
PENAL ABOLITIONISM AND CRIMINAL
LAW MINIMALISM:

HERE AND THERE, NOW AND THEN[†]

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INTRODUCTION

I was exposed for the first time to penal abolitionist authors and discourse when I took Criminal Law as a first-year undergraduate law student at the University of Buenos Aires, Argentina, in 1990.¹ At that time, several professors taught penal abolitionism together with theories of punishment at the beginning of the course, and penal abolitionism was a common theme in criminal law and criminology discussions. In 1992, while still an undergraduate law student in Argentina, I published my first criminal law/criminology article, critically examining two of the most important penal abolitionist authors.² However, when I came to Harvard Law School in 1998 to pursue an LL.M., penal abolitionism was not even mentioned in my Criminal Law class. In fact, to this day, prison abolitionism is not even mentioned in most if not all of the main American criminal law casebooks.³ It is only in the last five to ten years

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¹ Unlike in the United States, in most of the world law is an undergraduate degree.

² See Hernán Charosky & Máximo Langer, *Crítica destructiva: Por un nihilismo criminológico*, 7 NO HAY DERECHO 32, 32 (1992) (Arg.) (discussing the work of Nils Christie and Louk Hulsman).

³ See, e.g., JOSHUA DRESSLER & STEPHEN P. GARVEY, *CRIMINAL LAW: CASES AND MATERIALS* 60 (8th ed. 2019) (mentioning abolition of punishment but only in relation to philosophical debates on determinism, not prison abolitionism); SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* (10th ed. 2017); WAYNE R. LAFAVE, *MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS* (6th ed. 2017). As prison abolitionism has become more prominent in American legal academia and public discourse, I expect this lack of references to it to change in future casebook editions.

or so that penal abolitionism has become a theme, sometimes central, most often peripheral, at (some) American law schools and law reviews.⁴ The recent *Harvard Law Review* symposium on prison abolitionism⁵ and the thought-provoking *Foreword: Abolition Constitutionalism*⁶ by the prominent and insightful scholar Professor Dorothy Roberts — a work that this Response discusses — mark and crown this trend. The recent protests following George Floyd’s killing by the Minneapolis police have included proposals and demands to abolish the police and have made prison abolitionism known to even broader audiences.⁷

This is part of a positive trend. The United States is the country that incarcerates the most people per capita in the world,⁸ and it does so in a way that is often inhumane, unnecessary, unfair, and disproportionately affects poor, Black, Latinx, Native American, female, immigrant, and mentally ill people, among other groups.⁹ Fatal violence by the police against Black lives and the lives of others is much more common in the United States than in other Western democracies.¹⁰ Public discourse, academic work, and reform efforts that aim at reducing the scope of, and humanizing the way we approach, a range of social situations that have been called “criminal” are thus welcome developments. The rise of prison abolitionism in the United States has already made

⁴ Though this is anecdotal and may be a reflection of my own limitations, I think this pattern is also reflected in broader trends in American legal academia, including criminal law academia — and others have reported similar experiences. See, e.g., Dan Berger et al., *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/K959-9FF5>] (summarizing support of prison abolitionism in radical and mainstream sources, including some legal sources, and stating that “[t]his would have seemed difficult to fathom even just five years ago”).

⁵ *Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1568, 1568–69 (2019).

⁶ Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

⁷ On the relationship between police and prisons and their abolition, see generally, for example, Eduardo Bautista Duran & Jonathan Simon, *Police Abolitionist Discourse? Why It Has Been Missing (and Why It Matters)*, in THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 85–103 (Tamara Rice Lave & Eric J. Miller eds., 2019).

⁸ See *Highest to Lowest — Prison Population Rate*, WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All [<https://perma.cc/D6XD-87YD>].

⁹ See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 8 (2010); JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 6–7 (2017); DAVID GARLAND, THE CULTURE OF CONTROL 178–79 (2001); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 4–7 (2014); JONATHAN SIMON, GOVERNING THROUGH CRIME 6 (2007); BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 14 (2014); LOÏC WACQUANT, PRISONS OF POVERTY 63 (2009); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 3–4 (2006); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 976–77 (2009).

¹⁰ See, e.g., FRANKLIN E. ZIMRING, WHEN POLICE KILL 76 (2017).

contributions in these directions by inspiring the transformational efforts of many of the people and organizations working to change the penal system around the country. This rise has also provided tools and pushed us to rethink many assumptions about the penal system and has helped shape an ambitious agenda for changes in the penal system and beyond. This development is especially timely as communities across the United States are currently discussing how to reimagine public and community safety.¹¹

In this sense, Roberts's goal that "we can imagine and build a more humane and democratic society that no longer relies on caging people to meet human needs and solve social problems"¹² is admirable. However, it is important to keep a critical eye if we are to fully and meaningfully discuss how to think and what to do about harmful social behavior and decide how to reduce the footprint of and humanize the penal system. In this Response, with this critical-eye perspective in mind, after situating American prison abolitionism in a comparative context and putting it in conversation with European and Latin American penal abolitionism, I will introduce the concept of criminal law minimalism as an alternative to penal abolitionism (Part I). For criminal law minimalism, the penal system still has a role to play in society, but a radically reduced, reimagined, and redesigned role relative to the one it has played in the United States. In Part II, I will explain three of the main challenges that penal abolitionism faces and why, given these challenges, I am closer to criminal law minimalism. In Part III, I will sketch a minimal criminal law constitutionalism as an alternative to Roberts's abolition constitutionalism that can also be put in conversation with it.

In terms of the challenges to penal abolitionism that I will discuss, the first has to do with harmful behavior. These types of harms do not always or necessarily require police intervention, prison, or punishment responses from society. But I will argue that fully discarding police intervention, prison, or other potential punishments as a possible response to these situations — as penal abolitionists who advocate for "abolishing the police," "a society without prisons," or "a society without punishment" do — can itself be unfair, discriminatory, and inhumane; deprive the weak of protection against the powerful; harm the communities and individuals affected by these situations; and enable more of these harmful situations in the future.

Another challenge for penal abolitionists is that even assuming that police and prisons could one day be abolished, power relations and regimes cannot. Every society has to structure power relations and regimes somehow. Since the range of these is endless, the question is which power relations and regimes are more just than other alternatives.

¹¹ See, e.g., Dionne Searcey & John Eligon, *Minneapolis Will Dismantle Its Police Force, Council Members Pledge*, N.Y. TIMES (June 7, 2020), <https://nyti.ms/3dGjor16> [<https://perma.cc/6QCP-NN3T>].

¹² Roberts, *supra* note 6, at 7–8.

In this regard, it is not clear to me that any of the many possible variations of societies without any prisons — including the ones suggested by various penal abolitionists — would necessarily be more just than a set of societies that would still give to law enforcement, prisons, or other forms of punishment a role in addressing harmful behavior.

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

As for minimal criminal law constitutionalism, I will assert that while it shares many of the same values of abolition constitutionalism, it accommodates the shortcomings of total abolition. I will first argue that Roberts's critique of *Flowers v. Mississippi*¹³ is consistent with minimal criminal law constitutionalism and could be powerfully applied to other doctrines besides jury selection such as prosecutorial discretion and plea bargaining — doctrines that arguably affect many more cases subjected to the penal system than jury selection regulations do. Second, I will suggest that a strong and renewed principle of *ultima ratio* — which has not been considered a constitutional principle in the United States but is well-known in other legal systems — should be part of minimal criminal law constitutionalism and should supplement the strong antistatutory principle that animates Roberts's analysis. Finally, I will suggest that if implementing penal abolitionism's and minimalist criminal law's visions would demand not only a substantial reduction of incarceration and an elimination of arbitrary, discriminatory, and violent policing, prisons, and punishment, but also a more just society, "abolition constitutionalism" and "minimal criminal law constitutionalism" would require a constitution and a social pact that includes, among others, the right to education, health care, food, work and economic safety, housing, and a healthy environment. Various constitutions around the world have included these rights.

Neither the comparative perspective nor the challenges for penal abolitionism I articulate in this Response deny the urgent need to radically decarcerate the United States and to work towards humane, non-discriminatory, and just policing, criminal processes, punishment, and societies in the United States and around the world. The goal of the piece is rather to contribute to the discussion about the best ways to advance this agenda.

Before I proceed, it is important to state that there has been a spectrum of positions under the label "prison abolitionism" in the United States that have ranged from the actual abolition of prisons and/or the police to a reimagining of these institutions and a radical reduction of their scope.¹⁴ I would characterize the latter position that calls for a

¹³ 139 S. Ct. 2228 (2019).

¹⁴ See, e.g., Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1548 (2020).

reimagination and a reduction of the scope of these institutions as criminal law minimalism. Acknowledging this spectrum of positions and analytically disentangling them may contribute to a constructive and meaningful debate in which the different parties do not talk past each other about the most constructive way forward to change the current penal system.

I. EUROPEAN AND LATIN AMERICAN PENAL ABOLITIONISM

Missing from Roberts's article is any reference to any penal abolitionist authors and movements outside of the United States. I worry that readers who are introduced to American prison abolitionism through Roberts's piece will fail to recognize the global movement and dialogue that American abolitionists have, at times, drawn from and taken part in.¹⁵ Ignoring non-American penal abolitionists risks falling into parochialism, reinforcing American exceptionalism's notion that people in the United States have nothing to learn from peoples and experiences in other countries, and undermining American prison abolitionism's global agenda.¹⁶ Including these non-American penal abolitionists in American debates is also important because the prison and other penal institutions like the police exist in most corners of the world. Engaging with the work of non-American penal abolitionists may thus provide insights to understand, discuss, and deal with American penal institutions.

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

First, today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained. Second, the expanding criminal punishment system functions to oppress black people and other

¹⁵ For American prison abolitionist efforts to engage with penal abolitionism outside of the United States or to analyze issues from a more global perspective, see, for example, Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1686–87, 1691 (2019), connecting abolition and resistance struggles in the United States with struggles outside of the United States, including criticism of and resistance against U.S. global power. See also ANGELA Y. DAVIS, FREEDOM IS A CONSTANT STRUGGLE 5–7 (2016) (discussing prison abolitionism in a broader international context); Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109, 120–21 (2013) [hereinafter McLeod, *Confronting Criminal Law's Violence*] (explicitly applying Professor Thomas Mathiesen's ideas about the "unfinished" to American reality); Allegra M. McLeod, Review Essay, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 690–701 (2017) (book review) (discussing Mathiesen's work and decarceration in Finland and other Nordic countries); MICOL SEIGEL, VIOLENCE WORK: STATE POWER AND THE LIMITS OF POLICE 15–16 (2018) (analyzing the police from an internationalist framework).

¹⁶ On American prison abolitionism's global agenda, see, for example, Roberts, *supra* note 6, at 120. See also Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1615 (2019).

politically marginalized groups in order to maintain a racial capitalist regime. Third, we can imagine and build a more human and democratic society that no longer relies on caging people to meet human needs and solve social problems.¹⁷

There is no question that the United States disproportionately locks up people of color.¹⁸ While race and slavery are important roots of this problem, the problem is also indicative of a general American trend toward incarceration.¹⁹ Roberts's Foreword focuses on the historical justifications for an abolition constitutionalism, but other philosophical positions may also justify penal abolition. The international penal abolition community has many insights in this area.

Roberts says that some activists mark the launch of the current prison abolitionist movement at a conference held at the University of California, Berkeley, in 1998.²⁰ However, as Professor Angela Y. Davis, one of the intellectual founders and pillars of American prison abolitionism, has said, "[t]here are multiple histories of prison abolition."²¹ One of these histories had its origins in Scandinavian countries in the 1960s and 1970s. In the second half of the 1960s, the so-called "Parliament of Thieves" — a conference that included ex-inmates, lawyers, psychiatrists, social workers, and sociologists that discussed penal and correctional policy — was held.²² This conference was followed by the creation of associations for penal reform in Sweden, Denmark, Finland, and Norway between 1966 and 1968.²³ These associations "served as a source of inspirational and organizational rubric for American prisoners."²⁴ One of these associations, the Norwegian KROM, was also particularly important because it formed the intellectual and political milieu

¹⁷ Roberts, *supra* note 6, at 7–8.

¹⁸ See sources cited *supra* note 9; THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 5 (2019), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/RP5P-K4LR>].

¹⁹ See, e.g., Roberts, *supra* note 6, at 12–13; JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 4 (2003).

²⁰ Roberts, *supra* note 6, at 5.

²¹ *The Challenge of Prison Abolitionism: A Conversation*, HISTORY IS A WEAPON, <http://www.historyisaweapon.com/defcon1/davisinterview.html> [<https://perma.cc/DFM6-4K42>] [hereinafter *The Challenge of Prison Abolitionism*]. For seminal prisoner movement or prison abolitionist books in the United States in the 1970s, see generally, for example, GEORGE JACKSON, SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON (1970); IF THEY COME IN THE MORNING: VOICES OF RESISTANCE (Angela Y. Davis ed., 1971); FAY HONEY KNOPP, INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS (1976). For contemporary historiography on the prisoner movement in the United States in the 1970s, see generally, for example, HEATHER ANN THOMPSON, BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY (2016).

²² See THOMAS MATHIESEN, THE POLITICS OF ABOLITION REVISITED 74 (2015).

²³ See *id.* at 74, 77–78.

²⁴ DONALD F. TIBBS, FROM BLACK POWER TO PRISON POWER: THE MAKING OF JONES V. NORTH CAROLINA PRISONERS' LABOR UNION 118 (2012).

for the publication of what Davis calls the “germinal text” of Professor Thomas Mathiesen, *The Politics of Abolition*, originally published in 1974.²⁵

This work was followed by a robust and lively academic literature that included penal abolitionist articles and books published in the 1970s, 1980s, and early 1990s by figures such as the Norwegian professor Nils Christie,²⁶ the Dutch professors Louk Hulsman²⁷ and Willem de Haan,²⁸ and the Argentinean professor Eugenio Raúl Zaffaroni,²⁹ to mention just some examples. In 1983, the first International Conference on Penal Abolition was held, and it continues to meet biannually.³⁰

Summarizing all the ideas of this diverse literature here would be impossible.³¹ But I would like to make four points about it. First, this literature produced outside of the United States typically refers, in different languages, to “penal abolitionism”³² — as reflected in the title of this article — rather than to “prison abolitionism” as has been much more commonly referred to in the United States.³³ The terminological distinction is important. The term “prison abolitionism” puts the emphasis in abolishing a particular institution — that is, the prison. This institutional emphasis is suggested even if “prison abolitionism” is supplemented with an agenda of “police abolitionism” as it has been proposed in the United States, with new impetus after the killing of George

²⁵ *The Challenge of Prison Abolitionism*, *supra* note 21.

²⁶ See generally, e.g., NILS CHRISTIE, LIMITS TO PAIN (1981); Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1977).

²⁷ See generally LOUK HULSMAN & JACQUELINE BERNAT DE CELIS, PEINES PERDUES: LE SYSTÈME PÉNAL EN QUESTION (1982).

²⁸ See generally WILLEM DE HAAN, THE POLITICS OF REDRESS: CRIME, PUNISHMENT AND PENAL ABOLITION (1990).

²⁹ See generally EUGENIO RAÚL ZAFFARONI, EN BUSCA DE LAS PENAS PERDIDAS (1989). On penal abolitionism in Latin America, see generally, for example, MAURICIO MARTÍNEZ SÁNCHEZ, LA ABOLICIÓN DEL SISTEMA PENAL (1990); EL ABOLICIONISMO PENAL EN AMÉRICA LATINA (Maximiliano E. Postay ed., 2012); Alberto Bovino, *La víctima como preocupación del abolicionismo penal*, in DE LOS DELITOS Y DE LAS VÍCTIMAS 261 (Julio B. J. Maier, ed., 1992); John Doe, *¡Abolicionismo Now!: Manual del buen abolicionista*, <http://nohuboderecho.blogspot.com/2006/11> [<https://perma.cc/47DF-WKAP>]; CONVERSACÕES ABOLICIONISTAS: UMA CRÍTICA DO SISTEMA PENAL E DA SOCIEDADE PUNITIVA (Edson Passetti & Roberto B. Dias da Silva eds., 1997).

³⁰ See Lisa Finateri & Viviane Saleh-Hanna, *International Conference on Penal Abolition: The Birth of ICOPA*, in THE CASE FOR PENAL ABOLITION 261, 261 (W. Gordon West & Ruth Morris eds., 2000); *The International Conference on Penal Abolition*, ACTIONICOPA, <https://www.actionicopa.org> [<https://perma.cc/AW65-3GKP>].

³¹ For instance, I will not discuss here the work by Christie that explores the relationship between prisons and the penal system and the private sector. See generally NILS CHRISTIE, CRIME CONTROL AS INDUSTRY (1993). This work has been influential on American prison abolitionists and their analysis of the prison industrial complex. See, e.g., ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 94 (2003).

³² E.g., DE HAAN, *supra* note 28; HULSMAN & BERNAT DE CELIS, *supra* note 27, at 7, 48; ZAFFARONI, *supra* note 29, at 93.

³³ E.g., DAVIS, *supra* note 31, at 55; Berger et al., *supra* note 4.

Floyd by the Minneapolis police.³⁴ Non-American penal abolitionism has included within its agenda and proposals the abolishing of prisons and other institutions, but it has also included the abolition of an area of law and of a way of thinking about social life — penal (that is, criminal) law.³⁵ These penal abolitionists have criticized the practice of looking at many social situations as crimes and through the lens of criminal law.³⁶ For these thinkers, criminal law has an impoverished view of social life and of human beings that distracts “from more serious problems and injustices” and justifies “inequality and relative deprivation.”³⁷ By looking at social situations through the lens of criminal law, the state uses “a process where conflicts have been taken away from the parties directly involved and thereby have either disappeared or become other people’s property.”³⁸ Penal abolitionists have called for a practice of looking at social situations in which there is a conflict between people through a broader, kinder, and more forgiving lens.³⁹

I am not suggesting that sophisticated American scholars like Roberts are proposing to only abolish institutions like the police and the prison. However, the terminological differences are important because there is the risk that less sophisticated or knowledgeable scholars and activists and that society at large take the terms “prison abolitionism” and “police abolitionism” literally and think that these are the only or the most important changes that penal abolitionists seek to advance.

The second point is that European and Latin American penal abolitionism has been animated by a variety of social and political philosophies.⁴⁰ According to Roberts, among the central tenets of (American) abolitionist philosophy is that carceral punishment can be traced back to the racial capitalist regime and has been expanded to maintain such a racial capitalist regime.⁴¹ Her underlying social philosophy seems to

³⁴ See, e.g., *Episode 29 — Mariame Kaba*, AIRGO at 35:38 (Feb. 2, 2016), <https://airgoradio.com/airgo/2016/2/2/episode-29-mariame-kaba> [<https://perma.cc/CG2Y-E4KE>]; *NLG Statement in Support of #8toAbolition*, NAT’L LAWS. GUILD (June 10, 2020), <https://www.nlg.org/nlg-statement-in-support-of-8toabolition> [<https://perma.cc/KX6N-VPKU>].

³⁵ See, e.g., DE HAAN, *supra* note 28, at 8–9; CHRISTIE, *supra* note 26, at 13–19; HULSMAN & BERNAT DE CELIS, *supra* note 27, at 103; MATHIESEN, *supra* note 22, at 76; Christie, *supra* note 26, at 6.

³⁶ See, e.g., DE HAAN, *supra* note 28, at 9–11; CHRISTIE, *supra* note 26, at 92–94; HULSMAN & BERNAT DE CELIS, *supra* note 27, at 171; Christie, *supra* note 26, at 6; Louk H.C. Hulsman, *Critical Criminology and the Concept of Crime*, 10 CONTEMP. CRISES 63, 63 (1986).

³⁷ DE HAAN, *supra* note 28, at 27.

³⁸ Christie, *supra* note 26, at 1.

³⁹ See *id.* at 97–98; HULSMAN & BERNAT DE CELIS, *supra* note 27, at 171.

⁴⁰ On different strands within European penal abolitionism, see, for example, DE HAAN, *supra* note 28, at 179 n.9; MARTÍNEZ SÁNCHEZ, *supra* note 29, at 25–32; Gerlinda Smaus, *Gesellschaftsmodelle in der abolitionistischen Bewegung*, 18 KRIMINOLOGISCHES J. 1, 1 (1986).

⁴¹ See Roberts, *supra* note 6, at 7–8.

be thus nurtured by Critical Race Theory and Marxism,⁴² and it seems that these theories have been prevalent among American prison abolitionists so far.⁴³ Non-American penal abolitionists have presented a different range of social theories that have varied from author to author and that have included Marxism,⁴⁴ humanist phenomenology,⁴⁵ localism combined with a position against professionals and their expertise,⁴⁶ and Christian thought and categories.⁴⁷ Some non-American penal abolitionists have also argued that abolitionists need to turn not only to social, but also to moral theory to make explicit and improve the quality of their own moral judgements and to discuss whether a just society includes punishment.⁴⁸

This contrast could be an opportunity for a constructive conversation between these varieties of penal abolition.⁴⁹ The American prison abolitionist movement might be enriched by, and benefit from, engaging with a different variety of social and political philosophies. At the same time, penal abolitionists and others could also engage in critical analysis of why race has not figured more prominently in non-American penal

⁴² Cf., e.g., DAVIS, *supra* note 31, at 44–45, 103. For introductions to Critical Race Theory, see generally, for example, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1996); Devon Carbado, Afterword, *Critical What What?*, 43 CONN. L. REV. 1593 (2011); Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215 (2002).

⁴³ Cf., e.g., Roberts, *supra* note 6, at 46, 120; DAVIS, *supra* note 31, at 44–45, 103; Fred Moten & Stefano Harney, *The University and the Undercommons: Seven Theses*, 22 SOC. TEXT 101, 114–15 (2004). Other theoretical trends that have also fed recent prison abolitionist analysis in the United States include feminist theory (in which the work of Angela Davis is also seminal) and queer theory. See generally, e.g., LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION (2020); CHARLENE A. CARRUTHERS, UNAPOLOGETIC: A BLACK, QUEER, AND FEMINIST MANDATE FOR RADICAL MOVEMENTS (2018); BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION (2012); EMILY L. THUMA, ALL OUR TRIALS: PRISONS, POLICING, AND THE FEMINIST FIGHT TO END VIOLENCE (2019).

⁴⁴ See generally, e.g., MATHIESEN, *supra* note 22; THOMAS MATHIESEN, LAW, SOCIETY, AND POLITICAL ACTION: TOWARDS A STRATEGY UNDER LATE CAPITALISM (1980); Heinz Steinert, *Marxsche Theorie und Abolitionismus: Aufforderung zu einer Diskussion*, 14 KRIMINALSOZIOLOGISCHE BIBLIOGRAFIE 131 (1987).

⁴⁵ See, e.g., HULSMAN & BERNAT DE CELIS, *supra* note 27, at 46. For an interpretation of Hulsman's work in this direction, see ZAFFARONI, *supra* note 29, at 103. The perspective can be understood as phenomenological in the sense that it emphasizes "structures of consciousness as experienced from the first-person point of view." *Phenomenology*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Dec. 13, 2016), <https://plato.stanford.edu/entries/phenomenology> [<https://perma.cc/8BA9-7SWZ>].

⁴⁶ See CHRISTIE, *supra* note 26, at 72–74, 81–83; Christie, *supra* note 26, at 5.

⁴⁷ For readings of Hulsman's and Christie's work in this direction, see VINCENZO RUGGIERO, PENAL ABOLITIONISM 105–27 (2010), and Charosky & Langer, *supra* note 2, at 34, respectively.

⁴⁸ See DE HAAN, *supra* note 28, at 32–35, 102.

⁴⁹ Non-American penal abolitionists have been aware of these differences. See, e.g., *id.* at 74.

abolitionism.⁵⁰ In this regard, American penal abolitionism and other critical analyses have powerfully explored the continuities and discontinuities between slavery, Jim Crow, and mass incarceration in the United States and possible connections between slavery abolitionism and penal abolitionism.⁵¹ Similar explorations could be pursued in other countries concerning the relationship between current penal system practices and institutions and national prior oppressive origins, practices, and institutions.

There have also been critiques of non-American penal abolitionism from a feminist perspective.⁵² But the American feminist prison abolitionist literature has been particularly rich and could be discussed and applied to new realities outside of the United States.⁵³ Similarly, the American prison abolitionist literature has analyzed connections between disability and incarceration that could also be explored further in other countries.⁵⁴

Third, non-American penal abolitionism, especially the work by Mathiesen, offers a theory of political and group action that could help American prison abolitionists think about their own practice. According to Mathiesen, an important challenge for abolitionist organizations as they engage in their political agenda is how to keep their radical positions and their loyalty to relevant social actors such as prisoners, while neither being co-opted/normalized, nor being considered as irrelevant by the authorities and other audiences and groups in their environment.⁵⁵ For Mathiesen, one of the answers lies in his concept of “the unfinished.”⁵⁶ The basic idea is that when pressed for the articulation of alternatives to the existing social order, these groups should resist articulating fully finished — that is, fully formed or laid out — messages or alternatives because fully formed or laid out messages or alternatives may be either easily absorbed by the existing system or rejected as too

⁵⁰ See, e.g., MATHIESEN, *supra* note 22, at 2 (“Several topics, especially in the US, were not as relevant when the book was published in 1974 This especially concerns *gender* and ‘*race*’ in prisons.”).

⁵¹ See generally ALEXANDER, *supra* note 9; DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); DAVIS, *supra* note 31, at 22–39, 94–95; FORMAN, *supra* note 9; DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHEMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996); WACQUANT, *supra* note 9; James Forman, Jr., *Harm’s Way: Understanding Race and Punishment*, BOS. REV. (Jan. 1, 2011) <http://bostonreview.net/forman.php> [<https://perma.cc/U5AD-HDS2>].

⁵² See, e.g., Gerlinda Smaus, *Feministische Beobachtung des Abolitionismus*, 21 KRIMINOLOGISCHES J. 182, 183 (1989); René van Swaaningen, *Feminismus und Abolitionismus als Kritik der Kriminologie*, 21 KRIMINOLOGISCHES J. 162, 162 (1989).

⁵³ See sources cited *supra* note 43.

⁵⁴ See BEN-MOSHE, *supra* note 43, at 32–35.

⁵⁵ See MATHIESEN, *supra* note 22, at 66.

⁵⁶ For use of this concept by an insightful American penal abolitionist, see McLeod, *Confronting Criminal Law’s Violence*, *supra* note 15, at 120; McLeod, *supra* note 16, at 1646.

radical.⁵⁷ Instead, these abolitionist and other radical groups should articulate “unfinished” messages that contradict the existing order, while not being as easily co-opted or dismissed.⁵⁸ For instance, these groups may propose or support the abolition of forced labor for alcoholic houseless people — as KROM did in Norway in the late 1960s/early 1970s — without laying out a fully formed, “finished” proposal about what to do with these people.⁵⁹

There are many other concepts, ideas, and distinctions in this theory of political and group action that American prison abolitionists might find useful. Just to give a few illustrative examples, KROM defined itself not as “a kind humanitarian organization” — that is, one engaged in practical projects giving aid to the individual inmate — but as a political organization.⁶⁰ According to Mathiesen, defining themselves as a political rather than humanitarian organization enabled KROM to not be co-opted by authorities and the existing penal system given the compromises with authorities that humanitarian projects — that is, projects that provide individual help to prisoners — may entail.⁶¹ Mathiesen also argues that besides an “abolition” policy, these groups need a “defensive” policy that “consists . . . in working to prevent new systems of the kind you are opposing from being established.”⁶² For instance, KROM advocated for the abolition of a youth detention center and when, in response, the authorities redirected their efforts to the construction of a new closed youth prison, KROM adopted a defensive line to stop this new project moving forward.⁶³

Mathiesen also criticized the notion of “non-reformist” reforms that has been prominent among American prison abolitionists, including Roberts.⁶⁴ According to Roberts, nonreformist reforms are “those measures that reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates.”⁶⁵ Mathiesen explains that this distinction was introduced by André Gorz to analyze workers’ strategies.⁶⁶ He finds it “theoretically interesting”⁶⁷ but argues that nonreformist reforms — such as reforms to give workers the power

⁵⁷ See MATHIESEN, *supra* note 22, at 47–61, 66–67.

⁵⁸ See *id.* at 57.

⁵⁹ See *id.* at 122–28.

⁶⁰ *Id.* at 99.

⁶¹ See *id.* at 115.

⁶² *Id.* at 131.

⁶³ See *id.* at 131–32.

⁶⁴ *Id.* at 231; see also Roberts, *supra* note 6, at 114–18; Berger et al., *supra* note 4; McLeod, *supra* note 16, at 1616. In contrast, Davis has questioned whether there exists a “strict dividing line” between abolition and reform. *The Challenge of Prison Abolitionism*, *supra* note 21.

⁶⁵ Roberts, *supra* note 6, at 114 (quoting Berger et al., *supra* note 4).

⁶⁶ MATHIESEN, *supra* note 22, at 231 (citing ANDRÉ GORZ, *STRATÉGIE OUVRIÈRE ET NÉOCAPITALISME* 51 (Norwegian ed. 1967)).

⁶⁷ *Id.* at 231.

to decide their working conditions — are also not “guaranteed against being absorbed by and consolidating the main system.”⁶⁸ Instead, Mathiesen argues for using the previously described concept of “the unfinished.” In contrast to Mathiesen, de Haan (also an abolitionist) has criticized penal abolitionism as too rigid a political strategy because it denies reformist reforms any significance, except in the maintenance and legitimation of present criminal justice.⁶⁹ This would be a mistake because, according to de Haan, countries like the Netherlands had low levels of incarceration after World War II because judges had a negative view of imprisonment based not on abolitionist or radical beliefs, but on mainstream views on theories of punishment.⁷⁰ Instead of an abolitionist political strategy, de Haan argued for a pragmatic one, combined with a critique of punishment and a radical theory perspective.⁷¹

Mathiesen also advocated for action research as a way to approach the relationship between the production of knowledge by academics and others and political action.⁷² According to him, in action research “the loyalty is towards the action, and not towards the theory What is important here, is the feed-back process from practical/political activity, through a systematic gathering of information, back to the practical/political activity.”⁷³ This would mean that for American academic prison abolitionists, the production of knowledge or theory — such as abolition constitutional theory — should inform and give priority to prison abolitionist political action and not produce knowledge for its own sake.

I am not suggesting that any or all the aspects of this theory of political action are correct or that they could or should simply be “cut and pasted” by American penal abolitionists.⁷⁴ My point is that this is a rich theory of political action that could be further studied, discussed, criticized, and, when considered appropriate, put into practice in the United States.

The fourth point I would like to make about non-American penal abolitionism is that in the 1970s, 1980s, and early 1990s, it was in conversation with and part of a broader set of critical ideas to humanize and reduce the scope of the penal system — a set that included critical

⁶⁸ *Id.* at 232.

⁶⁹ See DE HAAN, *supra* note 28, at 78–80.

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See MATHIESEN, *supra* note 22, at 62.

⁷³ *Id.* at 64 (emphasis omitted).

⁷⁴ On why concepts may not be “cut and pasted” between different legal systems and social orders, see Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L. J. 1, 5 (2004).

criminology and criminal law minimalism.⁷⁵ The term “minimal criminal law” (*diritto penale minimo* in Italian) was articulated by Italian philosopher of law Luigi Ferrajoli and then used to elaborate a critical perspective of the penal system that was different from penal abolitionism and from “maximalist” conceptions of criminal law.⁷⁶

For Ferrajoli, minimal criminal law includes, first, a paradigm of meta-theoretical justification of criminal law according to which criminal law is justified if, and only if, it is capable of achieving two goals: deterrence or, at least, the minimization of offenses against fundamental good and rights; and the minimization of arbitrary punishment.⁷⁷ In other words:

[I]t is not enough to justify punishment, which is itself an evil, in terms of the prevention of similar crimes on the part of the offender or others: this would take the form of a “utilitarianism cut in half”. . . . Punishment, according to Ferrajoli . . . “does not protect only the person harmed by the crime, but also protects the offender from informal public and private reactions.”⁷⁸

For Ferrajoli, minimal criminal law would also include a normative model composed by criminal law and criminal procedure principles that would make minimal criminal law the law of the weakest against the law of the strongest. It would always protect the weakest: the injured party during the offense, the defendant during the criminal process, and the prisoner during the execution of the prison sentence.⁷⁹ This model would be realized and realizable, but as a normative model there would always be a narrower or broader gap between the model and reality.⁸⁰ Consequently, the normative model could be used to criticize and set a program of changes to existing penal systems.⁸¹

Apparently unaware of “minimalist criminal law” positions outside the Anglo-American world, American philosopher Professor Douglas Husak has used the term to describe the theory of criminalization that

⁷⁵ For further background, see generally the Italian volumes of the law review *Dei delitti e delle pene*, which published articles on abolitionism, critical criminology, and minimal criminal law.

⁷⁶ See Luigi Ferrajoli, *Sul diritto penale minimo (risposta a Giorgio Marinucci e a Emilio Dolcini)*, 123 *IL FORO ITALIANO* 125, 126 (2000) (explaining that he coined the phrase “diritto penale minimo” in a debate with penal abolitionists in 1985).

⁷⁷ See LUIGI FERRAJOLI, *DIRITTO E RAGGIONE* 325–30 (1989); Luigi Ferrajoli, *Il diritto penale minimo*, 3 *DEI DELITTI E DELLE PENE* 493, 511–12 (1985); Luigi Ferrajoli, *Crisi della legalità e diritto penale minimo*, in *DIRITTO PENALE MINIMO* 9, 9–10 (Umberto Curi & Giovanni Palombarini eds., 2002) [hereinafter Ferrajoli, *Crisi*].

⁷⁸ TAMAR PITCH, *LIMITED RESPONSIBILITIES: SOCIAL MOVEMENTS AND CRIMINAL JUSTICE* 66 (John Lea trans., 1995) (quoting Ferrajoli, *Crisi*, *supra* note 77).

⁷⁹ See Ferrajoli, *Il diritto penale minimo*, *supra* note 77, at 512.

⁸⁰ See *id.* at 500–01.

⁸¹ See Luigi Ferrajoli, *Per un programma di diritto penale minimo*, in *LA RIFORMA DEL DIRITTO PENALE: GARANZIE ED EFFETTIVITÀ DELLE TECNICHE DI TUTELA* 57, 65–69 (L. Pepino ed., 1992).

he articulates to criticize and provide a framework to eliminate over-criminalization and reduce the infliction of state punishment.⁸² According to Husak, for punishment to be legitimate it must criminalize only conduct that produces nontrivial harm, is morally wrongful, and is deserving of punishment.⁸³ Every person has a right not to be punished that puts the burden of proof of the need to criminalize conduct on those who want to criminalize it.⁸⁴ Husak also adds as legitimacy requirements for criminalization that there be a substantial government interest in enacting the criminal law, that the law directly advances the government's objective, and that it is no more extensive than necessary to achieve its purpose.⁸⁵

There are important differences between Ferrajoli's and Husak's conceptions of "minimalist criminal law" that I cannot discuss here, and I do not fully agree with either of their theories. For instance, as I will explain later in Part III, I think that both accounts are incomplete and that "minimal criminal law" should include additional requirements to be applied in the United States and elsewhere. My main points now are showing (1) that there is conceptual and normative space for positions and theories that require a radical humanization and substantial reduction of the footprint of the penal system in the United States, but not its abolition,⁸⁶ and (2) that these theories have been in conversation with penal abolitionism for a long time, at least outside of the United States.⁸⁷

Going back to the 1970s, 1980s, and 1990s outside of the United States — though many, if not most, of these conversations and exchanges took place in Europe even before I became an undergraduate law student in Argentina, and there were criticisms between these different schools of thought⁸⁸ — my sense as a student from the Argentine pe-

⁸² DOUGLAS HUSAK, *OVERCRIMINALIZATION* 119 (2007). Husak says that he "gratefully borrow[s]" the term from Andrew Ashworth. *Id.* at 60 (citing ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 33 (4th ed. 2003)). The first edition of Ashworth's book, from 1991, only mentions "a minimalist system of criminal law" once, while discussing complicity. *See* ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 363 (1991). In its most recent incarnation, "minimalist criminal law" refers to: (1) respect for human rights and other moral constraints, including the proportionality principle; and (2) the recognition that punishment may cause great suffering, hardship, and impoverishment and must in most circumstances be a measure of last resort. *See* JEREMY HORDER, *ASHWORTH'S PRINCIPLES OF CRIMINAL LAW* 75–77 (9th ed. 2019).

⁸³ *See* HUSAK, *supra* note 82, at 55.

⁸⁴ *Id.* at 100.

⁸⁵ *Id.* at 128–29.

⁸⁶ For a critical discussion of the extent to which other theories of criminalization would require substantially reducing the scope of punishment and criminal law in the United States, see *id.* at 178–206 (discussing law and economics, utilitarianism, and legal moralism).

⁸⁷ Husak also briefly refers to abolitionism. *Id.* at 78 n.2.

⁸⁸ *See, e.g.,* Hulsman, *supra* note 36, at 63; Massimo Pavarini, *Il sistema della giustizia penale tra riduzionismo e abolizionismo*, 3 *DEI DELITTI E DELLE PENE* 525, 525 (1985). *See also* Hernán

riphery or semi-periphery was that penal abolitionists, critical criminologists, and criminal law minimalists saw themselves as simpatico with each other, rather than as ideological or political opponents.⁸⁹ In our present world of 2020, in which ideological and political intolerance seem to be on the rise and in which it might be tempting to be suspicious, dismissive, and even accusatory and aggressive toward those whose ideas do not exactly mirror one's own, it is important to highlight that these approaches share substantial points in their respective agendas.

For instance, American penal abolitionists have proposed, among other measures, the decriminalization or legalization of drug use; the decriminalization of sex work; the decriminalization of undocumented immigration; the elimination of violence against women (who may otherwise find themselves with no realistic alternative but to kill their abusers); opposition to the expansion of criminal law through the creation of new crimes; stopping the widespread use of stops and frisks to manage communities of color and low-income communities; eradication of cash bail; the repeal of harsh mandatory minimums even for violent crimes; the end of solitary confinement; the abolition of the death penalty; stopping the construction of new prisons; organizing to free people from prison; diverting resources from police and the penal system to education, health, and housing; democratizing political and economic institutions; and the adoption of alternative nonpunitive conflict-resolution mechanisms.⁹⁰ Criminal law minimalism would also support these proposals.⁹¹

In the last few years, U.S. prison abolitionists have earned various victories, including slowing down or stopping the construction of new prisons and reimagining conceptions of public and community safety following the killing of George Floyd and others. However, as important as prison abolitionists' social and political organization has been,⁹² it's important to recognize that they have not achieved these victories alone. Rather, they have done so through alliances and alignment with other groups that may not have as their goal a "society without prisons" or

Charosky & Máximo Langer, *Bosquejo para una historia de la historia*, 8 NO HAY DERECHO 16, 16 (1992) (criticizing two of the main critical criminology works as essentialist).

⁸⁹ See, e.g., MARTÍNEZ SÁNCHEZ, *supra* note 29, at 33–39; ZAFFARONI, *supra* note 29, at 93–94 (discussing both minimalist criminal law and penal abolitionism here and throughout); DE LOS DELITOS Y DE LAS VÍCTIMAS, *supra* note 29, at 7 (including abolitionist and criminal law minimalist texts in the collection); Stanley Cohen, *Preface to DE HAAN*, *supra* note 28, at xiii, xiv (1990); DE HAAN, *supra* note 28, at 10, 75–76.

⁹⁰ See, e.g., DAVIS, *supra* note 31, at 20, 108–11, 113–14; Berger et al., *supra* note 4; McLeod, *supra* note 16, at 1615, 1633–36; Roberts, *supra* note 6, at 115–16.

⁹¹ See, e.g., Ferrajoli, *Crisi*, *supra* note 77, at 11–12, 15, 19; HUSAK, *supra* note 82, at 17–32; DOUGLAS N. HUSAK, LEGALIZE THIS!: THE CASE FOR DECRIMINALIZING DRUGS 48–63 (2002).

⁹² See Berger et al., *supra* note 4.

“abolishing the police,” but agree that the penal system is structurally discriminatory and greatly oversized in the United States.⁹³

II. CHALLENGES FOR PENAL ABOLITIONISTS

There have been various challenges to American and non-American penal abolitionism.⁹⁴ In this Part, I would like to explore three of the challenges that I find the most persuasive and that explain why, despite considering penal abolitionism a positive and powerful social movement and set of ideas, I would consider myself closer to minimalist criminal law. Before I proceed with this analysis, I would like to make the following points.

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

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

A. Harmful Conduct

The first familiar challenge to penal abolitionism is what to do with harmful conduct without police or other forms of armed public law enforcement and prisons or other forms of involuntary confinement or

⁹³ In this regard, see ANGELA Y. DAVIS, *ABOLITION DEMOCRACY* 102–03 (2005) on the “profound lessons” of the 1970s victories in prisoners’ campaigns: “The successful coalescence of so many individuals, who came together across all kinds of differences, schisms, and borders — racial, class, political, geographical — was quite extraordinary. The creation of communities of struggle remains a major challenge today.”

⁹⁴ See, e.g., DE HAAN, *supra* note 28, at 85–87; Nicolas Carrier & Justin Piché, *Blind Spots of Abolitionist Thought in Academia: On Longstanding and Emerging Challenges*, 12 *CHAMP PÉNAL* 1, ¶¶ 32–38 (2015); Roger Lancaster, *How to End Mass Incarceration*, *JACOBIN* (Aug. 18, 2017), <https://www.jacobinmag.com/2017/08/mass-incarceration-prison-abolition-policing> [https://perma.cc/NQU7-KTW2].

punishment.⁹⁵ This conduct includes, first, situations that constitute serious ordinary crime, such as homicides, rape and other sexual assaults, domestic violence, aggravated assaults, home invasions, certain robberies, and arson, just to mention a few possible examples. It may also include other nontrivial harmful behavior.

In some societies, these challenges have also included how to deal with mass atrocities such as those committed in Africa (for example, the genocide in Rwanda, apartheid in South Africa, and so on), Europe (for example, the Holocaust, Srebrenica, and so on), Latin America (for example, the thousands of “disappeared,” tortured, and killed, and so on), and elsewhere.⁹⁶

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

By *backtracking to criminal law minimalism* I refer to a set of penal abolitionists that do not take the ideal of “a society without prisons” all the way down and explicitly or implicitly accept imprisonment as punishment, at least in response to serious crime.⁹⁷ In the Argentine context, for instance, this has happened with scholars who have defined themselves as penal abolitionists but have accepted and even advanced punishment for those who have participated in the commission of mass atrocities.⁹⁸ This set of people can be understood not actually as penal abolitionists, but as embracing some version of criminal law minimalism.⁹⁹ For them, penal abolitionism may be an ethos or a “sensitizing theory,”¹⁰⁰ but does not literally mean the abolition of prisons, police, and other institutions of the penal system.

I would also put in this category at least some of the penal abolitionists that would respond to the harmful-conduct challenge with an argument like this: “It is not important at this point to decide whether there are certain people who need to be in prison. Maybe there are. But if so, we are talking about a small minority of the people currently behind bars. Let us imagine a future without prisons and start working toward

⁹⁵ See, e.g., Carrier & Piché, *supra* note 94, ¶¶ 6–11 (referring to this problem as the challenge of the “dangerous few”).

⁹⁶ See, e.g., STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 3–26 (3d ed. 2009).

⁹⁷ See, e.g., KNOPP, *supra* note 21, at 19, 36, 129–30.

⁹⁸ Compare ZAFFARONI, *supra* note 29, at 248–50, with Corte Suprema de Justicia de la Nación [CJSN] [National Supreme Court of Justice], 14/7/2005 “Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.,” Fallos (2005-328-2056) (Zaffaroni, J., concurring) (concluding amnesty laws that prevented human rights prosecutions were unconstitutional).

⁹⁹ See, e.g., Carrier & Piché, *supra* note 94, ¶ 8 (“[T]he irresolution of the problem of the ‘dangerous few’ appears to transform abolitionism into a *de facto* minimalist posture.”).

¹⁰⁰ E.g., Sebastian Scheerer, *Towards Abolitionism*, 10 CONTEMP. CRISES 5, 10 (1986).

it. If we ever get to a point where prison populations are, say, 10% of what they are today, then we will need to have a conversation about that last 10%.”¹⁰¹ To the extent that some of the people that articulate this response are implicitly acknowledging that involuntary confinement in the form of prisons would still have to play a role regarding this remaining or residual 10%, I would characterize this position as *backtracking to criminal law minimalism*.

If instead people articulating this response are not implicitly granting the possible use of prisons for the remaining cases, I would characterize their position as *avoiding* answering this challenge.¹⁰² By *avoiding* I also refer to a set of penal abolitionists that concentrate on nonserious criminal cases in their analysis and proposals and avoid the serious ones and the questions that they raise.¹⁰³ This may include people who may be true penal abolitionists — who, for instance, prefer not to deal with serious criminal cases for political and strategic reasons — or criminal law minimalists.

More interestingly, Mathiesen has partially avoided these challenges by using the previously described concept of “the unfinished,” according to which abolitionists should not fully lay out alternatives that would be considered too radical and thus ignored or would be absorbed by the system.¹⁰⁴ As interesting as this political strategy is, it avoids the challenges to the abolitionist position about what to do with (seriously) harmful behavior.

By *tackling now*, I refer to penal abolitionists that have addressed what they would do with at least some seriously harmful conduct. For instance, Davis has brought up as an example of a nonpunitive and different way to deal with serious crime the case of Amy Biehl, in which the parents of an American young woman who was killed in South Africa grew close and worked with two of their daughter’s killers.¹⁰⁵ Christie has said that instead of punishing a commander of a concentration camp in which 1.5 million people were killed during the Holocaust, we should hold a hearing to establish what happened, communicate our repulsion to the commander, and let him go away in shame.¹⁰⁶ Another example may be the way the #LetUsBreathe Collective recently responded to the systematic practice of torture by the Chicago police by appealing neither to criminal prosecution nor to civil litigation, but by

¹⁰¹ I am thankful to Professor David Sklansky for fleshing out this position to me.

¹⁰² Or *postponing until a new society is created*, which I will discuss later.

¹⁰³ See, e.g., DE HAAN, *supra* note 28, at 91 (“[T]he response of most abolitionists to the criticism that their proposals are not feasible . . . has been a deafening silence.”).

¹⁰⁴ See MATHIESEN, *supra* note 22, at 48–49.

¹⁰⁵ See DAVIS, *supra* note 31, at 114–15.

¹⁰⁶ See Nils Christie, *Peace or Punishment?*, in CRIME, TRUTH AND JUSTICE 243, 243–44 (George Gilligan & John Pratt eds., 2004).

creating a space, “Freedom Square,” without police and in which it provided meals, clothing, books, child play spaces, and so forth.¹⁰⁷ There are also ongoing programs in the United States that use transformative justice — which has been defined as an approach that “seeks to respond to violence without creating more violence and/or engaging in harm reduction to lessen the violence”¹⁰⁸ — to deal with serious crimes such as child abuse and sexual assault.¹⁰⁹

Without getting into a discussion of these individual examples, I support the creation and expansion of programs and initiatives that may help to prevent and address interpersonal harm without punitive interventions.¹¹⁰ In the context of mass atrocities, there has been a long-standing discussion on this very issue, with South Africa being a classic example of a country that dealt with mass atrocities with an approach that emphasized truth and reparations rather than imprisonment and punishment.¹¹¹

However, there is a large difference between being open to dealing with some of these situations without imprisonment and other penal interventions and dealing with *all* of these situations this way. Despite penal abolitionists’ skepticism about the ability of the penal system to advance its stated goals,¹¹² it is hard to imagine, at least for the time being, how one could deal with a whole set of these cases without criminal law, armed public law enforcement, and involuntary confinement as one of the possible responses. A justification for why this is necessary should be contextual and grounded in and decided by affected communities.¹¹³ Theories of law enforcement and theories of punishment —

¹⁰⁷ See McLeod, *supra* note 16, at 1613–14.

¹⁰⁸ Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORM HARM, <https://transformharm.org/transformative-justice-a-brief-description> [<https://perma.cc/XA3D-ME9S>].

¹⁰⁹ See, e.g., BAY AREA TRANSFORMATIVE JUSTICE COLLECTIVE, <https://batjc.wordpress.com> [<https://perma.cc/ZW6V-TB8R>]; SPRING UP, <https://www.timetospringup.org> [<https://perma.cc/DA8V-RU3G>].

¹¹⁰ For a brief guide on some of these programs and efforts, see generally UCLA SCH. OF L. CRIM. JUST. PROGRAM, WHAT HAPPENS AFTER WE DEFUND POLICE? (2020), <https://law.ucla.edu/sites/default/files/PDFs/Academics/What%20Happends%20After%20We%20Defund%20Police--June%202020.pdf> [<https://perma.cc/RQF3-23XU>]. However, it is important to note that the results of experiments with deformalization, delegalization, and decentralization of litigation have been mixed at best, according to some non-American abolitionists. See, e.g., DE HAAN, *supra* note 28, at 85–86. For a positive assessment of the empirical studies on restorative justice programs, see generally JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION (2002); and John Braithwaite, *Principles of Restorative Justice*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS? (Andrew von Hirsch et al. eds., 2003).

¹¹¹ See, e.g., RATNER ET AL., *supra* note 96, at 175, 260–61, 267.

¹¹² See, e.g., McLeod, *supra* note 16, at 1638–43.

¹¹³ See, e.g., WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 287 (2011). Affected communities would have legitimacy to discuss these issues as long as those communities are democratic and respect the rights of minorities within them.

rehabilitation, retribution, deterrence, incapacitation, social norms maintenance, and mixed combinations thereof — are just a set of arguments that can be brought up in this discussion, as are different moral and constitutional principles that regulate legislation, criminalization, investigation, prosecution, and punishment.¹¹⁴ There are also discussions about what a society's members owe to each other and what a society's responsibility in individual harmful incidents or social conflicts is.

Given the goals of this piece, this is not the place to discuss these issues, and, anyway, they have to be discussed in specific contexts by affected communities and may also require different considerations for different crimes. But since this piece is discussing American penal abolitionism at a time in which the United States is grappling with the continuing survival of individual and structural racism, it is important to mention that the lack of criminal law enforcement and criminal punishment may promote racial inequality. For instance, Jill Leovy's book *Ghettoside* suggests the abysmally low homicide clearance rate in South Central L.A. promotes vigilantism and self-help in the minority communities there.¹¹⁵ Similar phenomena have been documented, studied, and discussed in other places around the world.¹¹⁶

It is also important to highlight that punishment of harmful conduct has been a long-standing demand of many Black leaders and the civil rights movement in the United States. Both have seen criminal law and criminal punishment, including prison, as important tools to fight against white rule and white supremacy and to have the rights of Blacks protected.¹¹⁷ This was the explicit demand of Black leaders and intellectuals and civil rights organizations like Ida B. Wells-Barnett,¹¹⁸

¹¹⁴ For a review of empirical studies on deterrence, law enforcement, higher punishments, and labor market opportunities, see generally Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5 (2017).

¹¹⁵ See JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* 156–57 (2015).

¹¹⁶ See, e.g., ANGELINA SNODGRASS GODOY, *POPULAR INJUSTICE: VIOLENCE, COMMUNITY, AND LAW IN LATIN AMERICA* 5–6 (2006).

¹¹⁷ See, e.g., FORMAN, *supra* note 9, at 11 (“African Americans have *always* viewed the protection of black lives as a civil rights issue, whether the threat comes from police officers or street criminals.”); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 29 (1997); LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* 174 (2008).

¹¹⁸ See IDA B. WELLS, *SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES* 21 (1892) (“The strong arm of the law must be brought to bear upon lynchers in severe punishment . . .”).

W.E.B. Du Bois,¹¹⁹ Al Sharpton,¹²⁰ and the American Civil Liberties Union.¹²¹ This demand also underlay the passing of the Civil Rights Act of 1866,¹²² the Reconstruction Amendments in 1865–1870,¹²³ the creation of the Department of Justice in 1870,¹²⁴ the Dyer Anti-Lynching Bill supported by the NAACP,¹²⁵ the creation of the Civil Rights Division within the Department of Justice in 1957,¹²⁶ federal prosecutions in the “Mississippi Burning” case, and more recent prosecutions of James Ford Seale, James Bonard Fowler, and many others.¹²⁷ This can be interpreted as one of the demands behind the Rodney King riots following the acquittals of police officers, and the protests after the killings of Eric Garner, Michael Brown, Trayvon Martin, and many others.¹²⁸ Accountability and criminal prosecutions have also been among the recent demands by family members, members of Black Lives Matter and other

¹¹⁹ See W.E.B. DU BOIS SPEAKS: SPEECHES AND ADDRESSES 1920–1963, at 202–03 (Philip S. Foner ed., 1970) (“Five thousand of them in fifty years have been lynched by mobs without trial and no lyncher has been punished; because as the attorney general of the nation admits, the law gives him no adequate ground on which to prosecute.”). *But see* Angela Y. Davis, *From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System*, in THE ANGELA Y. DAVIS READER 74 (Joy James ed., 1998) (describing Du Bois’s criticisms of the convict-lease system in the South and comparing to Frederick Douglass’s position on the issue).

¹²⁰ See *Jena 6 and the Role of Federal Intervention in Hate Crimes and Race-Related Violence in Public Schools: Hearing before the H. Comm. on the Judiciary*, 110th Cong. 42–43 (2009) (statement of Reverend Al Sharpton, Founder, National Action Network); *see also* J. Clay Smith, Jr., *Lynching at Bensonhurst: A Bibliographic Essay*, 4 HOW. SCROLL: SOC. JUST. L. REV. 97, 145 (2001).

¹²¹ See *Antilynching: Hearings before Subcomm. No. 4 of the Comm. on the Judiciary*, on H.R. 41, H.R. 57, H.R. 77, H.R. 223, H.R. 228, H.R. 800, and H.R. 278 . . . H.R. 1709 . . . H.R. 3488, H.R. 3618, H.R. 3850, H.R. 4155, and H.R. 4577 . . . H.R. 4528, 80th Cong. 99 (1948) (memorandum presented by Carl W. Berueffy on behalf of the American Civil Liberties Union, New York 10, N.Y., with regard to pending antilynching bills).

¹²² Civil Rights Act of 1866, ch. 31, 14 Stat. 27; *see also* John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1138 (1990).

¹²³ See, e.g., STUNTZ, *supra* note 113, at 101–11.

¹²⁴ See *About DOJ*, U.S. DEP’T OF JUST., <https://www.justice.gov/about> [https://perma.cc/4R2Q-S2AB] (describing the need for and creation of the department in 1870).

¹²⁵ See *NAACP History: Dyer Anti-lynching Bill*, NAACP, <https://www.naacp.org/naacp-history-dyer-anti-lynching-bill> [https://perma.cc/W5WK-KDPT].

¹²⁶ See Senator Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POL’Y REV. 211, 211 (2008); Wan J. Kim, Assistant Att’y Gen. for the C.R. Div., Remarks on the Department of Justice’s Civil Rights Division: A Historical Perspective as the Division Nears 50, at 2 (Mar. 22, 2006), https://www.justice.gov/sites/default/files/crt/legacy/2008/10/21/historical_perspective.pdf [https://perma.cc/8FUA-TCTG] (providing a history of the Division and its functions).

¹²⁷ See U.S. DEP’T OF JUST., U.S. DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION ACCOMPLISHMENTS, 2009–2012, at 73–74 (2013) https://www.justice.gov/sites/default/files/crt/legacy/2013/03/27/crtaccomplishment09_12.pdf [https://perma.cc/VY4W-CL4F].

¹²⁸ See John Lewis, *Michael Brown, Eric Garner, and the “Other America,”* THE ATLANTIC (Dec. 15, 2014), <https://www.theatlantic.com/politics/archive/2014/12/michael-brown-eric-garner-other-america-john-lewis/383750> [https://perma.cc/LN6W-MVQU] (“[I]n some courts even the worst offenders can go free as long as they wear a badge.”); Linda Poon & Marie Patino, *CityLab University: A Timeline of U.S. Police Protests*, BLOOMBERG (June 9, 2020, 1:39 PM), <https://www.bloomberg.com/news/articles/2020-06-09/a-history-of-protests-against-police-brutality> [https://perma.cc/NU5F-CLDZ].

groups,¹²⁹ and people protesting the killings of Ahmaud Arbery, Breonna Taylor, and George Floyd.¹³⁰

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

Outside of the United States, in the context of mass atrocities, those affected by them, human rights groups, and many other people have also demanded punishment, typically in the form of involuntary confinement, against those who participated in them. These demands have also plausibly assumed that impunity is in conflict with justice, that punishment may contribute to the future protection of rights, or both.¹³¹ The same reasoning would apply to other crimes committed by the powerful, such as white collar and corruption.¹³²

This is a defense neither of anything close to mass incarceration, nor of overspending on and overusing penal responses to social problems, nor of current policing and prisons in the United States, which should be radically different and more humane.¹³³ This is also not an argument against combining punishment with nonpunitive approaches to justice in response to harmful conduct, nor against fully replacing punishment

¹²⁹ See, e.g., Emily Bazelon, *A Discussion About How to Reform Policing*, N.Y. TIMES MAGAZINE (June 13, 2020), <https://nyti.ms/2BoBhYB> [<https://perma.cc/W2BV-V9TN>] (“Most immediate, we need accountability for the death of George Floyd. Increasing the charges to second-degree murder for Derek Chauvin, and also charging the other three officers involved, was really important.” (quoting Alicia Garza)). Other people and groups within Black Lives Matter have not included criminal prosecution and punishment among their demands or within their agenda. See, e.g., *A Vision for Black Lives*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/policy-platforms> [<https://perma.cc/9GJ5-HNKL>].

¹³⁰ See, e.g., The Late Show with Stephen Colbert, *Sherrilyn Ifill: There Is Bi-partisan Support for Reforming Qualified Immunity* at 0:16, YOUTUBE (June 19, 2020), <https://www.youtube.com/watch?v=tpCeUZR4B5Q> [<https://perma.cc/Z6SE-SFXE>] (referring to accountability, criminal indictment, and a “regime of impunity”).

¹³¹ See, e.g., KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS 5 (2011).

¹³² See Ferrajoli, *Crisi*, *supra* note 77, at 12.

¹³³ For recent critical analyses on policing, see generally, for example, Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017); Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOS. REV. (Aug. 1, 2017), <https://bostonreview.net/law-justice/tracey-l-meares-policing-public-good-gone-bad> [<https://perma.cc/8J UW-MCEV>]. On prisons, see generally Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965 (2012).

with nonpunitive approaches when certain conditions are met.¹³⁴ Rather, it is an argument for why fully discarding criminal law enforcement, involuntary confinement, and punishment as social responses to harm may be unfair, inhumane, and unprotective of individuals and communities, including individuals and communities of color.

The final response by penal abolitionists to the challenge of what to do with harmful behavior is *postponing until a new society is created*. I refer here to a set of responses by penal abolitionists who argue that not punishing social harm and abolishing prisons and other institutions can be only partially implemented today because we need a radically different society. The establishment of this new society, the argument goes, will radically reduce harmful conduct and make it possible to address it without police, prisons, and punishment.¹³⁵ I discuss this argument in the following section.

B. There Is No Way to Abolish Every Power Regime

Thirty years ago, my coauthor and I raised a second, rarely discussed challenge to penal abolitionism: even if prisons can be abolished, power regimes cannot.¹³⁶ Michel Foucault challenged the notion that the shift from corporal punishment to prisons was a humanizing process, arguing that a society with prisons was a disciplinary society with its own regimes of power and knowledge.¹³⁷ Similarly, one could question whether a transition to a society without prisons would necessarily be a humanizing process, and could ask what the possible power and knowledge regimes of this society without prisons would be.¹³⁸

This does not mean that all power relations are alike since some power relations may be fairer — for example, freer, more equal, more humane — than others. But it does mean that the “society without prisons” that penal abolitionists call for would have power relations, too. The plausibility and appeal of penal abolitionism as a program would thus depend on how fair this “society without prisons,” “without punishment,” or “without police” would be. I have to admit that even if I

¹³⁴ The use of nonpunitive approaches to supplement punitive approaches has been common in transitional justice contexts around the world. See, e.g., RUTI G. TEITEL, TRANSITIONAL JUSTICE 6–9 (2000).

¹³⁵ See, e.g., DAVIS, *supra* note 31, at 105–15; Moten & Harney, *supra* note 43, at 114; Arthur I. Waskow, “. . . I Am Not Free,” SATURDAY REV., Jan. 8, 1972, at 20 (“[T]he only full alternative is building the kind of society that does not need prisons . . .”).

¹³⁶ Charosky & Langer, *supra* note 2, at 32.

¹³⁷ See generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1995). Penal abolitionists have relied on Foucault’s analysis of prisons, but have generally not engaged with his broader argument that every social relation is necessarily a power relation and that every society presents its own set of power and knowledge regimes.

¹³⁸ Charosky & Langer, *supra* note 2, at 32–33 (discussing this issue in Christie’s and Hulsman’s work).

support many of the specific proposals of penal abolitionists, as well as their broader goal of creating fairer societies, I am skeptical about various penal abolitionist proposals in this regard for multiple reasons.

First, a number of penal abolitionists concentrate on penal policy and do not articulate a vision that covers other realms of social life, or articulate their vision in such general terms that it is hard to know what to make of it.¹³⁹

Second, when they articulate such a vision, or when one can infer it through a close reading of their discourse, penal abolitionists reveal aspects of their vision that, at least to me, often sound unrealistic or unattractive. For instance, some abolitionists seem to suggest a return to small communities where everyone knows each other, has extra time, and is committed to spending time and energy to deal with conflicts with other people without intervention by the penal system.¹⁴⁰ But it is unclear in these accounts how we would transition from our mass, socially complex, and specialized societies to these small communities. In addition, even if they may rely on the penal system less than larger societies, small communities can be oppressive and exclusive in their own ways.¹⁴¹

Other penal abolitionists have argued for “cop-free” zones. One of the ideas behind this is to have zones without surveillance — an understandable reaction given the justified frustration and anger against over-surveillance and overpolicing of vulnerable neighborhoods in the United States.¹⁴² But even if there were restorative and transformative justice processes in these zones, it is not clear to me that these processes would always be better ways to deal with harm, including serious harm, than resorting at times to armed public law enforcement, arresting someone who has killed or seriously injured other human beings, prosecuting them, and punishing them.

Another example is the strand of penal abolitionism that is articulated or combined with communist ideals. For instance, in *The Politics of Abolition*, published in the early 1970s, Mathiesen considered (then communist) Albania and China as possible model societies.¹⁴³

¹³⁹ See McLeod, *supra* note 16, at 1619 (“The question of how precisely to achieve more equitable distribution . . . necessarily remains only partially described in existing abolitionist accounts.”).

¹⁴⁰ For a close reading of Nils Christie in this direction, see Charosky & Langer, *supra* note 2, at 33–34.

¹⁴¹ See, e.g., *id.* (discussing this issue in Christie’s work); Sally Engle Merry, *The Social Organization of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America*, in 2 *THE POLITICS OF INFORMAL JUSTICE* 17, 20–21 (Richard L. Abel ed., 1982).

¹⁴² On oversurveillance and overpolicing, see generally ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018); and ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2018).

¹⁴³ See MATHIESEN, *supra* note 22, at 221.

Mathiesen, who believes that abolition never ends, found them attractive models because, according to him, they had the potential to host radical revolutions that could maintain their radical character over time.¹⁴⁴ But these were authoritarian states that did not respect basic human rights and rule of law standards, did not have high levels of economic development or social justice, and had prisons. For similar reasons, the banner of communism that has been embraced by several prison abolitionists in the United States is not reassuring,¹⁴⁵ even if I readily recognize that many critiques of American capitalism can be fully compatible with democracy and with other forms of capitalism.¹⁴⁶

I do not mean to dismiss all abolitionist visions of a future society. For instance, the Movement for Black Lives Platform — which includes reparations, divestment from the police in favor of investment in Black communities, economic justice, community control, and political power, and which is currently being updated¹⁴⁷ — provides an interesting agenda of discussion and change that is often articulated alongside penal abolition. But even if attractive versions of this platform were fully implemented, such a society would still have interpersonal harm and would require some sort of armed public law enforcement and punishment — as I will discuss in more detail in the next section.

In addition, given the variety of visions about what a “society without police and without prisons” would look like, another risk for penal abolitionist coalitions is meeting the same fate as the popular fronts of the 1930s, which collapsed when leftists and liberals within the same coalitions began attacking each other, allowing authoritarian actors on both the extreme left and the extreme right to take over or increase their power.¹⁴⁸

Another danger is that penal abolitionists may succeed in abolishing institutions but not in replacing them with more appealing alternatives. For instance, some advocates of defunding the police will often say that they are calling not only for abolishing the police, but also for replacing the police with something different, such as a mobile response force of unarmed mental health professionals. One danger here is winding up

¹⁴⁴ See *id.*

¹⁴⁵ See Roberts, *supra* note 6, at 46 (“Many abolition theorists . . . argue that creating a society without carceral approaches to addressing human needs requires radically overhauling the U.S. capitalist economy and replacing it with a . . . communist system.”).

¹⁴⁶ On different capitalist models, see generally, for example, *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* (Peter A. Hall & David Soskice eds., 2001); *DEBATING VARIETIES OF CAPITALISM: A READER* (Bob Hancké ed., 2009).

¹⁴⁷ See *Vision for Black Lives*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms> [<https://perma.cc/7PKT-BLHK>].

¹⁴⁸ See, e.g., Stephen Salter, *The Object Lesson: The Division of the German Left and the Triumph of National Socialism*, in *THE POPULAR FRONT IN EUROPE 20, 20* (Helen Graham & Paul Preston eds., 1987).

with just the first half of this, the cutting programs part. It could be like what happened with the deinstitutionalization of mental health. The idea wasn't just to empty out mental hospitals; it was to replace them with community mental health services. But we only got the first part.¹⁴⁹

As will be clearer later, I am making a plea here neither for superficial criminal justice reform nor for the economic, political, and social status quo.¹⁵⁰ Individual and structural racism are very much alive in the United States. Moreover, the United States is a country of great inequality, with large sectors of the population lacking adequate access to food, health care, education, housing, jobs, economic security, a healthy environment, and more, partly because of how the country's capitalist system has functioned.¹⁵¹ I am also not "trashing" penal abolitionism. Criminal law minimalists have to learn from and work with American prison abolitionists by articulating their minimalist agenda about the penal system within a broader economic, political, social, and environmental agenda. Moreover, criminal law minimalists have to think about how to implement their ideas through political action.

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

C. Does the Ideal Society Not Have Punishment?

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

Even if creating a radically different and more just society could substantially reduce harmful behavior, it is hard to imagine that harmful behavior would completely disappear. And as science fiction literature and movies like *Minority Report*¹⁵² suggest, the societies that have been

¹⁴⁹ See Samantha Raphelson, *How the Loss of U.S. Psychiatric Hospitals Led to a Mental Health Crisis*, NPR (Nov. 30, 2017, 1:15 PM), <https://www.npr.org/2017/11/30/567477160/how-the-loss-of-u-s-psychiatric-hospitals-led-to-a-mental-health-crisis> [<https://perma.cc/8WUR-VCF3>]. I am grateful to David Sklansky for fleshing this point out for me.

¹⁵⁰ For critiques of criminal justice reform, see, for example, Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016). ("[I]n some ways, reform efforts impede transformation." *Id.* at 1419.)

¹⁵¹ See, e.g., MICHAEL CAVADINO & JAMES DIGNAN, PENAL SYSTEMS: A COMPARATIVE APPROACH 50–61 (2005).

¹⁵² MINORITY REPORT (20th Century Fox 2002).

imagined with perfect crime prevention and no crime are often dystopias — for example, totalitarian societies in which there is no room for individual choice and individual liberties — rather than utopias.

If harmful social conduct is a feature of social existence, should an ideal society *only* respond to it nonpunitively?

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

But it is unclear that a society in which treatment fully replaced punishment would necessarily be fairer than a society that used some punishment.¹⁵³ For starters, a treatment ideology considers people not as fully autonomous beings but as patients. In this regard, a treatment ideology is paternalistic and may be in tension with liberal democratic values. A full replacement of punishment by treatment would also mean a replacement of lawyers by doctors, psychiatrists, psychologists, and other treatment professionals that have historically engaged in their own share of oppression and arbitrariness.¹⁵⁴ It is illustrative and telling in this regard that different literary works have created dystopian societies with treatment and without punishment.¹⁵⁵

Another alternative to punishment would be “preventive” measures in response to allegedly dangerous people such as proven or suspected terrorists, murderers, or sex offenders.¹⁵⁶ These measures might take the form of vastly expanded indeterminate civil commitment, quarantine, curfew, or high-tech surveillance.¹⁵⁷ The expansive literature on the preventive justice experiments of the last few decades has shown that this approach conceives of human beings as being predetermined as either dangerous or nondangerous instead of as autonomous beings,

¹⁵³ For a classical analysis, see generally Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968).

¹⁵⁴ See, e.g., MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON 279–89 (1965).

¹⁵⁵ See generally, e.g., SAMUEL BUTLER, EREWHON: OR, OVER THE RANGE (1872) (in which those who commit a crime receive medication and those who become ill receive punishment). Interestingly, Mathiesen says: “I don’t think I would like to live in Erewhon. . . . I would prefer the more simple-minded legal approach, but humanized more often than now by medically oriented men and women.” MATHIESEN, *supra* note 22, at 36.

¹⁵⁶ I am grateful to Professor Carol Steiker for bringing this point up to me.

¹⁵⁷ On the line between civil and criminal measures, see, for example, Jenny Roberts, Term Paper, *Gundy and the Civil-Criminal Divide*, 17 OHIO ST. J. CRIM. L. 207, 207 (2019); Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 778 (1997).

is in tension with civil liberties, and may be more punitive than formal punishment.¹⁵⁸ Its expansion would only increase these concerns.

Another alternative to criminal law and punishment and the penal system would be using conceptions of justice and processes different from those of the penal system to deal with harm.¹⁵⁹ According to Professor Allegra McLeod:

Justice, for abolitionists, is grounded in paying careful attention to experienced harm and its aftermath, addressing the needs of survivors, and holding people who have perpetrated harm accountable in ways that do not degrade but seek to reintegrate, while understanding the root causes of wrongdoing and working to address them. Justice grounded in attending to how redress is experienced also aims to change the world as it is so that those affected have greater resources to heal and so that harm is less likely to befall others in the future.¹⁶⁰

This approach to justice would include measures taken by individuals or the community without participation by the police to prevent harm from taking place or escalating.¹⁶¹ It could also include variations on restorative justice and participatory justice.¹⁶² The approach would also involve transformative justice, which has been defined as:

[A] community-based approach to responding to violence or interpersonal harm that works, as [Mariame] Kaba and Kelly Hayes describe, to “build support and more safety for the person harmed, figure out how the broader context was set up for this harm to happen, and how that context can be changed so that this harm is less likely to happen again.” Transformative justice differs from certain other experiments in restorative justice . . . in that transformative justice processes aspire to work toward broader social, political, and economic change.¹⁶³

One example given of the success and superiority of this approach has been a survivor of sexual assault that rejected criminal prosecution and instead participated with her assaulter and facilitators in a transformative justice process that lasted over a year.¹⁶⁴ At the survivor’s

¹⁵⁸ See, e.g., DIANE WEBBER, PREVENTIVE DETENTION OF TERROR SUSPECTS: A NEW LEGAL FRAMEWORK 1–13 (2016); Michael L. Perlin et al., “On Desolation Row”: *The Blurring of the Borders Between Civil and Criminal Mental Disability Law, and What It Means to All of Us*, 24 TEX. J. ON C.L. & C.R. 59, 65 (2018); Eric Sandberg-Zakian, *Beyond Guantanamo: Two Constitutional Objections to Nonmilitary Preventive Detention*, 2 HARV. NAT’L SEC. J. 283, 289 (2011).

¹⁵⁹ See DE HAAN, *supra* note 28, at 102–29.

¹⁶⁰ McLeod, *supra* note 16, at 1646.

¹⁶¹ See *id.* at 1628–30.

¹⁶² On the tension and possibility of combining punitive and restorative justice approaches, see generally, for example, BRAITHWAITE, *supra* note 110; Braithwaite, *supra* note 110.

¹⁶³ McLeod, *supra* note 16, at 1630–31 (quoting Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not “Transformative Justice.” Here’s Why*, THE APPEAL (Feb. 5, 2018), <https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-azea323a6645> [<https://perma.cc/7VV5-43AF>]).

¹⁶⁴ See *id.* at 1631–32.

request, the assaulter publicly acknowledged what he did and committed himself to political education on sexual violence and enthusiastic consent, and the collective that both the survivor and assaulter participated in adopted a curriculum on enthusiastic consent and sexual violence.¹⁶⁵

There could be promise in this type of program, and its effectiveness vis-à-vis the penal system should be (further) studied in a range of situations.¹⁶⁶ But even assuming, as I am happy to assume, that these programs are a better response to harm when certain conditions are met, what would communities and societies do with situations in which necessary conditions are not met? What would they do, for instance, if either the harm survivor or the harm inflictor were not willing or able to engage or genuinely engage in these types of processes? What would happen if the power or economic differences between survivors and harm inflictors were so large that one could question whether a survivor's willingness to participate in these processes is truly voluntary? What would communities and society do with situations in which the inflictor of harm had inflicted harm before or kept inflicting harm on other people? What would happen if, after going through these transformative justice processes, the different participants were not transformed or were not satisfied with the results?

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

III. PENAL ABOLITION AND CRIMINAL LAW MINIMALIST CONSTITUTIONALISM

Roberts's main proposal is her "abolition constitutionalism." Some non-American abolitionists have also tried to grapple with what doctrinal implications their positions should have.¹⁶⁷ But perhaps due to the importance of constitutional discourse in the United States, American

¹⁶⁵ *Id.*

¹⁶⁶ For descriptions and discussions of evaluations of restorative justice programs, see generally, for example, BRAITHWAITE, *supra* note 110; John Braithwaite, *Restorative Justice and Responsive Regulation: The Question of Evidence* (RegNet Research Papers, Working Paper No. 51, 2016), http://johnbraithwaite.com/wp-content/uploads/2016/10/SSRN_2016_BraithwaiteJ-revised-51.pdf [<https://perma.cc/Y5R2-N4HX>].

¹⁶⁷ See, e.g., ZAFFARONI, *supra* note 29, at 96–99.

prison abolitionists have long used constitutional arguments to advance their cause, and Roberts's article adds an important chapter to this tradition.¹⁶⁸

Roberts's theory is original, important, and particularly timely. Regardless of whether one embraces a penal abolitionist or a criminal law minimalist position, there is no question that the elimination of mass incarceration, the dismantling of individual and institutional racism, and the advancement of a fairer society require a new constitutionalism in the United States. I argue that this includes not only a new constitutionalism by the courts, but also a broader conception of the Constitution that encompasses other branches of government, a new popular constitutionalism, and a new social pact.

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

A. *The Antisubordination Principle and the Penal System*

Roberts criticizes *Flowers v. Mississippi* and the *Batson* doctrine that it applies.¹⁶⁹ This doctrine limits the way peremptory challenges may be exercised by either party during voir dire in jury selection. By requiring proof of both discriminatory effect and discriminatory intent, this doctrine establishes a standard that is hard to meet and assumes an exclusively individualistic conception of discrimination, without leaving room for a systemic or institutional conception, including one of systemic or institutional racism. Roberts's account adds to these criticisms a historical-constitutional perspective about the role of all-white juries in maintaining racial oppression in the United States.¹⁷⁰

This analysis is consistent with a minimal criminal law constitutionalism that also embraces a strong antisubordination principle. Such a principle is a requirement of justice and fundamental to reducing the uneven scope of the penal system in the United States. This principle could be extended to other areas of the penal system.¹⁷¹ For instance, a natural extension would be to the selective prosecution doctrine where,

¹⁶⁸ On this tradition of prison abolitionist reliance on the U.S. Constitution, see, for example, KNOPP, *supra* note 21, at 17.

¹⁶⁹ See Roberts, *supra* note 6, at 93–99. For another article critical of *Flowers* and the reliance of the majority opinion on color blindness, see generally Paul Butler, *Mississippi Goddamn: Flowers v. Mississippi's Cheap Racial Justice*, 2019 SUP. CT. REV. 73.

¹⁷⁰ See Roberts, *supra* note 6, at 99–105.

¹⁷¹ See Alexandra Natapoff, Atwater and the *Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 151 (2020) (applying abolition constitutionalism to the Fourth Amendment).

despite evidence that Blacks are charged more heavily than whites,¹⁷² the United States Supreme Court has also required proof of discriminatory effect and discriminatory intent to demonstrate unconstitutional racial bias.¹⁷³ Changes to this doctrine could have a large effect on criminal convictions and sentences since most criminal convictions in the United States are reached through guilty pleas rather than trials by jury.¹⁷⁴

B. *The Ultima Ratio Principle*

I would also like to argue that a strong antisubordination constitutional principle like the one Roberts proposes would only be one element within a criminal law minimalist constitutional law theory — and arguably within a penal abolitionist one. A way to bring this point home is to consider that in the United States the incarceration rate of non-Latinx whites in 2010 was 450 per 100,000.¹⁷⁵ This per capita incarceration rate would have made the United States the fourth most punitive country in the world around that time.¹⁷⁶ In other words, there is no question that there is continuing individual and structural racism and discrimination in the United States and that these phenomena affect punitiveness against African Americans and other minorities.¹⁷⁷ But the United States has become a very punitive society writ large.¹⁷⁸ This means that a strong antisubordination principle like the one Roberts proposes may not suffice to substantially diminish, let alone eliminate mass incarceration.

¹⁷² See, e.g., M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1322 (2014); Sherod Thaxton, *Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging*, 45 AM. J. CRIM. L. 95, 103 (2018).

¹⁷³ See, e.g., *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v. Bass*, 536 U.S. 862, 863 (2002).

¹⁷⁴ On how the United States relies to a larger extent than most nations on reaching criminal convictions without trial, see Máximo Langer, *Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions*, 4 ANN. REV. CRIMINOLOGY (forthcoming 2021) (manuscript at 1.2–1.3) (on file with the Harvard Law School Library).

¹⁷⁵ *U.S. Incarceration Rates by Race and Ethnicity, 2010*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/graphs/raceinc.html> [<https://perma.cc/7EX5-LZKG>].

¹⁷⁶ See *States of Incarceration: The Global Context*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/global> [<https://perma.cc/G62K-DC9E>] (using world data from 2013 because the source does not present 2010 data). On this point, see also GOTTSCHALK, *supra* note 9, at 4–5.

¹⁷⁷ While the incarceration rate for whites was 450 per 100,000 people, the rate was 2,306 for Blacks, 1,291 for American Indians/Alaskan Natives, 1,017 for Native Hawaiians/Pacific Islanders, and 831 for Latinx people. *U.S. Incarceration Rates by Race and Ethnicity*, *supra* note 175.

¹⁷⁸ One could argue that there is such a high level of punitiveness for white males in the United States because once a large penal system is built as a consequence of structural racism, large numbers of non-Black people are also going to be caught by such a system. I think that this phenomenon explains at least a portion of the high levels of punitiveness regarding whites in the United States. But even if this is the case, overpunishment writ large is conceptually different from disparate punishment and requires normative principles different from antisubordination to be addressed, such as the principle of *ultima ratio*.

A principle that could be articulated, refined, and used in this context as part of minimal criminal law constitutionalism is the principle of *ultima ratio*¹⁷⁹ (penal abolitionists could discuss whether this *ultima ratio* principle should also be part of an abolition constitutionalism). This principle — known in various countries around the world and discussed by a few Anglo-American legal and philosophy scholars¹⁸⁰ — states that criminal law should only be used as a last resort when no other social responses or public measures would suffice to adequately advance a legitimate goal, such as addressing harmful behavior.¹⁸¹ Since punishment (including death and prison in the United States) is the harshest type of public measure or burden that the state may take or impose against an individual and the state has the duty to consider the rights and interests of all people involved or affected by a situation (including those who cause harm), the *ultima ratio* principle requires that less harmful responses or measures, including noncriminal ones, be adopted if those responses or measures would adequately advance a legitimate goal such as addressing harmful behavior.¹⁸²

This *ultima ratio* principle is different from other criminal law principles that would also constitute part of minimalist criminal law constitutionalism, such as the harm principle, the wrongfulness principle, the desert principle, and the principle of proportionality of sentences, to mention just a few possibilities.¹⁸³ Even if all of these principles were met by a criminal statute and its enforcement, the *ultima ratio* principle would still require that the criminal law statute not be passed, and not

¹⁷⁹ See FERRAJOLI, *supra* note 77, at 466 (including a version of this principle in his own conception of criminal law minimalism as a “necessity principle”); HORDER, *supra* note 82, at 74. But see HUSAK, *supra* note 82, at 157–58, who has rejected the idea that this principle of last resort is included in his version of criminal law minimalism — which is one of the ways in which I consider his theory insufficient. In earlier work, Husak argued that there was a plausible basis for including the last resort principle among the substantive parts of a theory of criminalization but maintained it was trivial because he considered it unhelpful in reversing the tendency to overcriminalize. See Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207, 207 (2004).

¹⁸⁰ See, e.g., 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 26 (1984) (including a version of the last resort principle within his harm principle, but making it play little role in his subsequent four-volume analysis of criminal law); Husak, *supra* note 179, at 214.

¹⁸¹ I am trying to provide a definition that remains open to different theories of the state, of punishment, of what a legitimate goal is, and of what it means to adequately advance it. On different possible interpretations of the *ultima ratio* principle, including its relationship with different theories of punishment, see Husak, *supra* note 179, at 216–27.

¹⁸² See, e.g., Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio)*, 2 OHIO ST. J. CRIM. L. 521, 522 (2005); Thomas Frøberg, *The Role of the Ultima Ratio Principle in the Jurisprudence of the Norwegian Supreme Court*, 3 ONATI SOCIO-LEGAL SERIES 125, 128 (2013).

¹⁸³ On the relationship between these other principles and minimalist criminal law theories, see generally FERRAJOLI, *supra* note 77; and HUSAK, *supra* note 82.

be enforced once passed, if noncriminal responses or measures were sufficient to adequately advance a legitimate goal such as addressing harmful behavior.¹⁸⁴

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

There is debate on whether *ultima ratio* is a constitutional or just a moral or pragmatic principle.¹⁸⁵ According to some criminal law commentators, the constitutions of different countries are not so “far-reaching” as to have significant restrictions upon the legislature’s power to legislate punishment such that the punishment is consistent with the *ultima ratio* principle.¹⁸⁶ In fact, Husak has characterized the application of a last resort principle “as an exercise in *idealized* criminal theory” and claimed that “[n]o one can pretend that the criminal law incorporates a last resort principle at the present time.”¹⁸⁷ But the principle has been given constitutional status by courts and other authorities in a variety of countries, such as Colombia¹⁸⁸ and Finland,¹⁸⁹ and by a range of commentators.¹⁹⁰ The U.S. Constitution has not traditionally been interpreted to include this principle. However, the Eighth Amendment prohibition against cruel and unusual punishment or the Fifth and Fourteenth Amendments’ Due Process Clauses could be interpreted as including it.

Since the *ultima ratio* principle sets limits on the legislature, an explicit argument for or implicit assumption of why some consider it only a moral or pragmatic, but not constitutional, principle is that courts may not enforce it since they would have to second-guess the legislature

¹⁸⁴ For a justification of the *ultima ratio* principle on the basis that the state has the duty to ensure a peaceful coexistence among its inhabitants and a just social order, see, for example, Corte Constitucional [C.C.] [Constitutional Court], junio 20, 2001, Sentencia C-647/01, § VI.4 (Colom.), <https://www.corteconstitucional.gov.co/relatoria/2001/C-647-01.htm> [<https://perma.cc/Q6BB-FF2A>].

¹⁸⁵ See, e.g., Frøberg, *supra* note 182, at 128; Jareborg, *supra* note 182, at 521–23.

¹⁸⁶ See, e.g., Jareborg, *supra* note 182, at 522; see also *id.* at 521–23.

¹⁸⁷ Husak, *supra* note 179, at 208.

¹⁸⁸ See, e.g., C.C., junio 20, 2001, Sentencia C-647/01, § VI.4; Corte Constitucional [C.C.] [Constitutional Court], mayo 16, 2012, Sentencia C-365/12, §§ III.3.3.1, III.3.4.2.1 (Colom.), <https://www.corteconstitucional.gov.co/relatoria/2012/C-365-12.htm> [<https://perma.cc/J7UR-PJ48>].

¹⁸⁹ Kaarlo Tuori, *Ultima Ratio as a Constitutional Principle*, 3 OÑATI SOCIO-LEGAL SERIES 6, 11 (2013) (describing the recognition of the principle by the Constitutional Law Committee of Parliament in Finland).

¹⁹⁰ For an argument that the *ultima ratio* principle is an instance of a broader constitutional principle of proportionality, see *id.* For an interpretation of the German Constitutional Court’s 1975 abortion decision, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, BVerfGE 39, 1, as applying the principle of proportionality and the principle of last resort to the criminalization of abortion, see Tuori, *supra* note 189, at 10–11. On the *ultima ratio* principle in Germany, see, for example, 1 CLAUS ROXIN & LUIS GRECO, STRAFRECHT ALLGEMEINER TEIL: GRUNDLAGEN - DER AUFBAU DER VERBRECHENSLEHRE 86 (5th ed. 2020).

about the need for and other requirements of criminalization.¹⁹¹ But this is not a strong argument. First, in some countries, courts have applied the principle, which shows that there are ways in which courts can use this principle to assess the criminalization work of legislatures. Second, constitutional theories, such as the underenforcement thesis of Professor Lawrence Sager, suggest that even if courts may not be epistemologically or institutionally positioned to second-guess the legislatures in some cases, last resort could still be a constitutional principle that the legislature should abide by.¹⁹²

Another issue is whether the last resort principle applies only to the work of the legislature, as many scholars have suggested.¹⁹³ The criminal law minimalist constitutional theory that I am envisioning here would also apply it as a maxim of behavior for law enforcement, prosecutors, courts, and laypeople. The extent to which laypeople have relied on the police, criminal law, and punitive measures to deal with social problems may be one of the factors that has contributed to the extraordinary levels of incarceration and punitiveness in the United States.¹⁹⁴ If the Constitution is understood through the lens of popular constitutionalism and as a broader social pact that goes beyond the courts' authority and interpretation, *ultima ratio* could be understood as a maxim of behavior for the population of the United States not to unnecessarily or harmfully call the police, bring charges, and so forth.¹⁹⁵

The *ultima ratio* principle could also be a mandate for law enforcement and prosecutors to not move forward with a citation, arrest, charging decision, formal diversion program, or other punitive measure unless there are no appropriate nonpunitive responses.¹⁹⁶ It could also be a maxim of behavior for courts and juries as they adjudicate criminal cases.¹⁹⁷

Finally, the conception of the *ultima ratio* principle and minimalist criminal law that I envision would require not only that *criminal law as punishment*, but also that *criminal law as a conception of justice and as a way to look at harmful situations* be used as a last resort. Criminal

¹⁹¹ See Husak, *supra* note 179, at 208 & n.4; Jareborg, *supra* note 182, at 522.

¹⁹² See LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 6–7, 91–92, 102 (2004); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212–13 (1978).

¹⁹³ Cf., e.g., FERRAJOLI, *supra* note 77, at 464–65 (discussing the principle of necessity within his discussion of when and how to criminalize behavior — which is one of the ways I disagree with his account); Frøberg, *supra* note 182, at 128; Husak, *supra* note 179, at 208; Jareborg, *supra* note 182, at 522.

¹⁹⁴ See, e.g., GARLAND, *supra* note 9, at 1; SIMON, *supra* note 9, at 5.

¹⁹⁵ On popular constitutionalism, see generally, for example, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

¹⁹⁶ On the application of the theory of constitutional underenforcement to prosecutors, see generally, for example, Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591 (2014).

¹⁹⁷ For application of the principle to the work of criminal courts and specifically judicial statutory interpretation, see, for example, Frøberg, *supra* note 182, at 128–32.

law assumes that harmful situations involve individual wrongdoers who are individually responsible and may be punished for their actions against (mostly) blameless victims. Criminalizing behavior thus involves addressing harmful situations not only with punishment and a certain set of institutions (police, prosecutors' offices, probation departments, courts, and so forth), but also with this conception of justice and this way to look at these situations. Under the conception of minimal criminal law that I envision, this conception of justice and way of looking at harmful situations should also be adopted as a last resort, only when other conceptions of justice and ways to look at these harmful situations would not suffice to adequately address them.

C. *An Economic and Social Constitution*

A final point I would like to make — that I can only articulate very briefly given the goals of this piece — is about social and economic rights. American penal abolitionism has argued that it is not possible to eliminate mass incarceration if other realms of social life and public policy are not also transformed.¹⁹⁸ This is an important point that has often been missed by criminal law minimalists, who have often concentrated only on criminal law policy.¹⁹⁹ The elimination of mass incarceration and the reduction of punitiveness in the United States would require the use of other social and public policy tools such as ensuring that people have access to housing, food, education, health care, jobs and economic security, a healthy environment, and so forth.

A criminal law minimalist constitutionalism — and arguably also an abolition constitutionalism — may thus have to go beyond renewing the interpretation of criminal law and criminal procedure's constitutional protections. It may also have to include a social and economic constitutionalism. The constitutions of various countries explicitly include these types of rights.²⁰⁰ But, regardless of whether these rights are explicitly included in constitutional text, a renewed constitutionalism could encompass or expand these rights in the United States.²⁰¹

IV. CONCLUSION

This piece has analyzed American prison abolitionism from a comparative perspective and articulated three of the main challenges for penal abolitionism in the United States and beyond. The piece has also

¹⁹⁸ See, e.g., DAVIS, *supra* note 93, at 74.

¹⁹⁹ However, Ferrajoli has explored these issues in his work. See generally, e.g., LUIGI FERRAJOLI, *DERECHOS Y GARANTÍAS: LA LEY DEL MÁS DÉBIL* (Perfecto Andrés Ibáñez & Andrea Greppi trans., 1999); LUIGI FERRAJOLI, *MANIFESTO POR LA IGUALDAD* (Perfecto Andrés Ibáñez trans., 2020).

²⁰⁰ See, e.g., S. AFR. CONST. 1996 ch.2.

²⁰¹ See, e.g., KATHARINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* 1–25 (2012).

introduced criminal law minimalism as an alternative theory, discussed it from a comparative angle, put it in conversation with penal abolitionism, and sketched a minimal criminal law constitutionalism. Criminal law minimalism would require a radical reduction and a reimagining and redesigning of current penal systems in the United States, but, unlike penal abolitionism, it would still give a role to the penal system in the prevention and reduction of harm, in the elimination of discrimination, and in the protection of rights.