The (In)evitability of Punishment

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Abstract

Punitive criminal legal systems impose accountability by deliberately inflicting hardship—through deprivation of life, liberty, and property—upon criminal offenders. Despite the ills that come with such systems, including criminogenic effects that spur further criminality, they continue to predominate over non-punitive alternatives. One explanation for the primacy of punitive systems comes from expressivist punishment theory, which holds that severe punishments like incarceration are intended to symbolically express societal condemnation of criminality. Under this theory, punitive systems endure because they express condemnatory sentiment more effectively than less punitive and non-punitive approaches, including those that emphasize penance, forgiveness, reparation, and other absolvent expression. If this theory is true, then it is defensible to presume that punitive criminal legal systems are inevitable despite their criminogenic pitfalls because they perform their expressive functions better than available alternatives. But is this actually true? Is punishment inevitable? This Article approaches this question by first exploring the expressive characteristics of punitive systems and alternative absolvent methodologies, including their processes and outcomes. It then scrutinizes how these characteristics impact their viability as societally legitimate systemic solutions for achieving accountability against criminal offenders. While this Article

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stops short of definitively answering the question of whether punishment is inevitable, it offers a framework for considering the question by identifying three premises that must be true if absolvent systems are to ever supplant punitive ones. First, it must be true that criminal accountability does not demand that condemnation be symbolically expressed through the infliction of punishment. Second, it must be true that punishment is not the only means of symbolically expressing societal sentiment regarding criminality. And third, it must be true that absolvent systems can stand as clear and unambiguous symbols of such societal sentiment. If any of these premises is false, then punitive criminal legal systems may be indispensable. But if all three premises can be true, then a new world of viable possibilities for holding criminal offenders accountable may yet be ahead of us.

I. INTRODUCTION

Are punitive methodologies like the deprivation of life, liberty, and property necessary to accomplish the central aims of punishment, or may these methodologies be comprehensively replaced by alternatives that achieve the communal goals intended to be served by punishment while minimizing or even avoiding its harms? In other words, is punishment inevitable? Or, can it be replaced with some other system

of accountability that dispenses with punishment's core retributive foundation?

For many, the answer to this question is either a resounding yes or a resounding no, particularly when the question is considered as a political one centered on the feasibility or desirability of enlarging, maintaining, minimizing, or eliminating punitive systems of accountability. As such, answers are frequently predicated on consequentialist grounds, whereby those in favor of punishment point to the harms that may arise from punishing too little and those opposed to it point to the harms that can arise from punishing too much or at all.

Within the academy, various theories across multiple disciplines have each struggled to provide coherence and rationality to the notion that punishment—manifesting as deliberate hardship imposed as a consequence for criminality—is necessary for achieving accountability and therefore just.[1] Over centuries, scholars have debated whether retributivist, consequentialist, moralist, and rehabilitative theories, among others, adequately account for why punishment can, should, or even must be imposed whenever someone commits a transgression against the public.[2] And yet, all attempts to arrive at a unified theory of punishment and its justification have failed, perhaps unavoidably so.

But while theories of punishment may fail at justifying it, at least as a matter of scholarly consensus, they can nonetheless illuminate important characteristics of punishment and alternative systems of accountability that describe how and why these systems operate as they do. Perhaps more crucially, they may also explain at a fundamental level why alternative systems have enjoyed less political popularity than conventional, retributive ones, and what it would take for alternatives to attain the level of communal support necessary to reach systemic adoption.[3]

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1. *See generally* THOM BROOKS, PUNISHMENT: A CRITICAL INTRODUCTION (2d ed. 2021) (discussing assorted legal and philosophical theories of punishment).

2. *See generally* TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS (rev. ed., Pluto Books 2006) (1969) (offering a polemical account of the historical debates over prevailing punishment theories).

3. Frequently, the viability of non-punitive criminal accountability systems has been explored through the lens of the "dangerous few" critique, which questions the ability of non-punitive systems to hold society's most dangerous and least repentant offenders to account. *See, e.g.*, Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2022).

Understanding these characteristics can, in turn, inform and explain the dynamics underlying historical and contemporary debates on how criminal legal systems should be shaped, such as those on recent display in contested district attorney elections in Pennsylvania, California, Florida, and Oregon;[4] crime control ballot initiatives in Colorado and Arizona;[5] and court restructurings in Massachusetts.[6] Considering that many of these debates are, in effect, rooted in competing threads of punishment theory, from retributivism to abolition, it stands to reason that punishment theory can help explain the stakes and outcomes of these kinds of campaigns. More deeply, they can also reveal

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These critiques, however, are ultimately outside the scope of this Article, which instead explores how any system, whether punitive or not, can be considered capable of satisfying societal demand for accountability generally and not just with regard to a particular cohort of offender.

4. *See* Shaila Dewan & Michael Corkery, *Voters Sent Mixed Message on Crime and Law Enforcement*, N.Y. TIMES (Nov. 7, 2024), https://www.nytimes.com/2024/11/07/us/prosecutors-law-enforcement-measures-voters.html (reporting on the election outcomes of assorted district attorneys' races in 2024, including in Florida, where two separate prosecutors sought their re-election after having been removed from office by the state governor for their alleged categorical refusal to prosecute certain offenses); Trisha Thadani, *'Soros of the Right' Elon Musk Eyes Progressive Prosecutors as Next Target*, WASH. POST (Nov. 26, 2024), https://www.washingtonpost.com/technology/2024/11/26/elon-musk-george-soros-pac-republican-elections (discussing planned political campaigns against progressive elected district attorneys in response to their alleged leniency on crime and the recent election losses of such prosecutors in San Francisco, Los Angeles, and Portland).

5. *See* Jesse Sarles, *Colorado Voters Approve Proposition 128, Which Changes How Offenders' Parole Eligibility Works*, CBS NEWS (Nov. 6, 2024, at 18:35 MT), https://www.cbsnews.com/colorado/news/proposition-128-parole-eligibility-colorado-ballot-measure-election-result/ (reporting on the approval by Colorado voters of a proposal to tighten parole eligibility requirements for most offenses and to remove parole eligibility entirely for persons with three or more violent felony convictions); Jerod MacDonald-Evoy, *Ballot Prop Roundup: What Passed*, *What Failed*, AZ MIRROR (Nov. 6, 2024, at 02:08 CT), https://azmirror.com/briefs/ballot-prop-roundup-what-passed-what-failed (reporting on the approval by Arizona voters of various ballot initiatives aimed at making criminal justice more punitive, such as adding new criminal offenses to state law).

6. *See Massachusetts Trial Court Strategic Plan 2.1*, MASS. TRIAL CT. (2016), https://www.mass.gov/files/documents/2019/04/10/sp2.1.pdf (outlining an ambitious plan to restructure the trial court system in Massachusetts to achieve assorted justice-oriented goals, like improved court access, fairness, transparency, and innovation in justice delivery, among others).

the underlying prerequisites for the successful maintenance or dismantling of punitive systems of accountability. Among the punishment theories that could be applied to yield these insights, expressivism stands out.

The conventional view of expressivism holds that punishment is ultimately an act intended to symbolically communicate something about criminal transgressions and about criminal laws themselves.[7] Regarding the former, punishment typically communicates outrage, shame, resentment, and indignation over the fact that some harm was inflicted against society through a criminal act committed against an individual.[8] These sentiments are commonly comprised under an umbrella term: condemnation. Regarding the latter, punishment communicates that the law, as validated through its enforcement and the consequent imposition of hardship against transgressors, is respected, meaningful, and worthy of obedience.[9]

Applied to criminal systems, expressivism can be used to describe how each stage of the criminal legal process possesses expressive features intended to say something—sometimes abstractly, sometimes literally—about the offender, their offenses, their blameworthiness, the status of victims, and the state of the law.[10] From

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7. *See* BROOKS, *supra* note 1, at 122–23 (providing an overview of the conventional account of punitive expressivism).

8. *See* RICHARD L. LIPPKE, THEORIZING LEGAL PUNISHMENT 57 (2024) (discussing the view that "legal punishment communicates censure to offenders for their criminal misdeeds").

9. *See id.* ("Some theorists add that this moral communication . . . [serves] to remind the public of the important moral values embodied in defensible legal prohibitions.").

10. Expressivism is not to be confused here with communicative theory, which holds that punitive systems are used to, quite literally, communicate some message *to* various criminal legal actors, particularly criminal offenders, rather than to express something *about* them and the system in which they operate. *See generally* R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001) (examining the prevailing trends in penal theory). Among the tenets of communicative theory are the notions that communication within punitive systems is a two-way process between a political community and an offender whereby the community communicates censure to the offender, and the offender, acting as a "rational agent" in a communicative exchange, may respond by communicating their guilt, shame, and acceptance of censure as a form of reparation. *Id.* at 79–80. Expressivism and communicative theory are thus distinguishable from one another largely on the grounds that the former "requires only

the decision to prosecute, requests for bail, witness testimony, and opening and closing arguments at trial, to confessions, pleas, verdicts, and sentencing, criminal law and procedure is rife with literal and metaphorical expression delivered through a combination of articulated statements, performative acts, and procedures infused with symbolic meaning. Judges, prosecutors, defense attorneys, victims, witnesses, and defendants all interact with one another through criminal legal systems to shape the expressive outcome of a criminal case. These interactions culminate in that case's ultimate adjudicative outcome, which itself carries substantial expressive meaning.

For example, condemnation may be symbolically expressed through the conviction and sentencing of transgressors. Pardon may be expressed through a verdict of legal innocence, including successful claims of self-defense or incapacity. Pathos may be expressed through an affirmative dismissal in the interests of justice. Apology may be expressed through a dismissal granted upon a successful appellate claim of actual innocence and the consequent granting of equitable or compensatory relief. And solidarity may be expressed through a trial dismissal resulting from jury nullification.

But regardless of whatever sentiments may be expressed upon the conclusion of predominant, status quo criminal systems, expressivism reveals that these systems primarily function to express condemnation and are initiated in direct pursuit of that result. After all, when functioning perfectly, these systems would only ever be initiated against those who have actually committed the offenses underlying their prosecution and who are ineligible to claim legal innocence. Further, the consequences for criminality under status quo systems are rooted in deliberate deprivations of life, liberty, or property, whereby the experience of deprivation is the means by which accountability is imposed.[11] As such, under perfect functioning, predominant criminal systems would have to concern themselves only with the degree of

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one who expresses," and does not require that such expression be "mediated by the recipient's reasoning or understanding." *Id.* at 79.

11. *See* Robert C. Findlay, *What Constitutes Punishment?*, 39 NOTRE DAME L. REV. 594, 594 (1964) (citing Screws v. United States, 140 F.2d 662 (5th Cir. 1944), *rev'd on other grounds*, 325 U.S. 91 (1945)) (discussing how government-imposed punishment deprives an individual of "his fundamental or natural rights, such as those to life or liberty").

condemnation to express rather than whether condemnation is to be expressed at all.

Under more realistic scenarios that reflect these systems' actual, imperfect functioning, non-condemnatory expression is strongly indicative of some failure having occurred in the criminal process. After all, within status quo systems, non-condemnatory sentiments can only be expressed when the state has either erred in its decision to seek condemnation by prosecuting a factually or legally innocent person or has failed to meet its burden (evidentiary or otherwise) that condemnation is warranted.[12] Expressivism thus retains tremendous potential to reveal key insights into how and why these predominant systems are designed and operate as they do, and how well (or not) they serve their intended purpose.

Expressivism may also be used to understand alternative views of criminal accountability that eschew condemnation in favor of the expression of other, non-punitive sentiments. Such sentiments include penance, forgiveness, and reparation, which can all be captured under a separate umbrella term positioned in this Article as condemnation's antonym: absolution. If condemnation is centered within the logics of punitive systems of accountability, then absolution resides at the center of non-punitive absolvent systems, such as those that apply restorative justice methodologies to achieve accountability without inflicting punishment per se.[13] In these systems, condemnation is supplanted by absolution as both the means and endpoint of criminal accountability. Avoiding punitive vocabularies, logics, and objectives, these systems measure accountability through alternative means, including the degree of reconciliation achieved between transgressors and those harmed by

12. Factual innocence is "the kind of innocence that occurs when new evidence reveals that the defendant did not commit the offense for which he was convicted." Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 417 (2018). Legal innocence encompasses individuals who are found not guilty under the law but where the available evidence is insufficient to clearly demonstrate factual innocence. *Id.* at 437.

13. "Some of the most common programs typically associated with restorative justice are mediation and conflict-resolution programs, family group conferences, victim-impact panels, victim-offender mediation, circle sentencing, and community reparative boards." RESTORATIVE JUSTICE, OFFICE OF JUV. JUST. AND DELINQ. PREVENTION 1 (2010), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/restorative_justice.pdf.

criminality.[14] While these systems are far less prevalent than their punitive counterparts, growing dissatisfaction with the criminal legal status quo is fueling public demand for better results, giving non-punitive alternatives a further opportunity to grab a place within the collective consciousness regarding criminal accountability. This has resulted in the growing visibility and availability of non-punitive criminal accountability programs, even if many, if not most such programs currently exist alongside or within punitive systems rather than completely outside of them.[15]

Given that accountability, whether punitive or non-punitive, is suffused with expressive meaning and function, expressivism offers a framework for understanding the design and operation of competing systems of accountability. It asks why certain systems enjoy more or less public favor; whether incumbent systems can be supplanted; and, if so, how. Expressivism's potential in this regard holds true even as we set aside the difficult question of justification because accountability is fundamentally expressivist in nature.[16] To conclude differently

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14. *See* Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST. 212, 217–18 (2000) (discussing the prison abolitionist effort to extricate punishment from the popular conceptualization of accountability, which "articulates crime and punishment in such a way that we cannot think about a society without crime except as a society in which all the criminals are imprisoned" and which may therefore necessitate "a new popular vocabulary . . . to replace the current language" of criminal accountability).

15. Multiple states administer restorative justice programs through state corrections departments. *See, e.g.*, *Restorative Justice*, MINN. DEP'T CORR., https://mn.gov/doc/victims/restorative-justice (last visited Sep. 12, 2025) (describing victim-initiated restorative practices offered through the Minnesota Department of Corrections); *Restorative Justice*, MO. DEP'T CORR., https://doc.mo.gov/programs/restorative-justice/restorative-justice-information (last visited Sep. 12, 2025) (describing programs in Missouri, including community service programs, reparation boards, restitution and victim compensation programs, and impact statements); *Restorative Justice*, VT. DEP'T CORR., https://doc.vermont.gov/content/restorative-justice (last visited Sep. 12, 2025) (describing community-based restorative justice programs administered by the Vermont Department of Corrections).

16. A similar premise lies at the foundation of other works regarding the nature of punishment. *See, e.g.*, Matt Matravers, *"What to Say?": The Communicative Element in Punishment and Moral Theory*, *in* PUNISHMENT AND POLITICAL THEORY 108, 108 (Matt Matravers ed., 1999) ("A premise of this chapter is that punishment . . . has some communicative element. That is not to endorse an account of punishment as having the transmission of censure or of any other communication as its general

would inadequately account for why we have historically relied on punishment as our primary means of accountability, even as non-punitive alternatives often operate in similar fashion as their punitive counterparts and thereby offer similar or even better public safety benefits. For example, consider detainment in prisons versus detainment in secure mental health facilities. Each form of detainment serves public safety similarly by incapacitating offenders through their secured confinement away from the public. However, they each symbolically express different messages. The former expresses punitive condemnation while the latter expresses that criminality, insofar as it intersects with mental health, merits commensurate leniency and therapeutic intervention. So, while the two forms of detainment frequently operate similarly,[17] their expressive symbolism is distinct.

Expressivism's account of punishment's primacy is reflected in the wide agreement among scholars that no means of accountability has met the demand for condemnatory expression as well as punishment has, giving punishment a considerable edge in the public discourse on criminal legal design.[18] The infliction of hardship upon a criminal transgressor fulfills mightily its purpose of expressing communal condemnation against the transgressor, their transgression, or both. This advantage largely explains punishment's widespread adoption as society's chosen method for achieving—or perhaps more accurately, imposing—accountability. Thus, while alternatives to punishment may

justifying aim. It is just to assume that the criminal justice system . . . has as one of its central functions the task of expressing to the accused that . . . he is guilty of some wrongdoing and that that wrongdoing is of the type that deserves . . . censure.").

17. Building codes offer a clear indication of the operational similarity between correctional facilities and secured mental health facilities, requiring each to be constructed according to common, if not identical, standards. *See, e.g.*, N.Y. BLDG. CODE § 308.5 (2022) (comprising correctional centers, detention centers, jails, psychiatric centers where patients are under restraint, prerelease centers, prisons, and reformatories under the same institutional group for purposes of setting common building code requirements among them). These institutional similarities help explain how and why correctional facilities have effectively replaced mental health hospitals after the systemic deinstitutionalization of people with serious mental illnesses. *See* STEPHEN EIDE, HOW TO REFORM CORRECTIONAL MENTAL HEALTH CARE 1 (2024), https://media4.manhattan-institute.org/wp-content/uploads/how-to-reform-correctional-mental-health-care.pdf (discussing the "trans-institutionalization" of people with serious mental illnesses).

18. *See infra* Section II.A (discussing various legal philosophers' views on punishment).

serve key public safety goals as well if not better than punishment, punishment nonetheless endures.

But critical questions central to the debate between advocates of punitive and non-punitive systems of criminal accountability remain underexplored in scholarship. Among them are whether society's historical fixation with punishment derives from an innate and inseverable need to condemn criminal transgressions;[19] whether condemnation may ever be adequately expressed without punishment;[20] whether alternatives to punishment require the abandonment of condemnation in favor of some other sentiment like absolution;[21] and whether the expression of non-punitive sentiments is sufficiently compelling to anchor a system of accountability that applies to all criminal transgressors and for all criminal transgressions.[22] Simply: is punishment inevitable?

Expressivism can help reveal why punitive systems have enjoyed such predominance for so long, why alternatives have lately enjoyed increased attention, and whether these alternatives can ever

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19. *See generally, e.g.*, Chad Flanders, *Shame and the Meaning of Punishment*, 54 CLEV. ST. L. REV. 609 (2006) (discussing the meaning of punishment but not addressing specifically why punishment prevails).

20. One of the few legal scholars to consider this question squarely is Bennett Capers. *See generally* I. Bennett Capers, *Punishment Without the State*, 2023 U. ILL. L. REV. 1753 (2023) (suggesting that public shaming through social media may obviate the need to express condemnation through state-sponsored punishment).

21. The question has been considered somewhat through the philosophical conceptualization of *negative abolition*, or the view that "the state [should] get out of the punishing business" but not "the condemning business." *E.g.*, Stephen P. Garvey, *Alternatives to Punishment*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 493, 497–98 (John Deigh & David Dolinko, eds., 2011). But this view of abolition has not gained significant traction in the legal literature on punishment, which more often tends to hew toward *positive abolition*, or the view that "the state should get out of the business of condemning and punishing altogether." *Id.* at 497. This tendency toward positive abolition is explained in part by the frequent linkage of condemnatory punishment to systems of racial and class oppression within abolitionist legal literature. *See, e.g.*, Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7 (2019) (adopting as a central tenet of abolitionism that "the expanding criminal punishment system functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime").

22. Dan Kahan considered a version of this question nearly thirty years ago. *See generally* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) (arguing that common alternatives to imprisonment are inferior to incarceration). Few have considered it since then.

become the new status quo. By unshackling theories of punishment from the question of justification,[23] it is possible to more easily confront these questions and illuminate why punishment has so long endured as a problematic but seemingly inextricable human institution.[24]

To confront these questions, this Article bypasses the debates over punishment's justification and the consequentialist arguments that propel them. Instead, it examines the theoretical underpinnings of arguments both for and against punishment's inevitability. Specifically, this Article applies expressivist theories to describe punitive and non-punitive systems of accountability and their respective virtues and pitfalls. It then examines what it would take, from a theoretical standpoint, to overthrow the predominance of punitive systems.[25] Thus, where expressivism may fail as an adequate justification for punishment, this Article applies expressivism as a useful analytical framework to help explain why punishment endures and whether its alternatives have systemic viability.[26]

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23. *See* Gideon Yaffe, *The Norm Shift Theory of Punishment*, 132 ETHICS 478, 478 (2022) ("For some time, the philosophical literature about punishment has been focused, primarily, on the question of justification. What, if anything, makes it permissible, or even obligatory, for the state, or some other actor, to punish?").

24. *See, e.g.*, *id.* at 479 ("The focus on the question of justification has left another question neglected: the question of definition."); *id.* at 481 (arguing that "[t]he question of definition matters politically and morally independently of the question of justification," including because the nature of punishment itself can be a frequent subject of litigation when determining, for example, which sanctions do and do not constitute it).

25. While punitive expressivism has taken center stage among expressivist theories in criminal law, it is important to note that expressivist theory generally does not tie itself to any particular methodology of accountability and can be used to explore both punitive and non-punitive methodologies equally. *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1513–14 (2000) (describing generally how "[e]xpressive theories of action evaluate given actions according to how well they express attitudes that we ought to have toward people" without favoring the expression of either positive or negative sentiments).

26. Peter Königs touches on a similar point in his critique of expressivism as a justification for punishment when he notes that "[i]f . . . punishment can be justified on other (e.g. instrumentalist) grounds, it seems that we ought to punish in ways that are *also* expressive of our reprobation" and that "we should opt for the mode of punishment that is the best expression of our indignation"). Peter Königs, *The Expressivist Account of Punishment, Retribution, and the Emotions*, 16 ETHICAL THEORY & MORAL PRAC. 1029, 1039 (2013).

This Article proceeds in four steps. Following this introduction, Part II defines what this Article means by punishment, expression, and inevitability. Parts III and IV then explore both punitive and non-punitive expression and the methodologies by which each is articulated. Finally, Part V provides guidance on whether punishment is inevitable by identifying certain conditions that, if met, would enable absolvent systems to overtake punitive ones. Specifically, this Article argues that punitive systems can only be avoided if at least three expressivist premises are true. The first is that societally legitimate criminal accountability does not require that condemnation be expressed through punishment. The second is that the collective expression of sentiment regarding criminality is possible by some means other than the deliberate infliction of hardship. And the third is that absolvent systems of criminal accountability are capable of performing their expressive function to the satisfaction of a critical mass of society. Part VI of this Article concludes by asserting that criminal accountability need not be oriented inevitably toward punitive regimes if non-punitive alternatives can succeed in fulfilling the expressive purposes that motivate society's collective pursuit of criminal accountability.

II. PUNISHMENT, EXPRESSION, AND INEVITABILITY

As an initial matter, it is crucial to elaborate on what is meant by *punishment*, *expression*, and *inevitability* since, within and across multiple literatures, each term is highly contestable. Further, the lack of a clear definition for each term can lead to the interpolation of unintended meaning by those filling in blanks with their own viewpoints, leading to critical misunderstandings of the arguments and conclusions offered in this Article. Accordingly, each term will be defined here with as much precision and clarity as possible, albeit with the caveat that the definitions offered here are not intended to settle longstanding debates over each term's meaning. Instead, these definitions are offered merely as premises upon which this Article's arguments and conclusions are built.

A. Defining Punishment

Different legal philosophers offer various ways to understand the definitional elements of punishment. Thom Brooks, for example, offers a largely procedural accounting of punishment whereby it is

defined by the process through which it is imposed. In Brooks' view, punishment is a sanction meted in response to the breaking of a law, against a person for having broken that law, and by an authority intentionally inducing a loss on that person for their transgression.[27] Joel Feinberg captures many of these same elements in his definition, which he describes "as the infliction of hard treatment by an authority on a person for his prior failing in some respect (usually an infraction of a rule or command)."[28] And Bill Wringe differentiates among comparable acts of deprivation—namely imprisonment, quarantine, and involuntary hospitalization—on the basis that the latter two, unlike the former, "do not involve an intention to cause suffering" and are therefore distinguishable from punishment.[29]

This Article largely agrees with these conceptualizations but streamlines them by focusing on what appears to be punishment's key characteristic across these various definitions: the imposition of deliberate hardship. This view distinguishes punishment's core substantive characteristics from its secondary, largely procedural characteristics, like its purpose, justifications, and the processes by which it is imposed. This separation is necessary since each of these procedural characteristics can mirror those of non-punitive penalties like civil fines. These procedural similarities can blur the difference between punitive and non-punitive systems. However, the deliberate infliction of some hardship upon a criminal transgressor is unique to punishment. Even to the extent that contemporary standards insist that the degree of hardship imposed be commensurate with the nature and severity of the offense sanctioned, punishment nonetheless demands that at least some nominal level of hardship be inflicted.

It is with this conceptualization in mind that this Article distinguishes punishment from methodologies of accountability that are not centered around the deliberate infliction of hardship, such as restorative justice. It does so with full acknowledgment that such a distinction has been challenged by others who expressly encompass methodologies like restorative justice within their frameworks of punishment. For example, Thom Brooks outright rejects the position that restorative

27. BROOKS, *supra* note 1, at 1–5.

28. Joel Feinberg, *The Expressive Function of Punishment*, 49 THE MONIST 397, 397 (1965).

29. BILL WRINGE, AN EXPRESSIVE THEORY OF PUNISHMENT 29 (2016) (citations omitted).

justice is not a theory of punishment. Instead, he argues that because restorative justice does not exclude the possibility of other, more punitive responses like imprisonment, and because restorative justice is utilized as a direct response to crime, that it therefore constitutes a form of punishment.[30]

Brooks' conceptualization of restorative justice as punishment extends from his procedural view of punishment generally, whereby punishment comprises any attempt at bringing accountability to criminal offenders as long as certain procedural steps are followed.[31] For Brooks, this holds true irrespective of whether the aim underlying the attempt is punitive, rehabilitative, or, in the case of restorative justice, reparative.[32] However, if these procedural requisites are replaced by substantive ones predicated on whether hardship is purposefully inflicted, then restorative justice and similar methodologies become plainly distinguishable from punishment. Accordingly, even though restorative justice is commonly imposed through status quo criminal processes and is administered alongside punitive methodologies, these circumstances do nothing to erode the substantive distinctions between non-punitive methodologies, like restorative justice, and punishment. After all, the design of restorative justice does not call for its necessary co-administration alongside punitive methodologies, and many of its practitioners consequently advocate for its total extrication from punitive frameworks.[33] The substantive view, rather than the procedural view, of punitive and non-punitive methodologies thus does a superior job of accounting for the core logics that distinguish these methodologies.

To the extent that this Article's conceptualization narrows in on each methodology's substantive characteristics, like the purposeful imposition or avoidance of hardship, Brooks' critiques against the exclusion of restorative justice from the concept of punishment fail to land

30. BROOKS, *supra* note 1, at 79–80.

31. *See id.* at 17–19, 62 (discussing retributive and rehabilitative theories of punishment using the same framework under which Brooks discusses restorative justice).

32. *Id*.

33. *See, e.g.*, DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 129–56 (2019) (arguing for the supplantation of imprisonment with restorative justice frameworks that operate outside criminal legal processes, including trial, conviction, and incarceration).

here. Accordingly, punitive and non-punitive methodologies are free to be understood in this Article as two distinct concepts defined fundamentally by their contrasting substantive cores.

B. Defining Expressivism

Expressivism has been used to both describe punishment (as an expression of condemnatory outrage) and to justify it (as the best method for achieving criminal accountability through the expression of condemnatory outrage).[34] Expressivism can be seen as standing separate and apart from other theories of punishment inasmuch as it is not preoccupied with achieving any outcome other than expression. As summarized by philosopher Joshua Glasgow, in expressivist theory "[t]here is nothing . . . about deterrence or desert or fairness or any other justification for punishment."[35] However, given that expressivist theory primarily concerns itself with the expression of condemnation and related sentiments, it has frequently been described as bearing a close relationship to retributive theories of punishment, which seek to condemn crime through hard treatment of offenders.[36] The problem arising from expressivism's close resemblance to retribution has been described as one of distinctiveness rather than plausibility,[37] though even on this account expressivism's distinctiveness is underestimated. Unlike retribution, expressivism can describe the motivations and purpose of both punitive and non-punitive methodologies: if it can be said through expressivism that incarceration, hard labor, and death express condemnation in its fiercest terms, then it can also be said through expressivism that interventions rooted in restorative justice and similar methodologies express absolution in similar fashion.

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34. *See, e.g.*, Feinberg, *supra* note 28, at 400 (presenting his view that "the hard treatment aspect of punishment and its reprobative function must be part of the *definition* of legal punishment"); Joshua Glasgow, *The Expressivist Theory of Punishment Defended*, 34 L. & PHIL. 601, 603 (2015) ("The core position of the view is exhausted by the principle that punishment is permissible at least in part because that is the only, or the best, way for society to express condemnation of the offense.").

35. Glasgow, *supra* note 34.

36. *See* BROOKS, *supra* note 1, at 123 ("Expressivism has even been said to be a servant of retribution.").

37. *See id.*

But expressivism can do more than abstractly describe systems of accountability. It can also describe the experience of participants in those systems and their associated rituals, from the literal expressions of trial testimony and pronouncements of judgment at sentencing to the metaphorical symbolism of the justice system, including the extraordinary allocations of time, money, and emotion that are invested into it.[38] This Article adopts this more expansive view of expressivism and applies it to better understand why punitive methodologies operate as they do and what pre-conditions must be met for non-punitive alternatives to overtake them systemically.

To the extent that expressivism may have its own limitations as a singular justification for punishment, its effectiveness as a lens through which accountability systems can be understood is potent but largely untapped. Where other theories of punishment are largely confined to explaining why, globally, we seek to punish or otherwise hold people to account for their crimes, expressivism can illuminate deeper insights about both how and why accountability systems and their components function as they do. And ultimately, expressivism can determine whether predominant punitive systems are, in fact, inevitable.

C. Defining Inevitability

But what, exactly, is meant here by *inevitability*? The notion of inevitability refers to whether punishment—defined as the infliction of deliberate hardship as a consequence for criminality—is so effective at satisfying the expressivist purpose of systems of criminal accountability that they will continue to predominate over non-punitive alternatives. This notion may also be presented alternatively by examining whether non-punitive methodologies for achieving accountability can match or exceed punishment's expressive capabilities as a systemic

38. The financial costs of carceral punishment alone are staggering. By one estimation, the United States expends more than $80 billion per year on corrections, excluding the additional associated costs of crime enforcement (another $63 billion), criminal courts (another $29 billion), and prosecution (nearly $6 billion). *See* Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html. While harder to capture, expenditures of intangibles like time and emotion are also tremendous. *See generally* Megan Comfort et al., *The Costs of Incarceration for Families of Prisoners*, 98 INT'L REV. RED CROSS 783 (2016) (discussing the financial, social, and emotional costs borne by the loved ones of prisoners).

response to criminality. Ultimately, the question of inevitability asks whether punitive and non-punitive methodologies are up to the task of meeting society's expressive demands regarding criminal accountability and, if so, how.

Dan Kahan raised a similar but fundamentally distinct question nearly thirty years ago during expressivism's resurgence within the legal academy[39] when he considered the political viability of alternatives to incarceration.[40] Ultimately concluding that such alternatives were not viable, his argument rested on the notion that the prevailing alternatives of the day—namely, community service and the issuance of fines—were doomed to failure because they "fail to express condemnation as dramatically and unequivocally as imprisonment."[41] In Kahan's view, punishment's purpose lies primarily in its expressive function and, in particular, the expression of moral condemnation of those who violate criminal laws.[42] According to Kahan, when it comes to expressing condemnation, "actions speak louder than words,"[43] with incarceration speaking the loudest given the high value that society places upon liberty.[44]

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39. Expressivism received considerable scholarly attention from the legal academy during the 1990s and early 2000s. *See generally, e.g.*, Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991) (exploring the expressive features of shaming punishments); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001) (examining, in part, the role of expressivism in justifying retributive punishment); Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385, 1409–11 (2007) (criticizing the view, espoused by Dan Kahan, that restorative justice has wide appeal because of its expressive overdetermination—or, its ability to cater to multiple worldviews regarding criminal accountability).

40. *See* Kahan, *supra* note 22, at 592.

41. *Id.*

42. *See id.* at 593.

43. *Id.* at 601.

44. *See id.* at 621 ("Prison . . . is clearly a sanction; because liberty is so universally and intensely valued, taking it away is our society's most potent symbol of moral condemnation."). Curiously, Kahan scarcely addresses how something like the death penalty might not be even more expressive than imprisonment aside from quoting, in a footnote, Benjamin Rush, a Quaker proponent of the American Enlightenment movement who wrote: "Personal liberty is so dear to all men, that the loss of it,

Time has challenged Kahan's thesis regarding the political viability of alternatives to incarceration. Bail reforms and alternative-to-incarceration programs have, for example, continued to proliferate substantially since Kahan published his view.[45] However, his sense that imprisonment may be most durable for the most serious violent offenses we punish,[46] and that its durability ties directly to its expressive function, remains strongly supported by the ongoing overrepresentation of violent offenders within prisons nationwide[47] and by the rejection of decarceral pathways for accountability for such offenses.[48] And while the tendency toward incarceration and away from release for more serious offenses can be explained by the general view that criminal sentences should be commensurate in their severity to the crimes they are punishing, proportionality along these lines tends to be evaluated in expressivist terms. Thus, we condemn the convicted murderer much more harshly than we condemn the petty thief, who in turn faces greater relative condemnation than the jaywalker, with the degree of

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for an indefinite time, is a punishment so severe, that death has often been preferred to it." *See id.* at 613, n.90.

45. *See generally State Reforms Reverse Decades of Incarceration Growth*, PEW CHARITABLE TRUSTS (2017), https://www.pewtrusts.org/-/media/assets/2017/03/state_reforms_reverse_decades_of_incarceration_growth.pdf (discussing how justice reinvestment initiatives centered on alternatives to incarceration have successfully reversed much of the nationwide growth in incarceration rates between the 1970s and 2000s).

46. *See* Kahan, *supra* note 22, at 605 ("Incarceration might be the only option for many violent offenses—including murder, forcible rape, and armed robbery.").

47. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2025*, PRISON POL'Y INITIATIVE (Mar. 11, 2025), https://www.prisonpolicy.org/reports/pie2025.html (reporting that a near supermajority (62%) of people sentenced to incarceration in state prisons nationwide had been convicted of violent felonies). To the extent that the proportion of violent offenders in federal prisons is substantially lower, at about 5% of the federal prison population, this discrepancy can be largely explained by the fact that violent offenses tend to be more commonly prosecuted at the state level, with federal prosecution more commonly geared toward commercial and narcotics crimes. *See id.*

48. *See, e.g.*, H.B. 49, 31st Leg., Reg. Sess. (Alaska 2019) https://www.akleg.gov/basis/Bill/Text/31?Hsid=HB0049Z (limiting parole eligibility and removing caps on parole revocations for non-criminal technical violations of parole); H.B. 9, 2024 2d Extraordinary Sess. (La. 2024), https://legis.la.gov/legis/ViewDocument.aspx?d=1342732 (eliminating discretionary parole eligibility except in narrow circumstances).

condemnation expressed symbolically tied to the length and severity of any criminal sentence imposed. And we use imprisonment as our preferred method of condemnation, according to Kahan, because "[i]mprisonment, as a sanction, invariably condemns."[49] This contrasts with the expressive symbolism of alternatives like fines and community service whose symbolic meaning can be muddled by their application in situations that have little or nothing to do with expressing condemnation,[50] like when we issue parking tickets or impose community service requirements as a condition of high school graduation.

Despite Kahan's deep exploration of the expressivist dimensions of alternatives to incarceration to evaluate their political limits, he stops short of raising, let alone addressing, the question of inevitability. He does, however, briefly touch upon something close while further giving us cause for hope that an answer may be found. First cautioning that the social norms that motivate punishment "reflect deeply rooted public understandings that mere exhortation is unlikely to change," he then writes that "[c]areful attention to social norms might allow us to translate alternative sanctions into a punitive vocabulary that makes them a meaningful substitute for imprisonment."[51]

With this, Kahan outlines an expressivist path for finding the answer to whether punishment, as a matter of political and criminal theory rather than a mere question of political sentiment, is a necessary institution of public accountability and, therefore, inevitable. This path can be forged by tracking and documenting expressive representations of social norms through punitive systems to see how those norms both inform, and are reinforced by, such systems. This path may, conceivably, lead to the conclusion that punishment is, in fact, inevitable inasmuch as the expression of condemnatory sentiment is both

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49. Kahan, *supra* note 22, at 621.

50. *Id.* at 593 ("The message of condemnation is very clear when society deprives an offender of his liberty. But when it merely fines him for the same act, the message is likely to be different: you may do what you have done, but you must pay for the privilege. Because community service penalties involve activities that conventionally entitle people to respect and admiration, they also fail to express condemnation in an unambiguous way. This mismatch between the suffering that a sanction imposes and the meaning that it has for society is what makes alternative sanctions politically unacceptable.").

51. *Id.*

indispensable and, as Kahan insists, that no methodology expresses condemnation as well as punishment (and, in particular, severe punishment).

However, this path is only one of two potential paths for testing the strength of the expressivist case for non-punitive alternatives to punishment. The second path abandons entirely the punitive vocabulary and logics used to articulate and propel the expressivist defense of punishment. By utilizing a different vocabulary and core of logics, the second path propels the pursuit of non-punitive accountability as a true alternative to—and not a mere substitute for—punishment. As with the first path, this second path traces the symbolic expression and representation of social norms through systems of accountability. However, instead of tracing social norms that seek to express condemnatory sentiment through punitive systems, this path traces norms that propel the expression of absolvent sentiment through non-punitive systems.

As explored in Parts III and IV of this Article, tracing these paths through these systems, with their respective expressive strengths and limitations, holds the key to determining how we shape our systems of accountability, whether by choice or by, perhaps, some degree of determinism.

III. PUNITIVE EXPRESSION

Punitive expression is centered on the symbolic communication of condemnatory sentiments in the judgment of criminal offenders and their acts. A non-exhaustive list of such sentiments includes disapproval, denunciation, and censure as well as "moral rejection, dislike, disgust, resentment, repudiation, hatred, fear, and a host of other modes of moral disapprobation."[52] The exact degree of condemnation expressed is the product of a complicated calculus that considers multiple factors, including the identity of the offender, their personal circumstances, the nature of their offense, the harm inflicted by it, and the identity of the person experiencing the harm.[53] And while Kahan may

52. Glasgow, *supra* note 34, at 609.

53. *See* ERIN I. KELLY, THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY 5 (2018) (discussing various sub-factors considered when assessing the degree of condemnation to be directed against wrongdoers); Antti Kauppinen, *Hate and Punishment*, 30 J. INTERPERS. VIOLENCE 1719, 1730 (2014) ("[P]unishment

be correct that certain punishments express condemnation better than others, it would be erroneous to assert or presume that the expression of condemnation within criminal legal processes is effectuated only through the punishment imposed. Rather, it is more accurate to assert that condemnatory expression occurs throughout these processes, from inception to disposition, and that the potency of any condemnatory expression derives from both the nature of the hardship imposed *and* the processes by which the punishment is determined and given effect. As such, no matter the output of the punitive calculus in a given case, the notion that punishment serves an expressive function is made apparent throughout the criminal legal processes for both pursuing and imposing punishment.

To understand how this is so, it is crucial to understand how expression manifests throughout the criminal legal process. This section tracks the process for imposing punishment through its assorted stages to offer a more complete accounting of its symbolic expression of condemnatory sentiment. As will be demonstrated, while the substance of a criminal sentence may offer the greatest summation of the criminal system's symbolic expression of condemnation, it is far from the only avenue through which such sentiment is symbolized.

A. Arraignment as Expression

The punitive expressiveness of the criminal process is made evident early on where, despite constitutionally mandated presumptions of innocence, the very character and blameworthiness of criminal defendants is made subject to argumentation almost immediately.[54] This starts as early as arraignment, where criminal charges are publicly presented and described and where initial bail determinations are

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also sends a message to the victim: We, the community, will not let others enact disrespect toward you with impunity; we will stand up for you.").

54. Typically, defense counsel argues on behalf of a criminal defendant regarding these issues, a practice that has long historical roots in the Anglo-American legal tradition. But this practice is not without deep faults, including deprivations of personal autonomy by defendants when discretion over bail-related decision-making is ceded to defense counsel, whose advocacy may be shaped by their own personal interests over those of those they represent. *See* Alma Magaña, *Public Defenders as Gatekeepers of Freedom*, 70 UCLA L. REV. 978, 988–99 (2023) (discussing historical and contemporary bail practices and implying a limited role for defendants in their own advocacy).

commonly made.[55] In virtually all bail hearings, courts are required to make preliminary determinations on the character of the accused, particularly to the extent that bail statutes both federally[56] and in nearly all states[57] permit judges to impose pre-trial detention on the basis of future dangerousness, an inquiry that touches directly on condemnatory sentiment like blameworthiness and disapprobation. Such determinations must, by law, be individualized, publicly issued, and based on sufficient evidence submitted to the court.[58] These requirements force judges to make early, public pronouncements of condemnatory sentiment, particularly when they issue pre-trial bail or detention orders that restrict a person's liberty interests and that must, therefore, be supported by a public record of credible evidence justifying such actions.

Such condemnatory sentiment was readily evident in a high profile case where a judge, in denying the petitioner's third request for pretrial release, based his order upon a finding of "compelling evidence of [petitioner's] propensity for violence."[59] He further cited "the nature of the allegations in this case and the information provided by the government" in its public filings opposing release, which caused the judge to "doubt[] the sufficiency of any conditions that place trust in [petitioner]

55. *See, e.g.*, 18 U.S.C. § 3142(f) (requiring that detention hearings, during which bail determinations are made in federal criminal cases, must "be held immediately upon the person's first appearance before the judicial officer," which is when criminal arraignment occurs).

56. *See id.* § 3142(b) (requiring judicial officers to determine whether a person's pre-trial release "will endanger the safety of any other person or the community" before ordering either release or pre-trial detention).

57. *See* Chelsia Rose Marcius & Liset Cruz, *Man Arrested in Harlem Killings Had Been Accused of Attacking Officers*, N.Y. TIMES (Apr. 13, 2023), https://www.nytimes.com/2023/04/11/nyregion/easter-killings-arrest.html (reporting that New York remains the only state where "judges cannot explicitly assess a defendant's 'dangerousness' when setting bail" and are instead limited to "choos[ing] the 'least restrictive' means merely to ensure that defendants return to court" so as to protect the presumption of innocence that may otherwise be undermined by a pre-trial finding of dangerousness by the court).

58. *See, e.g.*, 18 U.S.C. § 3142(f)–(g) (requiring that detention orders be supported by clear and convincing evidence and that judges consider individualized factors when determining such orders, including "the history and characteristics of the person" and "the nature and seriousness of the danger to any person or the community that would be posed by the person's release").

59. United States v. Combs, No. 24-CR-542, 2024 U.S. Dist. LEXIS 216280, at *4 (S.D.N.Y. Nov. 27, 2024) (order denying motion for bail).

. . . to follow" petitioner's proposed conditions of pre-trial release.[60] Thus both structurally and, as in this case, literally, the pre-trial bail and detention process is oriented toward the expression of condemnatory sentiment.

Structurally, this process is oriented toward condemnation by the fundamental inquiries it tasks courts with undertaking along with the further requirement that it do so in a public forum where evidence is required to be presented and contested by the parties. And condemnation is literally expressed through the public articulations of condemnatory sentiment that necessarily accompany any judicial order imposing any condition or denial of pre-trial release. Certainly, the pre-trial bail and detention process may not necessarily result in such literal expressions like when, for example, a judge releases a person on their own recognizance without opposition from the prosecution. But even in such scenarios, the structural orientation of this process toward condemnatory expression forces courts to, at the very least, publicly admonish criminal defendants about the ever-present possibility of some condemnatory response should they fail to comply with the court's conditions of release.[61] So even when condemnatory expressions are not expressly articulated, the system's orientation toward condemnatory expression is still made apparent at this early, non-adjudicative stage of the criminal process.

B. Adjudication as Expression

Beyond the arraignment and pre-trial detention phases, the condemnatory expressiveness of the criminal legal system only becomes more apparent as a case progresses toward the adjudicative phases. These stages include presentation and argumentation of evidence at trial, the delivery of a verdict, and the imposition of a sentence upon any conviction. Upon their conclusion, these phases culminate in the completion of the adjudication of a case and, in most instances, the ultimate disposition of a criminal case.

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60. *Id.* at *8.

61. *See, e.g.*, N.Y. CRIM. PROC. L. § 510.40(5) (McKinney 2025) (requiring that courts make a record notifying defendants in plain, clear, and specific language "that the possible consequences for violation of such a condition may include revocation of the securing order and the ordering of a more restrictive securing order").

During the trial phase, both the prosecution and the defense have an opportunity to present evidence tending toward or away from the guilt of the accused. However, only the prosecution is affirmatively mandated by law to present evidence as part of its burden of proving guilt beyond a reasonable doubt.[62] By contrast, the defense has no affirmative mandate to present evidence of innocence or evidence that controverts the inculpatory evidence submitted by the prosecution.[63] Thus, the trial phase of the criminal process, like the arraignment and bail phases that preceded it, is also fundamentally oriented toward condemnatory expressiveness. With each submission of inculpatory evidence by the prosecution, the system becomes further primed to assign blame on the accused and, consequently, find them guilty.

The central inquiry of this stage focuses on whether the prosecution has met its evidentiary burden of proving condemnable (i.e., criminalized) behavior beyond a reasonable doubt. To the extent that the defense may present evidence to contest the prosecution's claims, including evidence of good character or acts, they do so not in the hopes of earning some kind of commendable adjudication (such as an affirmative finding of innocence, which is generally not an available trial-level disposition within the Anglo-American legal tradition) but solely in the hopes of sufficiently undermining the state's pursuit of a

62. *See, e.g.*, MODEL PENAL CODE § 1.12(1) (A.L.I. 2023) (stating that "[n]o person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt" and that "[i]n the absence of such proof, the innocence of the defendant is assumed").

63. Typically, the only affirmative evidentiary mandate applicable to the defense in a criminal case relates to proving any affirmative defense that is proffered by them, like by proving mental incapacity or self-defense by the requisite burden of proof. *See, e.g.*, *id.* § 1.12(4) (placing the burden of proof upon a party in a criminal case "depending on whose interest or contention will be furthered if the finding should be made" and whenever "the fact must be proved to the satisfaction of the Court or jury, as the case may be," like for any affirmative defense presented). Additionally, there is no requirement that the defense present evidence of actual innocence as a counter to the inculpatory evidence presented by the prosecution. In fact, any such mandate would be constitutionally impermissible given the state's constitutionally rooted duty to prove guilt beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358, 361–64 (1970) (recounting the historical view in Supreme Court cases that proof beyond a reasonable doubt in criminal cases is foundational in American criminal law and "explicitly hold[ing] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

condemnatory result such that it fails.[64] As noted directly within the nomenclature attached to the accused—phrases like "defendant" and "the defense"—evidence of this kind is always submitted as a parry *against* the prosecution's condemnatory case-in-chief. And when such defensive parries are successful, they result, at most, in a finding of "not guilty." Such a finding indicates only that the case for condemnation has failed and is not an affirmative finding of innocence that would carry with it the expression of some associated, non-condemnatory sentiment.[65] Thus, even where evidence submitted by the defense may

64. *See, e.g.*, Michelson v. United States, 335 U.S. 469, 476 (1948) (explaining that a defendant "may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged" and that "such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt"); Edgington v. United States, 164 U.S. 361, 366 (1896) ("[A]n established reputation for good character . . . would alone create a reasonable doubt . . . ."); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984) ("[A]n acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.").

65. As discussed by Daniel Givelber and Amy Farrell:

> Judges in criminal cases tell jurors that they must presume that the accused are not guilty of the crimes charged. They also tell jurors that prosecutors are obliged to introduce evidence to persuade them beyond any reasonable doubt that the defendants are guilty. If the state succeeds in doing so, then juries must convict. If the state fails to eliminate reasonable doubt about guilt, juries must acquit. A not guilty verdict says something definitive about the evidence that the state introduced: it was insufficient to eliminate all reasonable doubt about guilt from the minds of the jurors. But acquittals do not answer, nor even address, the question of whether defendants are *factually innocent*. All we know is that the juries were not persuaded that the defendants committed the crimes charged.

DANIEL GIVELBER & AMY FARRELL, NOT GUILTY: ARE THE ACQUITTED INNOCENT? 2 (2012).

This feature of the adversarial criminal legal system has not gone without substantial critique, with some calling for reforms that would enable affirmative findings of innocence or give legal effect to formal pleas of innocence as a means of furthering the interests of those who are "actually innocent." *See, e.g.*, Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 547, 549–50 (2008) (proposing a series of new criminal procedures intended to protect the innocence interests of the accused, including stricter burdens of proof and the ability to draw certain pro-defense inferences from pleas of innocence, non-inclusion of certain evidence by the prosecution, and prosecutorial

paint the accused in a positive, non-condemnable light, such impact is necessarily secondary to the primary purpose of undermining the state's burden of proof regarding the defendant's alleged commission of some condemnable offense. The design of the system at this stage therefore remains oriented toward the expression of condemnation, a result that occurs far more frequently than not, considering current conviction rates.[66]

In action, this design also results in literal expressions of condemnation by various actors. Specifically, prosecutors, judges, and victims are typically given some opportunity to articulate condemnation through the adjudicative stages of the criminal legal process. Foremost, prosecutors, in seeking to meet their burden of proof, characterize evidence in a condemnatory light during their opening and closing remarks, discussing the evidence that will be, or has been, presented in the case and why that evidence is demonstrative of a defendant's guilt. And although they may be prohibited by ethical requirements from making condemnatory statements about a person or their case *outside* of court,[67] they are effectively required to speak condemningly when characterizing evidence and arguing their theory of a case before a factfinder.[68] This is not to say that every case requires a forceful

misconduct); Frederick Lawrence, *Declaring Innocence: Use of Declaratory Judgements to Vindicate the Wrongly Convicted*, 18 B.U. PUB. INT. L.J. 391, 392 (2009) (arguing for the "right to a declaration of innocence" as a "remedy that will help the wrongfully accused or convicted protect or rebuild a personal reputation inevitably harmed by criminal accusations and convictions").

66. According to the most recently available statistics, approximately 93% of federal criminal cases result in some finding of guilt, excluding cases that, for administrative reasons, have been transferred, dismissed, or indefinitely suspended. *See* UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, FISCAL YEAR 2023 tbl. 2A (2023), https://www.justice.gov/usao/media/1343726/dl?inline (recording a total of 49,348 guilty dispositions nationwide in federal court in fiscal year 2023, compared with 169 not guilty dispositions and 3,013 dismissals in the same period). By comparison, state national conviction rates, according to best estimates, hover around 59% on average, though some states, like Arkansas, California, Minnesota, and Missouri boast rates between 75% and 92% across all offenses. *See* Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 594–95 tbl. B-1 (2020).

67. *See* MODEL RULES OF PRO. CONDUCT r. 3.8(f) (A.B.A. 2024) (requiring prosecutors to "refrain from making *extrajudicial* comments that have a substantial likelihood of heightening public condemnation of the accused" (emphasis added)).

68. For a collection of some of the most celebrated prosecutorial closing arguments, each delivered in starkly condemnatory terms, see MICHAEL S. LIEF, H.

articulation of the facts in the most grimly condemnatory way possible. In fact, sound trial practice cautions attorneys to take a measured approach where the tenor of their characterizations and delivery matches the particulars of a case.[69] But prosecutors must nonetheless characterize evidence in a way that is demonstrative of a person's guilt beyond a reasonable doubt and that sufficiently convinces a factfinder that the prosecuted offender is worthy of condemnation.[70] Given these considerations, even the most measured prosecutorial summations will be delivered in clearly condemnatory terms.

The challenge of overcoming burdens of proof and staving off nullification explains why prosecutors tend to adopt certain condemnatory linguistic strategies when arguing before factfinders. One study noted that prior research had shown that "lawyers carefully control the semantic properties of their lexical choices for a specific referent in order to fit their argument" and that, to this end, "prosecution lawyers use metaphors to construct defendants as being violent."[71] In exploring this trend further, the study found that prosecutors also "tended to silence most aspects of the defendant's identity by using functionalizations to refer to him only by his role and actions" and that they

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MITCHELL CALDWELL & BEN BYCEL, LADIES AND GENTLEMEN OF THE JURY: GREATEST CLOSING ARGUMENTS IN MODERN LAW (First Touchstone ed. 2000) (reprinting the closing arguments delivered during the prosecutions of, among others, Nazi war criminals during the Nüremberg trials, Charles Manson for his orchestration of the murders of Sharon Tate and Leno and Rosemary LaBianca, and the killers of civil rights leader Medgar Evers).

69. Effective trial advocacy is predicated on understanding the nuances of jury psychology and how jurors interpret the facts of a case. *See* THOMAS A. MAUET, TRIAL TECHNIQUES 13 (7th ed. 2007) ("To persuade juries, you need to understand juries—their backgrounds, beliefs, and attitudes, how they process information, how they think, and how they make decisions.").

70. Although nullification is not common, it still occurs as a means for factfinders (most commonly juries) to communicate their disapproval of prosecutions they believe to be unjust or improvidently pursued. *See* Kaimipono David Wenger & David A. Hoffman, *Nullificatory Juries*, 2003 WIS. L. REV. 1115, 1140 (2003) (discussing the view that "[b]oth punitive damages and nullification . . . are a forum in which citizens 'send a message' to elites about the moral acceptability of certain laws and legal theories" and that "[w]here the rule would produce results that are contrary to people's notions of individualized justice, jurors nullify the rule by returning a not-guilty verdict, or an 'inefficient' punitive award").

71. LAURA FELTON ROSULEK, DUELING DISCOURSES: THE CONSTRUCTION OF REALITY IN CLOSING ARGUMENTS 14 (2014).

emphasized "sexual, and/or criminal behavior by frequently including [the defendant] as the agent of material processes that detailed the specifics of the alleged crime."[72] On top of this, prosecutors also "de-emphasized or even silenced any testimony or discourses about events in which the defendant had more positive behaviors, as well as his mental and emotional processes."[73]

In making their case for conviction, prosecutors thus tend to characterize and define defendants by their criminality while shifting focus away from any personal characteristics or actions that would lead away from that result. Even more, the study found that prosecutors tended to substantially ignore the counterclaims and counterarguments of the defense, while defense attorneys, by contrast, "referred to the prosecution significantly more frequently."[74] These findings lend considerable evidentiary weight to the commonsense notion that the criminal legal system is firmly oriented toward condemnation and that defensive responses to it are just that: defensive. At no point can criminal defendants re-orient the criminal legal system toward other means like seeking affirmative remedies for a false accusation of criminality. Instead, the only purpose of the system is to examine and adjudicate the question of guilt and, by extension, condemnation. Once a conviction has been secured, the legal process orients itself only further toward condemnatory expression as the inquiry shifts from guilt to sentencing.

C. Sentencing as Expression

Sentencing statutes that govern the punishment process in criminal courts are replete with factors that tend toward the expression of condemnation by punitive means. The federal sentencing statute, for example, requires that courts consider "the nature and circumstances of the offense and the history and characteristics of the defendant" and that the sentences they impose "reflect the seriousness of the offense," "promote respect for the law," and "provide just punishment for the offense" committed.[75] These latter requirements for sentences prime courts to fashion their punishments toward condemnatory expression. Even if the level of condemnation may be mitigated by circumstances

72. *Id.*
73. *Id.*
74. *Id.* at 174.
75. 18 U.S.C. § 3553(a)(1)–(2)(A).

that minimize the severity of the harm of the offense or the culpability of the offender, the culmination of the court's deliberation on sentencing still results in some condemnatory expression.

The Model Penal Code on sentencing is even more explicit in its view of punishment as condemnatory expression. It states outright that a general purpose of the sentencing system is to "render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders."[76] Here, the focus on offense gravity, victim harm, and blameworthiness all reinforce the notion that the key inquiry at sentencing relates to the level of condemnation to be expressed through the imposition of an expressively appropriate punishment. These considerations orient the judge toward determining how much blame to assign to a person for their transgression, how condemnable their actions are, and, by immediate extension, how much condemnation to mete out. Even if, effectively, no additional punishment is handed down at this stage (for example, by issuing a "time served" or suspended sentence), the conviction itself stands as an expression of condemnation through its labeling function, whereby an offender is publicly and indefinitely condemned as a "convict," "felon," "delinquent," or some other condemnable equivalent.[77]

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76. MODEL PENAL CODE: SENT'G § 1.02(2) (A.L.I. 2023).

77. The labeling effect of criminal systems has been widely described and analyzed within labeling theory scholarship, which explores how society attaches "labels" or other descriptive markers on transgressive members through both formal and informal processes, like criminal prosecution and consequent social stigma. *See, e.g.*, RONALD L. AKERS, CRIMINOLOGICAL THEORIES: INTRODUCTION AND EVALUATION 99–100 (2d ed. 1999). Certain descriptive claims by labeling theorists have, however, been challenged, particularly those that allege that criminality is spurred by the harms arising from social stigma attached to labels like "convict" and "juvenile delinquent." *See id.* at 101–107 (summarizing those claims and their critiques). Nevertheless, the notion that criminal systems attach such labels to those who are subjected to criminal legal processes is far less contestable. Criminal legal processes and the statutes that govern them are, after all, replete with labels marking their subjects with socially stigmatizing terms, like "defendant," "prisoner," and so on.

The expressive importance of these terms was recently raised by both sides of a legislative debate in Illinois over a proposal to change the word "offender" to "justice impacted individual" with regards to the state's Adult Redeploy Illinois alternatives to incarceration program. *See* Catrina Petersen, *Illinois Legislators Set to Change "Offender" to "Justice-Impacted Individual,"* CTR. SQUARE (May 21, 2024), https://www.thecentersquare.com/illinois/article_cb6dd896-17ae-11ef-a59a-

The criminal legal system's condemnatory expression is most readily visible whenever courts issue public explanations of their sentencing decisions, as may be required by statute.[78] One judge, for example, described a defendant as "a charlatan."[79] Another characterized the criminal acts of a defendant as "evil."[80] And another seemingly lamented that the U.S. Constitution prohibited cruel and unusual punishments while proudly, even giddily, describing their sentencing order as a "death warrant."[81] And while a judge's consideration of mitigating circumstances can lessen the degree of punishment imposed by courts, even nominal punishments express condemnation.

This expression occurs through the person's conviction and their subsequent sentencing (and status) as a convicted person, which stands at least as *some* denunciation of the act that led to their sentencing and of the person who committed that act. This symbolic denunciation occurs even if the person themself is not specifically judged to be highly condemnable.

At this stage, we again typically see the prosecutor argue for *some* condemnatory consequence for the criminal offense at issue, even if they are not expressly required to do so by any applicable rules of

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1341d90c009a.html. Opponents of the change characterized the proposal as a way "to take away all accountability for people who commit crimes," despite the fact that the bill would only change the term "offender" to "justice-impacted individual" without changing the term's underlying definition under state law. *See id.* (quotation omitted); H.B. 4409, 103rd Gen. Assemb., Reg. Sess. (Ill. 2024), https://www.ilga.gov/documents/legislation/103/HB/10300HB4409eng.htm.

78. *See, e.g.*, 18 U.S.C. § 3553(c) (requiring that "[t]he court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence").

79. *See* Mead Gruver, *Former Colorado County Clerk Tina Peters Sentenced to 9 Years for Voting Data Scheme*, ASSOCIATED PRESS (Oct. 4, 2024, at 16:47 CT), https://apnews.com/article/tina-peters-colorado-clerk-election-vote-fraud-b456ce4f80dc97f4b967eb6297311a51 (referring to a "defiant" defendant convicted of an election-related data breach).

80. *See* Katy Osborn, *Read the Full Remarks by the Judge Who Sentenced Dzhokhar Tsarnaev to Death*, TIME (June 24, 2015, at 20:07 ET), https://time.com/3934639/dzhokhar-tsarnaev-judge-trial-boston-bombing (describing the terroristic acts of one of the Boston Marathon bombers).

81. *See* Anne E. Gowen, *How the Judge in Larry Nassar's Case Undermined Justice*, TIME (Jan. 26, 2018, at 13:15 ET), https://time.com/5119433/larry-nassar-judge-rosemarie-aquilina-justice (regarding a 175-year prison sentence for a serial sexual abuser).

criminal procedure.[82] And we can safely presume that prosecutors deploy similar strategies when arguing for their preferred sentence as they do when arguing for conviction in the first instance.[83] But frequently, we see them joined by another, non-legal actor who is commonly afforded an opportunity for expressive voice during the sentencing phase of a prosecution: the victim themselves. Although these opportunities are typically intended to give victims an opportunity for self-advocacy in the criminal legal process, victim impact statements also serve as a summation of collective condemnatory sentiment against criminality.[84] And just as the victim's personal injury by criminality formed the basis of society's communal injury, the expressivism of victim impact

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82. Federally, for example, there is only a requirement that all parties, including defense counsel, the defendant, the prosecution, and any victims, be afforded an opportunity to be heard prior to imposition of sentencing. *See* FED. R. CRIM. P. 32(i)(4) ("Opportunity to Speak").

The same is typically true under state criminal procedure laws as well. *See, e.g.*, N.H. R. CRIM. P. 29(c)(1)–(2) (2025) (requiring, respectively, that in New Hampshire criminal courts "[b]oth the defendant and the State will be afforded the opportunity to address the court, call witnesses, and present evidence relevant to sentencing" and that "[t]he victim or next of kin of the victim shall be afforded the opportunity, where provided by law, to address the court prior to the imposition of sentence"); N.Y. CRIM. PROC. L. § 380.50(1) (McKinney 2025) (requiring New York criminal courts to, "[at] the time of pronouncing sentence . . . accord . . . an opportunity to make a statement" to the prosecution, defense counsel, and the defendant as well as either any victim or victim's representative).

83. On this point, consider the views of Dan K. Webb and Scott F. Turow, respectively writing then as United States Attorney and Assistant United States Attorney on sentencing advocacy by prosecutors:

> [T]he criminal justice system provides for punishment not simply as a means of visiting retribution on wrongdoers, or isolating them from the community, or even deterring such conduct in the future. It does so also as a means of allowing the community to join together in *condemning* misconduct and, perhaps most important, of assuring the members of the community who have resisted the impulses of violence and self-interest which commonly lead to crime, that their society values law-abiding behavior.

Dan K. Webb & Scott F. Turow, *The Prosecutor's Function in Sentencing*, 13 LOY. U. CHI. L.J. 641, 652 (1982) (emphasis added).

84. *See* Julian V. Roberts & Edna Erez, *Communication at Sentencing: The Expressive Function of Victim Impact Statements*, *in* HEARING THE VICTIM: ADVERSARIAL JUSTICE, CRIME VICTIMS, AND THE STATE 232, 236–37 (Anthony Bottoms & Julian V. Roberts eds., 2011).

statements can also serve as an expression of communal sentiment, one that is frequently condemnatory in nature.

Federal and state laws typically allow victims to deliver impact statements in order to inform the court's decision on sentencing and punishment.[85] These statements can serve various functions, including certain communicative functions that allow victims to speak directly to their victimizers "to provide information about the effect of the crime, and to communicate with the principal players in the proceeding," like judges and prosecutors.[86]

More commonly, the function of victim impact statements is to increase the punitiveness of the system both by offering victims an opportunity to express condemnatory sentiment (whether about the offender, the offense, or both) and to consequently make the legal system's condemnatory response more severe through increased punishment.[87] In fact, this result has prompted calls to reform or abolish victim impact statements on the basis that they infringe upon the due process rights of criminal defendants by unfairly prejudicing judges against them at sentencing.[88] Proponents of allowing victim impact statements counter these contentions by asserting that such statements do not unduly orient judges toward harsher punishments. Instead, they argue, such statements allow judges to impose sentences that are "commensurate with the harm inflicted on the victim," enabling them to formulate a punishment that is more appropriately tailored to both the

85. *See id.* at 232 (discussing how "victims acquired the right to provide input into sentencing and parole as early as the 1980s" in the United States and some other countries with adversarial legal systems).

86. *Id.* at 234.

87. *See id.* at 233–34 (discussing and comparing the punitive and non-punitive models of victim rights and their impact on how victim impact statements are conceptualized).

88. *Id.* at 235 (discussing criticisms against allowing victim impact statements, including that they may "be particularly moving for the judge, and may further enhance any aggravating effect on sentencing patterns"); *see also* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 365 (1996) ("[V]ictim impact statements are narratives that should be suppressed because they evoke emotions inappropriate in the context of criminal sentencing. Specifically, victim impact statements appeal to hatred, the desire for undifferentiated vengeance, and even bigotry.").

offense and the offender than would otherwise result in the absence of the victim's statement.[89]

Whatever the merits of each argument, the allowance of victim impact statements only further contributes to the criminal legal system's orientation toward punitive and condemnatory expression. Because victim impact statements are typically intended to provide information to sentencing judges about the harm experienced by victims, such statements are almost always condemnatory in sentiment.[90] In fact, the expression of condemnatory sentiment through victim impact statements is specifically designed to improve victim welfare by enabling them to participate in the criminal legal system's expressive

89. Roberts & Erez, *supra* note 84, at 235. Federal district judge Frederic Block writes about the utility of victim impact statements for judges by invoking sentiments expressed by his judicial colleague, Jack Weinstein:

> Victim impact statements and the sentencing desires of victims perform an important function in our modern criminal justice system. While a victim's reactions are not controlling, they are something that a judge must and should consider before imposing sentence. These statements serve three valuable purposes. First, they provide details about the seriousness of the crime. Second, they provide some indication of what punishment society deems appropriate. Finally, they allow victims to realize that they are important participants in the criminal justice process, thus preventing them from losing faith in the system and possibly turning to the dangerous course of self-help.

FREDERIC BLOCK, CRIMES AND PUNISHMENTS: ENTERING THE MIND OF A SENTENCING JUDGE 67 (2019).

90. The tendency for victim impact statements to be strongly condemnatory, particularly through their recounting of harm suffered by the victim, has led to considerable litigation over their constitutionality, with a slew of U.S. Supreme Court cases attempting—and struggling—to walk fine lines between upholding the rights of criminal defendants while facilitating the policy aims behind allowing such statements. *See* Booth v. Maryland, 482 U.S. 496, 509 (1987) (disallowing victim impact statements during the sentencing phase of death penalty cases as a violation of the Eighth Amendment); South Carolina v. Gathers, 490 U.S. 805, 811–12 (1989) (holding that victim impact statements may be admissible in death penalty cases only when they "relate[] directly to the circumstances of the crime"); Payne v. Tennessee, 501 U.S. 808, 827 (1991) (overruling the Court's holdings in *Booth* and *Gathers* to hold that victim impact evidence is admissible before sentencing juries in capital cases even where such evidence relates only to the victim's personal characteristics and the emotional impact of the crime committed against them).

functioning.[91] And although victims could, of course, use their victim impact statement to argue for leniency,[92] the asymmetric nature of victim impact statement delivery during criminal sentencing—whereby victims speak at defendants but where true communication between the two is not readily facilitated or even permitted—makes it a poor vehicle for expressing, at a systemic level, absolvent sentiment.[93] This limitation is very much in line with the condemnatory design of status quo criminal legal systems.

Instead, criminal sentencing laws typically require that judges make findings regarding the seriousness of the offense,[94] the personal history of the offender,[95] and the societal interests in punishment,[96]

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91. *See* Roberts & Erez, *supra* note 84, at 236 ("Beyond the symbolic recognition of victims in the criminal justice process, the expressive function of [victim impact statements] can help promote the welfare of crime victims" since the statements are "situated at a critical point in the criminal process, namely the ultimate disposition of the crime" where they may thus "precipitate beneficial reactions and serve various therapeutic ends.").

92. For a discussion of the myriad ways that victim impact statements can be used to argue for both leniency and greater punishment, see generally Paul G. Cassell, *On the Importance of Listening to Crime Victims . . . Merciful and Otherwise*, 102 TEX. L. REV. 1381 (2024).

93. *See* Roberts & Erez, *supra* note 84, at 234 ("In contemporary debates concerning the integration of victim input into criminal proceedings . . . victim *communication* is considered appropriate for restorative justice but not for retributive justice." (emphasis added)); DUFF, *supra* note 10, at 79–89 (discussing communicative theory and its foundation in two-way exchanges between criminal legal actors).

94. *See* Kelly Lyn Mitchell, *State Sentencing Guidelines: A Garden Full of Variety*, 81 FED. PROB. 28, 29 (2017) ("The two primary determinants of the sentence under sentencing guidelines systems are offense severity and criminal history.").

95. *Id.*

96. Federal law, for example, requires judges to consider "any pertinent policy statement" issued by the United States Sentencing Commission or memorialized in the United States Code before imposing a sentence. *See* 18 U.S.C. § 3553(a)(5). Punishment theory posits various additional interests, including deterrence, retribution, and rehabilitation, each of which can inform judicial determinations on how severe a punishment should be. *See* BROOKS, *supra* note 1, at 15–97 (discussing at length the traditional theories of punishment that are rooted in these societal interests).

Researchers have also offered compelling biologically rooted theories of punishment that suggest that punishment serves assorted evolutionary purposes intended to improve societal survival, like norm enforcement and maintenance of cooperative behaviors. *See, e.g.*, Daniel A. Levy, *Optimizing the Social Utility of Judicial Punishment: An Evolutionary Biology and Neuroscience Perspective*, 16 FRONTIERS HUM.

including society's interest in affirming the seriousness of certain offenses through punitive symbolism.[97] Judges must then expressly articulate the basis of their sentencing decision, which will push them toward describing and defending why their chosen sentence is appropriately condemnatory—neither excessively nor insufficiently so.[98]

Whatever the ultimate punishment, the fact of conviction, like a scarlet letter, stands as a public recognition of the inherent criminality of the conduct for which the person has been prosecuted. This recognition of criminality then infuses the imposed punishment with condemnatory effect since criminality, by definition, is condemnable. As such, fines, community service, and other "lesser" punishments are far more expressive in their condemnation than scholars like Kahan have suggested.[99] The performance of community service or the payment of a

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NEUROSCIENCE 1, 4–9 (2022) (discussing and comparing evolutionary motivations for punishment among both animals and humans).

The fact that societal interests play at least some role in sentencing is openly acknowledged by prosecutors, whose advocacy on sentencing is informed, at least in part, by such considerations. *See, e.g.*, Webb & Turow, *supra* note 83, at 651–52 (discussing the role of community values in shaping the sentencing advocacy of federal prosecutors in the Northern District of Illinois in the early 1980s, who sought to "provide an assurance to the community . . . that the system of justice is operating to seek out and, if appropriate, to punish those who have wronged the residents of that locale and, by extension, the community itself").

97. *See, e.g.*, TENN. CODE ANN. § 40-35-103(1)(B) (West 2025) (requiring that criminal sentences consider whether "[c]onfinement is necessary to avoid depreciating the seriousness of the offense").

98. *See, e.g.*, 18 U.S.C. § 3553(c) (stating that federal courts, "at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence").

Judge Frederic Block, in his book discussing sentencing by judges, describes clearly how judges are keenly aware of the expressive value of criminal sentencing. In discussing one case from his own docket involving an international human trafficking operation, Judge Block wrote the following about his thoughts prior to sentencing the operation's organizers: "We look upon these types of crimes amongst the most serious of crimes that can be committed. The violation of women, the disrespect for women, all of these issues are matters which we take quite seriously in this county and our laws reflect that. And a stiff sentence is required here in my opinion to send a clear message that these types of criminal conduct will not be tolerated under our laws." BLOCK, *supra* note 89, at 63.

99. In fact, contrary to the concern raised by Kahan that the civic virtue associated with community service may muddle condemnatory expression whenever

fine as a punishment cannot be decoupled from the conviction that resulted in that punishment, a conviction that itself has considerable expressive meaning. No one would, for example, celebrate as virtuous someone's community service when the service was imposed as a punishment. On the contrary, such punitive service would be seen as shameful, and therefore condemnatory, because of its compelled performance as a consequence of the person's underlying criminal conviction.[100]

The fact that convictions carry substantial expressive meaning is perhaps best evidenced by recent campaigns to redefine offenses so that their legal definitions better align with the commonly understood expressive meaning of their labels.[101] In 2024, for example, the state of New York reformed its laws governing sexual assault offenses by redefining "rape" to include conduct that had previously been categorized under state law as a "criminal sexual act."[102] Critically, the reform

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community service is imposed as punishment, others have raised the opposite concern: that the use of community service as a punishment has blemished its standing as a civic virtue. *See, e.g.*, Eric Liu, *Why Community Service Should Not Be A Punishment*, TIME (June 12, 2012), https://ideas.time.com/2012/06/12/why-community-service-should-not-be-a-punishment ("Imagine if we required *voting* as a form of punishment for low-grade criminals. That seems not just strange but corrosive, even sacrilegious. Civic responsibility—being a grown-up who contributes and doesn't just take—should be neither bought with carrots nor used as a stick." (emphasis added)).

100. The stigmatic association between community service and its compulsory performance has been used to argue against mandatory community service in other contexts as well. In 2004, for example, Congressman Gregory Meeks argued against community service requirements for persons receiving federal public housing assistance on the basis that such requirements stigmatize aid recipients. *See* Gregory W. Meeks, *The Community Service Stigma*, GOTHAM GAZETTE (Aug. 9, 2004), https://www.gothamgazette.com/open-government/2516-the-community-service-stigma.

101. *See, e.g.*, A.B. 1171, 2021–22 Gen. Assemb., Reg. Sess. (Cal. 2021–22), https://legiscan.com/CA/text/AB1171/id/2436383 (repealing the spousal exclusion from the state's rape laws).

102. *See* A.B. A3340, 2023–24 Gen. Assemb., Reg. Sess. (N.Y. 2023–24), https://www.nysenate.gov/legislation/bills/2023/A3340 (amending the definition of the state's rape laws to include non-penetrative sexual contact and repealing provisions that previously categorized such conduct as a "criminal sexual act"); A.B. A8558, 2023–24 Gen. Assemb., Reg. Sess. (N.Y. 2023–24), https://www.nysenate.gov/legislation/bills/2023/A8558 (making conforming amendments to the laws reformed under A.B. A3340).

did not change how such offenses were punished.[103] Instead, the reform only addressed the definition of rape by expanding its meaning to include multiple forms of sexual contact and not just those involving penetration, as the offense had previously been defined.[104] The reform was enacted in response to various instances where alleged rapes had resulted in expressively "lesser" adjudications—both civilly and criminally—that labelled the underlying acts as something other than rape.[105] The changes enacted under the reform sought to re-align the legal definition of these offenses with common understandings of their meaning. As described by one supporter, "this legislation updat[ed] outdated language in our laws to call these horrific crimes what they are—rape—and ensur[es] that survivors of sexual assault are able to seek justice."[106] Additionally, other supporters remarked that "[w]ords have power" and that, by enacting this reform, "the legislature will more closely align our laws with the experiences of sexual assault

103. *See* A.B. A3340, 2023–24 Gen. Assemb., Reg. Sess. (N.Y. 2023–24), https://www.nysenate.gov/legislation/bills/2023/A3340 (leaving unchanged the felony classifications for each amended rape offense, which determine the range of available sentencing options for them).

104. *Id.*

105. In a memorandum detailing their justification for proposing these reforms, the bill's sponsor cited the case of Police Officer Michael Pena, who had committed forcible sodomy but who was ultimately convicted of sexual assault instead of rape because of how those offenses were defined at the time. Catalina Cruz, *Memorandum in Support of Legislation*, N.Y. STATE ASSEMB., https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A03340&term=2023&Memo=Y (last visited Sep. 21, 2025). As stated by the bill sponsor, "[c]ommon sense dictates that what happened to the victim in this case is rape." *Id.* Upon signing the reform into law, New York state Governor Kathy Hochul cited the civil case launched by E. Jean Carroll against Donald Trump, which ended with a civil adjudication in favor of Carroll but one that fell short of recognizing that the then-former president had raped her. *See* Maysoon Khan, *New York Expands the Legal Definition of Rape to Include Many Forms of Nonconsensual Sexual Contact*, ASSOCIATED PRESS (Jan. 30, 2024, at 15:49 CT), https://apnews.com/article/new-york-rape-law-governor-hochul-50e5f9d35b1a7e26881db616a787b45a.

106. *New York State Assembly Passes Rape is Rape Act, Clearing the Way for Governor Hochul's Signature*, N.Y. STATE ASSEMB. (Jan. 29, 2024), https://nyassembly.gov/Press/?sec=story&story=108933 (quoting Assembly Speaker Carl E. Heastie).

survivors."[107] Certainly, none of this is to assert that convictions, by themselves, fully satisfy the expressive function of the criminal legal system. But they do contribute substantially to the system's expressiveness, which helps explain why punitive systems have endured and prevailed over alternatives.

D. Parole as Expression

The criminal legal system's orientation toward condemnatory expression is arguably most nakedly apparent well beyond sentencing, often years or even decades later, when the system turns its attention to the question of whether someone should be granted parole and released earlier than the maximum term of their prison sentence. Formally, these decisions typically center on whether a person would recidivate or pose a danger to the community if released early.[108] In practice, parole determinations can be largely divorced from the question of public safety risks[109] and can instead be predicated on other, often retributive and condemnatory factors.[110] This includes expressivist considerations

107. *Id.* (quoting, respectively, former New York State Assembly Member Aravella Simotas, who originally proposed these reforms, and Liz Roberts, CEO of Safe Horizon, the largest provider of victim services in the United States).

108. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-125 (West 2025) (basing parole eligibility on whether "(1) it appears from all available information . . . that there is reasonable probability that [an] inmate will live and remain at liberty without violating the law and (2) such release is not incompatible with the welfare of society").

109. *See, e.g.*, Lauren Gill, *In Alabama, an "Out of Control Board" Cuts Chances for Parole*, BOLTS MAG. (Nov. 28, 2023), https://boltsmag.org/alabama-parole-board (discussing how parole grants in Alabama plummeted from 53% in 2018 to around 10% in 2022 despite 80% of parole applicants having met the risk requirements for parole under the state's risk assessment tool); Lauren Gill, *Parole Plunges in South Carolina as Governor-Appointed Board Issues Denial After Denial*, BOLTS MAG. (June 3, 2024), https://boltsmag.org/parole-plunges-in-south-carolina (discussing how parole grants in South Carolina declined from around 40% in 2018 to 7% in 2023 despite low recidivism and public safety risks, and how similar trends have been seen in eighteen of twenty-seven surveyed states according to a study by the Prison Policy Initiative).

110. *See, e.g.*, Lauren Gill, *Sentenced to Life Without Parole at 17 and Denied Freedom at 52*, APPEAL (Aug. 7, 2019), https://theappeal.org/alabama-life-without-parole-denied-freedom-supreme-court (discussing the Alabama attorney general's opposition to parole for a 52-year-old man convicted of murder as a minor despite "uncontradicted evidence" of his rehabilitation because "[a]n early release would defeat

over how early release would promote or undermine the administration of justice through the symbolic meaning attached to a person's parole.[111]

This trend has become particularly pronounced since the 1980s, when crime victims and their families were first granted the opportunity to participate in the parole process by submitting either written or oral testimony before parole boards.[112] While available data reveals that relatively few victims choose to participate,[113] whenever they do participate the result tends toward continued incarceration over release, largely as a result of the condemnatory testimony offered by victims or their next of kin.[114] This occurs despite the fact that victims and their proxies rarely have or offer information that is relevant to the law's central inquiry concerning a potential parolee's rehabilitation or any ongoing threat of dangerousness.[115] Instead, victim participation in parole hearings largely serves an expressivist function that is considered

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the retribution purposes of the State's penal system and would undermine the overall goal of incarceration").

111. *See, e.g.*, Isabela Dias, *Under Glenn Youngkin, Parole in Virginia Has Nearly Vanished*, BOLTS MAG. (May 20, 2024), https://boltsmag.org/virginia-parole-nearly-vanished-glenn-youngkin (reporting on the decline of parole grants in Virginia to 1.6% of applications in 2023—down from around 6% between 2014–2018—and how the state parole board is, according to the Governor's office, "guided by policies that prioritize the voices of victims before any decision is made to release violent offenders back on the street").

112. *See* Catherine C. McVey, Edward E. Rhine & Carl V. Reynolds, *Modernizing Parole Statutes: Guidance from Evidence-Based Practice*, ROBINA INST. OF CRIM. L. & CRIM. JUST. 8 (2018), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-02/parole_ebp_report.pdf.

113. *See id.*; Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME & JUST. 347, 361–63 (2009) (discussing research indicating low submission rates by victims for impact statements at sentencing, which suggests a comparably low submission rate for statements at parole).

114. *See* Roberts, *supra* note 113, at 396–97 (summarizing available research on the effect of victim participation in parole hearings and finding that such participation was far more predictive of punitive outcomes at that stage than similar testimony when submitted at sentencings).

115. *See id.* at 364 (discussing survey-based research that reveals strongly expressivist reasons for victim participation in sentencing and parole hearings over more utilitarian motivations regarding sentence length).

indispensable to the integrity and legitimacy of the parole process.[116] This function operates similarly to the victim impact function at sentencing, allowing victims or their loved ones to reaffirm the condemnatory sentiments they associate with the potential parolee or their offenses without necessarily determining the outcome of the proceedings.

Although requirements and allowances for victim impact testimony vary across jurisdictions,[117] participation in parole hearings frequently enables victims to discuss their concerns regarding their safety if a person is released; any recidivist threat posed by the subject of the hearing; the victim's opinion on whether release should be granted; and, broadly, any information that the victim themselves believes may be relevant to a parole board's determination on release.[118] With these broad allowances, participating victims commonly submit testimony that, like similar testimony at sentencing, expresses condemnatory sentiment that can evoke a punitive response by the adjudicating body. In fact, although there are fewer studies on the impact of victim testimony at parole hearings than those delivered at sentencing, the available findings strongly indicate that testimony at parole has a far greater impact on release determinations than on sentencings and is a strong predictor of parole denials.[119]

And yet, victim surveys suggest that these kinds of punitive outcomes may not be the primary reason that victims offer their testimony. One study found that victims more commonly cited expressive, rather than instrumental, reasons for why they submitted testimony in

116. *See* Noah Epstein, Note, *An Uncertain Participant: Victim Input and the Black Box of Discretionary Parole Release*, 90 FORDHAM L. REV. 789, 808 (2021) (discussing how parole board members commonly "support the unrestricted participation of victims because it confers a procedural and moral legitimacy on the hearings" and because "it appears fundamentally wrong not to allow victims to express their emotions when inmates who caused them such distress might be released back into society," thus "confer[ring] procedural integrity" to the parole process by facilitating an expressive role for victims (citations omitted)); *see also* Roberts, *supra* note 113, at 363–64 (discussing the diverse reasons that victims participate in parole hearings but noting expressive motivations as modal).

117. *See* Roberts, *supra* note 113, at 387 ("As with sentencing, victim input arrangements vary considerably across different jurisdictions . . . .").

118. *Id.* at 387–92 (surveying the varied practices of different parole boards from across the Anglo-American legal tradition regarding the substance of victim impact testimony).

119. *See id.* at 396–97 (summarizing multiple studies).

criminal sentencings, in part because they did not know whether their testimony would impact a court's determination.[120] These findings are consistent with other studies that have found similar motivations within other researched victim groups.[121] And while studies on the motivations of victims participating specifically in parole hearings are comparably sparse, victims likely would not differentiate substantially between the two stages when deciding whether to participate in one versus the other, as suggested by proposed parole reforms that would make the distinctions between the two stages more clear to victims before they submit their testimony.[122] This likelihood suggests that studies concerning victim participation at sentencing and their expressivist motivations for doing so are generalizable to victim participation at parole hearings.

E. The Gestalt as Expression

From the initiation of criminal legal proceedings to their ultimate disposition, the criminal legal system facilitates its expressivist function in multiple ways and at multiple stages. It does so first by centering questions of harm, blameworthiness, and guilt in its substantive adjudications. It then continues by repeatedly reaffirming the symbolic value of criminal legal processes, including by facilitating victim participation despite its debated adjudicative value. Thus, by its very design, the criminal legal system functions to promote its condemnatory ends through its expressively condemnatory means.

When weighing the comparable expressive values of punishments and their alternatives, it is important to note how, and how much, the values of those outcomes are shaped by their underlying processes. In the case of the criminal legal system, it should be plain that its expressively condemnatory outcomes are determined not just by their

120. *See id.* at 363–64 (citing FIONA LEVERICK, JAMES CHALMERS & PETER DUFF, CRIME AND CRIMINAL JUSTICE: AN EVALUATION OF THE PILOT VICTIM STATEMENT SCHEMES IN SCOTLAND 48 (2007)).

121. *See id.* at 364.

122. S*ee* McVey, Rhine & Reynolds, *supra* note 112, at 8–9 (recommending reforms to the parole process that would emphasize to victims the "forward-looking" purpose of parole hearings and would frame victim impact testimony as informing only "safety concerns and protective measures" for victims in the event of a person's release).

substance, but by the continual reaffirmation of condemnatory sentiment and symbolism throughout the criminal legal process. The result is an expressively rich punitive outcome that serves well its condemnatory purpose, a fact that any alternative to punishment must contend with in order to be compelling enough to supplant punitive regimes.

IV. NON-PUNITIVE EXPRESSION

Like those of punitive legal systems, the designs of non-punitive systems are suffused with expressive sentiment and purposefully structured to affirm and continually reaffirm that sentiment. And like those of punitive systems, the processes of non-punitive systems culminate in a substantive outcome intended to reflect that system's underlying expressive sentiment. Such designs give meaning to the procedures and rituals of their systems while serving to increase the expressive value of their outcomes. Thus, just as the expressive value of punishment is shaped and amplified by the processes that generate it, so too are the absolvent outcomes of non-punitive systems shaped and amplified by their respective processes.

Although there is no universal design for non-punitive systems—such systems have, for example, been constructed to remediate the effects of local crime[123] and adjudicate systemic international human rights violations,[124] among other applications—non-punitive systems do share core commonalities that inform their philosophies and practices. These commonalities include an emphasis on non-punitive logics that are "positioned in diametric opposition to retributive and punitive philosophies and practices"[125] and, by extension, express

123. *See* WESLEY CRAGG, THE PRACTICE OF PUNISHMENT: TOWARDS A THEORY OF RESTORATIVE JUSTICE 139, 166 (1992) (discussing how "reparative justice presents itself . . . as an attractive sentencing orientation" for criminal enforcement to the extent it builds the public's "continued confidence in the capacity of the law to fulfil its function").

124. *See generally* Daniel W. Van Ness, *Restorative Justice and International Human Rights*, *in* RESTORATIVE JUSTICE 121, 134 (Theo Gavrielides ed., 2015) (conceptualizing a restorative justice-based framework for international human rights violations that, in part, helps "victims and offenders reintegrate").

125. Thalia González, *Restorative Justice Diversion as a Structural Health Intervention in the Criminal Legal System*, 113 J. CRIM. L. & CRIMINOLOGY 541, 574 (2023) (describing a core tenet of restorative justice while acknowledging that "there is no formal uniform definition of restorative justice in criminal systems").

assorted absolvent and non-condemnatory sentiment. Thus, even though non-punitive systems endeavor to achieve accountability for otherwise condemnable acts and the harms they produce, these systems continually orient themselves and their participating actors away from condemnation and retribution as both means and ends. Rather, the goals of non-punitive systems emphasize non-condemnatory outcomes like reparation, reconciliation, and reintegration.

Complicating the effort here to articulate the expressive function of non-punitive criminal systems is the fact that such systems most commonly "function[] as a therapeutic adjunct to prosecution that seek[] to promote offender 'accountability' and victim healing,"[126] rather than as a true alternative operating outside the bounds of status quo criminal legal systems. Those who participate in non-punitive systems like restorative justice frequently do so within conventional criminal legal processes, either after they have commenced or after they have concluded.[127] This explains why restorative justice programs are most commonly found within prisons or as alternatives to incarceration overseen by the police and prosecutors rather than as standalone alternatives to existing criminal legal processes.[128] As noted by Eve Hanan, "[a]s it is currently formulated, restorative justice is a sentencing theory, and one that may be beneficial to our system of criminal justice, but one that does not offer an alternative to that system."[129] Nonetheless, while

126. M. Eve Hanan, *Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation*, 46 N.M. L. REV. 123, 125 (2016).

127. *See* González, *supra* note 125, at 576–78 (describing how "[w]ithin the criminal legal process, restorative justice diversion occurs in three main categories: pre-arrest, pre-charge, and post-charge" and summarizing how such diversion operates at each phase).

128. *See* Don Clairmont, *Penetrating the Walls: Implementing a System-Wide Restorative Justice Approach in the Justice System*, *in* NEW DIRECTIONS IN RESTORATIVE JUSTICE 245, 247–48 (Elizabeth Elliott & Robert M. Gordon eds., 2005) (recounting how "alternative justice" systems were initially "discredited by academic research and criminal justice system practitioners as being ineffective, inefficient and of limited value for larger goals of justice" before resurging in popularity as conventional criminal systems faltered in their aims).

129. Hanan, *supra* note 126; *see also* González, *supra* note 125 (discussing how access to restorative justice diversion is largely controlled by law enforcement and criminal courts); Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1152 (2020) [hereinafter González II] (discussing how "[t]he current restorative justice scheme offers an important alternative to the status quo but, in its present form, should not be viewed as a ready-made solution to

existing non-punitive systems may be far from reaching full maturity,[130] they remain, at least conceptually, ripe for expressivist analysis. For simplicity, the analysis presented here will focus on expressivism within restorative justice practices since systems rooted in restorative justice theory are more prevalent than other non-punitive theories and methodologies.[131]

Multiple procedural frameworks exist for restorative justice-based practices,[132] but a common model emphasizes reconciliation between victims and offenders through sustained and controlled dialogue between the two. Unlike punitive criminal legal systems, which position victims and offenders as adversaries working toward typically irreconcilable ends, restorative justice is a "consensual process" that

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contemporary justice issues," but that restorative justice laws may nonetheless offer "a basic infrastructure from which to begin radically reorienting the criminal justice system, and hopefully, by extension, society").

130. *See* Adriaan Lanni, *Meeting the Challenges of Scaling Up Restorative Justice in the United States*, *in* RESTORATIVE JUSTICE AT A CROSSROADS 149, 151–54 (Giuseppe Maglione, Ian D. Marder & Brunilda Pali eds., 2024) (discussing the comparatively tiny number of people diverted to restorative justice programs in the United States and the significant logistical implications of scaling those programs to systemic maturity, including the likely need to professionalize and institutionalize restorative justice programs and providers).

131. Given their shared values and aims, it can be difficult to distinguish between non-punitive systems. Compounding this difficulty is the frequency with which terms like "restorative justice" are used as catch-all umbrella terms for any non-punitive approach to justice. Nonetheless, other potential non-punitive alternatives beyond restorative justice may include those rooted in mediation or non-adversarial systems of adjudication and dispute resolution, which are most commonly seen in the civil context. Within criminal systems, distinctions can also be made between systems that seek to adjudicate or respond to criminality and those that seek to prevent it. *See, e.g.*, Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1164–67 (2015) (discussing preventive justice and its intersections with, but fundamental separation from, "penal projects" and "individualized criminal targeting").

132. *See* González II, *supra* note 129, at 1160–61 (finding that "there is no universal form, practice, or process of restorative justice across the [United States]," but that "[d]isaggregated data indicates that the most commonly codified forms of restorative justice are victim-offender conferencing, mediation, and dialogue, followed by impact panels and family group conferencing").

"considers that crime constitutes a conflict between an injured person and an offender" that is, ultimately, reparable.[133]

As described by Daniel Van Ness, a noted restorative justice practitioner and researcher, this process of dialogue involves five key elements: meeting, narrative, emotion, understanding, and agreement.[134] These elements capture both the conceptual ingredients of many restorative justice regimes as well as their processes. Through dialogue, victims and offenders first meet, often with the help of a third-party facilitator, and then discuss what happened between them and the impacts of those occurrences.[135] During these discussions, participants on both sides earnestly share their emotions concerning the circumstances that led to the need for reparation and, through that exchange, develop a shared understanding that retrospectively examines each participant's history and prospectively identifies next steps toward healing.[136] The participants then apply their mutual understanding to come to an agreement on practical steps for reconciliation.[137]

Naturally, the focus on dialogue as a means for attaining restorative justice aligns restorative justice practice with communicative theory, which posits that accountability and the legitimacy of justice outcomes derive from literal communication between and among system actors, including victims and offenders.[138] However, the structural framework of these practices is symbolically representative of the nonpunitive sentiments and logics that drive the system's reparative work, making its overall design fundamentally expressivist. The legitimacy of this framework derives not simply from what it enables participants to do, but also from its symbolic alignment with social norms governing accountability for criminal wrongs.

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133. Serge Brochu, *Restorative Justice and the Morality of Law*, *in* PUNISHMENT, RESTORATIVE JUSTICE AND THE MORALITY OF LAW 79, 85–86 (Erik Claes, René Foqué & Tony Peters eds., 2005).

134. Daniel W. Van Ness, *The Shape of Things to Come: A Framework for Thinking About a Restorative Justice System*, *in* RESTORATIVE JUSTICE: THEORETICAL FOUNDATIONS 1, 3 (Elmar G. M. Weitekamp & Hans-Jürgen Kerne eds., 2011) ("While not all restorative programmes involve encounters [between victims and offenders], the importance of this feature of restorative justice is substantial, and clearly influences restorative programmes.").

135. *Id.*

136. *Id.* at 3–4.

137. *Id.* at 3.

138. *See* DUFF, *supra* note 10, at 79–80.

Most visibly, the dialogue-based approach of restorative justice puts victims and offenders on comparable—even if not entirely equal—footing with one another, whereby the two sides work toward a common goal, albeit with the understanding that offenders owe a personal debt of sorts to those they have harmed.[139] The owing of this debt then makes offenders responsible for identifying and adhering to a plan for compensation to those they have harmed, the details of which are determined in cooperation with those very people or their representatives.[140] This contrasts, purposefully, with the adversarial relationship imposed on victims and offenders by status quo criminal legal systems, which leverage the harm suffered by victims as the basis for seeking societal reprobation against the offender. In doing so, status quo systems silo victims and offenders from one another, placing them into a much more passive, decentralized role compared with their positions within restorative justice frameworks.[141]

Howard Zehr, a preeminent restorative justice thinker, contrasts restorative justice frameworks from status quo criminal legal frameworks by distinguishing their fundamental processes at a high level. He defines the restorative justice process as "involv[ing], to the extent possible, those who have a stake in a specific offense and to collectively

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139. As described by Andrea Goldblum:

> The main principles of RJ in general involve a shift in the paradigm of how we look at offenses or crimes. Instead of crimes being considered violations of laws or the state, they are considered violations of people, relationships, and community. RJ considers that these violations create obligations, the greatest of which is to identify and repair the harm. This is accomplished, to whatever extent possible, by holding offenders directly responsible to those harmed, rather than or in addition to the state.

Andrea Goldblum, *Restorative Justice from Theory to Practice*, *in* REFRAMING CAMPUS CONFLICT: STUDENT CONDUCT PRACTICE THROUGH A SOCIAL JUSTICE LENS 140, 141 (Jennifer Meyer Schrage & Nancy Geist Giacomini eds., 2009).

140. *See id.*

141. *See* CRAGG, *supra* note 123, at 141 ("The criminal law places the state between the offender, his victim, and the public," one effect of which is to "isolate offenders, making it more difficult for them to repair the harm their actions have caused and win back the confidence of those whose trust has been shaken."); *see also id.* ("By interposing itself between offenders and those they have offended against, the state blocks direct dialogue," and, as such, "[v]ictims are left to inform themselves," which "can easily distort public perceptions of what counts as an adequate remedy for particular offences.").

identify and address harms, needs and obligations, in order to heal and put things as right as possible."[142] According to Zehr, the focus then shifts toward addressing three questions: "What is the harm that has been done? How can that harm be repaired? [And] [w]ho is responsible for the repair?"[143] As described by Andrea Goldblum, these questions are "in contrast to the questions implicitly or explicitly asked in criminal justice, including: What law was broken? Who broke it? How should the offender be punished?"[144]

This paradigmatic shift toward reparation and away from punishment orients the expressive message of restorative justice accordingly. When implemented maximally, restorative justice systems strive toward the symbolic expression of their underlying absolvent sentiment through both their processes and substantive outcomes. Just as the assorted stages, processes, and adjudications of the criminal system are rooted in condemnatory expression, the procedural and substantive components of restorative justice are rooted in absolvent expression. To illustrate this point, consider the conceptual framework offered by Daniel Van Ness, who argues that a fully restorative system would contain nine critical components:

> *meeting* of the parties;
> *communication* between the parties;
> *agreement* by the parties;
> *apology* by the offender;
> *restitution* to the victim;
> *change* in the offender's behaviour;
> *respect* shown to all the parties;
> *assistance* provided to any party that needs it; and
> *inclusion* of the parties.[145]

These components describe not only the procedural steps and substantive outcomes of a maximally restorative system, but also the values that undergird the restorative process. The intended result is a system that puts its value system into direct practice, both in

142. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 37 (2014).

143. Goldblum, *supra* note 139, at 142; *see also* ZEHR, *supra* note 142, at 37 (defining the goals of restorative justice).

144. Goldblum, *supra* note 139, at 142.

145. Van Ness, *supra* note 134, at 6.

furtherance of its specific reparative aims but also in purposeful symbolic contrapose to punitive systems and their condemnatory orientation. As summarized by Van Ness, "[i]n restorative systems, the values and principles of restorative justice sufficiently predominate and competing values and principles are sufficiently subordinate that the system's processes and outcomes are highly restorative."[146] Anything less would result in a system that, necessarily, becomes less restorative, since within restorative systems, the process, and not just the outcome, is part of the restoration.[147]

Given the relative infancy of restorative justice systems when compared to the full maturity of status quo criminal systems, it can be challenging to make a one-to-one comparison between the two. For example, the fact that restorative justice is most commonly pursued alongside, within, or immediately following the conclusion of prevailing criminal processes can both muddle the expressivist meaning of its operative components and leave unanswered the question of how a truly independent restorative system would operate. Some lingering questions on these matters include: whether restorative justice implemented within a prison setting still expresses some level of condemnatory sentiment; what arrest, adjudication, conviction, and sentencing—or at least their procedural analogues—look like in a purely restorative system; and whether the change in the expressivist meanings of these processes and the system as a whole would suffice to address their associated ills. But despite these open questions, restorative justice frameworks of accountability are clear in their intent to stand separate and apart from punitive frameworks that center retribution and condemnatory expression. As such, restorative frameworks carry substantial non-punitive expressive meaning. But is this meaning enough to overthrow the predominance of punitive systems of accountability?

146. *Id.* at 17.

147. *See id.* at 6–17 (discussing how the "restorative character" of a system may be assessed by evaluating the extent to which it includes all the necessary components for maximal restoration and reparation). The notion that the process is part of the reparation within restorative systems again stands in stark contrast to punitive systems where the saying "the process is the punishment" has become a common descriptive refrain. For a seminal exploration of this issue, see generally MALCOLM M. FEELY, THE PROCESS IS THE PUNISHMENT (1979) (discussing how the frequently Kafkaesque operation of status quo criminal legal systems is part of its punitive design and that the criminal legal process itself, and not just the formal sentence it generates, is part of the punishment it metes out).

The next section explores this question and argues that the answer lies in just how well restorative systems express communal sentiment—whether condemnatory or absolvent—regarding criminality and the societal harms that it generates.

V. PUNISHMENT'S (IN)EVITABILITY

The viability of any criminal system, whether expressively condemnatory or absolvent, depends substantially on its ability to fulfill its expressive purpose. Certainly, other factors also matter, including its equitableness, efficacy, and cost efficiency. But, to the extent that criminal systems are reflective of the societies that bear them and depend on such reflectiveness for legitimacy, perhaps no factor approaches the kind of existential importance as a system's expressive orientation.[148] This importance is evidenced by the continual changes that occur in criminal legal systems in response to new societal demands, changes that are made in large part to maintain these systems' standing as legitimate public institutions. And while many factors can prompt change within criminal systems, it is defensible to argue that no factor would

148. The centrality of a criminal system's expressive meaning to its character is evoked by the refrain, commonly quoted in reformist and abolitionist literature, that "[t]he degree of civilization in a society can be judged by entering its prisons." Ilya Vinitsky, *Dostoyevsky Misprisioned: "The House of the Dead" and American Prison Literature*, L.A. REV. OF BOOKS (Dec. 23, 2019), https://lareviewofbooks.org/article/dostoyevsky-misprisioned-the-house-of-the-dead-and-american-prison-literature. Although the origins of this statement remain undetermined, its continued salience to the conversation on criminal systems supports expressivist explorations of criminal systems since expressivism explains so much of a system's design. *See id.* (discussing the statement's apocryphal attribution to Fyodor Dostoevsky and its frequent appearance in anti-carceral messaging).

Historical evidence for expressivism's centrality within the American criminal legal tradition is provided by Alexis de Tocqueville's famed observations of the then uniquely American approach to criminal justice, in particular as contrasted with the approach taken in continental Europe at the time. Whereas, according to Tocqueville, "[i]n Europe, the criminal is an unfortunate who fights to hide his head from the agents of power; the population in some way assists in the struggle. In America, he is an enemy of the human race, and he has humanity as a whole against him." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 91 (Harvey C. Mansfield & Delba Winthrop eds. and trans., U. Chi. Press 2000) (1835). Condemnatory expression has thus infused itself into the American criminal legal design from its earliest days, as would be expected within any democratic society oriented toward criminal condemnation.

be more transformative, at least within democratic societies, than a change in a society's expressive orientation on criminality and criminal response. This would explain why punishment has remained so central to criminal legal systems for so long despite the problems associated with punitive accountability. At the same time, it also reveals a path for future transformation away from punitive accountability toward *something else*, something expressively different and, therefore, distinct from prevailing criminal systems. This section examines punishment's expressive utility to explain its longstanding durability and how that durability may fade as societal expressivist norms change.

A. Punishment's Durability

For all their faults, status quo criminal systems do at least one thing quite well: they afford multiple opportunities to fulfill their expressively condemnatory purpose. As detailed in Part III, predominant criminal systems enable system actors like judges, prosecutors, juries, and victims to center condemnation as the system's primary area of focus, largely to the exclusion of any form of non-condemnatory expression. Even when system actors disagree on the degree of punishment to administer to a guilty defendant, these disagreements tend to contest only the severity of punishment and not whether punishment is to be imposed at all. After all, even relatively nominal punishments come with some level of consequent "hard treatment," like social stigma[149] or diminished legal status.[150]

149. *See generally* Elaina R. McWilliams & Bronwyn A. Hunter, *The Impact of Criminal Record Stigma on Quality of Life: A Test of Theoretical Pathways*, 67 AM. J. CMTY. PSYCH. 89 (2021) (discussing how perceived stigma of people with criminal convictions was a significant predictor of assorted negative impacts on such people, including reduced quality of life and social withdrawal).

150. The Council of State Governments Justice Center maintains the National Inventory of Collateral Consequences of Conviction, which tracks hundreds of state and federal collateral consequences that can attach to criminal convictions separate from the de jure criminal punishment itself, including those that adversely impact employment, immigration status, state and federal licensing for specialized trades, and assorted civil rights and privileges like voting and drivers' licenses. The Inventory can be accessed at *Collateral Consequences Inventory*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.nationalreentryresourcecenter.org (last visited Sep. 1, 2025).

These characteristics lend themselves to a system that stands as a powerful symbol of public reprobation against criminality, allowing for the reinforcement of related norms that demand the condemnation of criminality as a social imperative and the elevation of law abidance as a social virtue.[151] Thus, for as long as these norms are widely held, societally reflective criminal systems will remain oriented toward condemnation and condemnatory expression. In fact, as indicated by global histories of punishment, predominant criminal systems are—and remain—socially and politically legitimate precisely because they enable and reflect a socially calibrated level of condemnatory expression.[152]

One historical instance of this kind of social calibration occurred during the so-called Victims' Rights Movement, spurred in part by the constitutional criminal procedure revolution of the 1960s and 1970s when the U.S. Supreme Court expanded considerably the procedural rights of criminal defendants at the purported expense of crime victims.[153] These changes, which included protections against unreasonable searches and seizures by the police,[154] notice of constitutional rights prior to custodial interrogations,[155] and the abolition of the death penalty,[156] fed into a political narrative that the criminal legal system was "soft on crime," that societal respect for law and order was in substantial decline, and that crime victims were being subordinated.[157]

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151. This is, of course, in addition to the retributive and communicative purposes of status quo criminal legal systems, which are also greatly served by this design.

152. *See, e.g.*, MITCHEL P. ROTH, AN EYE FOR AN EYE: A GLOBAL HISTORY OF CRIME AND PUNISHMENT 107–10 (2014) (offering a historical overview of the transformations of global penal systems over the past few centuries and the social changes that spurred them); *see also id.* at 108 ("Along with parallel developments in policing, reformed judicial systems and legal codes, the emergence of the modern prison signalled the materialization of a new societal order that was much less enamoured with bloody displays of exhibitory punishments.").

153. *See* MICHAEL VITIELLO, THE VICTIMS' RIGHTS MOVEMENT 11–13 (2023) (discussing the origins of the Victims' Rights Movement and its galvanization in response to the marquee criminal procedure decisions of the Warren Court, including *Mapp v. Ohio*, *Miranda v. Arizona*, and *Furman v. Georgia*).

154. Mapp v. Ohio, 367 U.S. 643, 655–56 (1961).

155. Miranda v. Arizona, 384 U.S. 436, 495–99 (1966).

156. Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

157. *See* VITIELLO, *supra* note 153, at 11.

This rhetoric helped recharacterize public perception of the criminal legal system at the time, resulting in the widespread impression that the system was no longer oriented toward the condemnation of criminality, but rather its coddling. As described by historian Julilly Kohler-Hausmann, "[b]y the 1980s, the notion that sentencing policy might address 'root causes' of crime or help reintegrate prisoners into society was branded as permissive and 'soft' and therefore politically untenable."[158] The result was that "[t]oughness in criminal sentencing policy became politically essential."[159] Among the views that undergirded this new political era was the view that constitutionally rooted changes to the criminal legal order rendered the system insufficiently responsive to the voices and needs of society, which, according to victims' rights advocates, demanded greater, not lesser, condemnatory action.[160] The result was a political agenda that demanded greater victim representation in criminal proceedings, a retrenchment of due process protections for criminal defendants, and more severe penalties for criminal violations,[161] an agenda that largely succeeded despite early doubts about the efficacy of such policies in addressing crime.[162]

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158. JULILLY KOHLER-HAUSMANN, GETTING TOUGH: WELFARE AND IMPRISONMENT IN 1970S AMERICA 250 (2017).

159. *Id.*

160. *See* VITIELLO, *supra* note 153, at 13 (discussing the views of certain members of the Task Force on Violent Crime, created by U.S. Attorney General William French Smith, which included "distrust [of] career prosecutors as well as experts [who were seen as] not sufficiently responsive to the voice of the silent members of society").

161. *See id.* at 13–18 (discussing the policy agendas of prominent victims' rights groups like the Crime Victim's Legal Advocacy Institute, Inc. and the National Organization for Victim Assistance); *see also* James O. Finckenauer, *Crime as a National Political Issue: 1964–76: From Law and Order to Domestic Tranquility*, 24 CRIME & DELINQ. 13, 15–17 (1978) (discussing the political platform of 1964 Republican presidential candidate Barry Goldwater, which was predicated on his view that "law and order were being sacrificed 'just to give criminals a sporting chance to go free,'" and which staunchly opposed the recognition of expanded constitutional rights for criminal defendants).

162. *See* Finckenhauer, *supra* note 161, at 15 ("[I]t was not crime per se that became an issue in the 1960s, but rather 'law and order.'"); *see also id.* at 18–19 (discussing criticisms against Barry Goldwater's tough-on-crime agenda as being "phony" and unresponsive to the root causes of crime such as civil inequality, homelessness, and poverty).

These campaigns achieved political success largely because they tapped into the collective consciousness of a wide swath of the voting public who feared not so much the actual changes to status quo legal regimes, but rather what those changes represented symbolically. For example, opponents of progressive crime control strategies like reintegrative social servicing for former offenders frequently attacked these strategies for their symbolic inversion of the social order. Some "insisted that attending to 'root causes' emboldened and coddled criminals."[163] Others argued that "[i]t is time we become less concerned with the rights of the criminal, and more concerned with the rights of the innocent victims."[164] And yet others questioned whether political leadership was "getting soft" by concerning itself more with "the welfare of our prisoners, (bums, radicals, etc, etc,) then [sic] us who are trying to make a [sic] honest living."[165] So even if progressive criminal law and policy had been proven effective at addressing concerns about crime, their inadequacy in expressing symbolic condemnation toward criminality and their perceived inversion of the relative social standing of victims and criminals rendered them politically vulnerable. As a consequence, criminal legal systems became ripe for reversion to more severe designs.

The political backlash to criminal legal progressivism culminated in a reaffirmation of condemnatory sentiment and symbolic expression within and through the criminal legal system. Victims gained key participatory rights in criminal cases in all fifty states and in federal criminal cases, including the right to directly address the court at sentencing through the submission of impact statements.[166] Sentencing

163. KOHLER-HAUSMANN, *supra* note 158, at 254.

164. *Id.* at 255.

165. *Id.* The source of this quote, obtained from a constituent letter to a U.S. Senator, further implored the political ascendence of "men with guts in today's society," with the will to "stand up and show us that we also have rights, also the right to work in peace without looking over our shoulders or keeping our fingers on the trigger." *Id*.

166. *See* VITIELLO, *supra* note 153, at 13 ("The 1982 Victim and Witness Protection Act established victims' rights to participate at the sentencing stage of a criminal trial. It also required prosecutors to consult with victims when they negotiate plea deals with defendants. The federal model eventually spawned a national trend, with all states providing some form of victim participation in the criminal justice system.").

laws became harsher and more rigid.[167] And rhetoric on criminality sharpened, becoming much more retributive and far less rehabilitative. And although history can be marked by the comparative ebb and flow of these sentiments over time, the resiliency of status quo criminal systems can be explained in substantial part by their ability to be formed and re-formed in response to these expressive vacillations while remaining a potent messenger of symbolic expression. The system can become either more or less punitive as societal norms shift, but it remains fundamentally condemnatory both spiritually and symbolically. This condemnatory nature persists even as alternatives to conventional punitive responses (like diversion in lieu of prosecution, supervised release in lieu of pre-trial detention, and probation or parole in lieu of extended incarceration) become more available.

But the growth of these alternatives offers a clear indication that non-punitive ebbs may be able to supersede punitive flows to substantially reduce the footprint of status quo criminal legal systems over time. However, answering the question of whether non-punitive systems can supplant status quo systems requires a deeper analysis of whether these systems can satisfy the expressive purposes of systems of criminal accountability writ large.

B. The Evitability of Punishment

Recent years have seen the adoption of reforms aimed at making the criminal legal system less punitive. Whereas the forty-year span between 1970 and 2010 saw precipitous increases in arrest, conviction, and sentencing rates, the years since have been marked by concerted efforts to minimize the use of conventional criminal legal responses while maintaining public safety.[168] These historical developments track closely with changes in public sentiment regarding the nature of

167. *See, e.g.*, KOHLER-HAUSMANN, *supra* note 158, at 79–80 (recounting the history of the enactment of New York's draconian Rockefeller drug laws and the closely related debate over "who deserved rights, benefits, and [social] standing and on what terms").

168. *See* STATE REFORMS REVERSE DECADES OF INCARCERATION GROWTH, PEW CHARITABLE TRUSTS 1–10 (2017), https://www.pewtrusts.org/-/media/assets/2017/03/state_reforms_reverse_decades_of_incarceration_growth.pdf (discussing efforts across the United States to reduce imprisonment and pre-trial detention while maintaining a historical decline in crime rates).

criminality itself and the question of which kinds of offenders are deserving of punitive condemnation.[169] People with substance use disorders and other mental health conditions, for example, are now seen almost universally as needing health-oriented, not punishment-oriented, responses to their criminal wrongdoing, particularly when their offenses are non-violent in nature.[170] These changes in public opinion have opened the door for broader changes in the criminal legal system, including shifts away from punitively condemnatory systems and toward absolvent ones.

Additionally, the same kinds of concerns that propelled the reactionary response to the Warren Court's changes to the criminal constitutional order may also propel changes away from status quo systems and toward reparative ones. To the extent that, for example, victims' rights advocates fear the de-centering of victims in criminal legal processes, such advocates may find reparative systems compelling at least to the degree that reparative methodologies hold offenders directly accountable for the harm they caused their victims and for identifying

169. *See* WILLIAM R. KELLY, THE FUTURE OF CRIME AND PUNISHMENT: SMART POLICIES FOR REDUCING CRIME AND SAVING MONEY 133 (2016) (discussing polling data from Texas, a historically conservative state, that reveals supermajority support for treatment of nonviolent drug offenders over incarceration and majority support for adjusting criminal justice spending and sentencing practices accordingly); WILLIAM R. KELLY, ROBERT PITMAN & WILLIAM STREUSAND, FROM RETRIBUTION TO PUBLIC SAFETY: DISRUPTIVE INNOVATION OF AMERICAN CRIMINAL JUSTICE 176–77 (2017) (discussing broad political support, including by victims, for criminal justice reform, including substantial support for treatment in lieu of incarceration for mentally ill persons and those with substance use disorders; reductions in the prison population; and elimination of mandatory minimum sentences for drug offenders).

Recognition of the limited utility of punishment has even been incorporated into federal sentencing law, which requires judges to impose sentences in accordance with delineated federal sentencing factors while also "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a).

170. *See* Christina Mancini & Kristen M. Budd, *Public Preferences for Mental Health Initiatives to Prevent Crime*, 50 CRIM. JUST. REV. 249, 256–64 (2025) (surveying studies indicating substantial public support for interventions that improve health outcomes for those experiencing mental health crises, including improved policing techniques, reduced reliance on police-exclusive responses, and diversion away from criminal legal processes).

reparative solutions.[171] After all, among the chief priorities of victims' advocates was greater inclusion in criminal legal processes to better ensure that both offenders and the system were held to account.[172] Thus, while the probability that absolvent systems of accountability will supplant punitive systems may be small, it is not zero. And the likelihood that absolvent methodologies will continue to grow in availability and in prominence is higher still, particularly where victim dissatisfaction with conventional processes is high and where greater punishment is inadequately responsive to victim needs.

A broad systemic shift toward absolvent expressionism would require a concomitant shift in social norms and practices regarding criminal accountability. Seeking absolution through restorative practices would likely come at the expense of seeking condemnation through punishment to the extent that the aims and methodologies of each system are incompatible with one another. But historical examinations of the rise of mass incarceration indicate that reshaping societal norms is not only possible, but greatly feasible with continued public education and evidence-based criminal policymaking.

According to criminologist William Kelly, "[t]here was no compelling research in the 1960s indicating that tough on crime [policies] would work," as well as "no evidence supporting the conclusion that a policy of harsher punishment deters criminal offending."[173] Instead, the

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171. Among the demands of many victims' rights groups was a shift away from the notion that crime constituted a harm against the public and that criminal legal systems exist to vindicate those public harms. *See* VITIELLO, *supra* note 153, at 13 (discussing how the report of the U.S. Attorney General's Task Force on Violent Crime, of which prominent victims' rights advocates were members, "implicitly rejected the modern view of criminal prosecutions as a dispute between the state and the defendant" and how they instead "wanted to revert to a much earlier system that pitted the victim, as the private prosecutor, against the defendant").

That said, restorative justice practices have their own limitations in meeting the needs of victims. *See generally* Kathleen Daly, *A Tale of Two Studies: Restorative Justice from a Victim's Perspective*, *in* NEW DIRECTIONS IN RESTORATIVE JUSTICE 153, 153–60 (Elizabeth Elliott & Robert M. Gordon eds., 2005) (discussing two Australian studies that indicate that while restorative justice programming may yield higher victim satisfaction compared to status quo criminal processes, satisfaction rates may nonetheless be low, especially if offenders appear unremorseful or if victims are unable to empathize with offenders, among other factors).

172. *See* VITIELLO, *supra* note 153, at 13.

173. KELLY, THE FUTURE OF CRIME AND PUNISHMENT, *supra* note 169, at 130.

punitive policymaking of the past was based "largely on intuition, common sense, and emotion."[174] By contrast, today's policymaking can benefit from continued scientific inquiry into both the causes of, and effective responses to, criminal impulse and recidivism, research that reveals that punitive crime control strategies can, ironically, be criminogenic.[175] But if non-punitive methodologies are to proliferate as systemic solutions for criminal response, their viability as a socially sanctioned response to criminality must have roots beyond better science and evidence-based policymaking. They must also satisfy the expressive functions that are demanded of them, lest they lose societal legitimacy and succumb accordingly.

Consider a scenario where criminological data clearly supports the idea that providing criminal offenders with housing, employment, education, and other social benefits greatly reduces recidivism, while incarceration sustains or even increases it.[176] From a purely instrumentalist perspective, policymaking should clearly hew toward the former approach if crime reduction is the goal. But policymaking is not a purely instrumentalist endeavor, and policies are not merely legalistic means toward purely pragmatic ends. Policymaking, and the laws it

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174. *Id.*

175. *See* Damon M. Petrich et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 CRIME & JUST. 353, 363–68, 398–99 (2021) (discussing, respectively, studies finding that incarceration has a criminogenic effect and the authors' conclusion, based on a meta-analysis of available research, that "imprisonment has either no effect or makes reoffending outcomes worse when compared with non-custodial sanctions such as probation, electronic monitoring, or otherwise").

Although research findings on the criminogenic effects of punishment, especially incarceration, are largely stable, there are fewer conclusive explanations for why this criminogenesis occurs. *See* Meghan A. Novisky & Robert L. Peralta, *Gladiator School: Returning Citizens' Experiences with Secondary Violence Exposure in Prison*, 15 VICTIMS & OFFENDERS 594, 595–97 (2020) (exploring the potential criminogenic effects of secondary exposure to prison violence and urging further study); Shelley Johnson Listwan et al., *The Pains of Imprisonment Revisited: The Impact of Strain on Inmate Recidivism*, 30 JUST. Q. 144, 150 (2013) (suggesting potential explanations for incarceration's criminogenic effects, including victimization while incarcerated, environmental factors within prisons, and correctional staff hostility toward incarcerated persons).

176. Available data already supports this notion. *See* KELLY, THE FUTURE OF CRIME AND PUNISHMENT, *supra* note 169, at 48–50 (discussing multiple studies showing that punitive criminal policies had either no impact on recidivism rates or were associated with increased recidivism rates).

produces, carry symbolic meaning that must reflect societal sentiment if the laws are to remain legitimate. So, if societal norms would be offended by the notion that criminal offenders would be given social benefits to abate future criminality, public support for such benefits should, expectedly, be reduced, even if there is recognition that criminal offending would increase as a result. This expectation has borne out in reality, with many non-punitive crime prevention strategies having been dismissed, despite their efficacy, as "hug-a-thug" approaches that inadequately express the condemnatory sentiment demanded by wide swaths of the public.[177]

Identifying effective means for durably changing social norms to enable systemic transformation continues to be a challenge. But it is possible to identify a number of key prerequisites for such a transformation that, with continued thought, may help pave the way for identifying those means. By imagining a world where punitive systems have been supplanted by absolvent systems, and by applying expressivist analysis to this scenario, it is possible to work backward to identify how such a change could have been made possible and, specifically, what must be true for such a change to have occurred. Pursuing this thought experiment leads to at least three premises that must be true for an absolvent system as broad as current status quo systems to exist.

First, it must be true that societally legitimate criminal accountability does *not* require that condemnation be expressed through punishment. This could be true either because social norms no longer demand the expression of condemnation in systems of criminal accountability or because condemnation may be adequately expressed without the imposition of punishment. In a world where absolvent sentiment, including reparation, has taken hold, it is much more likely for the former to be true since reparation and condemnation are frequently at methodological odds with one another. But the latter is nonetheless possible to the extent that absolvent processes may still enable condemnatory expression without purposefully inflicting hard treatment. For example, being identified as a criminal defendant (or their equivalent counterpart in an absolvent system) could still be seen as a

177. *See, e.g.*, Mark Thompson, *Hug-a-Thug Pays Off: Drug Courts Aren't a Panacea for Drug Addiction, but They Have Won Hearts and Opened Pocketbooks in State Legislatures*, 32 STATE LEGIS. 30, 30 (2006) (discussing early skepticism of drug treatment courts as "soft on crime" and "hug-a-thug" despite their increased effectiveness and reduced cost).

condemnable status in the absence of some consequent and deliberate hard treatment. This could be especially true when such a status carries with it some kind of social stigma or diminished (but non-punitive) legal status that functions to reflect society's repudiation of criminality.[178] Thus, the wide implementation of absolvent systems of accountability need not require that expressive condemnation be entirely dispensed with. Rather, it could instead be true that condemnation be imposed by some means other than the deliberate infliction of hard treatment.

Second, it must also be true that the collective expression of sentiment regarding criminality is possible by some means *other* than the deliberate infliction of hardship. As has already been discussed, the substance and processes of status quo criminal legal systems are suffused with expressive symbolism, whether it relates to the subordinated status of criminal defendants, the elevated status of victims, or the societal standing of law and order generally.[179] And this expressive symbolism is rooted in punitive logics concerned with determining the extent of any hard treatment to be imposed as a means of affirming and reaffirming those expressive norms.[180] If absolvent methodologies are to grow into systemic maturity, it must be because the substance and processes of their non-punitive logics are both expressively meaningful and clearly so. If incarceration, as one of the hardest forms of hard treatment, endures largely because it is invariably and unambiguously condemnatory,[181] then absolvent methodologies must also be invariably and unambiguously expressive. And, at the risk of tautology, if they are invariably and unambiguously expressive, it must be because they are capable of so being.

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178. Such diminished legal status could include the revocation of driving privileges for those adjudicated as intoxicated drivers as a means of preventing future unsafe driving; loss of professional licenses for those who are unable to meet the character and fitness standards for continued licensure; and ineligibility to hold public office for those adjudicated for corruption-related offenses as a means of protecting the integrity of public institutions. While these consequences could be seen as punitive in certain contexts, their imposition for non-punitive reasons could, credibly, be understood as depriving them of punitive expressive value, such as Dan Kahan described when discussing the ambiguous expressive meaning of fines and community service. *See supra* notes 22, 45 and accompanying text.

179. *See supra* Part III.

180. *See supra* notes 27–29 and accompanying text.

181. *See supra* notes 46–48 and accompanying text.

Finally, for an absolvent system of criminal accountability to exist, it must be true that such a system is capable of satisfying its expressive function to the satisfaction of a critical mass of society. To the extent that this question overlaps with the political feasibility of alternatives to punishment as discussed by Dan Kahan and others, it would be easy to reduce this premise to one of mere political popularity.[182] It would also be tempting to link political feasibility to the kind of fear-based policymaking that characterized the ascent of mass incarceration politics as described by William Kelly.[183] But accounting for the political circumstances that would enable absolvent systems requires more than treating policymaking as a popularity contest and fearmongering as an effective means for winning popular opinion. A more comprehensive accounting would acknowledge the full emotive dynamics of both punishment and the policies that have enabled it. Specifically, it would account for not just the emotions that led to widespread political action, but also the emotions that led to the specific political outcomes that resulted over available alternatives. Punishment politics won the fraught political wars of the 1960s, 70s, 80s, and early 90s because the polices they produced symbolically expressed the emotions of a critical mass of the public. For an absolvent system to have similarly prevailed, it can only be because that system accomplished the same political feat.

VI. CONCLUSION

Much of the conversation on the viability of alternatives to punishment has centered on logistical concerns regarding the creation and maintenance of carceral and non-carceral infrastructures,[184] philosophical concerns regarding punitive desert and justification,[185] and the

182. *See supra* notes 40–46 and accompanying text.

183. *See supra* notes 173–74 and accompanying text.

184. *See* Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71, 77–93 (2019) (discussing the primacy of narrow economic analysis in the development of carceral policy).

185. *See* David Dolinko, *Restorative Justice and the Justification of Punishment*, 2003 UTAH L. REV. 319, 338 (2003) ("The most fundamental question with which the call for restorative justice confronts us is this: what *should* be society's response to criminal behavior?").

popular politics of punishment.[186] And all of these conversations are indispensable in the effort to right-size both punitive and non-punitive solutions to criminality. But much less has been written about the viability of placing non-punitive alternatives at the center of an expressively legitimate criminal legal system.[187]

This Article has begun filling this deficit by accounting for the expressive functioning of punitive and non-punitive systems and by identifying what must be true in order for non-punitive methodologies to grow into systemic maturity, a milestone that even the most ardent supporters of alternatives to punishment concede is currently far in the distance. In turn, by bringing these expressivist considerations to the fore, our understanding of the attendant logistical, philosophical, and political considerations that go into criminal legal system design will become deeper and more complete.

Logistically, the expressivist characteristics of potential criminal legal systems—whether punitive or absolvent—help determine and explain their substantive and procedural components. Although it is true that there are important practical considerations that go into the development of criminal legal processes (like the availability of funding, staffing, and space; and applicable legal requirements), there is an undeniable expressive purpose that propels these processes toward certain ends over others. The increased inclusion of victims within criminal legal processes, for example, resulted from a groundswell of public perception that those processes were both inadequately considerate of victim interests and overly considerate of offender interests, thus violating the expressivist norms that demand that victims symbolically stand above victimizers in the eyes of the law.[188] This perception has fueled a decades-long movement toward increased victim involvement

186. *See, e.g.*, Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 281–305 (2023) (analyzing the contours of the political conversation on prison abolition in the United States).

187. Some scholars have considered related questions, like how different criminal legal systems express competing views on the individual moral standing of offenders. *See, e.g.*, Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933 (2016) (comparing American and European systems). But this Article ultimately explores a separate and distinct question that appears largely unaddressed in existing literature: whether systems centered on non-punishment can achieve systemic expressive legitimacy.

188. *See supra* notes 160–61 and accompanying text.

in criminal legal processes and concurrent attacks on due process rights for criminal defendants.[189] These efforts have fundamentally altered the logistics of criminal law and procedure in furtherance of substantially expressivist aims. Similarly, the movement to divert certain offenders, including those with substance use and mental health disorders, away from punitively condemnatory processes has been propelled by expressivist motivations, which seek to reserve punitively expressive condemnation for those who "deserve" it and to exclude those who are morally exculpable.[190]

Philosophically, criminal legal expressivism helps advance the conversation regarding systems of accountability by moving it beyond questions of justification and desert, which have focused largely on defending the notion that punishment is the most effective means of achieving accountability against criminal offenders. Certainly, it may be true that certain kinds of punishment are more expressively rich or clear than others and are therefore justifiably used to express the greatest amount of condemnation over the most condemnable acts. But the conversations that applied expressivist thought to questions of punishment largely stopped short of applying them more broadly to questions of criminal accountability and what else could be expressed through alternative criminal legal designs. Thinkers like Dan Kahan and those who engaged in the criminal-legal-expressivist conversation circa 1996 raised critically important points about how well different punishments fulfilled their expressivist functions.[191] But much had yet to be explored by the time that conversation faded by the early 2000s. This Article

189. *See supra* note 161 and accompanying text.

190. Despite the apparent consensus that those facing punishment should receive no more punishment than they deserve (*see* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 76–77 (2005) (discussing the widespread adoption of punitive systems based on some form of "just deserts")), no consensus appears to exist for calculating desert-based punishments. *See generally, e.g.*, Mirko Bagaric, *The Punishment Should Fit* the Crime*—Not the Prior Convictions of* the Person *that Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343 (2014) (arguing that retributivist punishment should focus on the offense, not the offender, even where the offender is a recidivist); Patrick Tomlin, *Time and Retribution*, 33 LAW & PHIL. 655 (2014) (arguing that retributivist desert prefers shorter punishments of greater severity over longer punishments of lesser severity).

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

revives that conversation in the hopes of capturing conceptual insights that were left on the table.

Contemporary political developments emphasize the conversation's continued relevance. Contested district attorney elections, state ballot initiatives on crime, and efforts to reconfigure judicial systems, among others, all have implications for criminal legal system design, and the success of associated political campaigns is often impacted by the perceived expressive messages associated with different potential outcomes.[192] At issue in these political battles are not just the policy outcomes that result from one side's victory or another side's defeat, but the expressive meanings of the symbolism attached to these outcomes.

This Article presents just one possible exploration of the expressivist dimensions of criminal legal design, focusing on the expressivism of competing methodologies for criminal accountability and the systems they anchor. The goal here is not to settle longstanding debates between advocates for either punishment or absolutive solutions. Instead, it is to help identify the necessary preconditions for absolutive systems to grow into systemic maturity, whereby absolutive methodologies become the default responses to criminality rather than the occasional exception for a narrow class of offenders or offenses. The conditions identified here—that accountability does not demand punitive expression, that punishment is not the only means of criminal legal expression, and that absolvent systems be capable of satisfying their expressive functions—are not intended to be exhaustive. But they are intended to serve as a starting point for further exploration of important questions underlying conversations on criminal legal design. Because if some or all of these premises can never be true, then it is likely that punishment is, in fact, inevitable. However, if these premises can all be true, then a considerable new world of possibilities opens up for how society responds to criminality and holds to account those whose criminal acts incite our collective emotions.

192. *See supra* notes 4–6 and accompanying text.