negated in such a way that if I were to allow it to happen, *I should lose not only what belongs to me but in general the capacity for ownership, the universal [element] of my being, which in such a case is not recognized. . . .* The one who commits a crime against me simply *does not admit, or denies, that I have a right*.<sup>67</sup>

Hegel then adds, with respect to the crime of most interest to him throughout his career: “To make and keep a human being as slave is the absolute crime, *since the personality of the slave is negated . . .*”<sup>68</sup>

If crime is communication, who or what determines the content of what is communicated? Is it the intentions of the criminal (the crime means whatever he or she means by it)? I think this idea is more often true than one might think. A lot of behavior carries deliberate expressive content — like one person refusing to shake another’s hand — and crime is no different. Consider an argument in the street that escalates into a fight and then a beating. The person administering that beating might be acting so thoughtlessly that his mind carries no expressive content at all, but I’d guess that in many or even most instances the offender takes himself to be “telling” the victim (and third parties, and even himself) who is in charge, intends to express his contempt or sense of affront, and means to let the world know that he is not cowed by the victim, by the prospect of a fight, or by the law. Or consider what many rapists intend at some level to communicate about power and gender. Rape is often *meant* to express domination.

That said, it would be a mistake to focus exclusively on “authorial intent” in determining the communicative content of a crime. Meaning in general is intersubjective; if one person refuses to shake another’s hand for idiosyncratic reasons (maybe fear of germs), the act still

<sup>65</sup> *Id.* § 94, at 121 (second emphasis added).

<sup>66</sup> *Id.* § 95, at 122.

<sup>67</sup> GEORG WILHELM FRIEDRICH HEGEL, LECTURES ON NATURAL RIGHT AND POLITICAL SCIENCE: THE FIRST PHILOSOPHY OF RIGHT 96–97 (J. Michael Stewart & Peter C. Hodgson trans., Univ. of Cal. Press 1995) (1983) (alteration in original) (emphasis added) (translating a transcription, discovered in 1982, of lectures Hegel gave in 1817–1818).

<sup>68</sup> *Id.* at 97 (emphasis added).

carries the public meaning a culturally literate member of the community would assign it. As Hampton, who develops a Gricean account of crime's behavioral meaning, puts it: "[C]ertain behaviors have fixed conventional meanings, so that, for example, blowing a raspberry will be taken to convey disrespect in this society, even if one intended it as a compliment."<sup>69</sup> Furthermore, even where behavior lacks "fixed conventional meanings," it might carry the meaning a reasonable member of the culture would take it to mean. If someone moves the half-and-half container from the cream and sugar station to the serving counter after getting coffee at a café, anyone in the café would understand the gesture to indicate that the half-and-half container is empty. One could also focus on what a behavior *shows* rather than what it means in a linguistic sense: someone walking with fists clenched and a furious expression is ready for conflict. So there are at least four mechanisms of communication through conduct: authorial intent, convention, reasonable third party interpretation, and demonstration. Crime communicates through all four.

Hegel adds a fifth mechanism by which crime takes on communicative content, and it is a particularly interesting addition because it has to do with the element of *law*; it turns on the way in which *crimes* are different from mere *wrongs*, *legal* violations from purely *moral* violations. Hegel argues that the existence of a legal order necessarily makes crime expressive and necessarily confers on it particular meanings. *The Philosophy of Right* is a book in three large parts, the first of which is about moral concepts in the abstract and the last of which is about embodied ethical life. The chapter on which most Hegel interpreters have focused, "Wrong," is in Part I, which is problematic, because Part I is not supposed to be anything more than conceptual analysis, and Hegel insists that conceptual analysis by itself is incomplete.<sup>70</sup> It is important, then, to build into our understanding of Hegel's theory the material on crime and punishment in Part III, which has a great deal to say about how actual legal systems function. Hegel's Part III argument on what crime communicates is this:

Since property and personality have legal recognition and validity in civil society, *crime* is no longer an injury merely to a *subjective infinite* [that is, to an individual person], but to the *universal* cause . . . . [T]he injury now

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<sup>69</sup> Hampton, *Correcting Harms*, *supra* note 35, at 1676; *see also id.* at 1670 ("The analogies between the meaningfulness of language and the meaningfulness of behavior are striking enough that one can use the Gricean theory of linguistic meaning to distinguish different ways in which human conduct can be meaningful; and in what follows, I will employ Gricean categories in the course of explaining how wrongful conduct is meaningful . . ."). Nozick draws on Grice too, albeit to understand how punishment, rather than crime, acquires its communicative content. *See* NOZICK, *supra* note 2, at 370–74.

<sup>70</sup> *See supra* notes 27–28 and accompanying text.

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affects the attitudes and consciousness of civil society, and not just the existence of the immediately injured party.<sup>71</sup>

What is crucial here is the first word of the passage: “Since.” A society under a legal order effectively makes, Hegel thinks, certain claims to all: “There is a right to property here.” “There is a right to physical security here.” “There is a right to sexual autonomy here.” To commit a theft is necessarily to negate the claim, “There is a right to property here.” To commit an assault is necessarily to negate the claim, “There is a right to physical security here.” To commit a rape is necessarily to negate the claim, “There is a right to sexual autonomy here.” The expressive content of crime is therefore not wholly contingent — not wholly a matter of the criminal’s (contingent) intentions, nor even society’s (contingent) conventions — but fixed in necessary ways by the legal order. Perhaps in a state of nature the meaning of a crime would be more open-ended, but in a legal order, the meaning of a crime is fixed by the existence of the law itself. A crime denies the claims made by whatever particular law it violates and, by extension, denies the rule of law in general.

One advantage of reconstructivism’s account of the nature of crime is that it provides a highly specified account of why crime does harm to society, rather than to the individual victim alone. One of criminal theory’s tasks is to explain why criminal law has evolved to be a form of public rather than private law, why a crime is an offense against “the people” or “the commonwealth” rather than, like a tort, solely the individual victim-plaintiff. To make theoretical sense of criminal law’s status as public law, crime *has* to be regarded as an attack on society. But that is surprisingly difficult to explain. Why is, say, an individual act of violence toward a particular victim an attack on society? The explanation most often given is that the *risk* of crime to future victims justifies a social response — in other words, criminal law is public law because of the need for deterrence and other forms of crime control, that is, because of the need to socially manage risk. But for two reasons, that rationale is problematic and reconstructivism offers a better alternative.

First, the risk-management explanation does not treat society as a true collective (a collective unity) at all: society in this picture is just a set of individuals consisting of the actual victim and possible future victims. But if crimes harm embodied ethical life, they harm a true collective good — for embodied ethical life is intersubjective. It is, like

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<sup>71</sup> HEGEL, PHILOSOPHY OF RIGHT, *supra* note 27, § 218, at 250 (German terms omitted). Hegel uses the term “subjective infinite” when he seeks to emphasize that individuals are dignity-bearing subjects.

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a language, both the product of common activity and a resource on which everyone draws.

Second, the risk-management explanation does not distinguish crimes from torts (a theme I return to below in section II.D). Crimes are a matter of public law and torts are a matter of private law, and the reason cannot be (a) that torts are nonharmful (they are more reliably harmful than crimes because harm is an element of all tort causes of action); (b) that torts are nonwrongful (in a system that is generally negligence-based, which is to say fault-based, torts are civil wrongs); or (c) that torts are not a fit target for deterrence or other forms of risk management (deterrence and risk management are major factors in any economic understanding of tort law). But most torts are negligent accidents, and what do negligent accidents *express*? Typically that “the author of this harm behaved stupidly,” rather than, “the author of this harm denies the claims of our moral culture.” Accidents that reflect mere civil negligence may fall short of society’s organizing normative order or even offend it, but they do not attack or deny it. Intentional crimes and criminally negligent accidents do attack or deny that normative order. The one therefore undermines a true collective good, moral culture, while the other does not. The one is therefore societal harm and public law, and the other individual harm and private law.

### C. *What Punishment Is For*

Punishment’s function is to reconstruct a violated normative order in the wake of a crime. This function makes reconstructivism a type of expressivism, but a very particular type, for two reasons.

First, expressivism is on its terms wide open with respect to *what* punishment expresses and *why*. Reconstructivism is specific: it insists that punishment does or should have a particular meaning for a particular purpose. The essential idea follows naturally from understanding what a crime is: if a crime says of the norm or right it violates, “This norm or right is insecure,” and of the person it violates, “This person or this kind of person is not one whose rights need to be respected,” and if in doing so the crime potentially puts both society’s system of norms and its status structure in jeopardy, then punishment must decisively reaffirm the violated norm and elevate the violated victim. Punishment is the communicative negation of the message of the crime.

Second, expressivism might be taken to imply that punishment is *only* expressive. Reconstructivism treats punishment as a speech-act. Punishment *falsifies* the claims made by the crime — not only declaring the crime to be morally wrong, but making it, as a description of social life, untrue. If the crime was a theft, for example, part of its claim is that the right to property does not hold. Punishing that theft

is a speech-act in that it both says the theft was wrong (the speech) and *makes the right to property hold* (the act).

Hegel characteristically refers to punishment as “the cancellation of the crime”<sup>72</sup> or “the nullity of this nullity.”<sup>73</sup> To thus cancel the crime is a “restoration of right,”<sup>74</sup> a way of moving “through punishment . . . to affirmation, i.e. to *morality*.”<sup>75</sup> Contra Bentham, punishment is not an evil we accept to reduce the total stock of evil in the world over time:

The theory of punishment is one of the topics which have come off worst in the positive jurisprudence of recent times . . . . If the crime and its cancellation . . . are regarded only as *evils* in general, one may well consider it unreasonable to will an evil merely *because another evil is already present*. This superficial character of an *evil* is the primary assumption in the various theories of punishment as prevention, as a deterrent, a threat, a corrective, etc. . . .<sup>76</sup>

Punishment on any such theory is just violence in a good cause: “To justify punishment in this way is like raising one’s stick at a dog; it means treating a human being like a dog instead of respecting his honour and freedom.”<sup>77</sup> But to punish as an affirmation of morality is respectful of all, including the offender, and renders punishment not a *prima facie* evil but, where used appropriately to secure the right, simply the language in which one expresses a commitment to what is moral.

For Hegel, at least in Part I of the *Philosophy of Right*,<sup>78</sup> the normative logic of punishment — to restore the right through “the nullity of this nullity” — is a matter of conceptual entailment. There is a certain logic in that, but perhaps something problematic as well. Even conceptually, nullifying a crime does not necessarily mean right prevails over wrong: that happens only if it is (contingently) the case that the crime really was wrong and that the legal order being restored really is right. There is also something off-putting in treating these matters as conceptual entailments at all: the context calls for a sociological logic, not a propositional one. Durkheim is less abstract: punishment for Durkheim is a wholly sociological phenomenon whose “real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigour.”<sup>79</sup> The only way to do so

<sup>72</sup> *Id.* § 99, at 124 (German term omitted).

<sup>73</sup> *Id.* § 104, at 132.

<sup>74</sup> *Id.* § 99, at 124.

<sup>75</sup> *Id.* § 104, at 132.

<sup>76</sup> *Id.* § 99, at 124 (footnote omitted) (citation omitted) (German terms omitted).

<sup>77</sup> *Id.* § 99, at 125–26.

<sup>78</sup> As discussed above, Hegel in Part I intends only conceptual analysis; the sociology comes later. See *supra* notes 27–28, 70 and accompanying text.

<sup>79</sup> DURKHEIM, *DIVISION OF LABOR*, *supra* note 12, at 63.

(Durkheim insists that it is the “sole means”) is “to give voice to the unanimous aversion that the crime continues to evoke, and this by an official act, which can only mean suffering inflicted upon the wrongdoer.”<sup>80</sup> Like Hegel, Durkheim does not think punishment in this functional context can be seen, even defeasibly, as an evil (or as Durkheim, ever the sociologist, puts it, as “cruelty”).<sup>81</sup> Punishment is rather “a sign indicating that the sentiments of the collectivity are still unchanged.”<sup>82</sup> For creatures constituted or acculturated like us, *not* to punish is not to care about one another, or not to care about our shared ethical life, or both.

An interesting feature of Durkheim’s view of punishment is its pluralism. Durkheim does not deny in the radical way that Hegel does that punishment might also “intimidate possible imitators through threats.”<sup>83</sup> He just thinks deterrence cannot be “the unique nor even the chief reason for punishment,” for “if [punishment] had no other object, the functions it performs would be of altogether secondary importance, and one might well ask whether they are worth the quite considerable disadvantages.”<sup>84</sup> (Punishment does come with quite considerable disadvantages, and scaring off would-be offenders does seem like a secondary sort of social function — not a dispensable one, but secondary as a matter of understanding the basic structure of society.) Nor does Durkheim wholly deny that punishment might “atone for the infraction,”<sup>85</sup> in the spirit of some forms of retributivism, by making the offender “expiate his crime through suffering”;<sup>86</sup> he finds something in this view “to hold on to.”<sup>87</sup> But to Durkheim, retributivism’s functional inertness — its insistence that atonement alone is punishment’s necessary and sufficient condition, with punishment’s pragmatic purposes and effects playing no role — along with the mysteries around atonement itself (how it works, why it matters), make the retributivist view on the whole too mystical to serve social needs. Punishment *does* something, and what it does is not primarily to instill fear in would-be offenders; it is rather “to buttress those consciences which violations of a rule can and must necessarily disturb in their faith — even though they themselves aren’t aware of it; to show them that this faith continues to be justified.”<sup>88</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> DURKHEIM, MORAL EDUCATION, *supra* note 4, at 167.

<sup>84</sup> *Id.* at 161.

<sup>85</sup> *Id.* at 164.

<sup>86</sup> *Id.* at 167.

<sup>87</sup> *Id.* at 165.

<sup>88</sup> *Id.* at 167.

Notice the audience to whom, on Durkheim's view, punishment's communicative message is aimed: "those consciences which violations of a rule" will "disturb." Deterrence aims at offenders and would-be offenders — Holmesian bad men, who need to be discouraged or intimidated. Retributivism, rehabilitation, and incapacitation aim at offenders as well. Reconstructivism's main audience is ordinary people open, as ordinary people are, to signals of what others in their social milieu find acceptable. Punishment must operate on their beliefs and their feelings; it must buttress their "consciences" and their "faith." Holmesian bad men are in the audience too, but they are not the focus. James Fitzjames Stephen makes exactly the same point: "[Criminal law] operates not only on the fears of criminals, but upon the habitual sentiments of those who are not criminals. . . . [T]he sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax."<sup>89</sup> It gives "ratification" to the moral feelings held by the public.<sup>90</sup> Again, to appreciate this view, one must see that the threat crime poses to a functioning morality is real. To quote Durkheim: "[I]t is not punishment that gives discipline its authority; but it is punishment that prevents discipline from losing this authority, which infractions, if they went unpunished, would progressively erode."<sup>91</sup> What would most undermine typical students' sense that cheating on exams is a line not to be crossed is the knowledge that their friends are cheating and that the teachers, who know, don't care. Punishment is for them.

Hampton presents her views on punishment more or less within the four corners of traditional punishment theory. Her views also go through two phases (before *Forgiveness and Mercy* and after). But both phases, if we look past her self-presentation, reflect her instinct for the restoration of a violated normative order. In her early work on punishment as "moral education," she argues that punishment not only sets up certain barriers but "conveys a larger message to beings who are able to reflect on the reasons for these barriers' existence."<sup>92</sup> Human beings are reason-givers, and to effectively prevent wrongs in a community of reason-givers requires not just making wrongs costly but persuading people to reject the wrongs in virtue of their wrongfulness. Punishment is a "speech act"<sup>93</sup> that conveys to the wrongdoer

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<sup>89</sup> STEPHEN, *supra* note 2, at 80, 81.

<sup>90</sup> *Id.*

<sup>91</sup> DURKHEIM, MORAL EDUCATION, *supra* note 4, at 167.

<sup>92</sup> Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 212 (1984).

<sup>93</sup> *Id.* at 215. This a different understanding of punishment's character as a speech-act than the one I offer at pp. 1513–14. For Hampton, punishment is speech in that it communicates a message, and an act in that it communicates the message by taking action (punishing). My sug-

that his or her action was “morally wrong and should not be done for that reason”<sup>94</sup> (*that* reason and not simply fear of the costs). Because the lesson is public, punishment “conveys an educative message not only to the convicted criminal but also to anyone else in the society who might be tempted to do what she did.”<sup>95</sup> So this is not standard rehabilitationism, though it might initially appear so. This is social communication about moral ideas. Hampton’s argument in *The Moral Education Theory of Punishment* is in fact consistent with Durkheim’s in *Moral Education*, right down to the title, though Hampton does not appear at any point in her oeuvre to have been influenced by Durkheim (a sad testament to how high the wall between normative philosophy and the empirical study of social life can be). Punishment is a message to the class, not just the errant student, and the message is not just about costs, but about right and wrong — as it is for Durkheim (and Stephen). Hampton’s account is rationalistic and individualistic where Durkheim’s is sentimentalist (in the technical sense of involving the sentiments) and solidaristic. Hampton was jointly devoted to analytic philosophy and to Protestant Christianity, and her early outlook has the mark of those two roots. But at the end of the day, punishing in order to persuade third parties to see a criminal’s action as wrong is reconstructivist.

After *Forgiveness and Mercy*, Hampton developed a new theory of punishment, which she called “the ‘expressive’ theory of retribution.”<sup>96</sup> “[B]ehavior can carry meaning with regard to human value,” she argues.<sup>97</sup> Where the meaning of that behavior constitutes “*an affront to the victim’s value or dignity*,”<sup>98</sup> it warrants a response intended “to vindicate the value of the victim denied by the wrongdoer’s action through the construction of an event that not only repudiates the action’s message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.”<sup>99</sup> At this point in her career, Hampton understood this as a kind of retributive theory, separate from but consistent with her previous moral education theory.<sup>100</sup> But the two theories are not so separate, and both fit into a larger whole. The moral education theory understands crimes as wrongs and punishment as a message to wrongdoers and third parties about their wrongness. The expressive retribution theory understands

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gestion is that punishment is speech in that it communicates a message and an act in that it brings a new fact into existence (falsifying the claim made by the crime).

<sup>94</sup> *Id.* at 212.

<sup>95</sup> *Id.*

<sup>96</sup> Hampton, *Correcting Harms*, *supra* note 35, at 1659.

<sup>97</sup> *Id.* at 1670.

<sup>98</sup> *Id.* at 1666.

<sup>99</sup> *Id.* at 1686.

<sup>100</sup> *Id.* at 1659.

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crimes as meaning-bearing wrongs carrying specific content about victims' value or dignity, and punishment as a message to wrongdoers and third parties repudiating that specific content. Hampton never worked her way to solidarity. But all the other elements are there: crime and punishment were for Hampton an exchange of behaviorally encoded messages addressed to all concerning the value of persons and the moral authority of certain norms. Her thinking was reconstructive.

Reconstructivism's account of punishment, like its account of crime, fits organically into criminal law's character as public law. To the extent crime is harm-doing, punishment cannot undo the harm; it is a commonplace that punishing the murderer does not bring a loved one back to life. At most criminal law might reduce the incidences of harm in the future. But to the extent crime is a *claim* that the norm it violates is defunct, punishment *can* in a sense undo it; punishment makes that claim untrue. Likewise, to the extent crime is a claim that the victim is of lowered social status, punishment can undo it, because status is socially given and punishment is the social performance of the conviction that the victim merits better treatment. In other words, since the message of a crime is a social one — a proposal submitted to the community that can become true as a description of social life only if the community approves it — punishment by the community genuinely undoes the crime. To be clear, while punishment cannot literally reverse the *individual harm* done by the crime, it can reverse the crime's *message*, because the message is a proposal about the social authority of rights and the social status of victims that punishment both declares to be false and makes false. This is why a mature system of criminal law must be public law. Private vengeance, even if retributively just and adequate to the goal of deterrence (and vengeance might be retributively just and adequate to the goal of deterrence), cannot by its nature accomplish this nullification. As Hegel puts it, the "*content*" of revenge "is just so far as it constitutes retribution. But in its *form*, it is the action of a *subjective* will . . ." <sup>101</sup> Public punishment is different, not because the emotions accompanying it are different (the emotions motivating the community and its officials are not at issue) but because it is public, because "[i]nstead of the injured party, the injured universal now makes its appearance, and it has its distinctive actuality in the court of law." <sup>102</sup> So long as punishment is filtered through public institutions discharging a public duty, the punishment does not merely satiate private anger, or even merely give the offender his just desserts, but affirms public right.

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<sup>101</sup> HEGEL, PHILOSOPHY OF RIGHT, *supra* note 27, § 102, at 130.

<sup>102</sup> *Id.* § 220, at 252 (emphasis omitted).

D. *Why Not Say It with Flowers?*

The last section argued that punishment's *function* is to reconstruct embodied ethical life, but is punishment *necessary* for that purpose? Why does punishment's message have to be encoded in the form of pain?<sup>103</sup> If the goal is to naysay what the crime expresses about norms and victims, why not make a public statement of disapproval? Or give the victims a parade?<sup>104</sup> Establish a fund from taxes with which to pay them compensation? Pour additional resources into prevention rather than correction? Restore relations by having the victim and offender meet to talk things out? Wouldn't these measures express the value of the victim and support for the norm just as well as punishment, and might some of them do better than punishment at securing the norm socially — that is, making sure the norm generally prevails in social life?

These questions generally arise as an objection to reconstructivism; the suggestion is that there is a more humane way of accomplishing what reconstructivists regard as punishment's function. But reconstructivism is both normative and descriptive, a theory of how criminal systems *should* function and how they *do* function, and the first thing to notice about this objection is that, descriptively, it is no objection at all. It admits the entire structure of the situation as reconstructivism interprets it, saying effectively: "Well, crime and punishment may carry just the meanings and be linked together in just the way you reconstructivists say, but punishment is still objectionable because there are gentler ways to accomplish the same thing." A reconstructivist interested only in understanding how societies actually function might be agnostic on this point; certainly nothing in the theory counsels against making public statements, honoring or compensating victims, or directing resources toward prevention. And on the other side, if, say, a utilitarian did not accept reconstructivism's normative implications, but admitted that it correctly describes the social world as it stands, that would be a great theoretical victory on reconstructivism's part. The game here is not just normative, and even if it were, any serious normative theory has to deal with the realities on the ground.

Turning to the normative issue, notice that the spirit of this objection is the one I earlier associated with Bentham and Beccaria: the Enlightenment-humanist revulsion at suffering and consequent intense discomfort with punishment.<sup>105</sup> We should not accept that motivating

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<sup>103</sup> For punishment's character as "hard treatment," see *supra* note 25 and accompanying text.

<sup>104</sup> Jean Hampton discusses an incident in the Biblical Book of Esther in which the victim of a wrong was given a parade. See Hampton, *Correcting Harms*, *supra* note 35, at 1695–97.

<sup>105</sup> See *supra* p. 1498.

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spirit. It should give us pause — very great pause — that no society ever has dispensed with punishment in the way the objection suggests. Something about the objection's *outlook* is amiss — quixotic, utopian, unworkable. The real question is *why* a system made up altogether of punishment substitutes would be quixotic, utopian, and unworkable. What exactly is wrong with the Enlightenment-humanist spirit in criminal law?

The first thing wrong with it is the implication that we might be able to avoid the occasions for punishment if we'd only invest more in, say, education and prevention. Crime and wrongdoing are permanent features of social life. They will always be with us. The objection to punishment deflects attention from that fact, but as soon as the deflection is brought out into the open, it becomes obvious that it misses the point. The question is not whether we should try to prevent crime (of course we should) but what we should do once those efforts have failed (as at times they surely will). Reconstructive criminal law starts from the point at which a wrongdoing has occurred, and if the say-it-with-flowers objection is to have any real joinder with the reconstructive argument, it must do the same; it must jettison the suggestion that wrongdoing might be altogether prevented. The objection then amounts to the claim that we could effectively reaffirm a violated normative order while letting the offender go. *That* is what the argument is really about.

Could we effectively reaffirm a violated normative order while letting the offender go? No, because — and this is the second thing wrong with the Enlightenment-humanist spirit in criminal law — a culture cannot remake its behavioral language just because the spirit of gentleness would have it so. The language in which we express our norms is not something we can choose the way we choose an outfit in the morning. If the meaning is to be intelligible, it must be expressed in a way that members of our culture — not some imagined culture, but *this* one, the one we have — can understand and accept. Where a crime has occurred, punishment is our culture's language of response. The encoding is socially given, and to imagine a way out of it is to imagine, not just a policy change on the part of punishers, but a different kind of society with a different kind of history.<sup>106</sup>

Why is the encoding by which we affirm a violated normative order — pain for wrongdoing — apparently a cultural universal? One can imagine different possible answers. Perhaps the encoding is uni-

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<sup>106</sup> The moves in this argument are familiar from the philosophical literature on why a private language is impossible. The core idea — or one version of the core idea — is that the meaning of utterances has to be socially given, not private, or language as a medium of communication would be impossible. See generally KELD STEHR NIELSEN, *THE EVOLUTION OF THE PRIVATE LANGUAGE ARGUMENT* (2008).

versal because, if the crime makes claims of a certain kind, the rebuttal has to be a kind of authoritative speech-act: it has not just to *say* but to *make something socially true*; it has to *overcome* the contrary position. Or perhaps something about human nature — about our genetic heritage, or the ways in which we’re capable of reasoning or being motivated — makes punishment the only possible language of response for creatures constituted as we are. Or perhaps it is just a contingent fact of history that punishment has been used for so long that it has come to be the language in which crime is disapproved. Or perhaps punishment has to be accompanied by signs that are tied intrinsically rather than arbitrarily to its message if that message is to be effectively communicated, like establishing gold rather than paper money as currency — something that is thought to be actually valuable rather than just a symbol of value. And of course it is also possible that it simply has been and continues to be convenient to have one social tool by which to accomplish multiple purposes — pragmatic control of crime on the one hand, social messaging on the other. If I had to choose one explanation for why our behavioral-social language uses punishment in the way it does — and I am frankly unsure on this point — I would suggest a version of the first explanation: to the extent crimes make claims about norms and victims, we need in response not just to *say* those claims are false but to *make* and *prove* them false. Crime can’t pay or its message won’t be rebutted. The model of communication isn’t solely discursive, like countering a position in a debate, but a kind of communicative action, like showing that a badly engineered bridge falls down.<sup>107</sup>

All that said, if the encoding did prove to be contingent, and if in the course of time a society’s embodied ethical life developed in such a way that nonviolent or noncoercive expressions of disapprobation could reconstruct a violated normative order as well as or better than traditional punishment, then reconstructivism would accommodate that approach. Reconstructivism is the union of a value (treasuring embodied ethical life), a functional understanding of wrongdoing and redress, and a set of empirical observations about how societies work.

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<sup>107</sup> This suggestion, if it doesn’t exactly rely on Grice’s philosophical account of meaning, may track that account — particularly Grice’s conception of “natural meaning” and “word meaning”: Grice has distinguished four different ways in which conduct can be meaningful. First, there is “natural” meaning, as when we say “Smoke means fire.” Note that this use of “means” is not really a linguistic one, for what we are really saying is “Smoke is evidence of fire.” . . . Nonetheless, a person can say or do something as a way of intending a person to draw a certain evidentiary conclusion. In which case, even if the natural meaning is not itself linguistic, it is the object of a linguistic expression. . . . The second Gricean category of meaning is “word” meaning: in any language, there are linguistic conventions defining the meanings of words, and these conventional meanings, in certain contexts, will prevail regardless of what one might intend to say when one uses them. Hampton, *Correcting Harms*, *supra* note 35, at 1675–76 (footnote omitted).

If the empirics were to change, reconstructivism could support a new kind of criminal justice consistent with its old understanding of what needs to be accomplished and why; indeed, in that case a new kind of criminal justice would *be* reconstructive. But there is a gulf between noting that factual possibility — a consequence of reconstructivism’s partially empirical character — and advocating a world without hard edges.

It is interesting in this connection to compare reconstructivism and restorative justice theory. A moderate strain of restorative justice theory simply promotes using apology and other reintegrative proceedings in addition to or in place of hard treatment in certain kinds of cases, but a more radical strain clearly longs for a world altogether without hard treatment.<sup>108</sup> Yet the arguments restorative justice theorists make on behalf of their position, both moderate and radical, are often highly reconstructive. The points of emphasis are different, but like reconstructivists, restorative justice theorists commonly believe that criminal law’s aim is solidaristic community, and they seek to restore broken norms and broken relationships to that end.<sup>109</sup> A difference is restorative justice’s focus on repairing interpersonal relationships, including the relationship between offender and victim, but this is a difference reconstructivists can learn from. Reconstructivists and restorative justice theorists also share a populist orientation, the idea that criminal law should be responsive to the people and not just public officials, the laity and not just the experts.<sup>110</sup> With that orientation goes

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<sup>108</sup> See, e.g., John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1728–29 (1999) (“What is the proper punishment for a given type of crime? . . . [I]t seems a silly question, for why should one assume that any punishment is the proper response to a crime? . . . [R]estorative justice is one promising alternative for a future in which punishment is marginalized.”); John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 2 (1999) (“[T]he more evil the crime, the greater the opportunity for grace to inspire a transformative will to resist tyranny with compassion. . . . Crime is an opportunity to prevent greater evils, to confront crime with a grace that transforms human lives to paths of love and giving.”).

<sup>109</sup> In a foundational text of the movement, Nils Christie argues that something is lost when “conflicts” — the conflicts that arise between victims and offenders after a crime — are shifted from a community-oriented setting to a state-centered one. Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 1–3 (1977). The conflicts are the people’s “property.” *Id.* at 7. And when they are taken away, “the big loser is us — to the extent that society is us. This loss is first and foremost a loss in opportunities for norm-clarification. It is a loss of pedagogical possibilities. It is a loss of opportunities for a continuous discussion of what represents the law of the land.” *Id.* at 8 (emphasis omitted); see also JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 4, 84–85 (1989) (arguing that punishment that works — punishment in low-crime societies — requires a backdrop of communitarianism and involves “reintegrative shaming” that first dramatizes the values and victims injured by the crime, and then “reintegrate[s] the offender back into the community of responsible citizens,” *id.* at 4).

<sup>110</sup> See, e.g., John Braithwaite, *Principles of Restorative Justice*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE 1, 15 (Andrew von Hirsch et al. eds., 2003) (“For republicans, bottom-up values clarification that actively involves disempowered people is superior to the imposition of

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the faith that the people are not inexorably punitive, but often wiser and more restrained than the impersonal forces of contemporary criminal bureaucracies. The question thus arises: should restorative justice where so grounded count as a type of reconstructivism? Can it count as a type of reconstructivism even though restorative justice in its radical form opposes punishment?

I think the answer is probably yes — the roots of restorative justice are reconstructive enough for that — but note two caveats corresponding to the two ways in which restorative justice diverges from the main reconstructivist current. The first has to do with aspirations: reconstructivism aims to *understand* how the social world works, and, having understood it, to equip criminal law to play its part in the social order. Restorative justice in its radical form aspires to create a new social world with gentler norms. The second node of difference has to do with empirics: reconstructivism is open to a system of criminal justice without hard treatment if society's ethical life should so evolve, but restorative justice in its radical form is committed to the proposition that a world without hard treatment is possible and would be functional. I think Durkheim and perhaps also Hegel and Hampton would regard that insistence as sentimental and utopian. Real criminal justice systems can and should take some restorative justice proposals on board: apology and other reintegrative proceedings could supplement and in certain cases even substitute for hard treatment in today's world to good reconstructive effect. But our social language — perhaps even the human form of life — is what it is. In thinking normatively about the social world, understanding should come first, advocacy second, and wishful thinking should have no place at all.

In the final analysis, reconstructivism does not need to explain why our social language is the way it is. Regardless of the answer to that question, reconstructivism submits as an empirical contention that if our society were to let criminal offenders go in favor of the alternatives the say-it-with-flowers objection suggests, our norms would be insecure. If we tsk-tsked and didn't punish, our norms would not be reaffirmed in an effective way by other means; they would simply collapse and victims' position in the social hierarchy would collapse along with them. In the very best case scenario — and this would genuinely be the best outcome one could hope for — the norms protected by the

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a unicultural, univocal set of narrow legal values backed by a Diceyan conception of the sovereignty of parliament. . . . [W]e need to restructure the rule of law by allowing the justice of the people to bubble up to reshape the justice of the law. That done, the justice of the law can then more legitimately constrain the justice of the people.”); Christie, *supra* note 109, at 11–12 (“The second major peculiarity with the court model I have in mind is that it will be one with an extreme degree of lay-orientation. . . . [L]et us reduce specialisation and particularly our dependence on the professionals within the crime control system to the utmost.”).

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criminal law would be taken about as seriously and abided by about as faithfully as those making up the contemporary law of international human rights. More likely, the normative commitments we presently share would come over time to seem like the dreams of fools and suckers or, worse, the whining of the weak. Social solidarity would break down; people would be thrown back upon their familial relationships as the only relationships that still hold; corrupt, ruthless, and violent people, provided they were also clever, would gradually take hold of the top of the social hierarchy. And norms would change: people would value the characteristics that gave rise to security and power, and those characteristics would become normative.

I don't mean this so much as prophecy as an analysis of how societies break down. Reconstructivism is falsifiable: it makes empirical claims. Among other things, it claims that sustained, large-scale wrongdoing with impunity would over time undermine shared norms, lower victims' status in the social hierarchy (provided they were not already at the bottom of the hierarchy), and diminish individuals' sense of being bonded to others within the society.

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I have argued that there must be a connection between embodied ethical life and criminal law, a connection that explains why theorists interested in the former end up writing about the latter and vice versa. The connection is this: the nature of criminal wrongdoing is that it violates and threatens embodied ethical life and the nature of punishment is that it restores and protects embodied ethical life in the wake of the crime. Punishment does so for the sake of social solidarity and because respect for the society's normative order and the worth of all persons, including both offender and victim, demands it.

## II. SITUATING RECONSTRUCTIVISM WITHIN LEGAL THEORY

The basic reconstructive view is now on the table and I turn to questions and implications. The goal is to see reconstructivism more clearly by situating it within broader criminal and legal theory.

### *A. Retributivism, Utilitarianism, Expressivism, or a Separate Category?*

Is reconstructivism a version of retributivism, utilitarianism, or expressivism? It is not identical to them: neither retributivism, utilitarianism, nor standard forms of expressivism have anything to say about embodied ethical life and solidarity; nor do they necessarily present a theory of the nature of crime; nor do they come with a social theory that builds normative content atop a thick description of social life. And as argued earlier, reconstructivism answers cardinal questions of criminal theory and policy differently than do retributivism

and utilitarianism.<sup>111</sup> Yet those differences leave open the possibility that reconstructivism might be a distinctive *type* of retributivism, utilitarianism, or expressivism. And while taxonomical questions of this sort can be distracting or uninteresting (the central issue is whether reconstructivism is true to the phenomenon in the world it is about, not how it relates to other theories of that phenomenon), in this case the taxonomical question is pressing because both Hegel and Hampton characterized their views as retributive; Durkheim said his view partakes of both retributivism and utilitarianism; and Duff has indicated that he is a kind of expressivist.<sup>112</sup>

My view in brief is that reconstructivism builds on the expressivist insight but is not identical to expressivism, and that it is a true alternative to retributivism and utilitarianism. It is an interesting sort of alternative to retributivism and utilitarianism because it conflicts with some of their central claims while affirming others on independent grounds. As I will argue, where it affirms the same claim on different grounds, reconstructivism consistently has the better of the argument. Reconstructivism is a version of expressivism because it conflicts with no central element of the expressive idea, but comes with a great deal of content that ordinary expressivism does not. Before explaining these claims, however, a caveat is in order: retributive, utilitarian, and expressive ideas have been developed in many ways by many authors. To distinguish reconstructivism from any of them, I have to compress that internal diversity and complexity. My goal, then, is to describe the three views in ways that are typically true, rather than true without exception.

Hegel characterized his view as retributive in a very limited way: “The cancellation . . . of crime is retribution in so far as the latter, by its concept, is an infringement of an infringement . . . .”<sup>113</sup> The “in so far” is important: if one understands by “retribution” (by its “concept,” Hegel says) an attack on wrongdoing motivated by the fact that wrongdoing is itself an attack on the right — thus an attack on an attack on the right, “an infringement of an infringement” — then Hegel’s theory is retributive. Is that thought recognizable as a form of retribu-

<sup>111</sup> See *supra* pp. 1491–93.

<sup>112</sup> DUFF, *supra* note 7, at 79–80 (arguing for a “communicative conception of punishment” that goes beyond expressivism by seeing punishment as “*reciprocal* and *rational* engagement,” *id.* at 79).

<sup>113</sup> HEGEL, PHILOSOPHY OF RIGHT, *supra* note 27, § 101, at 127 (emphasis omitted). This language echoes Kant’s formulation of the Doctrine of Right as coercion that is a “hindering of a hindrance to freedom.” IMMANUEL KANT, THE METAPHYSICS OF MORALS \*6:232, at 25 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797) (emphasis omitted). That might contribute to Hegel’s understanding of his own theory as retributive, as Kant’s was clearly retributive.

tivism?<sup>114</sup> It does not in any direct way implicate the idea of desert. But insofar as desert itself channels the more basic idea that justice *requires* the punishment of wrongs — that wrongdoing cannot be allowed to stand, that punishing wrongs is not *prima facie* evil but simply right — Hegel’s “attack on an attack on the right” fits. Think of it this way: standard forms of retributivism claim that justice requires punishing the offender because he deserves it, to the extent he deserves it. But if one presses hard on the question of why justice demands this, at some point one’s spade hits bedrock, and it is common (though not universal) at that point to hear claims of a mystical flavor: “The scales must be balanced,” “The universe must be set right.” There is a mystery at the core of retributivism, which has allowed the theory’s opponents to charge it with irrationalism. Hegel could be read as providing a deep explanation of that mystery, a demystification of the “balancing the scales” idea, because he provides a reason to think wrongdoing by its nature calls for punishment and justice by its nature insists on punishment. The key is the act side of punishment’s speech-act. Wrongdoing actualizes the wrong and punishment in the wake of wrongdoing re-actualizes the right. Since justice insists on the actualization of the right, justice requires punishment.

Hampton’s thinking on this is similar in structure to Hegel’s. She took her task to be exactly that of explaining why wrongs deserve to be punished and thus unpacking the mystery at the core of retributive justice. I earlier quoted her conclusion:

[R]etribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer’s action through the construction of an event that not only repudiates the action’s message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.<sup>115</sup>

If one deletes Hampton’s references to victims in this passage, thus abstracting from her special concern for victims, one can see the same sort of call-and-response understanding of wrongdoing and punishment in Hampton that one sees in Hegel: retribution is “a response to a wrong that is intended to vindicate [the right] . . . through the construction of an event that . . . repudiates the action’s message.” This is a bloodless kind of retributive justice relative to what some retributive thinkers have in mind, but perhaps that is not a bad thing.

Yet if reconstructivism is retributive insofar as it sees punishment as an imperative of justice, it is not insofar as it explains that imperative in an instrumental way. Punishment as Hegel and Hampton see it

<sup>114</sup> Hegel addresses the connections between his “infringement of an infringement” view, retribution, desert, and proportionality at HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 27, § 101, at 127–30.

<sup>115</sup> Hampton, *Correcting Harms*, *supra* note 35, at 1686.

serves human welfare: it ensures that the norms proposed by the wrong do not overtake social life. Theirs is not the kind of retributivism that would execute the last murderer on Kant's island.<sup>116</sup> What would be the point? When society disbands, there is no one left to receive the message for which punishment exists. Kant's invocation of "blood guilt" that would "cling to the people for not having insisted upon this punishment"<sup>117</sup> is, to a reconstructivist, magical thinking; Hegel and Hampton never talk that way. Reconstructive punishment has a *function*. The theory is instrumentally structured; it is teleological. It becomes teleological as soon as a reconstructivist unpacks retributivism's core mystery. Retributivism in the Kantian tradition is not *teleological* but *deontological*: part of its identity consists in rejecting means-ends thinking.<sup>118</sup> Retribution to a Kantian is not an instrument of any kind but a set of imperatives given by moral reason. It is the form justice takes in the face of wrongdoing; it does justice by being justice.<sup>119</sup>

So we have here a similarity and a dissimilarity: reconstructivism, like retributivism, sees punishment as good or right in itself, but unlike retributivism, explains that goodness or rightness in terms of human welfare. Both the similarity and the dissimilarity seem to me to break

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<sup>116</sup> See KANT, *supra* note 113, \*6:333, at 106 ("Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve . . .").

<sup>117</sup> *Id.*

<sup>118</sup> Some criminal justice theorists have proposed positions they style "teleological retributivism" or "empirical desert." See NOZICK, *supra* note 2, at 370–74 (discussing teleological retributivism); Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1943 (2010) (terming his own position "empirical desert"). But I think these are misnomers. The positions so termed are often compelling in substance, but to style them "retributivism" confuses matters. If theory is to draw straight lines, "retributivism" should refer always and only to deontological theories. This is also, emphatically, Michael Moore's position. See Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 181–82 (Ferdinand Schoeman ed., 1987) (arguing that functional, instrumental, or teleological theories of punishment — including "denunciatory theories" by which "society can express its condemnation of the criminal's behavior" — should not be "confused" with retributivism because retributivism has a "deontological nature").

<sup>119</sup> Likewise, Ernest Weinrib has argued that tort law is just the form corrective justice takes in the world: tort law serves no other purpose than to do justice by being justice. Compare MOORE, *supra* note 6, at 91 ("Retributivism, in other words, is truly a theory of justice such that, if it is true, we have an obligation to set up institutions so that retribution is achieved."), with ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 4–5 (1995) ("[F]unctionalist approaches to private law are radically incomplete . . . Private law, I will claim, is to be grasped only from within and not as the juridical manifestation of a set of extrinsic purposes. If we *must* express this intelligibility in terms of purpose, the only thing to be said is that the purpose of private law is to be private law."). For my part, although I am extremely sympathetic to the idea of embodied norms, and while I think some social institutions do and should embody norms in this way, I do not think criminal law and tort law are that kind of social institution. They are meant to serve human welfare.

in reconstructivism's favor. One of the strengths of retributive thinking is that it can explain the ordinary human conviction that punishment is not just useful but right, that Adolph Eichmann shouldn't get away with it, even if he really isn't going to do it again, and even if letting him go won't encourage others to try. One of the weaknesses of retributive thinking is that it takes a social institution that seems obviously designed to serve human welfare and then refuses to explain it in welfarist terms. Normative reconstruction can explain both why punishing Eichmann is an imperative of justice and why doing so serves human welfare. We punish Eichmann to establish and uphold a principle. Justice requires that we uphold the principle, and by upholding it we advance human welfare. That was precisely how Justice Jackson as prosecutor at Nuremberg understood his activity. As he wrote to President Truman:

Our people have been waiting for these trials in the spirit of Woodrow Wilson, who hoped to "give to international law the kind of vitality which it can only have if it is a real expression of our moral judgment." . . . International Law as taught in the Nineteenth and the early part of the Twentieth Century generally declared that war-making was not illegal and is no crime at law. . . . It is high time that we act on the juridical principle that aggressive war-making is illegal and criminal. . . . We therefore propose to charge that a war of aggression is a crime, and that modern International Law has abolished the defense that those who incite or wage it are engaged in legitimate business.<sup>120</sup>

And it worked. Nuremberg *did* establish the principle that aggressive war is criminal. Even more vividly to the contemporary mind, Nuremberg established the principle that genocide is criminal; indeed, Nuremberg created the category of "crimes against humanity." Reconstructivism can explain this where retributivism (and utilitarianism) cannot. We punish to make principles take hold — to *actualize* them. Punishment is morally required because establishing and upholding certain principles is morally and pragmatically essential to social life.

Consider another half-similarity between retributivism and reconstructivism: the focus on dignity. A proud feature of the retributive tradition is its concern for dignity. I earlier argued that reconstructivism is also a dignitary tradition.<sup>121</sup> But they are dignitary in different ways. Retributivism's concern for dignity is oriented to *offenders*: retributivism holds that offenders' dignity requires that they be treated as agents with the capacity for freedom and choice, which

<sup>120</sup> Robert H. Jackson, *Report to the President by Mr. Justice Jackson, June 6, 1945*, in REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 42, 50–53 (1945).

<sup>121</sup> See *supra* pp. 1508–09.

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also means holding them responsible for their wrongs. Retributivism also holds that offenders' dignity means they cannot be treated in an instrumental way (e.g., by making an example of them, or by caging them in order to protect others). Reconstructivism is oriented to the dignity of *victims*: since part of what a crime does is degrade the victim, restoring the social order violated by the crime also means restoring the victim's rightful place in that social order. The offender has rights and dignity in the social order as well: to restore the violated social order does not permit just anything to be done to the offender. (A community whose ethical life includes norms of noncruelty will not torture.) But the dignitary focus is on the victim.

Again, it seems to me that reconstructivism has the better of this similarity/dissimilarity. It may be true that part of showing respect to other persons is seeing them as agential and therefore holding them responsible. But the reality is that many offenders' agential capacities *are* damaged, and damaged in morally complex ways. To treat someone whose agential capacities are genuinely damaged as fully responsible does not respect that person's dignity; it is simply inaccurate and potentially quite callous. On the other hand, to excuse such a person may be impracticable and dangerous. There are psychological and moral nuances here, and ignoring them makes criminal law *less* respectful of persons, and certainly less sensible, than would taking them into account. Anyway, the focus shouldn't be on offenders' dignity only: it is victims' dignity that should take pride of place in punishment.<sup>122</sup>

A final aspect of retributivist/reconstructivist intersection has to do with the place of emotion in punishment. What Durkheim as a sociologist found salient about retributivism was its emotional overlay: that wrongdoing spurs a "passionate reaction"<sup>123</sup> the satisfying of which through punishment is "*expiation*."<sup>124</sup> This emotional overlay is what we might call the *condemnatory* aspect of retributivism: emotions of anger at wrongdoing and the desire that the wrongdoer suffer, or at least outrage at wrongdoing and satisfaction in seeing the wrongdoer punished. Retributivism is the union of a belief about justice — that it is morally right to punish wrongdoing — and a set of condemnatory emotions that characteristically accompany that belief. Many criminal

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<sup>122</sup> In the retributivist tradition, dignity also grounds the idea that innocents may not intentionally be punished even to accomplish greater social good. Dignity is a bar to wholly instrumental ways of using people. It may be that reconstructivism has no adequate way to ground such a requirement. If so, a full theory of reconstructivism might have to build in side-constraints of justice from the retributive tradition. Certain liberal utilitarians have taken this strategy; reconstructivists could, if necessary, follow suit.

<sup>123</sup> DURKHEIM, DIVISION OF LABOR, *supra* note 12, at 48.

<sup>124</sup> *Id.* at 46.

theorists and other philosophers are troubled by these emotions and have treated them as grounds for objecting to retributivism, sometimes arguing that people should arrange their emotions in bizarre and humanly unrecognizable ways to overcome them.<sup>125</sup> Some retributivists respond by jettisoning the condemnatory emotions, presenting their theory as a dry, wholly cognitive thing. But in my view, making a place for these emotions is one of retributivism's strengths: crime and punishment are passionate phenomena and the passions should have a place in understanding them. Reconstructivism has a place for them too. But it is not the same place.

For retributivists, condemnatory emotions are part of the sense of justice: they undergird intuitions about punishment that prove, upon scrutiny, to be true. They can go to excess, but, assuming they don't, they are reason's confederate. For reconstructivists — and here Durkheim is our guide<sup>126</sup> — we have condemnatory emotions only because we care enough about one another to have some fellow-feeling for victims and care enough about society to have some concern for its underlying norms. Having these emotions is thus part and parcel of being bonded to one another, and acting on them by punishing is what helps keep us bonded to each other. Indeed, punishment must be emotional if it is to have solidaristic effect; nothing wholly cerebral could produce the feelings of attachment that are one of punishment's objects. Thus, comparing retributivists to utilitarians, Durkheim concludes: “[O]ne [side] sees in punishment an expiation, the other conceives it as a weapon for the defence of society,” but in fact punishment “fulfil[s] the function of protecting society . . . because of its expiatory nature.”<sup>127</sup> The two sides “must be reconciled.”<sup>128</sup> This is not to deny, of course, that condemnatory emotions have unhealthy forms. Reconstructivists, like retributivists and utilitarians, recognize that condemnatory emotions can be too strong and thus cruel or vengeful. Unlike most retributivists and utilitarians, reconstructivists recognize that condemnatory emotions can also be too *weak*, and thus inadequate to their solidaristic purpose and indicative of weak social bonds. The fact that middle-class white Americans don't feel more outrage and more desire to punish when poor black Americans are victimized by crime shows that Americans need to feel closer to one another. Part of what makes

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<sup>125</sup> See, e.g., MARTHA C. NUSSBAUM, *ANGER AND FORGIVENESS* (2016) (arguing that all anger, including all anger at wrongdoing, is generally an unnecessary and immoral part of human emotion).

<sup>126</sup> Of course it is Durkheim who recognizes the social function of condemnatory emotions, rather than Hegel, who was too focused on reason, or Hampton, who was too focused on the individual.

<sup>127</sup> DURKHEIM, *DIVISION OF LABOR*, *supra* note 12, at 63.

<sup>128</sup> *Id.*

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Durkheim's view so helpful is that he shows us what it means for these passions to be healthy and unhealthy. They are healthy when they reflect an appropriate and functional bondedness to one another, and unhealthy when they do not.

Thus far, the answer to the taxonomical question is this: reconstructivism, like retributivism, holds that justice demands punishment for wrongdoing. But reconstructivism's demystifying, instrumental explanation for why that is so clashes with retributive deontology. Reconstructivism, like retributivism, is oriented to human dignity, but the focus is on victims' social status rather than offenders' position as agents. And reconstructivism, like retributivism, can honor condemnatory emotions, but reconstructivism does so because such emotions are pro-social rather than because such emotions track abstract justice. These features make reconstructivism so alien to standard forms of retributive thought that reconstructivism cannot properly be classified as a form of retributivist theory. Hegel and Hampton erred in so characterizing it.

Is reconstructivism, then, a type of utilitarianism? They share territory. Like utilitarianism, reconstructivism has an aim grounded in human welfare and justifies punishment insofar as punishment advances that aim. If that structure were enough to make a theory utilitarian, then reconstructivism would be a type of utilitarianism. But that structure is not enough because of the characteristic *way* in which utilitarians think punishment contributes to human welfare — indeed, because of utilitarianism's characteristic understanding of the good itself. Consider the harm principle: “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>129</sup> What this principle means has everything to do with how “harm” is defined. Theoretically, the term could mean anything, but it has been standardly interpreted to mean “temporal harm,” like “a punch in the nose,” harm that is “tangible, secular, material — physical or financial, or, if emotional, focused and direct — rather than moral or spiritual.”<sup>130</sup> And crucially the harm must be “other-regarding” and “without consent,” rather than “self-regarding” or consensual (consensual harm is impossible under this interpretation of the harm principle).<sup>131</sup> For example, drug use to a standard liberal utilitarian is necessarily nonharmful to the extent it is self-regarding, and to the extent it affects

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<sup>129</sup> MILL, *supra* note 8, at 80.

<sup>130</sup> Richard A. Posner, *On Liberty: A Reevaluation*, in MILL, *supra* note 8, at 197, 197; *see also* 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 31–36 (1984) (limiting the harm principle to “setbacks of interests that are wrongs, and wrongs that are setbacks to interest,” *id.* at 36); H.L.A. HART, *LAW, LIBERTY AND MORALITY* 4–5 (1963).

<sup>131</sup> *See* Posner, *supra* note 130, at 197.

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others, what is relevant is the way in which drug users may commit crimes, impose costs for treatment and care, or otherwise cause tangible harm. Considerations of a “moral or spiritual” sort, or (the better term) of a *cultural* sort — whether addiction offends or threatens a moral culture based on freedom, whether mind alteration offends or threatens a moral culture based on reason, and whether effortless forms of overpowering hedonistic pleasure create a bad environment in which to raise children — are not just outweighed but excluded from consideration. The utilitarian tradition, in other words, is a *materialist* tradition. It was Mill’s genius to fuse that materialism to a liberal political program, but the materialism is in Bentham too; I would argue that it is part of the implicit definition of utilitarianism itself. It is the reason why “utility” is not in fact open to any conception of the good. The materialism is a common element among criminal theory utilitarians of virtually all types. Some focus on crime control, some on cost, some on Millian harm, some on risk, but there is an implicit agreement that culture is off limits.

Reconstructivism, like the whole of the embodied ethical life tradition, has a different understanding of the good because it has a different understanding of how human flourishing and social life work. Culture is a common good on which the flourishing of all crucially depends. Each individual’s words and actions contribute to a network of ideas, practices, and institutions, and also derive from those ideas, practices, and institutions. We form this intersubjective sphere, a *culture*, and we are formed by it, as with a shared language, and our true welfare depends on it. It is precisely this network of ideas, practices, and institutions that standard forms of utilitarianism exclude from view, sometimes blind to it, sometimes determined to push it out of sight. Thus what is wrong with utilitarianism from a reconstructive perspective is not its view of criminal law as an instrument by which to advance human welfare. Of course criminal law is an instrument by which to advance human welfare. What is wrong with utilitarianism is its impoverished sociology.

Should we therefore say that reconstructivism is a type of consequentialism? Consequentialism really is open to any conception of the good whatsoever. But while I don’t have strong objections to characterizing reconstructivism as consequentialist, I think the characterization obscures more than it illuminates. The problem is that consequentialism, stripped of any substantive conception of the good, consists in the idea that the good, whatever it is, should be maximized. But what does it mean to “maximize” embodied ethical life? There is some logic to maximizing solidarity, but solidarity is not ultimately the good at which reconstructivism aims. (The goal is not totalitarian consensus.) There may be some logic to maximizing human flourishing, but if that is reconstructivism’s ultimate end, it is not one that distinguishes reconstructivism from other theories. Reconstructivism prizes

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embodied ethical life; it enlists criminal law in the defense of ethical life. It thus partakes of consequentialism's means-ends rationality, but as its end is not the sort of thing that can be maximized, the theory is better termed "teleological" or "functionalist" than "consequentialist."

Finally, is reconstructivism a version of expressivism? I think the answer here is, "Yes, but . . ." The "but" is because expressivism on its face is so thin that it is not really a comprehensive theory of punishment or criminal law at all. Expressivism just observes that punishment carries expressive properties, and insists, at most, that those expressive properties are important to punishment's justification. One could be *both* an expressivist and a liberal utilitarian whose sole concern is reducing Millian harm and who observes that community condemnation is a useful tool for that job. That may have been Joel Feinberg's view.<sup>132</sup> One could also be both an expressivist and a retributivist: the argument would be that punishment's expressive capacity is important to retributive condemnation. Robert Nozick made precisely this argument.<sup>133</sup> This mixing and matching is not theoretical confusion: it results from the fact that expressivism without further specification makes no claims about the ultimate grounds of punishment, whether justice, welfare, or whatever else. Expressivism is a building block to be used in various theories of punishment as appropriate. Reconstructivism makes unusually central use of expressivism's insight that punishment carries expressive properties, and indeed extends it: not only is punishment expressive, but crime is too. It is not inaccurate, then, to say that reconstructivism is an expressivist theory. But reconstructivism — with its ideas of embodied ethical life, solidarity, and more — has a great deal of content that expressivism by itself does not. Reconstructivism, unlike bare expressivism, *is* a position on all fours with retributivism and utilitarianism: one could not be a reconstructive utilitarian or a reconstructive retributivist.

Two caveats are in order at this point. The first is that many self-described expressivists, including Antony Duff<sup>134</sup> and Dan Kahan,<sup>135</sup> have developed the expressive insight in such reconstructive ways that expressivism in their hands just merges with reconstructivism. They are members of the reconstructive family; if bare expressivism is not necessarily reconstructive, their worked-out expressivism is. Second, as a formal matter, reconstructivism *is* a subcategory of expressivism. The entailment relation is this: all reconstructivists are expressivists but not all expressivists are reconstructivists. But that formal charac-

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<sup>132</sup> See 1 FEINBERG, *supra* note 130; FEINBERG, *supra* note 2.

<sup>133</sup> NOZICK, *supra* note 2, at 374–77.

<sup>134</sup> See DUFF, *supra* note 7, at 79–80.

<sup>135</sup> See generally Kahan, *supra* note 2.

terization risks misleading. Imagine a school of thought about poetry that holds that all poetry should be beautiful. Call it the “aesthetic school.” Now imagine another school of thought about poetry that holds that all poetry should be beautiful and advance the cause of social justice. Call it the “social justice school.” Formally, the social justice school is a subcategory of the aesthetic school, but many in the aesthetic school would find the ideas of the social justice school anathema. It would be better to say that the social justice school agrees with the aesthetic school on a central issue and otherwise goes its own way. The situation is the same with expressivism and reconstructivism.

In the final analysis, it seems to me that the answer to the taxonomical question is this: reconstructivism has features in common with retributivism and utilitarianism, but is in the end a true alternative to them both. Reconstructivism *is* a form of expressivism, but such a highly specified form of expressivism that the label obscures as much as it illuminates. In the final analysis, reconstructivism is best thought of as a *teleological* or *functionalist* theory in a category of its own.

*B. Normative, Descriptive, or Both?*

Reconstructivism sounds on both descriptive and normative levels, advancing at one and the same time a view of how criminal law generally works and how it is supposed to work. Is that a problem — a confusion of the normative/descriptive line? Is the theory in the end normative or descriptive?

The answer is “both,” and that is not a problem. The normative/descriptive (or normative/positive or fact/value) distinction in academic legal culture has gone awry; it has come to be invoked reflexively, as if every well-formed claim in the world could be set straightforwardly on one side of the ledger or the other like so many zeroes and ones. The distinction is not treated that way in the philosophical literature from which it comes — at least, not anymore. The story in Anglo-American philosophy involves a school of thought, “logical positivism,” which dominated the field between the 1920s and 1950s and which has now died almost completely away, in large part because its rigid treatment of the fact/value distinction turned out to be naive and unworkable.<sup>136</sup> Many contemporary philosophers argue, for example, that the process of forming descriptive beliefs about the world is a normatively inflected process (good beliefs are those that we

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<sup>136</sup> See HILARY PUTNAM, *The Empiricist Background, in THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS* 7 (2002) (summarizing the history and current state of the philosophical literature).

*should* believe because they are supported by adequate reasons).<sup>137</sup> Thus the very concept of the “normative,” once thought to be isomorphic with morality or ethics, has come to be seen as a broader phenomenon (the universe of “ought”) of which morality or ethics is a part.<sup>138</sup> Contemporary philosophers also argue that many ethical concepts, such as “cruel” or “generous” (“thick ethical concepts” as they’re termed), have irreducibly and simultaneously normative and descriptive content: one cannot wield them correctly in description without first understanding them from a normative point of view.<sup>139</sup> Thus both our descriptive claims about the world and our ethical concepts exhibit what is called “entanglement”: the descriptive claims are entangled with norms and the normative concepts entangled with descriptions. Entanglement may or may not be a feature of the world in itself, but it does prove to be a basic feature of human thought. Our capacity to understand the world simply did not evolve for the normative/descriptive distinction to be an impenetrable barrier.

Logical positivism died in philosophy about five decades ago, but the rigidity with which contemporary academic legal culture invokes the fact/value distinction recalls the logical positivists’ views. The irony is that, if we lawyers and legal scholars attend to our own practices, we see entanglement all the time. Is the corrective justice view of tort law, which holds that the doctrinal structure of tort law reflects ideals of corrective justice,<sup>140</sup> normative or descriptive? Well, both; it is a sort of idealizing interpretation. What about the economic view that regards tort law as an instrument for efficient resource allocation?<sup>141</sup>

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<sup>137</sup> See HILARY PUTNAM, *The Entanglement of Fact and Value*, in *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS*, *supra* note 136, at 28, 30–31 (“[N]ormative judgments are essential to the practice of science itself. . . . [J]udgments of ‘coherence,’ ‘plausibility,’ ‘reasonableness,’ ‘simplicity,’ and of what Dirac famously called the beauty of a hypothesis, are all normative judgments in Charles Peirce’s sense, judgments of ‘what ought to be’ in the case of reasoning.”); see also ROBERT B. BRANDOM, *MAKING IT EXPLICIT* 5 (1994) (building an account of language and rationality based on “a species of *normative* force, a rational ‘ought,’” implicit in our social practices of “giving and asking for reasons”).

<sup>138</sup> See sources cited *supra* note 137; see also T.M. SCANLON, *BEING REALISTIC ABOUT REASONS* 1 (2014) (“Contemporary metaethics differs in two important ways from the metaethics of the 1950s and 1960s, and even the later 1970s . . . . In that earlier period, discussion in metaethics focused almost entirely on morality . . . . Today, although morality is still much discussed, a significant part of the debate concerns practical reasoning and normativity more generally: reasons for action, and, even more broadly, reasons for belief and other attitudes, which are increasingly recognized as normative, and as raising questions of the same nature as those about reasons for action.”).

<sup>139</sup> PUTNAM, *supra* note 137, at 34–43.

<sup>140</sup> See generally WEINRIB, *supra* note 119.

<sup>141</sup> See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 1 (1987) (“This book explores the hypothesis that the common law of torts is best *explained as if* the judges who created the law . . . were trying to promote efficient resource allocation.” (emphasis added)).

Again, the view is at once normative and descriptive: it is an interpretation of the existing legal system with critical force to the extent the system diverges from it. What about a view of contract law as the legal effectuation of promise-keeping values?<sup>142</sup> The interpenetration of normative and descriptive ideas in that view is impossible to unravel — either in principle (because the two categories are not truly separate) or in practice (because the two categories get so entwined in the course of argument) or both. When a lawyer argues that the Establishment Clause prohibits school-sponsored prayer in public schools, is that a descriptive claim about what the Constitution *does* mean or a normative one about what it *should* mean? What about when a lawyer argues that a contract's reference to "reasonable efforts" means whatever efforts are standard in the industry rather than all cost-justified efforts? Entanglement is a normal feature of human understanding in general, but it is, if anything, particularly pronounced in law. Law is interpretive, and interpretive enterprises exhibit entanglement in extreme form.<sup>143</sup>

My point is not that the normative/descriptive distinction is altogether confused or meaningless (though some distinguished philosophers think it is).<sup>144</sup> I actually think the distinction gets at something important and there are deep reasons why contemporary intellectual culture is fixated on it. My point is that the nature and scope of the distinction is much more disputed and complex than one would think from the way it is often treated in the legal academy. And thankfully so: when it comes to thinking about social life, we should *want* our normative theories to have some descriptive uptake and our descriptive ones to have some normative implications. Otherwise the normative theory would misunderstand its target and the descriptive theory would have no relevance for action.

Of particular relevance to reconstructivism, philosophers have long recognized that teleological or functionalist explanations are mutually normative and descriptive.<sup>145</sup> A house is a structure that is supposed to give shelter. That is part of its definition and also a standard for evaluating it: if it does not give shelter, it is a defective house, and if it is defective to a sufficiently extreme extent, it might cease to be a house altogether and become some other kind of thing.<sup>146</sup> Likewise, a

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<sup>142</sup> See generally CHARLES FRIED, *CONTRACT AS PROMISE* (1981).

<sup>143</sup> See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986) (arguing — and this is the book's thesis — that the interpretive method is the soul of lawyering and judging).

<sup>144</sup> See, e.g., PUTNAM, *supra* note 136.

<sup>145</sup> See CHRISTINE M. KORSGAARD, *SELF-CONSTITUTION: AGENCY, IDENTITY, AND INTEGRITY* 27–41 (2009).

<sup>146</sup> *Id.* at 32 (“[E]very object and activity is defined by certain standards that are both constitutive of it and normative for it. These standards are ones that the object or activity must at least try to meet, insofar as it is to be that object or activity at all.”).

heart is an organ that exists to circulate blood; if it does not do so, it is unwell, assuming it really was a heart to begin with.<sup>147</sup> To identify a social institution's function is jointly descriptive and normative in the same sense that a medical description of the function of an organ is jointly descriptive and normative. A university is supposed to educate and advance knowledge; if it has no students and no teachers, it is either a defective university or not really a university at all.

Reconstructivism is teleological and functionalist in precisely the same sense: it is an argument that describes how criminal law works under the heading of a certain end or function that criminal law is supposed to accomplish. Reconstructivism thus lives at the border of normativity and description, and there is nothing wrong with that.

### C. Teleology and Pluralism

Retributivism and utilitarianism are totalizing theories: unless trumped by considerations external to the theory, they disapprove of any nonretributive or nonutilitarian use of the criminal law.<sup>148</sup> But teleological or functionalist theories tend in general to be pluralistic: they do not crowd out all other purposes to which a tool may be put.<sup>149</sup> A hammer's purpose may be to hit a nail, but a hammer will serve as a good weapon in a pinch. Reconstructivism identifies the core function of criminal law, which sets into place certain limits on the criminal instrument: it should not be used in such a way as to undermine embodied ethical life or its own capacity to secure social solidarity around embodied ethical life. But that doesn't mean criminal law can *only* be used for reconstructive purposes. As a teleological account of criminal law, normative reconstruction is pluralistic.

Building on this functionalist pluralism, I would like to mention two related ways in which, in my view, the reconstructive tradition should make room for nonreconstructive items on criminal law's agenda.

First, it seems to me that Hegel, Durkheim, and Hampton excessively downplay the issue of tangible harm and risk. While it is true that threats to social organization are of societal concern in ways that individual harms are not, there is no reason societies couldn't also care, through empathy, about individual harms, or care about the way

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<sup>147</sup> Cf. *id.* at 35–37.

<sup>148</sup> See, e.g., Moore, *Liberty's Constraints*, *supra* note 6, at 192, 200 (arguing from a retributive standpoint that criminal legislation “must exclusively aim at preventing or punishing moral wrongs” by “prohibiting all and only those behaviours that are in fact morally wrong,” *id.* at 192, but acknowledging an external trump where “the small good of punishing minor wrongs” is “outweighed by other goods achieved by not punishing such minor wrongs,” *id.* at 200).

<sup>149</sup> Hampton specifically states that she supports “the pluralist approach” to justifying punishment. Hampton, *Correcting Harms*, *supra* note 35, at 1659 n.2.

in which individual harm-doing might multiply and become a risk to social organization. There is no reason to think victims care about degradation and not harm, or even care about degradation vastly more than they care about harm; they care about both. And there is no reason criminal punishment can't be used for two ends at once — both restitching a torn social fabric and pragmatically controlling the crime rate — unless one agrees with Hegel's claim that using punishment for deterrence is contrary to human dignity, like "raising a stick at a dog,"<sup>150</sup> which I for one find rhetorically overwrought and unconvincing. (If punishment is violence in a good cause, at least it is in a good cause.) In valorizing moral culture, reconstructivists should not fixate on it to the exclusion of some obvious additional functions that criminal law has historically performed. Criminal law has a role to play in intimidating Holmesian bad men, containing people who are predatory or violent, and preventing riot in the streets — in other words, in controlling harm and risk and keeping basic physical order. High levels of harm, risk, and physical disorder are extremely destabilizing to any decent moral culture, and even if they weren't, there would still be good pragmatic reasons to get them under control. At the same time, these matters are not just for criminal law. Really, harm reduction and risk management are far too important to be the special province of any one area of law. They are matters for all law. The worst serial killer does vastly less tangible physical harm than bad food and drug regulation.

But reconstructivism stands on stronger ground with respect to these matters than do its competitors. Retributivism sees criminal law as the bearer of a special kind of justice; the theory lacks the capacity to acknowledge criminal law's pragmatic functions. Even criminal law's traditional role in preserving the king's peace is lost from view. Utilitarianism, by contrast, is so taken up with those pragmatic functions that it cannot see any reason to distinguish criminal law from the mass of other legal instruments by which to exercise control over the social world; it cannot see criminal law's distinctiveness. As a teleological and therefore pluralistic theory, reconstructivism can acknowledge criminal law's role in minimizing tangible harms and keeping basic order, while also recognizing that many other institutions share those tasks, and that criminal law has a task to perform that few if any other institutions can perform equally well. Criminal law's primary purpose and primary competence is to restitch a torn social fabric, but it has a variety of additional functions as well.

Second, it must be acknowledged that much of contemporary criminal law is not about embodied ethical life at all. It is *malum*

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<sup>150</sup> HEGEL, PHILOSOPHY OF RIGHT, *supra* note 27, § 99, at 125–26.

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*prohibitum* and regulatory. If criminal law's primary competence is normative reconstruction, Congress and state and local lawmakers have used it for simple social control and used it with abandon. As Stuntz puts it:

[C]riminal law is not one field but two. The first consists of a few core crimes, the sort that are used to compile the FBI's crime index — murder, manslaughter, rape, robbery, arson, assault, kidnapping, burglary, larceny, and auto theft. The second consists of everything else. . . . These two fields have dramatically different histories. The law that defines core crimes derives from the common law of England. Save for auto theft, everything in the list of FBI index crimes was a crime in Blackstone's day. . . . But when we turn our attention to the rest of criminal law, a very different picture emerges. For the most part, *this* criminal law was the product of legislation, not judicial decision. And the central feature of its history is growth.<sup>151</sup>

So the question arises: Is a reconstructive theory of criminal law anachronistic? Are reconstructive ideas inappropriate for a contemporary, regulatory criminal order?

They are not. A reconstructivist would probably prefer that criminal law had never gotten into the business of pure regulatory enforcement and incentive management, unconnected with restitching torn social fabrics. But that ship has sailed and the theory is flexible enough to articulate, not just a fallback position, but a normatively attractive stance to the use of criminal law as a regulatory instrument. Indeed, normative reconstruction is at its best in dealing with this regulatory criminal order because it has the capacity both to make room for regulatory crimes and to object to their excesses.

Imagine an administrative agency asked Congress to criminalize some conduct for regulatory purposes. A reconstructive congressperson would ask whether doing so would undermine criminal law's reconstructive core or just be orthogonal to that core (much regulation has little or nothing to do with embodied ethical life and no particular effect on solidarity). If criminalizing the conduct would undermine criminal law's reconstructive core — if, for example, the regulation were itself inconsistent with embodied ethical life, or if using the criminal instrument in this regulatory instance would sap it of the moral authority to function reconstructively in other instances — the congressperson would vote no. But if criminalizing the conduct would have little or nothing to do with embodied ethical life, the congressperson would simply analyze on nonreconstructive grounds the merits and demerits of using criminal law in this instance. Consider, by way of comparison, a proposal to use universities as incubators for startup businesses. Universities have multiple functions, but their core func-

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<sup>151</sup> Stuntz, *supra* note 47, at 512–13 (footnotes omitted).

tions, let's assume, are education and knowledge production. A university president sensitive to that core would ask whether incubating startups would interfere with education and knowledge production. If so, she would not approve it. If not, and if the proposal were otherwise attractive, she would approve it.

How would a reconstructive judge deal with a case involving regulatory crime? Here, we don't have to hypothesize. Justice Robert Jackson probably *was* a reconstructivist<sup>152</sup> — in any case he was in my view one of the great criminal law judges in American history — and he wrote one of the foundational opinions on regulatory crime in *Morissette v. United States*.<sup>153</sup> The defendant in *Morissette* was prosecuted for what amounted to strict liability conversion of government property; the question was whether conversion is the sort of thing for which strict liability should be allowed. Justice Jackson acknowledged — grudgingly — the rise of strict liability regulatory offenses: “While many of these [regulatory] duties are sanctioned by a more strict civil liability, lawmakers, whether wisely or not, have sought to make such regulations more effective by invoking criminal sanctions . . . .”<sup>154</sup> But regulatory crimes, he reasoned, have a different history and a different social function than core criminal law: the wrongs they criminalize are “not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a

<sup>152</sup> It is striking to realize that the same Justice who decided *Morissette v. United States*, 342 U.S. 246 (1952), on a reconstructive rationale (preserving criminal law's reconstructive core in a regulatory age by keeping regulatory uses of the criminal instrument separate from the core) also prosecuted at Nuremberg on a reconstructive rationale (using punishment to actualize shared principles). See *supra* p. 1528. He also dissented in *Korematsu v. United States*, 323 U.S. 214 (1944), on a reconstructive rationale, emphasizing that Fred Korematsu was *criminally* convicted for refusing to abide by the Japanese internment orders and making *community* the central issue of the case in the first words of his dissent: “Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen . . . .” *Id.* at 242 (Jackson, J., dissenting). Furthermore, as Attorney General he gave a famous speech to U.S. Attorneys in which he also emphasized reconstructive themes:

[O]utside of federal law each locality has the right under our system of government to fix its own standards of law enforcement and of morals. And the moral climate of the United States is as varied as its physical climate. . . . The federal government . . . could hardly adopt strict standards for loose states or loose standards for strict states without doing violence to local sentiment. In spite of the temptation to divert our power to local conditions where they have become offensive to our sense of decency, the only long-term policy that will save federal justice from being discredited by entanglements with local politics is that it confine itself to strict and impartial enforcement of federal law, letting the chips fall in the community where they may.

Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 6 (1940). Justice Cardozo is often praised as the most morally insightful of America's great judges, but I think the title belongs to Jackson as well. Certainly it does in criminal law.

<sup>153</sup> 342 U.S. 246.

<sup>154</sup> *Id.* at 254–55 (footnotes omitted).

duty.”<sup>155</sup> Conversion of government property is not “neglect where the law requires care, or inaction where it imposes a duty”; the defendant was in substance being prosecuted for theft. Justice Jackson therefore exercised the traditional prerogative of the courts to assume Congress intended a mens rea requirement and to read one into the statute.<sup>156</sup> Thus Justice Jackson’s basic move in the case was to do just what our hypothetical legislator did: open up space for regulatory crime but not allow that category to infect criminal law’s ethically oriented core. In both cases, reconstructivism’s teleological pluralism gives the theory a critical edge while keeping it realistic in a regulatory age.

The two issues discussed in this section — regulatory criminal law, on the one hand, and criminal law’s role in keeping the peace, on the other — are related. Criminal law can be seen historically as having two functions: a *condemnation function* and a *control function*. The condemnation function has to do with criminal law’s character as an instrument of *punishment* directed against *wrongdoing* (rather than as, say, an instrument designed purely to price undesirable conduct). The condemnation function is what makes criminal law distinctive; indeed, condemnatory punishment is what U.S. courts use to distinguish criminal and civil law in ambiguous cases.<sup>157</sup> The control function has to do with criminal law’s character as an instrument by which to discourage dangerous or otherwise problematic conduct, disable dangerous or otherwise problematic people, and give police and prosecutors a legal hook by which to exercise power in situations of disorder — that is, as an instrument of social control. This function is not distinctive to criminal law; it is something criminal law shares with many other departments of law (and other social instruments as well). This function is also expanding: historically, criminal law focused its control efforts on force and fraud, but for a century or more, it has been growing to encompass the diverse regulatory purposes of the modern state.<sup>158</sup>

A great deal has been made of criminal law’s expansion from an instrument primarily used to keep the peace to an instrument of general regulation, and rightly so. But keeping the peace and general regulation have something important in common: they share the idea that criminal law’s function is social control. To the extent one’s purpose is

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<sup>155</sup> *Id.* at 255.

<sup>156</sup> *Id.* at 252, 263.

<sup>157</sup> See, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997) (holding that the involuntary commitment of repeat sexual offenders in mental hospitals is civil, not criminal, and therefore does not trigger the procedural protections of criminal law, because involuntary commitment does not constitute punishment); Hart, *supra* note 2, at 402–04 (arguing that condemnation is what turns an ordinary sanction into punishment, and that condemnation is therefore criminal law’s defining feature).

<sup>158</sup> See *Morissette*, 342 U.S. at 253–56.

purely social control, there is no reason to limit criminal law to force and fraud. Why not, in Justice Jackson's words, use criminal law "to make [civil] regulations more effective"?<sup>159</sup> In other words, keeping the peace and sheer regulation are both expressions of criminal law's control function. The two issues discussed in this section thus present a reconstructivist with two variations on one question: what should a reconstructivist make of criminal law's control function?

My larger point in this section is that a usable theory of criminal law must make room for *both* criminal law's condemnation function and its control function, and reconstructivism does so. Criminal law is a Janus-faced thing; its duality is something theorists need to explain, not deny or ignore. Retributivism and utilitarianism each speak to only one half of the duality — retributivism to condemnation, utilitarianism to control — and indeed reject the other half. By the same token, retributivism makes criminal law seem wholly distinct from all other areas of law, while utilitarianism makes it seem wholly indistinct. Reconstructivism, by contrast, can account for both halves of criminal law's dual character. Reconstructivism focuses on the condemnation function — on criminal law's distinctiveness — but it speaks to control as well. First, reconstructivism holds that strong social norms in solidaristic communities, reinforced by a criminal system that reflects the community's values, are extremely powerful instruments of control; indeed, there is evidence that such norms do far more than sheer deterrence in controlling crime.<sup>160</sup> Second, where strong social norms are not enough — in the relatively rare cases of people who are unper-suaded by social consensus and uncowed by social sanctions, or in the case of regulatory situations in which there are no strong social norms to draw upon — reconstructivism is pluralistic enough to make conditional room for the use of the criminal instrument purely for social

<sup>159</sup> *Id.* at 255.

<sup>160</sup> At least one member of the reconstructivist family — Paul Robinson — has focused on this thesis. See, e.g., PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME* 6–7 (1995) ("Greatest cooperation will be elicited when the criminal law's liability rules correspond with the community's views of justice."). The view that social solidarity is the key to crime control has received strong support recently from Randolph Roth's massive and magisterial investigation into homicide, which concludes that four factors explain periodic increases in homicide rates in the United States and other Western nations over the past four centuries: political instability; a loss of government legitimacy; a loss of fellow-feeling among members of society; and a loss of faith in the social hierarchy. See generally RANDOLPH ROTH, *AMERICAN HOMICIDE* (2009). In coming to these conclusions, Roth does not appear to have been influenced by Hegel, Durkheim, or any other reconstructivist theorist; his findings were empirically driven on the basis of extensive and carefully analyzed data. The importance of his findings cannot be overstated. As I discuss in section I.D, pp. 1519–24, reconstructivism has an empirical component; the theory can in substantial part be proved false and, by the same token, proved true. This Article is not the place for the empirical demonstration, but the empirics exist, and both Robinson's and Roth's work demonstrate that reconstructivism is built on solid empirical foundations and has important empirical implications.

control. Reconstructivism objects only where using the criminal law for purposes of pure social control would undermine criminal law's ability to perform its solidaristic functions. The theory is thus pluralistic and realistic, accommodating pragmatic demands while still retaining a critical edge.

*D. A Theory of Criminal Law, Not All Law*

A *lot* of law reflects and affirms our shared norms; a *lot* of law has solidaristic characteristics or functions. Is reconstructivism, then, a theory of *criminal* law or a theory of law in general? I have referred to normative reconstruction as criminal law's *distinctive* function, but is it really distinctive? In what way is it distinctive?

What gives this question special force is a school of jurisprudential thought about law in general (all law) with which reconstructivism unmistakably shares territory: the German, nineteenth-century "Historical School of Law," associated with Savigny and his contemporaries.<sup>161</sup> This sounds more obscure than it should: the Historical School was one of the great flowerings of legal theory in the history of the world. Some of its claims, in my view, are simply true, and it influenced Holmes, Pound, and Llewellyn and thereby affected American law. Like most complex intellectual movements, the Historical School is not susceptible to simple definition, but among its central claims was that a people's law should express that people's history and values. The historicists, like criminal theory reconstructivists, took inspiration from Hegel; thought good law to be immanent (a word important to them as it is to reconstructivists and other Hegelians) in how members of a culture conducted their social life; focused on community and solidarity; thought custom carried legal authority; favored democratic values and institutions; and tended to be conservatives of a Burkean sort, though not without a critical edge.

The deep roots of reconstructivism and the Historical School are shared as well. Retributivism, pure utilitarianism, and liberal utilitarianism in the tradition of Kant, Bentham, and Mill are pure normative philosophy: they are sets of abstract concepts meant to be *applied* to the social world with imperative force, reordering the world to the extent it is out of accord with their instructions, and their validity does not depend (or does not admit to depending) on how the social world actually operates. Reconstructivism, by contrast, is social theory: it is meant to *explain* the social world, and in explaining it, to give us criti-

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<sup>161</sup> See generally JAMES Q. WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA* (1990); Richard A. Posner, *Essay, Savigny, Holmes, and the Law and Economics of Possession*, 86 VA. L. REV. 535 (2000); James Whitman, *Note, Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987).

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cal purchase on it. Relatedly, Kantian retributivism, Benthamite utilitarianism, and Millian utilitarianism are products of the High Enlightenment — the first all rights and duties, a normative universe stripped down to bare imperatives of justice; the next pure bureaucratic rationality all the way down; the last a universe of atomic individuals vying for negative liberty against the state. Reconstructivism, like the Historical School, is a child of the Counter-Enlightenment.<sup>162</sup> Its foundational thinkers, Hegel and Durkheim, hail from the nineteenth century. They, like others of the era, were dissatisfied with pure rationalism and liberalism; they were interested in sociality; and they aimed at a form of thought that would be culturally embedded and true to human experience in ways they believed the High Enlightenment was not. Reconstructivism and the Historical School also run the same Counter-Enlightenment risk, the jeopardy of overcorrection, of becoming, rather than a caution against rationalism's and liberalism's excesses and a rebalancing of the scales, an anti-reason or anti-freedom position, or a nationalistic one. Reconstructivism connects criminal theory to these older, broader currents of thought, which go well beyond the sphere of crime and punishment. So is there good reason to restrict reconstructivism to criminal theory? Is normative reconstruction — more broadly, is advancing the cause of embodied ethical life — the function of *all* law?

A reconstructivist in criminal theory could defend the theory as a general one for all law — there is logical space for that, as the Historical School shows — but a reconstructivist need not generalize the view, and I would not. Should securities regulation, for example, advance ethical life? Better that it advance the economy. The community's value system may suggest side-constraints and ancillary goals, but securities regulation calls for a heavy dose of sheer instrumental rationality. We don't even have embedded cultural values with respect to much or most of what securities law covers. Should environmental regulation reflect and reinforce shared values? Some of those shared values need to change if we are to, say, minimize global warming at reasonable cost; on a sensible list of environmental law's goals, social solidarity probably shouldn't crack the top five. The modern world is just too complex and the social goals for which we turn to law too diverse for reconstructivism to be the shape of every part of the legal system. Furthermore, those goals require a balancing of continuity and change that makes reconstructivism too conservative, too resistant to social change, to encompass the whole of law. A state needs some tools by which to change the social world and not merely to protect it.

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<sup>162</sup> See generally Isaiah Berlin, *The Counter-Enlightenment*, in 2 *DICTIONARY OF THE HISTORY OF IDEAS* 100 (Philip P. Wiener ed., 1973).

That is by no means to say that embodied ethical life, solidarity, and the other pieces of the reconstructivist puzzle matter *only* to criminal law. Perhaps all law serves a coordinating or recognitional function, and is thus solidaristic at a sufficiently high level of abstraction. And in some departments of law, the reconstructive elements are quite straightforward. The “reasonable person” standard in tort law puts social norms at the doctrinal center of the field (though we bring regulative, cost-internalization goals to torts as well). Constitutional law unquestionably expresses a people’s history and values (though it should probably also lay out a functioning plan of government); indeed it seems to me that constitutional law has as much to do with embodied ethical life as criminal law, albeit in a different way. (Constitutional law, unlike criminal law, does not exist specifically to respond to individual wrongdoing.) These examples could be multiplied and multiplied again; the Historical School was on to some enduring truths. But figuring out the metes and bounds of reconstructive ideas in noncriminal areas is a job for independent inquiries, relative to specific departments of law. The claim here is neither that the ideas associated with normative reconstruction are unique to criminal law, nor that they are general to all law. The claim is that reconstructive ideas bear so strongly on criminal law that criminal law cannot be fully understood or fully just without them. The reconstructivism this Article advances really is a theory of *criminal* law.

Reconstructivism is suited to criminal law for two reasons. The first has to do with two distinctive characteristics of punishment: its power to secure shared norms when it builds on the settled sentiments of the community and its oppressiveness. Punishment in a single move shows intense commitment to certain norms and also makes those norms fearsome. Granted, contemporary criminal law is so inconsistently enforced and so often criminalizes conduct that our culture does not widely condemn that it obscures punishment’s power. But if we think about social condemnation and punishment more broadly, we can see that power more clearly. Imagine a professor at a typical American university publicly saying something unambiguously racist. The condemnation and other social and professional sanctions that would engulf that professor are part of how university culture has established racism as taboo. Or imagine the condemnation and sanctions that would engulf a U.S. Marine who said something unambiguously anti-American. Repression through punishment is a very effective tool for maintaining social cohesion around certain ideas, and, since a measure of social cohesion is necessary for societies to maintain themselves, repressive punishment is a good tool for an essential if illiberal job. But this also makes criminal punishment a bad tool for many other jobs. To use it to enforce norms that are not essential for society to maintain itself is just oppressive; it is unjustifiably illiberal.

The second reason criminal law calls for normative reconstruction has to do with the distinctiveness of crime. As I have argued, crimes do not just fall short of the norms on which social solidarity depends but expressively attack or deny those norms. This makes crimes different from other legal wrongs and makes a reconstructive legal response more necessary for crimes than for other legal wrongs. Now, this claim comes with tremendous risk of overstatement; exceptionless generalities about a social system as complex as the law are rarely true. But if we think of typical cases or ideal-types, there is a philosophical difference between criminal and civil wrongs. To see this, let us set aside civil wrongs that overlap with crimes, like serious intentional batteries or torts involving criminal levels of recklessness. The core contrast is between criminal wrongs and *purely* civil wrongs, and it is an *expressive* contrast, picking up on my earlier remark that most negligent accidents express the idea that “the author of this harm behaved stupidly” rather than “the author of this harm denies the claims of our moral culture.” Imagine a foreman at a construction site who forgets to lock the gate at night, leading to a child’s death. While he is tortiously negligent, it is extremely implausible to say that he has thereby expressed indifference or malice to the lives of children. He would probably be horrified at the child’s death, and his horror is a measure of his commitment to shared values. The criminal form of the wrong would be to intentionally or knowingly draw children to their death, or (the reckless form) to know that children come through the gate at night but not to care if they live or die. That kind of behavior crosses the line from tort to crime precisely when it denies the value of a child’s life. In other words, there is a difference between attacking shared values and failing to live up to them; there is a difference between denying another’s rights and merely infringing them.

Of course, some cases complicate this distinction. Does the driver who runs down a pedestrian because the driver is texting on her cell phone express an insufficient appreciation of the value of other lives? Maybe. Does the insufficient appreciation rise to a criminal level, to indifference? Again, maybe. But these borderline cases, where prosecutors and jurors make judgment calls, don’t repudiate the crime/tort distinction I’m drawing. They confirm the distinction; the distinction explains why they are borderline cases. Or consider punitive damages. They are typically restricted to intentional or otherwise egregious torts, and what makes those torts egregious is that they deny our society’s basic values. That we call the special character of our response to such cases “punitive” shows that we appreciate the criminal overtones of such torts and understand that there is something that must be done in such cases beyond compensation, resource allocation, or setting prices; there is something punitive to do. Indeed, one interpretation of torts that overlap with crimes, like serious intentional batteries, is that the legal system in such cases has two operations to perform — recon-

structing a violated normative order and compensating a victim — and it performs those separate operations in separate procedural settings. The more difficult case from a reconstructive perspective might be an intentional breach of contract. Such a breach might well deny (and not merely infringe) values of promise-keeping and fair dealing, and even break down trust, which is crucial to social solidarity. One interpretation is that society has carved out a sphere of authorized promise-breaking for commercial reasons in what are largely commercial contexts. In that case, the breaches may not actually constitute attacks on values of promise-keeping and fair dealing any more than tackling in football attacks the value of physical security. But it is interesting to notice that even in the commercial context, there are limits. Fraudulent contracting often *is* criminal. And even where the law authorizes breach, businesspeople in many industries appear nonetheless to regard breach as dishonorable or imprudent — reputation-damaging — and to blacklist breachers.<sup>163</sup>

It is interesting in this connection to think about the difference between civil and criminal negligence. It is black letter law that “negligence” doesn’t mean the same thing in civil and criminal contexts. The Model Penal Code takes the traditional common law notion of criminal negligence and splits it into two categories — negligence and recklessness — where negligence involves a “*gross deviation*” from a reasonable person’s standard of care<sup>164</sup> and recklessness involves both a “*gross deviation*” and a “*conscious[] disregard[]*” of a known risk.<sup>165</sup> In both cases, especially recklessness, the higher degree of culpability required for the criminal form of accident tracks cases in which the defendant’s behavior attacks or denies shared values, rather than simply falling short of them. Criminal liability for accidents, in other words, is for the parent who leaves the baby to fend for itself in an unsafe apartment all day, indifferent to the risks, rather than the one who absent-mindedly leaves the baby in a hot car for one disastrous hour. Common law criminal negligence is traditionally even more clear on this point (though as American law has grown harsher, common law criminal negligence has come to look more like mere civil negligence).<sup>166</sup> In other words, the tradition of criminal negligence is about

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<sup>163</sup> Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1745–56 (2001).

<sup>164</sup> MODEL PENAL CODE § 2.02(2)(d) (AM. LAW. INST., Proposed Official Draft 1962) (emphasis added).

<sup>165</sup> *Id.* § 2.02(2)(c) (emphasis added).

<sup>166</sup> See, e.g., *State v. Williams*, 484 P.2d 1167, 1171 (Wash. Ct. App. 1971) (holding devoted parents criminally liable for an error of judgment in which they failed to get necessary medical attention for their baby because Washington’s statutory law made “simple or ordinary negligence” sufficient for manslaughter, rather than the “gross negligence” previously required under common law standards).

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devaluation, not merely error. This, it seems to me, is a clue to the whole civil/criminal distinction and, indeed, to the nature of criminal law. It should come as no surprise that the clue is in borderline cases of *mens rea*.

So the argument in brief is this: normative reconstruction is not unique to criminal law, but it is a necessary social function for which criminal law is exactly fitted, and which would unduly restrict other departments of law. Criminal law is suited to the function because crimes are the subset of legal wrongs that deny or attack shared norms and thus call for a reconstructive response, and because punishment condemns and controls in ways that are appropriate only to secure essential and widely shared norms in the wake of an attack. Other departments of law are typically less suited to the reconstructive function both because they lack those two characteristics and because it makes sense for them to have an instrumental, flexible, and rationalistic character that is inconsistent with imposing on them the duty and burden of normative reconstruction. When I say, then, that normative reconstruction is criminal law's "distinctive function," I mean the term in a weaker sense than "unique function" and a stronger one than "comparative advantage." I mean it in the same way we might say education is the distinctive function of schools: children learn in many settings, but schools are made for the task, and if we tried to gear every setting to it, playgrounds would be awfully boring.

A broader implication of this discussion is that, rather than thinking of the various departments of law as general purpose tools, there is often utility in thinking of them as specialized tools suited to particular kinds of jobs. If concussions are a problem in football, what is the nature of the problem? Is it that football is being played in an unnecessarily unsafe way? Safety regulations might be the answer. Is it that players are being harmed? Compensation and cost-internalization — tort law — might be a good response. Is it that players don't have an opportunity to control the conditions of their work? New governance structures, such as unions, might be in order. Or is the problem that players are being lied to and preyed upon in ways that indicate indifference to their rights, welfare, and dignity? Then criminal law might be the answer. Any of these departments of law can be used for other purposes, but they are less likely to succeed and more likely to tread upon ancillary values outside of their core competencies. Lawmakers too often throw criminal law at social problems purely for the sake of maximizing compliance, without regard to distinctions of function among the departments of law. But to misuse the criminal instrument in this way is both oppressive and less effective than it might appear. A violin can play rock and roll, but an electric guitar is usually better, and it would be a lousy composer who didn't know that.

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### III. SOCIAL CHANGE AND PRESERVATION

Thus far this Article has aimed mainly to describe a theoretical point of view; spelling out and defending the view's normative implications is for the most part a downstream project. But there is an exception. Reconstructivism is conservative in the Burkean sense that it valorizes the ethical life extant in a culture. This normative implication runs counter to two widely held ideas: that there is no such thing as shared ethical life in contemporary, diverse societies, and that, to the extent there are shared norms, many of them are unjust and should be changed. The questions and objections connected to those two ideas are so insistent that they cannot be held in abeyance, and this Part responds to them. Before getting into the meat of the response, however, four prefatory points are in order.

First, these normative objections do not cut at all against reconstructivism as a descriptive theory of criminal law.<sup>167</sup> Much of reconstructivism is descriptive. Racist societies punish miscegenation, sexist societies punish gender nonconformity, and theocracies punish blasphemy. They do so because, if they did not reconstruct their castes, their gender roles, or their zealotry in the wake of acts of tolerance, resistance, or doubt, their culture's commitment to racism, sexism, or theocracy would be disturbed. Reconstructivism is part of understanding those social patterns whether we like them or not. If all this Article accomplishes is securing that descriptive claim, that is enough.

Second, reconstructivism restricts the uses to which *criminal* law may properly be put and accepts a kind of cultural relativism with respect to criminal law, but it does not restrict other areas of law and it does not imply indifference to justice. Reconstructivism should in my view be *nestled* within a theory of justice. The injustices in a community's ethical life should be opposed and reformed — just generally not by means of criminal law. And if those injustices are so extreme and pervasive as to make the society's ethical life unworthy of preservation, we should not *be* reconstructivists, except descriptively. A measure of solidarity is so important to basic social functioning that there is some value to it even in unjust societies, but in the main, a view that makes criminal law the handmaiden to moral culture is normatively attractive insofar as the culture it is preserving is worth preserving.

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<sup>167</sup> As I argue in section II.B, pp. 1534–37, reconstructivism sounds at one and the same time on descriptive and normative levels, and those levels are not as sharply separated as legal scholarship sometimes assumes. But it is nonetheless the case that a theory might be true descriptively and carry normative implications one finds unwelcome. One can accept reconstructivism as a good description of how criminal law functions in most societies most of the time and reject it as a normative account of how criminal law should function.

Third, it is not true that reconstructivism is quietist or without a critical edge. Given the state of criminal law in the United States today, reconstructivism has radical policy implications. The reason is that reconstructivism valorizes ethical life and social solidarity, and contemporary American criminal law does not. American criminal law today criminalizes so aggressively as to transform minor misbehavior and even normal conduct into crime.<sup>168</sup> It punishes much more harshly than ordinary Americans, provided they are informed of the facts, think is just.<sup>169</sup> It uses criminal procedure in ways that prizes bureaucratic efficiency over local control and popular morality.<sup>170</sup> And as I discuss above, the policies that have led to racial mass incarceration are like a giant solidarity-crushing machine.<sup>171</sup> Burkean respect for embodied ethical life is a revolutionary faith in the face of a criminal system that is by turns stridently moralistic and narrowly instrumental, that is trying essentially to imprison as many offenders for as many years as possible at as little cost as possible. True, reconstructivism is not revolutionary with respect to the way Americans live. But the problem in American criminal law today is not how Americans live; it is the way our criminal law lacks respect for how we live. It is widely appreciated that American criminal justice is in crisis.<sup>172</sup> The consensus on that point fans out beyond the academy to

<sup>168</sup> See generally STUNTZ, *supra* note 14.

<sup>169</sup> See generally PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT (2013).

<sup>170</sup> See generally STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012); STUNTZ, *supra* note 14.

<sup>171</sup> See *supra* pp. 1494–96.

<sup>172</sup> See, e.g., STUNTZ, *supra* note 14, at 1 (“Among the great untold stories of our time is this one: the last half of the twentieth century saw America’s criminal justice system unravel.”); see also THE NEW PHILOSOPHY OF CRIMINAL LAW 1 (Chad Flanders & Zachary Hoskins eds., 2016) (“There is a genuine sense today that the criminal law and criminal justice system are broken. To take only two of the more obvious examples, concerns are now routinely raised . . . about the phenomena of ‘overcriminalization’ and ‘mass incarceration.’”). Consider: at its peak in 2007, 3.2% of the U.S. adult population — one adult per thirty-one — was under some form of correctional control (incarceration, probation, or parole). LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2007 STATISTICAL TABLES 1 tbl.1 (2009). The incarceration rate per 100,000 residents was 756 (one in every 132 persons, or 0.8% of the population), rising for black men to over 3138. HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2007, at 4, 6 (rev. 2009). The standard rate in economically advanced Western nations — including both Europe today and America throughout most of the twentieth century — is approximately 100 per 100,000, or one person per thousand. MARCELO F. AEBI & NATALIA DELGRANDE, COUNCIL FOR PENOLOGICAL COOPERATION OF THE COUNCIL OF EUR., COUNCIL OF EUROPE ANNUAL PENAL STATISTICS 42 tbl.1 (2015); MARGARET WERNER CAHALAN, BUREAU OF JUSTICE STATISTICS, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984, at 35 tbl.3-7 (1986). Now, since 2007, American punishment has been getting milder, but the incarceration rate in 2013 was 623 per 100,000 — still extremely high by both the international standards and the standards of America’s own history. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, at 6 (2014).

much of the legal profession, political leadership, and public.<sup>173</sup> But consensus stops there: the nature, causes, and appropriate responses to the crisis are all intensely controverted.<sup>174</sup> The reason for the controversy is in part that the crisis is not just one of policy but one of ideas: caught in the ricocheting paradigms of retributivism, pure utilitarianism, and liberal utilitarianism, we lack new ideas that might show us a way forward. Burkean though it is, reconstructivism offers critical purchase on the present crisis. It suggests a new way to understand what has gone wrong in American criminal law and how it can be set right.

Finally, the social reform and cultural diversity objections to reconstructivism track major issues in political theory generally, such as the tension between universalist and nonuniversalist moral outlooks, disagreements between liberals and communitarians over the extent of moral division in diverse societies, problems of majorities oppressing minorities in democratic societies, and questions of how to define culture and identify its content. These are perennial issues that

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<sup>173</sup> See, e.g., Barack Obama, Remarks by the President at the NAACP Conference (July 14, 2015), <http://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> [<http://perma.cc/SBF2-8ZFU>] (“[T]oday, I want to focus on one aspect of American life that remains particularly skewed by race and by wealth, a source of inequity that has ripple effects on families and on communities and ultimately on our nation — and that is our criminal justice system. . . . Partly because of cameras, partly because of tragedy, partly because the statistics cannot be ignored, we can’t close our eyes anymore. . . . But here’s the good news. . . . [W]hen, let’s face it, it seems like Republicans and Democrats cannot agree on anything . . . a lot of them agree on this.”); see also Stephanie Clifford, *From the Bench, a New Look at Punishment*, N.Y. TIMES (Aug. 26, 2015) (“[A]cross the country, some judges are refashioning sentences, asking prosecutors to drop cases that judges see as unfair, considering how to reduce the long-term impact of old convictions, and writing essays advocating change.”); Carl Hulse, *Unlikely Cause Unites the Left and the Right: Justice Reform*, N.Y. TIMES (Feb. 18, 2015) (describing the view among many U.S. Senators that the “criminal justice system is broken” and their highly bipartisan efforts to reform it); *Confidence in Institutions*, GALLUP, <http://www.gallup.com/poll/1597/confidence-institutions.aspx> [<http://perma.cc/4GBE-KW78>] (reporting that, as of June 2015, only twenty-three percent of Americans describe their confidence in the criminal justice system as either a “great deal” or “quite a lot”).

<sup>174</sup> See Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein’s Monster?*, 126 HARV. L. REV. 1299, 1299 (2013) (book review) (“The American criminal justice system is broken. This claim, in one form or another, commands wide support among those who study criminal justice. But the view that the system is in urgent need of reform marks the limit of scholarly consensus. As soon as one moves to specifics — to analysis of the particular ways in which the system is defective or problematic; to interpretation of why these defects or problems have arisen; and perhaps above all, to elaboration of possible solutions and institutional reforms — one encounters not only the sort of variety that is to be expected in any vibrant field of scholarship, but also fundamental differences of diagnosis and prescription.” (footnote omitted)); Eric Tucker, *Criminal Justice Issues Showing Up in 2016 Presidential Race*, ASSOCIATED PRESS: THE BIG STORY (Nov. 25, 2015, 4:19 PM), <http://bigstory.ap.org/article/f188bcb683024cf592aabef40aa24cb9/criminal-justice-issues-showing-2016-presidential-race> [<http://perma.cc/KHQ8-T59Y>] (“[E]ven among those in both parties who support changing the criminal justice system, there’s no consensus on how to do it and candidates are scrambling to differentiate themselves on what law and order means.”).

go well beyond criminal law, and it is not realistic to expect their resolution from an article in criminal theory. My goal here is therefore the relatively modest one of showing where reconstructivism stands with respect to these larger issues and pointing out some of the resources available to reconstructivism in responding to them.

A. *Customary, Democratic, Conservative*

As I state above, reconstructivism commonly spurs objections based on ideas of social reform and cultural diversity. Let us begin by getting the normative implications that arouse such objections on the table. Developing these implications fully would require a full-scale theory of criminalization, which is not this Article's task. But the implications in broad strokes are simple enough.

Reconstructivism holds that there are proper and improper uses of the criminal instrument. Its most radical implication is that criminal law, unlike civil or administrative law, cannot be purely positivistic. Embodied ethical life is inscribed in custom. If it is criminal law's function to be embodied ethical life's protector, it follows that criminal law must begin in custom and maintain its connection to custom. Peripheral, positivistic uses of the criminal instrument may be permissible (e.g., regulatory uses of criminal law), provided they do not tread upon the link with custom, but core criminal law should be always and only codified customary law. If we wish to reform our culture or tie ourselves to the mast, as we sometimes should, civil and administrative law are available for the purpose, as is moral suasion. Criminal law should rarely if ever lead cultural change, though it should often follow it. Criminal law should be moral culture's handmaiden and knight-protector, indelibly linked but subordinate to it, as agent to principal. Indeed, in the United States, criminal law that conflicts deeply enough with how the people actually live their lives might be constitutionally invalid. As Cass Sunstein argues, criminal law that cannot claim "a plausible foundation in widely shared moral commitments" might violate due process.<sup>175</sup> As Durkheim argues:

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<sup>175</sup> Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 73. Sunstein's argument is about desuetude and constitutional invalidity in *Lawrence* and *Griswold*. "[T]he old common law idea of desuetude" is that "laws that are hardly ever enforced are said, by courts, to have lapsed, simply because they lack public support." *Id.* at 49–50. While "[m]ost American courts do not accept that idea in express terms," *id.* at 50, Sunstein proposes a constitutional variation on the doctrine that, he argues, American courts *do* accept — that indeed drove the Supreme Court's decisions in both *Griswold* and *Lawrence*. Both cases involved laws so "hopelessly out of touch with existing social convictions," *id.* at 27, so inconsistent with how Americans actually live and lived, that the public simply would not accept seeing them generally enforced. Imagine widespread arrests of married couples for using contraceptives. Or imagine a serious governmental effort to round up homosexuals, or even, depending on how sodomy were defined, anyone who engages in oral or anal sex. The pub-

Since the rules [of criminal law] are inscribed upon everyone's consciousness, all are aware of them and feel they are founded upon right. . . . [I]f by chance a penal rule persists for some time although disputed by everyone, it is because of a conjunction of exceptional circumstances, which are consequently abnormal — and such a state of affairs can never endure.<sup>176</sup>

Or as Hegel puts it in what is one of the most beautiful passages in his corpus (a passage specifically aimed at the problem of technocratic law but of general significance for positivistic law):

To hang the laws at such a height that no citizen could read them, as Dionysius the Tyrant did, is an injustice [*Unrecht*] of exactly the same kind as to bury them in an extensive apparatus of learned books and collections of verdicts based on divergent judgements, opinions, practices, etc., all expressed in a foreign language, so that knowledge [*Kenntnis*] of the laws currently in force is accessible only to those who have made them an object of scholarly study. . . . The legal profession [*Juristenstand*], which has special knowledge of the laws, often regards this as its monopoly and no concern of those who are not among its members. . . . But just as one need not be a shoemaker to know whether one's shoes fit, so is there no need to belong to a specific profession in order to know about matters of universal interest.<sup>177</sup>

Criminal law should be like Hegel's shoes: the community should feel that it fits.

To tie criminal law in this way to how members of a community actually live and what they think about right and wrong is to defend a *democratic* notion of criminal law.<sup>178</sup> Of course, all duly enacted law in a system of government like ours has some claim to being democratic: even criminal provisions that directly conflict with social practice

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lic just wouldn't have it, and so the laws in question went essentially unenforced. Now, to invalidate laws on that basis would just be common law desuetude, but this is where the doctrine takes its American turn. When laws become more or less dead letter, enforcement is "unpredictable and essentially arbitrary," *id.* at 50, and criminal prosecutions on such a basis violate principles of procedural due process "requiring fair notice, and banning arbitrary action," *id.* at 27. Thus the Court found a due process hook for invalidating criminal laws that "could not claim a plausible foundation in widely shared moral commitments," *id.* at 73 — that is, "[d]esuetude, American style," *id.* at 30 (emphasis omitted). I think reconstructivists should embrace this "desuetude, American style," and maybe desuetude, common law style as well. Stuntz thought so too. *See* Stuntz, *supra* note 47, at 591–94. Perhaps — although it would take some work to get the formulation of this claim exactly right — the Constitution simply prohibits criminalizing what a sufficient number of Americans do. Is that part of the guarantee of due process? Could that be part of the guarantee of democratic government? Could it be part of the guarantee against unusual punishment?

<sup>176</sup> DURKHEIM, DIVISION OF LABOR, *supra* note 12, at 34.

<sup>177</sup> HEGEL, PHILOSOPHY OF RIGHT, *supra* note 27, § 215, at 246–47 (footnote omitted).

<sup>178</sup> Some Hegel scholars might object to linking reconstructivism with democratic values, since Hegel was skeptical of democracy. However, Hegel's views on democracy were more nuanced than they might seem; his skepticism was multilayered and had a great deal to do with his experience of the French Revolution. *See* CHARLES TAYLOR, HEGEL 396–415 (1975). I also think Hegel simply failed to grasp the democratic implications of his own thought.

did, after all, survive the legislative process.<sup>179</sup> But because of what has been called the “pathological politics”<sup>180</sup> of criminal legislation in America, some of what survives the legislative process is democratic in name only, and not in the normatively relevant sense of enabling the people living under the law to see themselves as the law’s authors. For example, 46% of all Americans and 70% of Americans aged 18–29 have illegally copied or downloaded videos or music; only 52% of all Americans and 37% of Americans aged 18–29 support criminal penalties for such copying or downloading; and only 12% of all Americans think such copying or downloading should be punishable with imprisonment.<sup>181</sup> But American law treats sharing videos or music under broadly defined circumstances as a felony carrying a multiyear prison term.<sup>182</sup> Copyright violations are criminalized to this extent, not because the American people chose to live a certain way or came to a certain conclusion in public debate, but because of political processes and considerations far afield of ethical life — including Congress’s susceptibility to the influence of moneyed lobbyists.<sup>183</sup> If one understands democracy to mean that government should be the political echo of a self-defining culture, then contemporary American criminal law is in many instances undemocratic. Democratic failure of that kind is familiar to the point of cliché to students of law and political science, but it is especially disturbing in the criminal context because criminal law is an essentially repressive instrument: criminal law is the hammer of the state. For criminal law to be *meaningfully* democratic, the political processes involved in fashioning, interpreting, and enforcing it must be linked to culture, to a people’s ethical life. That culture–politics link has broken down in contemporary American governance.

There are variations on this theme of democratic failure in criminal law. The criminalization of homosexual sodomy was in its time an instance of sincere majority belief, but it was a majority oppressing a discrete and insular minority — a kind of democratic failure that has

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<sup>179</sup> Dan Markel’s argument for why we are “morally obligated” to conform to “dumb but not illiberal” laws turns on this sort of positivism, which regards law that survives the legislative process as unproblematically democratic. Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 1, 14 (2012). I disagree with his perspective because it strikes me as too attached to the formalities of legislation, too inattentive to processes of political breakdown in criminal lawmaking that Stuntz mapped, *see* Stuntz, *supra* note 47, and too disconnected from the substantive values for which we have democratic processes in the first place.

<sup>180</sup> Stuntz, *supra* note 47, at 505.

<sup>181</sup> JOE KARAGANIS & LENNART RENKEMA, AM. ASSEMBLY, COLUMBIA UNIV., COPY CULTURE IN THE US & GERMANY 30–31, 40–41 (2013).

<sup>182</sup> *See* 17 U.S.C. § 506 (2012); 18 U.S.C. § 2319 (2012).

<sup>183</sup> *See* LAWRENCE LESSIG, LESTERLAND: THE CORRUPTION OF CONGRESS AND HOW TO END IT (2013) (ebook).

been familiar at least since Ely.<sup>184</sup> Prohibition involved a social reform oriented political movement in which most Americans were inclined to criminalize, but not to live by the criminalization, and criminalized only because they didn't expect the law to be enforced against people like them (as with the war on drugs).<sup>185</sup> In fact, some of the breadth and harshness of contemporary criminal law appears to be the product of "tacit cooperation between prosecutors and legislators,"<sup>186</sup> with public opinion hardly playing a role at all.<sup>187</sup> Working out the metes and bounds of reconstructivism's democratic claims would be a large project — too large for this Article. I think a true commitment to custom in criminal law might require that legislation in the area be based on supermajorities rather than simple majorities. Of all the departments of law, this is the one where it is least appropriate to govern by fifty-one percent. But what is necessary for the moment is only to see that it is *possible* — all too possible — to have a democratic deficit in criminal law even when that law survives the American legislative process. Some procedurally regular criminal law violates the substantive principle that the people should be able to see themselves as the law's author. Reconstructivism, because it honors moral culture, vindicates that violated democratic principle.

Reconstructivism is thus conservative, not in the sense of the contemporary right wing, but in the small-c, Burkean sense: the reconstructive spirit is animated by respect for evolved moral culture and skeptical of projects in social reform by means of criminal law. The deeper the disconnect between the criminal law and the society under it, the deeper the skepticism; concomitantly, the more the reformist project proceeds from purely abstract principles — principles applied to rather than found in a community's way of life — the deeper the skepticism. Prohibition is a perfect example of the type. Moral crusades are not the business of criminal law.

Thus reconstructivism comes with a distinct conception of the role of the state with respect to criminal law. The state's role is not to be the night watchman of libertarians, nor the moral scold of the Right, nor the moral crusader of the Left. The state in the criminal context should be the embodiment and protector of society's lived moral culture — its way of life. Edmund Burke would approve. If Burke were a criminal theorist, he would be a reconstructivist.

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<sup>184</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

<sup>185</sup> See Stuntz, *supra* note 47, at 573–76.

<sup>186</sup> *Id.* at 510.

<sup>187</sup> This is the thesis of Stuntz's classic article, *The Pathological Politics of Criminal Law*. *Id.* at 509–11.

*B. Against Social Reform?*

A cluster of objections arises at this point, all connected to the limitations reconstructivism places on criminal law as an instrument of social reform. Does reconstructivism imply moral relativism or quietism with respect to criminal law? Does it sacralize the status quo? Does it make criminal law impotent or even complicit in the face of moral wrongdoing that happens to be socially accepted?

There is no singular or simple answer to these questions. They track objections commonly asked of all nonuniversalist normative positions, and relatedly, asked of all or many positions that focus on self-determination. One could equally ask a democratic theorist how she can defend democratic values given that some societies vote for morally bad policies. That doesn't mean the questions are wrongheaded; they're good questions, for the democratic theorist as for the reconstructivist. But it does show that the existence of the questions, even if imperfectly or incompletely answered, does not constitute a knock-down objection. And it also shows that, while the questions admit of no single, decisive answer, they do admit of various good responses.

To begin with, I take reconstructivism to be a theory of criminal law with descriptive force in virtually all societies, but one that is normatively appropriate only in basically decent societies.<sup>188</sup> That is part of what it means to say that reconstructivism should be nestled within a theory of justice. To be clear: in indecent societies, we should not be criminal law reconstructivists, except descriptively. Indeed, the very idea that embodied ethical life is something to treasure, a source of normative guidance defeasibly entitled to respect, only makes sense in the context of a basically decent society. It was Hegel's view that societies whose social order systemically violates principles of reason

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<sup>188</sup> There is no reason to think a normative theory has to apply to all societies at all times — especially where the subject of the theory is a social institution (e.g., a department of law) rather than an abstract moral concept (e.g., a theory of justice). Cf. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353, 1360 (2006) (opposing judicial review with an argument that is “not unconditional,” *id.* at 1353, but rather applies only to societies with well-functioning democratic and judicial institutions, among other conditions); cf. also JOHN RAWLS, *THE LAW OF PEOPLES* 4, 63 (1999) (formulating a conception of just international law that would apply to “liberal societies” and “decent, though not . . . liberal societ[ies],” *id.* at 63, but not “outlaw states,” *id.* (emphasis omitted)). Giving a philosophical account of particular social practices and institutions is hard, and one of the reasons it is hard is that one must often explicate and defend a normative structure that applies only to the part and not the whole — to the classroom or the family, or to natural science or jazz music, but not to the society generally. One must distinguish levels. I am proposing a certain kind of defeasible relativism on the level of criminal law, but in the context of a broader belief in justice (albeit one inflected with Hegel's, Durkheim's, and Burke's respect for embodied ethical life).

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and freedom are simply defective instances of embodied ethical life;<sup>189</sup> the very author of the concept of embodied ethical life was *not* a relativist. In Nazi Germany, the value of using criminal law according to its primary purpose would be trumped by the human rights of Jews. Indeed, the value of using criminal law according to its primary purpose in that case would be negligible anyway, because the primary purpose of criminal law is to preserve moral culture, and the moral culture of Nazi Germany wasn't worth preserving.

Yet the hard problem remains: whether to use criminal law to reform a wrongful practice in a basically decent society. Why not use criminal law to stamp out drunk driving, cigarette smoking, or whatever else is bad but common?

Some further clarification is necessary to sharpen this question. First, it is not the case that embodied ethical life includes whatever conduct happens to be widely practiced in society. Embodied ethical life has to do with common practices that are also normatively valorized and defended, that are practiced under a claim of right. Shoplifting and fistfighting are not part of embodied ethical life; they are only common because greed and aggression are common. Drunk driving is no different.

Second, the reconstructive theory of criminal law is a theory of *criminal law*; it puts no restrictions on civil law, administrative law, or moral suasion. That is to say, not only does reconstructivism have no objections to social reform through persuasion — which should be the obvious default in democratic society — it doesn't even object to social reform through law. It objects only to social reform through *criminal law*. The reconstructivist is a criminal law relativist, not a moral relativist or even a law relativist; again, reconstructivism must be nestled within a theory of justice. To thus limit criminal law does indeed limit the potential effectiveness of some reform projects, but less than one might think. Civil and administrative law can be more powerful than criminal law — not as frightening, perhaps, but more systematic, more capable of revising the way social practices and institutions work. (Criminal law has no equivalent to, say, the structural injunction.) And society has other mechanisms at its disposal as well: it is unconstitutional to criminalize racist speech, but people get fired for it. One of the most successful social reform projects of the century, the vast reduction in cigarette smoking among American adults, was accom-

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<sup>189</sup> See G.W.F. HEGEL, INTRODUCTION TO THE PHILOSOPHY OF HISTORY 21–22 (Leo Rauch trans., Hackett Publ'g Co. 1988) (1837) (arguing that human freedom is “[t]he final goal of the world” and that “history has been working” toward this goal, *id.* at 22, but that certain societies have incompletely realized or violated this goal, as in “the ancient Orient,” where only “one person,” “a despot,” was free, or ancient Greece and Rome, where “only . . . some persons are free, not the human as such,” *id.* at 21 (emphasis omitted)).

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plished by regulation, tort suits, and moral suasion. The recent civil rights achievements of gay Americans have been mainly a story of civil law and moral suasion. By contrast, one of the great legal failures of the last century, Prohibition, was a story of criminal law *without* civil law and moral suasion — for among other problems with using criminal law as the vanguard of social reform is that it doesn't work. Criminal law should be conservative in the Burkean sense because the function for which criminal law is distinctively suited — preserving moral culture, normative restitching after normative unstitching — is, in basically decent societies, worth doing, but other forms of law and moral pressure need not be conservative in any sense; they can lead from the front.

Yet the core of the hard problem remains: to the extent a generally decent society houses a seriously wrongful practice that is common, that is defended under a claim of right, that resists moral suasion, and that resists civil or administrative law, why not fight it with criminal law? Let us say that dueling is commonly practiced in a society, despite social and legal (but noncriminal) pressure to stamp it out, because a substantial portion of the members of the society believe dueling to be honorable. Can criminal law then be used against dueling?

The question shows precisely the lack of moral humility that makes zealous social reformers so objectionable to Burkeans. Perhaps if the society in question really does insist on dueling as a matter of right and in the face of considered opposition, it has a good reason for doing so. There is such arrogance on the part of the reformer in insisting that he or she simply knows the right. What would be the difference between the reformer's anti-dueling statute and the oppressive colonial laws England imposed upon India, which Burke, precisely because he respected embodied ethical life, fought so hard against?<sup>190</sup> The anti-dueling statute would be no less imperial. Indeed, even if one does not generally find the Burkean spirit of moral modesty appealing, there are special reasons to be restrained in the criminal case. It is criminal law's character to eliminate dissent by repression. If one is willing to admit even the smallest chance that one's political preferences are wrong — political preferences that, we are imagining, are highly contested even after efforts at moral suasion and reform through civil and administrative law — criminal law should not be the instrument with which to win the political battle. Criminal law wins its victories by force. If one's views are wrong, to win the political battle by means of

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<sup>190</sup> See, e.g., Edmund Burke, Speech on Bengal Judicature Bill (June 27, 1781), in 5 THE WRITINGS AND SPEECHES OF EDMUND BURKE 140, 140 (P.J. Marshall ed., 1981) ("It must always be remembered, that the genius of a people is to be consulted in the laws which are imposed upon them. They are to be adapted to the spirit, the temper, the constitution, the habits, and the manners of the people.").

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criminal law is to have committed a violent injustice. A reformer would have to be very, very sure of himself or herself.

The question also shows a naive optimism about criminal law. Whatever one's political preferences, there is no reason to think that, when criminal law is up for grabs, one's own political preferences rather than the opposing preferences will carry the day. The criminal instrument can be used against the pro-choice abortion doctor as easily as it can be used against the pro-life abortion protester. Indeed, the values typically associated with social reform — progressive political values — are *likely* to lose when criminal law is treated merely as a tool with which to strike whatever those with political power oppose. Historically, criminal law has been used against marijuana smokers,<sup>191</sup> homosexuals,<sup>192</sup> music sharers,<sup>193</sup> flag burners<sup>194</sup> — the dissenters, the powerless, the young, the provokers who cause offense. And not only has criminal law often been used that way historically, but if there is even a shred of truth in reconstructivism's descriptive claims, there is good reason to *expect* criminal law to be used that way. The defense of moral culture is inherently in tension with progressivism. Durkheim noted precisely this problem with criminal law:

The authority which the moral consciousness enjoys must not be excessive, for otherwise no one would dare to attack it and it would petrify too easily into an immutable form. For it to evolve, individual originality must be allowed to manifest itself. . . . According to Athenian law, Socrates was a criminal and his condemnation was entirely just. However, his crime — his independence of thought — . . . served to prepare a way for a new morality and a new faith . . . . Liberal philosophy has had as its precursors heretics of all kinds . . . .<sup>195</sup>

If the authority that the moral consciousness enjoys is not to be excessive, criminal law must not be treated merely as an instrument with which to strike anything those with political power think wrong.

And yet — even after all this — the seed at the core of the hard question *still* remains. If, even after heeding the counsels of moral humility and political prudence, one cannot but think that a practice is wicked, that the criminal law is available to fight it, and that all the other conditions discussed above hold true as well (the practice is common, defended under a claim of right, resistant to other efforts at reform, etc.), can the criminal law be used to fight it?

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<sup>191</sup> See *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>192</sup> See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>193</sup> See *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487 (1st Cir. 2011).

<sup>194</sup> See *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>195</sup> EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 101–02 (Steven Lukes ed., W.D. Halls trans., Free Press 1982) (1895).

There is no reason a reconstructivist need be an absolutist about this matter, and I am not absolutist about it. There are indeed cases in which some widespread evil is so egregious as to make it worth using criminal law against it. But that is a judgment that requires balancing costs and benefits, and to balance well, we need to know what is on each side of the scale. Reconstructivism shows us the solidaristic considerations on one side of the scale, but it does not hold that they can never be outweighed. I believe, for example, that female genital mutilation is morally objectionable to the point of moral repugnance. If a large wave of immigration led to a new America in which twenty-five percent of the citizenry engaged in and normatively defended the practice of female genital mutilation, and if I were confident that criminal law and only criminal law could be used to fight the practice effectively and change the norm, I'd use it. But I'd know in doing so that I would be damaging majority America's ability to have a functioning sense of community with its new fellow citizens and vice versa. Using criminal law against a community's embodied ethical life will exact a cost in the currency of solidarity. That cost may be worth it, but only through reconstructivism can we even see the cost for what it is.

To reject an absolutist position on this matter is not to abandon the theory when the going gets tough, nor to graft an ad hoc exception onto the theory. Reconstructivism is welfarist; its roots are in human flourishing.<sup>196</sup> It follows that it cannot finally support a practice abhorrent to human welfare even if that practice is part of a society's moral culture. Because reconstructivism highly values embodied ethical life and the place of criminal law in protecting embodied ethical life, the theory does not see every objectionable social practice as abhorrent. But there is room in the theory for it to see extreme practices as abhorrent, and to criminalize in those few cases. This is where Hegel, for whom embodied ethical life has a moral purpose connected to reason and freedom and may be deficient where it opposes reason and freedom,<sup>197</sup> finally gets the better of Durkheim, for whom solidarity is the only consideration. There is a moral center in Hegel's view that Durkheim's lacks.

In the end, what I am proposing is a kind of criminal law Thayerianism. James Bradley Thayer proposed a version of judicial restraint in constitutional law under which judges should strike down a statute only if its unconstitutionality is "so clear that it is not open to rational question."<sup>198</sup> That view, Judge Richard Posner argues, was carried forward by Holmes, Brandeis, Frankfurter, and Bickel, among

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<sup>196</sup> See *supra* p. 1493.

<sup>197</sup> See *supra* note 189.

<sup>198</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

others, and helped lead to rational basis review, but has now died away.<sup>199</sup> Now, my point has nothing to do with judicial review, but it is in the spirit of Thayer and his formula is helpful: use criminal law against a practice that is part of embodied ethical life only if the practice is so morally repugnant that its immorality is not open to rational question and its elimination is worth the cost in solidarity. That is not relativism. That is restraint.

### C. Cultural Diversity

Is reconstructivism's insistence on shared ethical ideas inappropriate to contemporary, culturally diverse societies? Perhaps reconstructivism implies a criminal law that illiberally imposes majority values on resident minorities. Or perhaps reconstructivism is just impossible in the modern world because we don't have thick, shared values. If so, is the theory an anachronism, a daydream of an earlier, more communal form of social life?

Reconstructivism comes in different varieties, and I think there are some — not all, but some — that would be vulnerable to the objection of imposing majority values on dissenting minority communities.<sup>200</sup> It is true that modern, diverse societies contain majority and minority communities with different conceptions of the good, or sometimes simply multiple communities with multiple conceptions of the good. And it is true that reconstructivism appeals to conceptions of the good in substantive ways that make disagreement within a diverse society very likely or inevitable. These are familiar issues. They are at the heart of the disagreement between liberals and communitarians in areas well beyond criminal law: liberals argue that we do not share thick or substantive first-order ethical ideas, so we must find thin or procedural second-order ideas to agree about for purposes of regulating public life; communitarians answer that the second-order agreement is illusory and that we can and do find agreement on the first order.<sup>201</sup> Criminal theorists have recapitulated this debate,<sup>202</sup> and it is an enor-

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<sup>199</sup> See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 522, 525–26, 534 (2012).

<sup>200</sup> This is one of the ways in which I think Lord Devlin's reconstructivism went awry. See *supra* note 2.

<sup>201</sup> Compare JOHN RAWLS, *POLITICAL LIBERALISM*, at xxv (1993) (“[T]he problem of political liberalism is: How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines?”), with MICHAEL J. SANDEL, *PUBLIC PHILOSOPHY: ESSAYS ON MORALITY IN POLITICS* 5 (2005) (“Liberals often worry that inviting moral and religious argument into the public square runs the risk of intolerance and coercion,” but the communitarian believes that “a pluralist society need not shrink from engaging the moral and religious convictions its citizens bring to public life.”).

<sup>202</sup> Compare Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 414 (1999) (“By abstracting from contentious expressive judgments, deterrence arguments serve the

mous and difficult debate in criminal theory, let alone in general political theory. I cannot do the issues justice here, but I would like to indicate some directions of response.

First, reconstructivism does not necessarily imply an oppressive relationship between majorities and minorities. Quite the opposite: reconstructivism in the democratic and Thayerian spirit discussed above implies a nonoppressive relationship between a majority and its resident minorities, because its position is not that everything the majority disfavors should be criminalized. Its position is that, to the extent possible, everything a resident minority regards as necessary to its way of life should be protected from criminalization. Reconstructivism is not intolerant; Thayerian restraint in using the criminal instrument is the opposite of intolerance.

Second, federalism and other forms of localism, and perhaps nonterritorial forms of legal pluralism as well, can be used to reduce the incidences of value disagreement and the need to work out universal values. With exceptions for areas of pressing national need and solid national consensus, criminal law should vary with the community whose ethical life it is preserving. Indeed, part of what is wrong with federal drug law is the suggestion that using drugs *means* the same thing in all communities at all times. There may be some communities in which smoking marijuana is a threat to social organization, but there are others in which taking a few puffs is just good manners (ever been to a Grateful Dead concert?). Some criminal law scholars — notably Stuntz and Bibas — have argued for their own reasons that federalism and more radical forms of localism (for example, city- or neighborhood-based control over criminal enforcement) are essential to addressing the ills of American criminal justice today.<sup>203</sup> Reconstructivists have independent grounds for joining that position.

Finally, reconstructivists can, as it were, incorporate by reference the existing array of communitarian arguments about cultural diversity, as a vast literature on the matter already exists.<sup>204</sup> One of these responses strikes me as especially important in the criminal context: that diverse, contemporary societies *do* have thick, shared values to a greater degree than many liberals suppose; that where we lack such

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ends of liberal public reason, which enjoins citizens to advance arguments accessible to individuals of diverse moral persuasions.”), with Nicola Lacey, *Community, Culture, and Criminalization*, in *CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF* 292, 293 (Rowan Cruft et al. eds., Oxford Univ. Press 2011) (arguing that Duff’s “liberal communitarian” philosophy of crime “pose[s] the question of whether it is possible to pursue the goal of a criminal law which realizes the values and represents the interests of a ‘liberal community’ in a world of radical value pluralism”).

<sup>203</sup> See BIBAS, *supra* note 170, at 129–65; STUNTZ, *supra* note 14.

<sup>204</sup> See, e.g., CHARLES TAYLOR, *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* (Amy Gutmann ed., 1994).

values, we can *develop* them through democratic discourse; and that in any case we *need* them no less and perhaps more than homogeneous societies.<sup>205</sup> This line of argument is especially relevant in the criminal context because most of the values at issue in criminal law are quite basic; it is on the whole both easier and more necessary to agree about them than it is to agree about values in other spheres of life. American society, for example, has widely shared values of life, property, equal dignity, honest commercial relations, etc.; we have to mutually value those things or we wouldn't survive as a society at all. Furthermore, the United States has shown that it requires some measure of normative alignment if it is to avoid dissolution (disagreements about values almost did dissolve the country in the Civil War); remain governable (high degrees of alienation, as I argued with respect to mass racial incarceration, are bad for democratic governance<sup>206</sup>); stay diverse and democratic (democracy and tolerance of diversity are themselves values that require shared belief); and function commercially (where trust is at a premium). Arguably, as ethnic and religious bonds become weaker, shared ideas must become stronger. Indeed, the idea of fellow-feeling has had a central place in the democratic tradition: what modern Europe calls "solidarity," revolutionary France called "fraternity," Alexis de Tocqueville called "association," and Walt Whitman called "connectedness."<sup>207</sup> Finally, participants in functioning societies often share social institutions and practices even where they do not share ideas. For example, Americans share a legal system. One strand of the communitarian tradition holds that it is through such shared practices and institutions that we make ourselves intelligible to one another and accord each other recognition.<sup>208</sup> To the extent these social practices and institutions are universal or widely shared, it should be less

<sup>205</sup> *See id.*

<sup>206</sup> *See supra* pp. 1494–96.

<sup>207</sup> In Tocqueville's words:

Americans of all ages, all conditions, and all minds are constantly joining together in groups. In addition to commercial and industrial associations in which everyone takes part, there are associations of a thousand other kinds: some religious, some moral, some grave, some trivial, some quite general and others quite particular, some huge and others tiny. . . . If, finally, they wish to publicize a truth or foster a sentiment . . . they associate.

ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 595 (Arthur Goldhammer trans., Library of Am. 2004) (1840). And as George Kateb writes of Walt Whitman:

Whitman's greatness lies in his effort, the greatest effort thus far made, to say — to sing — the democratic individual, especially as such an individual lives in receptivity or responsiveness, in a connectedness different from any other. . . . The deepest moral and existential meaning of equal rights is this kind of equal recognition granted by every individual to every individual. Democratic connectedness is mutual acceptance.

George Kateb, *Walt Whitman and the Culture of Democracy*, 18 *POL. THEORY* 545, 547, 551–52 (1990).

<sup>208</sup> This follows Hegel, who put practices, institutions, and "recognition" front and center in his philosophy of society. *See supra* notes 27, 62.

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problematic to defend them than it might be to defend more abstract ideals.

In short, contemporary America, like most contemporary democracies, does have a shared moral culture to some extent, enhanced rather than eliminated by its diversity. It is a matter of urgent importance that it has one. And the one it has is enough to sustain an approach to criminal law as the protector of embodied ethical life.

#### CONCLUSION: RECONSTRUCTIVISM'S SPIRIT

Implicit at points throughout this Article is the thought that ideas come with emotional concomitants, that the spirit of a normative position is the unity of its reasons and the feelings that make those reasons seem compelling. If that is true, reconstructivism has a spirit too, and a fully self-aware reconstructive theory should be able to identify its own emotional roots. I would like to close by making explicit those emotional roots and those of reconstructivism's competitors.

In the final analysis, the Enlightenment-humanist spirit in criminal law, insofar as that spirit means revulsion at all suffering and the effort to overcome all suffering, indulges in a fantasy of a different and gentler kind of society than the one we have, have ever had, or very likely could ever have. Because that fantasy is well-meaning, the field of criminal theory, along with political and moral philosophy generally, has treated it with too much indulgence. But in law and politics, and in thinking about social life, sentimentality is not a virtue; nor is wishful thinking; nor is squeamishness; nor is naiveté. Revulsion at suffering has an important place in criminal theory and historically has done indispensable good. But it should not be an obsessive, all-consuming point of focus. If the spirit that hates all suffering can neither make sense of the world nor recommend sensible ways of conducting it, then we should temper that spirit.

In favor of what? At points throughout this Article, I have criticized the Benthamite/Beccarian spirit that hates all suffering; the quasi-Kantian spirit that demands punishment on wholly non-functional grounds, and it seems to me finally atavistic; and the activist spirit that sees criminal law as just one more tool for social change.<sup>209</sup> What then is the spirit of normative reconstruction? I think it is a defeasible respect, rising even to reverence or wonder, for the normative orders actually at work in functional and more or less decent societies. To have that sense of respect, one must also feel that a functioning normative order, that society itself, is a moral achievement, and that it is potentially fragile — something complex, subtle, and not easily revised, and something that, for all its flaws, could be

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<sup>209</sup> See *supra* pp. 1498, 1527, 1556.

much worse. The respect, reverence, or wonder must always be defeasible or this attitude collapses into a reactionary and historically unsupported absolutism in favor of the status quo. But if held in a moderate, Burkean way, this kind of conservatism approaches the practices of crime and punishment in an interpretive rather than imperial spirit and comes to see in the criminal law a moral logic that deserves to be sustained.