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William S. Laufer^{a1} Robert C. Hughes^{aa1}

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***155 JUSTICE UNDONE^{d1}**

ABSTRACT

There is far more justice that is not served than served in our criminal justice system. Well more than half of all offending and victimization fails to make its way into the criminal justice system. An additional share of wrongdoing from initial police contact to the end of the criminal process is diverted or exits. A host of additional personal, systemic, and societal factors constrain the administration of justice to respond to criminal wrongs. This Article introduces the idea of justice remainders, or the omission of the state's response to crime. Justice remainders include both justified and unjustified failures to punish the guilty. The total of all justice remainders is the sum of justice undone. It is argued that the moral indignation and outrage over many types of justice remainders are simply and remarkably missing. Our collective response to sexual assaults, the most underreported of all serious criminal offenses, reveals the importance of formal and informal recognition of victims, the community affected by the wrongdoing, and the state.

This Article shows that theories of criminal law with significantly different assumptions and premises nevertheless support three conclusions about justice remainders. First, the state has a duty to address systematic justice remainders that involve either the failure to enforce an important criminal prohibition or a profound inequality in the effective protections of criminal law. Second, the state may be able to remedy some justice remainders with a commitment to effective and humane reforms to penal laws and practices. Finally, the state has a duty to provide public recognition of criminal wrongdoing when just punishment is impossible. This suggests the moral importance of an accounting for the sum of justice undone.

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***156 INTRODUCTION**

Generations of victims live among us, many of whom will never have the crimes committed against them known by others. So many of us live in silence as victims ourselves.¹ The silence on crimes never recognized is the sound of justice undone. This Article calls for a long overdue validation of this silence--a consideration of justice that is not served, and of victimization that

is never formally recognized, ratified, and made right by the state.² Recognition, ratification, and justice lay dormant for many years, while the most persuasive legal scholarship about criminal justice wrestled with every other kind of injustice: the many abhorrent miscarriages of justice; the many errors in the criminal process; and the precise amount of criminal law necessary to fairly and efficiently administer justice.³ The notion of “doing justice” has long replaced any consideration of justice that is *not* done-- *157 even though the scientific study of crime and its perennial search for better measures of crime and criminality suggest a clear path toward a public accounting of justice undone.⁴

More recent iterations of victimization surveys reveal what was once a fanciful dream: valid and reliable estimates of the difference between all crime that is committed and officially recorded crime, i.e., the “dark figure” of crime.⁵ The dark figure makes plain that there is far more justice that is not served than is served in our criminal justice system. Think about reporting failures by crime victims, lack of victim cooperation, millions of unserved felony warrants, lost prosecutions due to the exclusionary rule, all unsolved “cold” cases, and modest clearance rates of crimes known to the police. Consider the attrition from discretionary law enforcement, routine prosecutorial declinations, plea bargaining, and lost cases due to legislative changes in discovery requirements and bail reform.⁶ Reflect on the toll that our cherished standards and burden of proof takes on the success of the state's case. It is far from surprising that criminals regularly defy detection, apprehension, adjudication, and, ultimately, proportional punishment.

What is missed by the formalities of the criminal process, consistently more than half of all offending and victimization, we call *remainders of justice*.⁷ Justice *158 remainders include all omissions to justly punish wrongdoing that merits punishment--including omission to punish these crimes as well as imposition of punishment that is in no way proportionate to the offense.⁸ Justice remainders can result from failure by citizens to report crimes, by police to investigate offenses, and by prosecutors to pursue charges for those suspected of committing misdemeanor and felony offenses.⁹ In any criminal justice system, the total of all remainders is the *sum of justice undone*.¹⁰ This sum aggregates person, system, and societal remainders.¹¹

This Article argues that there is a need for public recognition of the sum of justice undone and some more substantive response from the state. Evidence for this *159 need comes both from empirical research on the extent and impact of justice remainders and from normative accounts of the state's duties with respect to criminal punishment.¹² Part I of this Article argues that there is little effort to acknowledge the sum of justice undone, and that our moral indignation and outrage over many justice remainders, such as crimes not reported to the police, are simply and remarkably missing. In the past decade, for example, survey data reveal over thirty million violent victimizations (i.e., sexual assault, robbery, assault, domestic violence, stranger violence, and violent crime involving injury).¹³ During this period, slightly more than twelve million violent crimes were reported to the police.¹⁴ In *160 the last two reporting years of the National Crime Victimization Survey, for example, more than fifty percent of all violent victimizations were not reported to the police.¹⁵ Assuming that there are reasons of justice for the state to respond, the difference between these victimization data and official reports may be seen as failures, omissions, or remainders of justice.¹⁶ Yet, no matter how injurious, traumatic, or economically deleterious, the wrongs that we characterize as justice remainders are most often lost and washed away over time. Remarkably, the state offers scant recognition and accounting of all person (e.g., victim non-reporting), system (e.g., cases lost due to the state failing to meet their burden of proof), and societal (e.g., differential treatment by race and class) remainders of justice.¹⁷

For a fortunate subset of those affected by remainders there is a recasting that reflects a type of private adjudication--an informal, non-state response to make up for the absence of formal, public validation through law enforcement, criminal adjudication, and punishment. For violent victimization, for example, the best that most can hope for is some kind of informal acknowledgment that the offense occurred. Acknowledgment might come from a family member, friend, or mental health care provider.¹⁸ This private kind of adjudication entails an informal reordering of the validation of those wronged.¹⁹

This private validation, though, may not be an adequate substitute for a public response.²⁰ First, it is fair to ask about its adequacy for the psychological needs of victims; the successful recasting of a wide range of unattended-to criminal wrongs, *161 as concluded below, often runs a risk of revisionist histories and lost or overwritten memories.²¹ Second, the lack of a public response to serious crime represents a failure of the state to condemn the violation of the victim's rights. We learn from both moral education theories and expressivist theories of the criminal law that this is an important and essential state function.²² Finally, consistent with other normative theories of criminal law, some justice remainders undermine both the moral

legitimacy and the perceived legitimacy of the criminal justice system, whether or not there is a private acknowledgment of crime to mitigate the lack of a public response.²³ Victims of certain crimes who receive neither public nor private validation--those who live in both silence and anonymity--may be especially inclined to see the criminal process as illegitimate.²⁴

The justice remainders from sexual assault, the most unreported state offense, are discussed below in Part II. The crime of sexual assault raises profound questions of compromised agency, violence, power, and complex victimization.²⁵ It has remarkably low clearance rates.²⁶ Sexual assault results in profound deficits that *162 should motivate some accounting and reconciliation,²⁷ particularly in light of its undisputed seriousness.²⁸

Justice remainders clearly demand a response from the state, but there is deep disagreement about the purposes that the criminal justice system ought to serve. It is thus striking that several sharply different accounts of the value, purpose, and justification of criminal law support some of the same practical conclusions about how the state should respond to justice remainders. Part III defends the first of these practical conclusions. According to a wide range of normative accounts of criminal punishment, the state has a distinctively strong duty to address systematic justice remainders of two types: (a) those that involve a very significant or total failure to punish acts that violate the most serious criminal prohibitions, and (b) those that reflect profound inequalities in the degree to which criminal law effectively protects the rights of victims from different social groups.²⁹ When serious criminal prohibitions go largely unenforced, the state fails in its duty to protect.³⁰ When crimes against members of a socially disadvantaged group are systematically left unpunished, members of this group fail to receive what is deserved from the rule of law and its institutions. On many accounts of the justification of criminal law, including contractarian deterrence-based accounts, fair play accounts, and some "soft" retributivist accounts, failure to punish crimes committed *against members* of a disfavored group undermines the moral justification for punishing crimes committed *by members* of that group.

*163 Unequal justice remainders can also undermine the state's empirical legitimacy--the willingness of all to obey the law and to support the state in the enforcement of its laws. These threats to the state's moral and empirical legitimacy are not hypothetical. They are real and quite often urgent, particularly in light of America's history of race and class-based inequalities. It should come as no surprise that the distribution of justice remainders is far from normal; that it is skewed in ways that support the primacy of power and the diminished value seen in certain lives.³¹ Indeed, our account would be woefully incomplete without recognizing that for most of this country's history those without class and race privileges have lived far too long with a disproportionate share of remainders. Addressing systematic inequalities in the distribution of justice remainders should thus be a high priority for the state.³²

Part IV discusses ways the state may respond to justice remainders when devoting more resources to successive stages of the criminal process will not successfully address the problem. Section IV.A begins a consideration of the need for remainders to be addressed in concert with a wide range of empirically-driven criminal justice reforms (e.g., evidence-based programs) and reforms derived from an overlapping consensus of normative theories (e.g., reforms that ensure that jails and prisons are reasonably humane). Section IV.B argues that there are important reasons for the state to respond formally to crime even when punishment cannot be justly imposed. Other formal responses to crime, it is argued, are morally important even when they do not ultimately result in state sanctioned punishment. These responses contribute to our collective moral education, communicate the state's condemnation of the wrong, and express regret about the lack of punishment when punishment cannot be forthcoming.

I. UNRIGHTED WRONGS

The criminal justice system long ago accommodated processing only a fraction of all actionable wrongdoing.³³ The number and deployment of all criminal justice *164 functionaries--from law enforcement and prosecutors to judges and corrections officers--are designed around predictable person, system, and societal remainders, e.g., victim non-reporting and a criminal process with a stable and significant rate of diversion and exit.³⁴ Moreover, as a practical matter, budgetary and system constraints assume that the dark figure of crime will remain dark.³⁵ Only some victimizations are reported, and only a modest percentage of those cases are cleared by an arrest and subsequent prosecution.³⁶ Substantive and procedural principles of justice also contribute to the incidence of adjudicated wrongdoing. The scales of justice are rightly and, indeed, paradoxically calibrated in favor of justice remainders.³⁷ The more we protect rights, the greater the incidence of adjudicated wrongdoing.

Reasonable and even generous deference to innocence concerns, while justly the guidepost for our rules regarding criminal investigation and adjudication, does not quell the moral tragedy of the unpunished guilty. We ought to punish the guilty, and we ought also to protect the innocent. When these “oughts” conflict, we may justifiably err on the side of the latter, but we nevertheless should feel regret when the guilty go free.³⁸ Regret does not presuppose a wish for a different outcome (e.g., where we cannot convict a factually guilty party because the state cannot satisfy its burden of proof) or even that we had a choice in doing differently (e.g., where the wrongdoer simply cannot be apprehended). It is not merely a feeling *165 of significant discomfort. To feel regret is to want to convey it.³⁹ The best justifications for the state's authority to punish crime, we will argue here, entail that the state has a duty to express regret for justice undone.⁴⁰

It is quite surprising that there are so few voices committed to recognizing, quantifying, no less accounting for the remainders in the criminal justice system.⁴¹ Justice that is undone is simply assumed by policy makers, criminal justice functionaries, and practitioners.⁴² The tireless representation of those with unknown voices is also so rarely recognized. There is no deeply-felt under-criminalization or non-criminalization movement against justice remainders to balance the ire of those who rail against over-enforcement and over-criminalization.⁴³ And all of the metrics and measures that increasingly support an evidence-based criminal justice system fail to capture what is collectively disregarded.⁴⁴ Most important, no single constituency owns the impunity so generously offered those wrongdoers who will remain unknown.⁴⁵

*166 The same general disregard of justice remainders does not accompany profound miscarriages of justice that are made known to the public, and justifiably so.⁴⁶ Cases of blatant racial discrimination, arbitrariness, and capriciousness fuel meritorious cries and claims of unequal justice under law.⁴⁷ Mass incarceration, the compromise of conviction integrity, and race-based shootings by law enforcement are more than notable concerns, even if perennial.⁴⁸ And we obsess, as we should, about carefully operationalizing the precepts of distributive justice; from intricate algorithm-based bail guidelines to exacting sentencing guidelines. Mistaken identification, the long shadow of a felony record, biased jurors, erroneous convictions, and disproportionate sentences move us in ways that, so it would appear, remainders of justice do not.⁴⁹ One may justifiably ask: If we care so much about abject failures of justice, about ensuring fairness in the criminal process, where is the moral accounting and reconciliation for the justice left undone?⁵⁰

Left unattended, justice remainders become more than our occasional and defensive look back at all of the wrongs that go unrecognized and unrighted.⁵¹ The catalog of wrongdoing witnessed over our lifetimes, much of which we let go, takes a toll. Over time, remainders that typically would leave a lasting moral stain are washed clean by the kind of rhetoric and imagery that leaves little moral indignation. The history is not re-written by an ideologue, but by administrative and judicial functionaries who speak on behalf of the state in criminal matters.⁵² Memories *167 are overwritten with time, as if stolen; trauma dissipates and disappears across generations; and, quite tragically, no reliable, permanent, and public accounts are kept of all those whose lives are diminished and altered by unaddressed wrongdoing.⁵³ This final sweep of wrongs is the ultimate injustice—an injustice captured by a sense of helplessness never to be publicly validated.⁵⁴

For certain offenses, the complex brew of victim anonymity and powerlessness may defy belief. It also encourages deniers in ways reminiscent of the transformative nature of our collective reaction to genocides and politicides.⁵⁵ We produce a story re-told in a different voice. And re-writing often results in a relationship with the state that has marginally greater parity; a narrative that legitimizes that which was delegitimized.⁵⁶

Denials of justice remainders are supported by all of the most obvious forms of accommodation found in a diverse scholarly literature, including: (a) successful techniques of moral neutralizations,⁵⁷ (b) psychological rationalizations,⁵⁸ (c) explanations from systems justification theory,⁵⁹ and (d) individual and group *168 efforts to recast the status of those affected by criminal wrongdoing.⁶⁰ Less obvious but as important, we have a history marked by justice remainders that are so very indebted to race and class.⁶¹ Devaluing lives on the basis of race and class has a long history for those inside and outside the reach of the criminal justice system. And few would dispute that race and class considerations are far too graciously tolerated in the continuation of what is now euphemistically called the post-McCleskey period.⁶²

There is a paradox that comes from the very justifiable orientation of a justice system listing heavily towards the accused and away from the victim. Our commitment to “doing justice” also may be an independent source of justice remainders. Comfort with justice remainders is enshrined in a generally uncritical acceptance of the logic and math behind Blackstone's Ratio.⁶³ It is certainly better to let ten guilty people go free than to convict one innocent. But, it is *best* that every innocent is acquitted, the guilty are convicted, and no victim be deprived of the recognition and validation that comes from the public administration of justice.⁶⁴

In considering the consequences of error in criminal justice, Daniel Epps recently rejected some of the math and principles supporting Blackstone's Ratio.⁶⁵ *169 His willingness to take on this time-worn adage would have been even more notable with a recognition of justice remainders.⁶⁶ It is an interesting and ironic twist that placing weights on the scales of justice that quite rightly prioritize the accused, nevertheless, produces remainders.⁶⁷ Letting guilty people walk free is a cost, even if preferred and wholly justified. False convictions are indeed more “costly” than false acquittals.⁶⁸ But in properly weighing each, where is the consideration, any consideration, of how these decisions affect justice remainders? Not all of the guilty who go unpunished are acquitted in court-- many are never apprehended, charged, or put on trial. Is there any reasonable counterweight to innocentism or perfect mathematical symmetry for both the innocent and guilty? Unanswered violations of victim-relative norms should have at least some place in a proxy or calculus for justice that is due from the state.⁶⁹ Instead, there is a near invisibility to these violations, a general disregard of a very wide range of normative deficits. Practically, what happens to a victim's life when the state fails to bestow a solemn ratification and justification? A discussion of the most unreported and underreported wrong addresses these questions below.

II. THE MOST UNDERREPORTED VIOLENT CRIME: SEXUAL ASSAULT AS JUSTICE REMAINDERS

Rates of sexual assault victimization, incidence, prevalence, and non-reporting, over time, reveal generation after generation of unrighted wrongs.⁷⁰ There are *170 countless victims and witnesses in case after case of injustice. The dark figure of sexual assault victimization is in excess of hundreds of thousands of unreported crimes each year, even assuming measurement errors of all sorts.⁷¹ And estimates are often far too conservative given the number of “hidden” or “unacknowledged” rapes, i.e., where the victim was sexually assaulted but does not consider the act to be rape.⁷² Sexual assault data from college campuses show far higher rates and, at the same time, more system attrition.⁷³ Even when sexual assaults are known to the police, very modest clearance rates contribute to another significant class of justice remainders.⁷⁴ Simply put, no other serious violent offense is so obviously missing from the criminal justice system.⁷⁵ No other serious violent crime leaves so much justice undone. No other violent crime is committed with this kind of impunity. *171 And, as we shall see below, no other violation of the criminal law calls out for more validation for its victim.

Reporting rates for all violent crime (i.e., rape, robbery, assault, domestic violence, stranger violence, violent crime involving injury) and property crime (i.e., household burglary, motor vehicle theft, and other theft) show rape as the least reported of these crimes in 2018 (24.9%), and the second least reported in 2017 (40.4%)--in both years second to theft.⁷⁶ Motor vehicle theft is consistently the most reported crime.⁷⁷

Life-course research on the impact of sexual victimization reveals likely consequences, including anxiety disorders, clinical depression, post-traumatic stress disorder, and self-disruptive behaviors.⁷⁸ The inevitability of life-course pathologies resulting from violent sexual victimization come, at least in part, from the absence of acknowledgment or validation of the wrong and harm.⁷⁹ The state's failed recognition of these wrongs is so well known, longstanding, and shockingly well-tolerated.⁸⁰ Add to this the fact that formal criminal justice processing of sexual assault victims entails that much more self-blame, re-victimization, and significantly worse recovery outcomes.⁸¹ Research further shows that seeking acknowledgment from formal support providers, even those with a clinical pedigree, often comes with negative social reactions.⁸²

*172 In contrast, an impressive body of research reveals meaningful informal acknowledgment and validation from private support providers, such as friends, family, and partners.⁸³ And some kinds of informal acknowledgment and validation may directly address the lacunae in the state's longstanding failure to recognize and respond to sexual assault. Consider, for example, the very welcomed change in conventional lexicon describing the status of a person sexually assaulted: from the word “victim”

that painfully centers on victimization, to the empowering language of “survivor.”⁸⁴ The brief account below suggests that new conventions in the personal and social construction of sexual violence are a direct accommodation to the justice remainder.⁸⁵ In the absence of a formal criminal justice response, some victims seek an informal recasting as “survivors.” For some, this may be considered a substitute for the moral balance lost by acts of violence.

The label of victim may further reduce a person already objectified and harmed by status, power, and bargaining differentials. Implicit in the status of victim is a sense of vulnerability, loss, hurt, pain, and harm. Victimhood relegates and reduces those who directly and indirectly suffer from the hands of active and passive aggressors. Worse, the social construction of victimization risks becoming reinforcing, cyclical, stigmatizing, and part of a larger process of labeling. Victims are often trapped. The move to see victims as survivors may be empowering and freeing. Survivors make choices freely, as unconstrained as possible by the wrong that resulted in this status.⁸⁶ The design and architecture of survivorship are inspirational and, one hopes, transformative in ways that reshape power differences.

By transforming the status of one harmed from that of a victim to a survivor, one may risk the missing victim. It is in the very nature of serious victimization that the state assumes the responsibility of a formal response, the initiation of law enforcement and the criminal process. As survivors shed their victim status and, instead, assume transcendence over the transgression, it might be said that the state is left with less debt to the victim, less perceived harm and wrong to make right. Survivors, however, still seek recognition for their transcendence over actionable *173 wrongs but, tragically, the state does not bestow recognition. For the state, the suffering and victimization are over.

That this may create a perception that survivors have a diminished claim on the state's power may be inconsequential given the government's already muted response to victims.⁸⁷ The concern, however, is really not with the likely or unlikely exercise of formal social controls by the state. Using the criminal process is, after all, rarely an option for victims.⁸⁸ The concern is that the state may wipe its slate clean, washing away its institutional indebtedness to those who demonstrate increasing mastery over the imposition of wrongs and harms. For some, this means being forever excluded from any formal acknowledgment or validation. It is as if the state pretends that this violence never happened. That pretense combines perfectly with a life spent in denial and silence. For others, it is just the mere knowledge that the government's slate is wiped clean. As Judith Lewis Herman cautioned: “The study of psychological trauma must constantly contend with this tendency to discredit the victim or to render her invisible.”⁸⁹

These more than uncomfortable musings suggest the need for new criminal justice policies to accommodate the shift in language from victim to survivor. Of course, policy makers should better conceive the role of victims in the criminal justice system, the costs of victimization, the extent of victim compensation, and the broad range of victim rights.⁹⁰ But it is also important to think about how to best counter any continued domination from the offender, while recognizing the obvious and less-than-obvious consequences of violent victimization.⁹¹ Independence and control are deserved objectives. Achieving these objectives without encouraging additional victimization minimizes the potential paradox that comes from the very idea of survivorship.⁹²

*174 One way out of the paradox is to emphasize victimization through an authentic narrative about the harm of the offense and wrong of the offender. Another way is to further invest in the kind of activism and advocacy that brings about a changed receptivity to allegations of violent victimization. Survivors should have agency and be able to maintain their identity free of an offender's control. That this seems so unlikely is further evidence that offenders control not only their victims, but survivors and, in a very real way, the state's response to violent victimization. This is, alas, what makes the paradox so very perverse.

In Parts I and II, a portrait of justice remainders as an important and yet overlooked kind of injustice is sought in descriptive and empirical terms. To fully appreciate the moral significance of justice remainders, though, it is necessary to consider how they frustrate some purposes a criminal justice system ought to serve. But the question of what purposes a criminal justice system should serve is forever contested. Parts III and IV aim to show that there is some consensus among vastly different accounts of the value, purpose, and justification of criminal law. Different normative accounts reach strikingly similar conclusions about the urgency of systematic justice remainders and the ways the state should respond to them.⁹³

III. THE MORAL URGENCY OF REMAINDERS

Eliminating all justice remainders is impossible. There will always be justice remainders as long as we define remainders to include all failures to punish crimes justly, whether or not these failures were avoidable. Such failures, again, include failures to punish crime that ought to be punished and imposition of punishment that is either unfairly lenient or unfairly harsh.⁹⁴ At the same time, it is fair to ask what government functionaries, individuals, and private organizations can and should do to reduce justice remainders, e.g., to make it less burdensome for victims of crime and witnesses to crime to come forward.

All attempts to reduce remainders must consider the uneven distribution of remainders and, in particular, the kind of justice undone that is systematic. Systematic justice remainders reflect patterns of failures to punish crimes of a certain type--patterns attributable to one or more persistent causes.⁹⁵ Systematic justice remainders may be contrasted with irregular failures: for example, *175 declinations to pursue felony prosecutions due to violations of a suspect's Fourth Amendment rights that are wholly race-neutral.⁹⁶ This Part discusses the importance of addressing moral objections to two types of systematic justice remainders. First, it is morally objectionable for a type of serious crime to be punished only rarely and, when punished, too lightly. Second, it is morally objectionable for serious crimes committed against members of a discrete social group not to be punished in ways equal to crimes against members of other social groups.⁹⁷ Though justice remainders of other types also matter, remainders of these two types have special urgency. Recognizing a long history of well-intended law enforcement, judicial, and correctional reforms, substantial criminal justice resources are still necessary to address systematic justice remainders of these two types.⁹⁸

Any claim about the priorities afforded remainders must rest on a broader theory of criminal justice. This Part seeks to recognize that several philosophical theories of criminal law suggest an urgency to certain systematic justice remainders. Among these are moral education theories, expressivist theories, many retributivist theories, and some deterrence theories.⁹⁹ The theories discussed in this Part are all non-consequentialist in that they accept ethical side constraints on the state's use of punishment to pursue social goods.¹⁰⁰ There is remarkable agreement among non-consequentialist theories of criminal law that the state's use of punishment *176 must satisfy two ethical constraints: first, that the state should not intentionally punish the innocent (e.g., through vicarious punishment), even when there are otherwise positive outcomes for doing so; second, that the state should not impose punishments that are disproportionately harsh, even when draconian sanctions would be effective as a general deterrent.¹⁰¹ The aim of this Part is to demonstrate that there is remarkable agreement among non-consequentialist normative theories about what the criminal justice system positively *should* do. That is, a wide range of normative theories about this system point to the urgency of addressing systematic justice remainders.¹⁰²

A. Moral Education and Expressivist Theories

Moral education theories and expressivist theories of the justification of punishment make clear why many systematic justice remainders are morally troubling. Moral education theories hold that criminal punishment aims to educate the offender and the general public about the importance of certain important prohibitions and about the reasons for those prohibitions.¹⁰³ Expressivist theories make the subtly different claim that criminal punishment aims to communicate a message to the offender and the general public.¹⁰⁴ On accounts of both types, punishment sends a message with two audiences: punished offenders and the public at large. Any failure to punish an offender involves a corresponding failure to deliver *177 the message of the criminal law to that offender. This Section argues that systematically omitting to punish certain types of offenses can distort the message criminal law sends to the public at large. Thus, under both moral education and expressivist theories of criminal law, two types of systematic justice remainders deeply undermine the criminal justice system's performance of its function: the systematic failure to punish any given type of serious crime and the systematic failure to punish serious crimes against certain types of victims. Though systematic justice remainders distort the message of punishment only when the omission of punishment is avoidable, that distortion can result from either an intentional or a negligent omission. It can occur even when the government calculates that omitting punishment would maximize an alleged metric of aggregate social welfare.

Moral education theories offer one explanation of how punishment has a message for two audiences. On Jean Hampton's account, a criminal prohibition with an attached penalty sends a message that is in some ways like the message an electrified fence conveys to a domesticated animal: "if you want to avoid pain, don't try to transgress the boundary marked by this fence."¹⁰⁵

But humans are not domesticated animals; we can reflect on the reasons for which society has deemed an act to be out of moral bounds. Criminal punishment aims to have offenders recognize these reasons and to refrain from future offenses because crime is wrong, not merely because crime will lead to further punishment.¹⁰⁶ Though offenders are the primary audience of punishment, society as a whole is a secondary audience.¹⁰⁷ Punishment serves as a reminder of every one of the state's criminal prohibitions and invites all to reflect on the reasons for these prohibitions. Included in this second audience are the victims of crime. Punishing criminals communicates to the victims of crime that society recognizes their rights and objects to violations of those rights.¹⁰⁸

Hampton's moral education theory is consistent with communicative theories, such as Duff's,¹⁰⁹ in holding that punishment sends a message to more than one audience. Duff, however, denies that the message to offenders is best understood as an educational message. Many offenders already know right from wrong and do not need to be taught the distinction. The problem is often that offenders do not care enough about what is right.¹¹⁰ According to Duff's communicative theory, *178 punishment has three primary goals. The first is to communicate the censure of the offender's actions to the offender in a way that invites the offender to repent.¹¹¹ The second is to help the offender to see what she must do to reform herself so that she will not re-offend.¹¹² The third is to impose a burden on the offender that makes possible a reconciliation between the offender and those the offender has wronged.¹¹³ If the offender comes to accept the punishment as legitimate and warranted, it can serve as an apology to the victims--an expression that carries more weight than a merely verbal apology because it is more burdensome.¹¹⁴

Though punishment's primary goals are to communicate a message to the offender and to aid the offender in communicating a message of apology to the victims, the general public is also part of punishment's audience. A criminal prohibition declares a certain form of conduct to be a wrong that the community condemns it.¹¹⁵ Attaching punishment to a criminal prohibition communicates to everyone in the community that the legal system takes the prohibition seriously. To enact a criminal prohibition without punishing violations would, on Duff's view, signal a lack of seriousness about the prohibition.¹¹⁶

On both Hampton's moral education theory and Duff's communicative theory, failure to punish an individual offense involves a failure to communicate an important message to the offender.¹¹⁷ A pattern of failures to punish--a systematic justice remainder--may undermine or distort the messages the criminal law is supposed to send to the community. When the state enacts a criminal prohibition, it attempts to communicate that there is a boundary that must not be crossed, and that the community condemns conduct that crosses this boundary. If the state chooses not to punish violations of that prohibition, its failure to punish violations undermines the message that the prohibition was supposed to communicate. *179 Regularly omitting to punish violations may signal that the boundary set out in law may in fact be crossed, and that the community's condemnation of violations is inauthentic and half-hearted. This failure to enforce can send a problematic signal to the victims of crime. It may suggest that the state does not take the violated right seriously--and that may be true.

Complete or near-complete failures to enforce a law are not the only failures of enforcement that raise moral problems. When a criminal law is frequently enforced, but there are systematic inequalities in patterns of enforcement and non-enforcement, these inequalities can confound and confuse the message that criminal law is supposed to communicate. Suppose that crimes against a certain socially disadvantaged group are punished much less consistently than are crimes against others.¹¹⁸ The contents of criminal law may protect everyone's rights equally. The differential pattern in enforcement, though, sends a signal that the rights of the disfavored group matter less to the state. The message the state sends to an offender when it does punish is likewise garbled. It fails to communicate that *no one's* rights are to be violated. It instead sends the message that the rights of those in socially more-favored groups are inviolable. This message is morally confused; there is no morally good reason for the rights of only a subset of the population to be inviolable.

Sending offenders a morally confused message may make it more difficult for punishment to serve an educative role. It may also invite the offender to repent for the wrong thing: the offender is to repent for violating the rights of a person in the more-favored group. For instance, if the state reliably punishes thefts from the financially privileged, and it reliably fails to punish thefts from the homeless, punishing a theft sends an ambiguous message. The punishment could be interpreted as inviting the offender to repent for stealing. However, it could also be interpreted as inviting the offender to repent for stealing *from a person of means*. Likewise, if the state regularly punishes assaults on citizens and legal residents, but it punishes assaults on undocumented immigrants much less reliably, the criminal law sends an ambiguous message. It could be interpreted as saying

that everyone has a right to bodily integrity. It could also be interpreted as saying that only citizens and legal residents have basic rights that matter.

***180** Justice remainders confound and confuse the moral message of a criminal prohibition only when the omission is both systematic and avoidable or reasonably regarded as avoidable. If the causes of failure to punish a certain type of crime are disparate, failure to punish this crime says little, if anything, about the state's view of this crime. For example, if roughly half of all murders go unsolved,¹¹⁹ the failure to punish all murders in no way signals that unsolved murders do not matter to the state.¹²⁰ Likewise, if a systematic failure to punish is publicly regarded as unavoidable, the justice remainder will not signal anything about the state's view of the crime's importance.¹²¹

By contrast, a systematic failure to punish serious violent crime due to budgetary constraints may send a clear and troubling signal about community values. Consider a police department that frequently declines to conduct even an initial investigation of an allegation of sexual assault but devotes substantial resources to the investigation of less serious crime (e.g., trafficking in soft drugs, “vice,” or “quality of life offenses”).¹²² In this instance, the systematic failure to punish sexual assault is likely to seem avoidable (and may in fact be avoidable, depending on what other obstacles there are to successful prosecution). A commitment to order-maintenance policing, or a “broken windows” policing philosophy, might appear to be a preference for prioritizing the total number of arrests, prosecutions, and convictions over the broader aims of protecting and serving the public.¹²³ Indeed, the department's commitment to “eradicating disorder” as a crime control strategy could be seen as a kind of indifference to serving justice.¹²⁴ For the criminal justice ***181** system to send the correct message, at times it may be necessary to spend resources in ways that might be seen as inefficient or contrary to the well-worn conventions of law enforcement.¹²⁵ Declining to pursue cases morally worthy of law enforcement resources on the grounds that they are unlikely to result in conviction risks conveying a message that the public does not take the wrong done to a victim seriously enough.¹²⁶

One might worry that the government risks doing psychological harm to victims of crime when it pursues investigation or prosecution knowing that conviction is unlikely.¹²⁷ How, if at all, do moral education and expressivist theories take this risk into account? According to theories of both types, the purpose of criminal punishment is to communicate the importance of a criminal prohibition to the offender and to the public. The individual victim is one important recipient of that message, but not the only important recipient. That the investigation and prosecution may impose more burdens on the individual victim than psychological benefits does not speak decisively against pursuing a case. The potential for causing further harm to the victim may appropriately be considered in deciding whether and how to pursue the case. At least when the victim wishes to be involved in investigation and prosecution, the risk that a case will do further harm to the victim does not justify ***182** refraining from pursuing the case. Declining to pursue a case out of paternalistic concern for the victim would send a problematic message indeed. When a victim does not wish to be involved in a case, pursuing prosecution on the basis of circumstantial evidence alone may be a way to reconcile the victim's psychological needs with the state's duty to affirm the importance of a criminal prohibition.¹²⁸

Some consequentialist approaches to criminal justice condone a pattern of partial enforcement in which relatively few crimes of a given type are punished, but those that are punished are punished severely. Such a policy might have the same deterrent effect as a policy of investigating and prosecuting crime more consistently and punishing crimes more leniently.¹²⁹ Moral education theories and expressivist theories of punishment condemn such policies. To communicate the correct message to offenders and to the public, punishments must be both humane and proportional to the crime.¹³⁰ Rarely applied but disproportionately harsh punishments cannot do this. To express the right message about serious crime, the state must investigate and prosecute crime regularly and consistently, rather than holding out a select few offenders as examples.

B. Retributive Theories

Retributive theories of punishment hold that the suffering or hard treatment of offenders, when justly applied, is good for its own sake.¹³¹ Retributive theories of criminal justice vary greatly, but openness to devoting substantial resources in pursuit of retribution is a common thread.¹³² Immanuel Kant's retributivist theory of criminal punishment is famously demanding. Kant asserted that if the inhabitants of an island collectively decided to leave, they would have a moral obligation to ***183** execute murderers rather than simply leaving those murderers behind.¹³³ Kant's assertion has rightly faced criticism, both because the

death penalty is arguably morally problematic, and because the view that the departing island residents are required to punish murderers may be too stringent. Nevertheless, this account of punishment offers a plausible argument for the modest claim that the state has an obligation, perhaps a defeasible obligation, to punish those who commit murder and other serious crime. It also presents one reason to devote resources to addressing justice remainders even when doing so would lack efficiency on a utilitarian account.

At the core of Kant's account is a certain conception of injustice: criminals attempt to exempt themselves from the authority of public law.¹³⁴ In addition to whatever harm a crime does to individual victims, crimes of different sorts wrong the public by rejecting the public's right to govern itself as a collective body.¹³⁵ To restore the supremacy of law, Kant argues, the state must turn the criminal's "maxim," or form of reasoning, against her. The state must alter the effects of the criminal's action so that instead of making a unilateral exemption for herself from public law, the criminal's act exempts herself from the protection of the relevant law.¹³⁶ For example, a thief attempts unilaterally to exempt himself from the legal requirement to respect others' property. The law must reassert its supremacy by excluding the thief from the protection of the law; theft is justly punished by denying thieves the right to own property.¹³⁷ Other crimes, being violations of the preconditions of equal freedom for everyone, are justly punished with a proportional restriction of the criminal's freedom.¹³⁸ Punishment is retributive in that it aims to reverse a component of a past wrong, the offender's assertion of a unilateral exemption from law, by imposing hard treatment on the offender. The institution of punishment also provides a deterrent--not by threatening offenders with suffering, but by threatening to make crime in one respect futile. If the regime of punishment is effective, an attempt to assert an exemption for oneself from public law will fail.¹³⁹

The Kantian account of criminal punishment implies that the state's failure to punish serious crime--that which threatens the condition of equal freedom for *184 everyone--is always objectionable.¹⁴⁰ Serious crimes that go unpunished represent threats to the supremacy of law. The state thus has a duty to punish all serious crimes. Nevertheless, some justice remainders with respect to punishment are unavoidable.¹⁴¹ The duty to punish must thus be understood as a *pro tanto* or defeasible duty. Other strict retributivist theories of criminal justice have similar implications.¹⁴² Some less strict retributivist theories take the more modest stance that the state has a duty to ensure that serious crimes are *normally* punished.

Consider Herbert Morris's theory in "Persons and Punishment."¹⁴³ On Morris's account, the central provisions of criminal law benefit everyone if generally followed, but they also impose burdens.¹⁴⁴ We all benefit from fellow citizens' compliance with laws against wrongful violence and against fraud. These laws impose a burden by requiring us to restrain our conduct.¹⁴⁵ Committing a crime upsets the balance of benefits and burdens: the criminal refuses the burden of compliance with one of these central rules, but the unpunished criminal continues to receive the benefits of general compliance with these rules. Crimes of violence and property offenses have two victims. One is the individual victim. The other is the public, which the criminal cheats by refusing the burdens that the law-abiding accept. Criminal punishment aims to remedy the unfairness to crime's second victim, the public, by imposing a substitute burden in lieu of the burden of self-restraint.¹⁴⁶ By imposing a punishment on the criminal, the state prevents crime from upsetting the fair balance of benefits and burdens.

This account of criminal punishment is largely retrospective. It suggests that the chief purpose of punishment is to correct a component of a past wrong rather than *185 to prevent future wrongdoing.¹⁴⁷ Punishment "restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt."¹⁴⁸ Note, however, that punishment is not the only way of restoring the equilibrium. The state can also restore equilibrium by pardoning the criminal, thus canceling or forgiving the criminal's debt to society rather than compelling its repayment.¹⁴⁹ The state's retributive duty on Morris' view is not to punish all serious crime; it is either to punish or to pardon all serious crime.

The reasons for preferring punishment over pardon in the normal case are prospective: if most adult felons are usually punished rather than pardoned, serious crime will be deterred.¹⁵⁰ There is a difference between pardoning crime and merely ignoring it. Formally pardoning crime addresses the disturbance in the social equilibrium that crime introduces; metaphorically, it cancels the debt. Merely ignoring crime leaves disturbance in the social equilibrium unaddressed, leaving a debt on the books. It is thus objectionable, on Morris's account, for a government to fail to respond in some formal way to serious crime, whether by punishing it or by formally pardoning it. Formally pardoning crime on a large scale, though, would be objectionable primarily because it would lead to a failure of deterrence.¹⁵¹

The state does not violate a moral duty, on this view, if it sometimes responds to crime with executive clemency. It does violate a moral duty if there is some type of serious crime it systematically fails to prosecute. Included here as a form of systematic failure is a decision by the state to leave most instances of crime unpunished while imposing a disproportionately heavy sanction on a few offenders. Making examples of a few offenders may yield as effective a deterrent as imposing more moderate punishments on all or most offenders. But imposing a draconian, disproportionate punishment on a few offenders does not restore fairness in the distribution in the benefits and burdens of the rule of law. It places an unfairly heavy burden on a few while allowing others to receive the benefits of the rule of law despite shirking the burdens.

There is a second way for the state to fail in its moral duties with respect to criminal punishment, according to fair-play retributivist accounts. The state also violates a moral duty if it consistently declines to prosecute crimes committed against members of a socially disfavored group. The justification of punishment rests on the presupposition that criminal law protects *everyone*. If the members of a disfavored minority--the homeless, say--are frequently victims of crimes, and the criminal justice system does not take crimes against members of this group *186 seriously, then the social distribution of benefits and burdens is unfair. Under these conditions, some people, such as the law-abiding homeless, fully accept the burdens of self-restraint without fully receiving the benefits of the rule of law and its institutions. Some other people, such as homeless people who are not law-abiding, refuse the burdens of self-restraint without thereby upsetting a fair balance of benefits and burdens. Indeed, some crimes by the homeless may bring the distribution of benefits and burdens closer to a fair balance. Thus, punishing crime by the homeless would not help to restore a fair balance of benefits and burdens; there was no fair balance to restore.

Likewise, if crimes against undocumented immigrants are rarely punished, undocumented immigrants who obey all the laws other than immigration laws accept a burden without receiving the benefits of rule of law. If an undocumented immigrant commits a crime, punishing the crime does not help to restore a fair balance of benefits and burdens. To be justified in punishing crimes by undocumented immigrants, the state must also punish crimes against undocumented immigrants. On a fair-play retributivist account of punishment, such as Morris's, the justification for punishing crimes by the members of a socially disfavored group is undermined if crimes against this group are not regularly prosecuted.

Systematic justice remainders can thus undermine the legitimacy of the criminal justice system as a whole. Denying some people effective protections of the criminal law and rule of law institutions undermines the justification for having criminal laws whose sanctions can be applied to any offender.

C. Non-Utilitarian Deterrence Theories

Some non-utilitarian deterrence theories of criminal law support similar conclusions about systematic failures to punish a type of serious crime or to punish serious crimes against certain victims. Among these are some general deterrence theories based on a non-consequentialist account of collective self-defense, as well as general deterrence theories grounded in the idea of a social contract. This Section will argue that on theories of the former sort, systematic justice remainders constitute a failure in the state's duty to protect. On theories of the latter sort, the state's failure to protect a vulnerable group can undermine the legitimacy of criminal law.

On some deterrence accounts, it is the *threat* of punishment, not the act of punishment, that deters crime.¹⁵² The state's genuine threat to punish serious crime is justified, on these accounts, as a form of collective self-defense.¹⁵³ Punishments are not justified because of the hope that they will themselves deter crime or that they will contribute to the credibility of the state's threat. Rather, they are justified because the state reserves the function of threatening to punish crime and the right *187 to make a sincere threat entails a right to carry it out.¹⁵⁴ The threat does not commit the state to pursue every crime it detects. The threat is consistent with the exercise of prosecutorial discretion and with simple failures of police and prosecutors to pursue complaints.¹⁵⁵ But the state cannot sincerely threaten to punish criminals if it never actually punishes any criminals at all or if it carries out the threat to punish only rarely.¹⁵⁶ Likewise, the sincerity of the state's threat is undermined if the state usually leaves certain offenders unpunished or if it usually omits to punish crimes against victims of certain types. Assuming that the state is morally required and not merely permitted to defend its people against serious crimes, systematic justice remainders constitute a violation of the state's *pro tanto* moral duty to protect its people.

Systematic justice remainders that involve a failure to protect socially disfavored groups are especially problematic, according to deterrence theories that draw on the idea of a social contract. Consider, for example, social contract theories of criminal punishment that hold a certain punishment for a certain crime is justified only if rational people would unanimously agree to its institution.¹⁵⁷ Rational people would make this decision with a view toward avoiding the worst-case scenario for themselves not knowing what their own future decisions will be.¹⁵⁸ The decision whether to agree to the institution of a ten-year prison sentence for grand larceny illustrates the calculation.¹⁵⁹ Rational people who cannot predict their own future decisions would need to take into account the possibility that they might one day choose to commit grand larceny and go to prison for it. But people would also have to consider what level of welfare they would experience in a society with no criminal enforcement of such law. If being in a society without criminal laws against theft would be even worse than going to prison for ten years, then *188 a ten-year sentence for grand larceny would be justified.¹⁶⁰ It would benefit everyone—even those who commit grand larceny and go to prison for it.

It may seem odd to base the justification of criminal punishment on the assumption that rational people do not know whether they will commit crimes. Other social contract theories of criminal punishment avoid this assumption.¹⁶¹ Sharon Dolovich, for example, points out that since even the best criminal justice system is fallible, rational people should take into account the possibility that they could be wrongly convicted of crimes.¹⁶² Rational people who know that they could be victims of crimes and that they could be wrongly convicted of crimes would agree to institute criminal punishments that make the worst-case scenario for them less likely. If a punishment harms people less than the crime to which it attaches, being a victim of the crime in question would be worse than being rightly or wrongly punished for it. If this punishment has a substantial deterrent effect, instituting it would reduce the risk of the worst-case scenario, even if it increases the risk of a different bad outcome. Rational people would thus agree to institute punishments that are less severe than the crimes for which they are applied and that have a deterrent effect.¹⁶³

On either of these contractarian views, the justification of punishment presupposes that everyone benefits from law and order.¹⁶⁴ But suppose that crimes against people in a disfavored group generally go unpunished. Then members of this disfavored group benefit less than other citizens do from the institutions of criminal law and punishment. The legal system does not directly deter crimes against members of the disfavored group. Members of this group might benefit indirectly from criminal punishments imposed on people who commit crimes against members of more socially favored groups. Perhaps, for instance, the criminal process facilitates economic stability that benefits everyone, including people whose rights the legal system does not protect effectively. These indirect benefits of partial law and order may or may not be significant enough to outweigh the risk of being rightly or wrongly punished for a crime.

To make this concrete, imagine that thefts from homeless people generally were not prosecuted and that this fact about law enforcement was widely known. Though homeless populations might benefit in indirect ways from the existence of *189 punishment for thefts from domiciled people, the criminal justice system would not effectively deter thefts from homeless people. For homeless people, then, the institution of criminal punishment would not substantially reduce the risk of being a victim of theft. If homeless people are sometimes (rightly or wrongly) punished for theft, then the institution of criminal punishment for theft would present an uncompensated risk to the homeless. A rational, risk-averse person would not consent to the institution of criminal punishment under these circumstances.¹⁶⁵ So, on a contractarian theory of punishment, failure to prosecute thefts from the homeless would undermine the justification for punishing theft by the homeless. Moreover, it would undermine the justification for punishing theft *by anyone* since, if we take the reciprocity requirement in the social contract seriously, coercive institutions are justified only if they benefit everyone.¹⁶⁶ The same reasoning would apply to crimes of other types and to crimes against other disfavored groups.

On social contract accounts, systematic failure to enforce an important criminal prohibition can undermine the legitimacy of that prohibition whether or not the government's failure to enforce was avoidable. If some people lack effective protection from the criminal law, the state's entitlement to punish crimes by these people is undermined, whether or not the state could have done more to punish crimes against these people. That the state could not avoid the failure of punishing crimes *against* these people does not affect the state's illegitimacy in punishing crimes *by* these people because the social contract requires that each person subject to the *190 burdens of the rule of law *actually* receive the benefits. A mere effort to provide these benefits will not suffice. Thus, if it is inherently difficult to prosecute crimes against people in certain social situations, such as homelessness or institutionalization, the existence of these social situations threatens the legitimacy of the legal system.

A partial remedy is to provide increased penalties for crimes against the most vulnerable victims. Most normative theories of criminal justice, social contract theories included, permit slightly increased sentences for crimes against members of vulnerable groups.¹⁶⁷ Those theories that require punishment to be roughly proportional to harm done will not permit governments to make up for the difficulty of punishing crimes against vulnerable people by *greatly* increasing the severity of punishments imposed for crimes against vulnerable victims. Compared with other non-consequentialist theories of punishment, some social contract theories are more flexible on the topic of proportionality. Dolovich's theory, for instance, allows for disproportionately severe punishment of lesser crimes if imposing these punishments somehow deters more serious crimes.¹⁶⁸ The punishments for the most serious crimes may not be disproportionately severe, however, and inhumane punishments are absolutely prohibited if there is any possibility of a wrongful conviction.¹⁶⁹ So on Dolovich's social contract account, the state could perhaps make up for the difficulty of prosecuting *thefts* from the homeless by punishing these or all thefts more severely. The state, though, could not make up for the difficulty of prosecuting serious violent crimes against certain groups by punishing these crimes disproportionately. The account implies that the state has a duty to protect everyone's bodily integrity.

There is an overlapping consensus, then, among many non-consequentialist theories of the value and justification of punishment. Some deterrence theories, as well as most retributivist theories, moral education theories, and expressivist theories, support the claim that two kinds of systematic justice remainders are urgently problematic: (1) a general failure to punish serious crimes, and (2) a deep inequality in the frequency with which crimes against members of different social groups are punished. There are, of course, some differences in the theories' specific implications. Moral education and expressivist theories take the state to have breached its duty to punish only if punishing crimes more consistently would have been feasible. Retributivist and non-consequentialist deterrence theories hold that the state has a *pro tanto* duty to punish serious crime even when punishing crime consistently is infeasible. Some social contract theories condone disproportionate punishment of lesser offenses (but only of lesser offenses) as a way of making up for the difficulty of prosecuting them. This option is unavailable under moral education *191 theories, expressivist theories, retributivist theories, and deterrence theories based on the right to collective defense.

D. Race and Remainders

Racial disparities produce some of the most obvious and troubling justice remainders. Inequalities in the effective protection of criminal law threatens not only the moral legitimacy of the legal system, as discussed above, but also the psychological and sociological legitimacy of the state in the administration of criminal justice.¹⁷⁰ In the aftermath of the police beating of Fran Jude, an unarmed Black man in Milwaukee, researchers found citizens of Black neighborhoods were far less likely to report crimes to the police.¹⁷¹ The net loss in call volume over a year exceeded 22,000 after controlling for neighborhood characteristics, crime rate, and prior call patterns. This study adds strong support to an already convincing stream of research that cooperation of neighborhood residents with law enforcement, including crime reporting, turns on how police use their authority and how fair the exercise of their authority is perceived. The authors' finding of missed calls recognized what is so often missed, diminished, or ignored.¹⁷² Poor, marginalized, and disaffiliated communities experience violence and victimization in relative silence and obscurity, where no one with any formal authority knows about a violent sexual assault, an act of domestic violence, or an abuse of a child, and where but for cameras, unconstitutional and illegal use of force by police kills differentially.¹⁷³

The invisibility and silence of those who lack power and status define too large a share of American history, from the legacy of slavery, Black lynching, and Jim Crow in the South, to the diminished recognition of the value of Black lives in the aftermath of *McCleskey* and the brazen killing of George Floyd.¹⁷⁴ There is *192 evidence of “systematic,” “institutionalized,” and “contextual” discrimination.¹⁷⁵ As a whole, Black victims are treated as if they matter less, and the lives of Black suspects, defendants, probationers, inmates, and parolees are also discounted, creating a unique victim pool.¹⁷⁶

It is simply impossible to ignore race and class when considering the value that should be given to any responsibility deficit from justice remainders.¹⁷⁷ Stephen Carter put it quite well:

[A]ll too often, American legal and political culture seems to suggest the grimly analogous principle that there are two varieties of people who are involved in criminal activity, black people and victims. So perhaps when victims happen to be black, the culture rationalizes the seeming contradiction by denying that there has been a crime.¹⁷⁸

It is an empirical question as to how much victim devaluation actually affects justice remainders and, thus, victim-related norms.¹⁷⁹ The Baldus data supporting the *McCleskey* case, however, offers evidence that bolsters Carter's musings.¹⁸⁰ One consistent finding is that murderers of white victims are more likely to be sentenced to death than murderers of Black victims.¹⁸¹ One must be disciplined to move beyond offender discrimination claims in capital sentencing to see the stark devaluation of Black victims' lives. Further research using the Baldus data gives us that discipline, showing it is not only race that mediates harsher punishment, *193 including the death penalty, but it is also the stereotypicality of Blackness that determines the perceived deservedness of harsh punishment and death-worthiness.¹⁸² And much of this scholarship supports the notion of an invisible Black victim, including the determination that stereotypicality effects are found for Black killers of whites and not Black killers of Blacks.¹⁸³

IV. RESPONDING TO JUSTICE REMAINDERS IN A FLAWED SYSTEM

Normative theories of criminal law support the conclusion that criminal justice expenditures should directly address justice remainders, particularly those that are systematic. Local and state criminal justice systems, however, are already very costly.¹⁸⁴ The idea of curing all justice remainders is, thus, beyond farfetched. What should be done if the resources required to pursue justice remainders are not found in ever-increasing government allocations?¹⁸⁵ What should be done if systematic justice remainders cannot be eliminated because some serious crimes are inherently difficult to successfully prosecute?

This Part proposes two approaches to addressing justice remainders in a criminal justice system facing these challenges. Section IV.A begins a discussion of the need for remainders to be addressed in concert with a wide range of criminal justice reforms, informed both by empirical research and by normative theory. On first impression it may seem odd to address justice remainders by seeking systemic criminal justice reform. After all, arguments in Parts I through III are narrowly premised on the need and justification for more justice for those who live in silence and with a long shadow of the state's neglect. There we argued that more justice will be done by recognizing significant justice deficits. The foundation of our argument, though, always assumed that the remainder problem would be addressed in ways that do not actively contribute to further injustice.¹⁸⁶

Section IV.B discusses second-best responses to systematic justice remainders that cannot be eliminated, e.g., because certain serious crimes are difficult to *194 prosecute successfully. It is argued that if a government systematically fails to punish those committing serious crimes, it owes its citizens a remedy, much as an individual who breaks a promise (even with justification) owes the promisee a remedy.

The government should formally acknowledge the existence of unpunished crime, e.g., by conducting thorough investigations of serious crimes even when successful prosecution of a defendant seems unlikely.

The second-best responses are consistent with the goals of theories of punishment already discussed. Retributivist and non-consequentialist deterrence-based theories of criminal punishment assert a *pro tanto* duty to punish with some degree of consistency even when doing so is infeasible. They thus will implicitly call for the state to acknowledge publicly the crimes that cannot be punished, given the premise that the breach of a *pro tanto* duty (even a justified breach) requires a remedy. Moral education and expressivist theories of punishment do not assert a *pro tanto* duty to punish when punishment is infeasible. They support a duty to acknowledge unpunished crime for another reason: this second-best response to crime is necessary for the criminal justice system to send the right message about the importance of victims and their rights.

A. Remainders and Criminal Justice Reform

It does not require much imagination to think of the many injustices that would be encouraged by any significant increase in the capacity and capture of the criminal justice system.¹⁸⁷ With so many remainders found at each stage in the criminal process, proposals to reduce the sum of justice undone must wrestle with the costs of any remediation, and this obvious conundrum: how can more justice be done by addressing remainders if the remedy comes from investing additional resources and capacity in an already compromised criminal justice system?

The recognition of justice remainders must be seen in practical context. For many reasons, few would support adding to system capacity at the present time: police departments are under pressure to connect to the community and be more effective with fewer resources;¹⁸⁸ courts are increasingly diverting misdemeanor and less serious felony cases to more effectively reduce workload;¹⁸⁹ and prison *195 populations are shrinking due to a change in thinking about the need, value, effectiveness, and legitimacy of institutionalized corrections.¹⁹⁰

Simply stated, the call for a reduction to the sum of justice undone should refrain from further underwriting the criminal justice system's status quo.¹⁹¹ There is widespread support for systemic reform to the criminal justice system that is appropriately informed by evidence from research on policing,¹⁹² the courts,¹⁹³ and corrections.¹⁹⁴ Reforms can and should be embraced for their evidence of effectiveness and the cost-effectiveness of institutions, policies, and practices.¹⁹⁵ Evidence-based research on reform of the criminal justice system should also take into account the moral need to address justice remainders.¹⁹⁶

The broader aim of reforming the criminal justice system and the aim of addressing justice remainders may turn out to harmonize, in three ways. First, to the extent that reforms would involve either reducing reliance on incarceration or reducing recidivism, costs associated with incarceration would be minimized and expenditures could be, in theory, redistributed to address justice remainders. Second, reforms would minimize concerns that attempting to address justice remainders would contribute to injustices in extant practices of imprisonment. Third, we suspect that there would be a number of favorable incidental effects. For example, reforms to the criminal justice system may increase the number of *196 victims willing to come forward as complainants and, importantly, cooperate with police and prosecutors.¹⁹⁷

There is strong harmony between the demand for reform of the correctional system, in particular, and the demand to address justice remainders. Many have argued that the American criminal justice system imposes unjust punishments, either because sentences are formally unjust (e.g., imposing prison sentences where an alternative punishment would be fairer) or because the conditions of incarceration are unduly harsh. To the extent that practices of the correctional system are unjust, reform of the correctional system would itself address a justice remainder. A justice remainder is a failure to punish crime *justly*. One type of systematic justice remainder is the failure to punish certain types of serious crime at all. Another type of systematic justice remainder is the routine imposition of unjustly harsh punishment.¹⁹⁸ There is an overlapping consensus among non-consequentialist theories of the value of punishment that just punishment must be proportionate to the crime and that it must not be cruel (even if a cruel punishment would be proportionate). Retributive theories of punishment nearly all demand proportionality, and most prohibit cruel punishments.¹⁹⁹ It should go without saying that the spirit of the *lex talionis* must not be applied literally.²⁰⁰ Non-consequentialist deterrence theories based on the idea of justified defensive threats require that the threatened punishment for crime be approximately proportional to its gravity.²⁰¹ Legislatures should not threaten disproportionate punishments to defend society for the same reasons that individuals should not use or threaten disproportionate violence to defend themselves.²⁰²

Cruel or unjustly harsh punishments present an especially serious problem according to moral education and expressivist theories. Cruel punishments cannot, *197 in principle, morally educate. This is not an empirical claim about which punishments alter behavior. It may well be the case that a cruel punishment or a disproportionate punishment can alter offenders' behavior for the better. Moral education theories of punishment demand more than mere behavior modification. The central claim of moral education theory is that punishment is supposed to be more than an electrified fence, warning people, like cattle, that there are places we are not supposed to go.²⁰³ Punishment is also supposed to communicate the reasons for those boundaries.²⁰⁴ A punishment that expresses contempt for the wrongdoer's humanity cannot convey the moral message that everyone ought to respect other people's basic rights.²⁰⁵ This is not an empirical claim about the likelihood that cruel punishment will cause wrongdoers to respect others' rights or to believe that they should respond to others' rights. It is a conceptual claim about the content of the message cruel punishment sends. Expressivist theories of punishment, likewise, demand that punishment address the offender as a member of the moral community. Cruel punishments cannot do this.²⁰⁶

It would thus address a justice remainder for prisons to abandon confinement practices that are unduly or needlessly harmful, such as long terms of administrative segregation and any period of solitary confinement.²⁰⁷ If prisoners are subjected to unhealthful and unsanitary conditions or placed in fear of physical attack, *198 these needless harms can and should be addressed.²⁰⁸ More broadly, addressing justice remainders is entirely compatible with a reconsideration of the extensive role of

incarceration in the American criminal justice system. Reforms may involve shortening prison sentences for some types of crime and eliminating prison sentences for others.²⁰⁹ For serious violent crime, including crimes of sexual violence, the problems with the correctional system may be best addressed by changing the conditions of imprisonment, rather than by eliminating it.²¹⁰ The decision to tolerate the consequences of mass institutionalized corrections is a morally problematic decision.

B. Expressing Regret for Justice Remainders

Normative thinking also informs our sense of the limitations of any reforms. Not all justice remainders can be eliminated, in part because some offenses are inherently difficult to investigate and prosecute. When the state leaves serious crimes unpunished, whether or not it was justified in doing so, it may owe the public or individual victims of crime some other response in acknowledgment of the wrong that was done. Accounts of the value and justification of criminal punishment have different implications about what the state should do in response to justice remainders. Nevertheless, there are some points about which many normative accounts of criminal punishment agree. This Section explores one of these areas of extensive overlap: when the state cannot punish everyone guilty of a serious crime, there is some responsibility to find other ways to recognize publicly that criminal acts have occurred or may have occurred. Put differently, when there is an unavoidable justice remainder with respect to the imposition of punishment, there will be a further justice remainder—at times an avoidable one—if the state fails to respond in another way.

There are two theoretical grounds for a duty to recognize systematic justice remainders with respect to punishment, even when these remainders are unavoidable. The first rests on the idea that people and institutions should express regret for any failure to fulfill an important *pro tanto* duty. Recall that many retributive and deterrence-based theories of value and justification of criminal law hold that *199 government has a duty to make punishment the normal response to serious crime.²¹¹ This duty is on most accounts defeasible. For example, the state's duty to respect due process rights appropriately takes precedence over the duty to punish. In some cases, the state's duty to make punishment the normal response to serious crime is impossible to fulfill, as some crimes may be inherently difficult to investigate. But on most retributive and some deterrence-based accounts of criminal punishment, the duty to make punishment the normal response to crime does not *go away* when it cannot be easily fulfilled. It is merely outweighed by other duties.²¹²

What should the state do when it cannot fulfill its obligation to make punishment the systematic response to serious offenses? This duty is in some ways like individuals' duty to keep their promises. Both duties are defeasible and sometimes impossible to fulfill. On one standard view of promise-keeping, when someone justifiably fails to keep a promise, the promisor still owes something to the promisee.²¹³ At the least, the promisor owes the promisee an explanation. The promisor may also owe the promisee an expression of regret, compensation for failure to perform, or both. Explanation, compensation, and expression of regret are appropriate responses to the “moral residue” or “moral remainder” that arises when the promisee's right is (justifiably) infringed.²¹⁴ Having justifiably broken a promise, one should not act as if the promise has been kept or as if the promise was never made. Even if the promisee knows the promisor's reason for the breach, it is important for the promisor to acknowledge the breach. There is no such thing here as a tacit apology or an implicit expression of regret.

The analogy between an individual's obligation to keep promises and the state's obligation to punish serious offenders suggests that when the state cannot fulfill the latter obligation, there is a moral residue it must address. As with a broken promise, the state should not pretend that all its *pro tanto* obligations have been kept. Nor *200 should the state pass over the breach of its obligations in silence. At the least, the state must publicly explain its inability to punish all serious offenders. It thus has an obligation to provide a public accounting of the sum of justice undone. It may also have an obligation to express regret for its inability to punish all crime that meets a threshold of seriousness.

Moral education theories and communicative theories of punishment suggest a distinct reason for the state to respond formally to justice remainders when punishing all crime is impossible. Unlike many retributivist and deterrence-based accounts, moral education and communicative theories do not imply that government breaches a *pro tanto* duty when it justifiably fails to punish crime.²¹⁵ Yet these theories of punishment imply that when punishment is infeasible, a formal acknowledgment of the crime, although short of punishment, can partially achieve one of punishment's purposes.²¹⁶ Failure to punish the guilty is not the only justice remainder that can distort the messages criminal law sends. Failure to investigate crimes or failure to prosecute crimes can constitute a justice remainder that is distinct from the failure to punish.

Aggressively investigating crimes and prosecuting cases of a certain type sends the message that the government takes these offenses seriously, even if convictions rarely result. Conversely, if police and prosecutors choose not to pursue cases of a certain type, their failure to investigate and to prosecute sends the message that the government does not take these offenses seriously. Police, for example, often fail to take even preliminary steps to investigate reported rapes and other sexual assaults.²¹⁷ Thousands of rape kits go untested,²¹⁸ and a significant percentage of people who report rapes are never formally interviewed by police.²¹⁹ One possible ***201** reason police and prosecutors might have for choosing not to investigate or to prosecute sexual assaults is a doubt about the likelihood that investigation and prosecution will lead to a conviction.²²⁰ Moral education and communicative theories of criminal law imply that there is a good reason to investigate sexual assault even when police or prosecutors think the chance of a successful prosecution fails to meet an accepted threshold. Taking meaningful steps to investigate accusations of sexual assault--e.g., testing rape kits, formally interviewing victims or alleged victims who want to be interviewed--sends a message to victims of sexual assault and to society at large that the government takes the criminal laws against sexual assault seriously.²²¹ The converse is also true. Refusing even to initiate investigations sends a message that sexual assault does not matter to the state.

A wide range of normative accounts of criminal law imply that the state has a duty to provide a public accounting for the sum of justice undone and to express appropriate regret. Taking small steps in the direction of an accounting may require rethinking the capabilities of extant databases, and perfecting technology to integrate police, courts, and corrections data.²²² In theory, such data and information sharing would reveal “remainder patterns” of law enforcement, prosecution, adjudication, and punishment. Still, these steps must account for the significant potential for misuse and abuse.²²³

***202** An accounting should also prompt some indicia of accountability. If, for example, the prosecutors in one jurisdiction fail to bring charges for serious offenses of a certain kind, or if that office frequently fails to bring charges for crimes with victims of a certain type, it owes the public an explanation of this pattern. But explanation is not enough. The systematic failure to investigate or to prosecute certain offenses such as sexual assault can constitute a justice remainder distinct from the failure to punish.

If violations of some criminal laws cannot be punished consistently, there may be value, nevertheless, in uniformly investigating violations of these laws. There may also be value in prosecuting violations as uniformly as possible, consistent with prosecutors' obligation not to proceed with a charge unless it is supported by probable cause.²²⁴ This enables the government to express regret for its inability to impose punishment in this case. It also communicates to the public that the state takes the underlying criminal prohibition very seriously.

The experience over the past three decades in prosecuting domestic violence cases is instructive.²²⁵ Increasingly, some prosecutors' offices are adopting mandatory or universal filing of charges--consistent with a mandatory prosecution or “no-drop” prosecutorial policies.²²⁶ Other prosecutors' offices proceed with cases of intimate partner violence even in the absence of a victim willing to testify, known more generally as an “evidence-based” prosecution.²²⁷ In addition to addressing our concerns with justice remainders, there is some evidence that such policies reduce re-victimization and improve victim beliefs about future safety.²²⁸

***203** The rise in evidence-based programs throughout the criminal justice system--from crime prevention programs to correctional interventions--should inspire the creation and systematic evaluation of justice remainder programs.²²⁹ Ultimately, Evidence-Based Remainder Programs (“EBRPs”) would look to the most effective ways to reduce justice remainders throughout the criminal process, including targeting the long neglected dark figure of crime. Three broad categories of EBRPs are envisioned to address person, system, and societal remainders: (a) proactive programs that seek to prevent remainders from occurring in the first place, (b) reactive programs that look to reduce existing remainders and minimize their effects, and (c) data and information-sharing initiatives designed to increase public accountability for remainders of different sorts. Such programs would be a promising first step toward adjusting systematic justice remainders.

CONCLUSION

This Article calls for more recognition of justice remainders, including an accounting of the sum of justice undone. The idea that there is far more justice that is not served than served should have long ago encouraged some formal recognition of all

of the wrongs unacknowledged and adjudicated; all of the remainders of justice that comprise the sum of justice undone. Publicly acknowledging the serious crimes that go unpunished may motivate more vigorous law enforcement, when that is both possible and deserved. More vigorous law enforcement is essential when the distribution of justice remainders is deeply unequal and some parts of the population lack public validation, no less protection from the state's exercise of criminal law. Acknowledging justice remainders, including unavoidable justice remainders, expresses appropriate regret that the state has left serious crimes unpunished. It also helps the state to communicate public condemnation of crime and our collective commitment to everyone's rights and safety.

It is certainly fair to ask why there has been no public accounting for the sum of justice undone. It is not as if the many costs of victimization are unknown.²³⁰ It is ***204** not as if the decisions made before, during, and after the criminal process are too difficult to measure and quantify. Theories that chronicle errors and failures of desert in the criminal process, offered by commentators from Epps and Forst, to Robinson and Cahill, paint a detailed and nuanced portrait. The person-related, system-related, and societal remainders are all well-known. It is also not the case that the silence and anonymity accompanying generation after generation of unheard victims is in any way new; and that we expect recognition of remainders to bring about concerns with over-enforcement and the specter of over-criminalization.

Perhaps it is simply that these different remainders are inevitable artifacts of any justice system that is distinctly human. And, because our system is so very human, there is something special, different, and important about what we may fairly ask of the state in recognizing and validating wrongs that breach the moral consensus of our community. This seems generally right and yet incomplete.²³¹

There is, as noted earlier, a catalog of wrongdoing witnessed over our lifetimes, virtually all of which we let go, and much of it uncounseled by the state. We would see this catalog of silence and ask that: (a) criminological and criminal justice research, anchored at any particular point in the criminal process, recognize rather than ignore significant systematic and non-systematic remainders; (b) the theoretical construction of victimization be expanded to include remainders; and (c) system-wide reforms designed to reduce remainders be paired with evidence-based scholarship that embraces outcome effectiveness with metrics of cost effectiveness (EBRPs).

We also would add that remainders of justice need not take an inconspicuous moral toll. Each wrong informally and formally unaddressed, unchallenged, and unacknowledged reflects a moral choice. It is also a moral choice, if not an obligation, to support an accounting of the sum of justice undone. At the very least, what we ask of the idea of equality and justice should not be compromised by accepting, uncritically, any and all victimization not acknowledged and made right by the state.

Footnotes

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a1 Julian Aresty Professor, Professor of Legal Studies and Business Ethics, Sociology, and Criminology, The Wharton School, University of Pennsylvania.

aa1 Assistant Professor, Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania.

1 See, e.g., Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEX. L. REV. 857, 869 (2009); Aliraza Javaid, *Male Rape, Stereotypes, and Unmet Needs: Hindering Recovery, Perpetuating Silence*, 3 VIOLENCE & GENDER 7, 10 (2016) (suffering in silence to prevent the stigma associated with rape); Kimberly D. Bailey, *The Aftermath of Crawford and Davis: Deconstructing the Sound of Silence*, 2009 BYU L. REV. 1, 5 (2009) (asking if victimless prosecutions encourage the systematic silencing and disempowerment of women);

PATRIZIA ROMITO, A DEAFENING SILENCE: HIDDEN VIOLENCE AGAINST WOMEN AND CHILDREN 7 (Janet Eastwood trans., 2008) (exploring the ways in which violence is intentionally subordinated and silenced).

- 2 Notably, this Article is a call for greater recognition, accountability, and justice for those who suffer wrongs in the absence of recognition by the state, not a plea for greater exercise of victim control over the legal system or a general call for victim rights in the context of the victims' rights movement. For a profound critique of the limits of the crime victim's movement, see Nils Christie, *Victim Movements at a Crossroad*, 12 PUNISHMENT & SOC'Y 115, 118 (2010), and FRANK WEED, CERTAINTY OF JUSTICE: REFORM IN THE CRIME VICTIM MOVEMENT 143-45 (1995), and compare with Lynn Jones, *Victims Movement*, in THE ENCYCLOPEDIA OF WOMEN AND CRIME 1087-88 (Frances P. Bernat & Kelly Frailing eds., 2019).
- 3 See generally PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOES NOT GIVE PEOPLE WHAT THEY DESERVE (2006) (offering a compelling account of violations of desert in the criminal justice system, and how at times justice is deliberately compromised by practical constraints and competing interests in the administration of criminal law); PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH (2008); BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES (2004); DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008).
- 4 See, e.g., Robert Shoemaker & Richard Ward, *Understanding the Criminal: Record-Keeping, Statistics and the Early History of Criminology in England*, 57 BRIT. J. CRIMINOLOGY 1442, 1443-44 (2017) (outlining the origins of quantitative inquiry in crime); Peter Lejins, *Uniform Crime Reports*, 64 MICH. L. REV. 1011, 1011 (1966) (discussing the importance of national crime statistics); Stanton Wheeler, *Criminal Statistics: A Reformulation of the Problem*, 58 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 317, 317-18 (1967) (reviewing the promise of criminal statistics). For a window into more recent discussions, see HANDBOOK OF QUANTITATIVE CRIMINOLOGY (Alex J. Piquero & David Weisburd eds., 2010).
- 5 See, for example, innovations such as the Cambridge Crime Harm Index (CHI), Lawrence Sherman, Peter William Neyroud & Eleanor Neyroud, *The Cambridge Crime Harm Index: Measuring Total Harm from Crime Based on Sentencing Guidelines*, 10 POLICING 171 (2016). For earlier work on non-reporting, see Wesley G. Skogan, *Dimensions of the Dark Figure of Unreported Crime*, 23 CRIME & DELINQ. 41 (1977); Wesley G. Skogan, *The National Crime Survey Redesign*, 54 PUB. OP. Q. 256, 263 (1990); Anne L. Schneider, *Methodological Problems in Victim Surveys and Their Implications for Research in Victimology*, 72 J. CRIM. L. & CRIMINOLOGY 818, 818 (1981); Albert D. Biderman & Albert J. Reiss, *On Exploring the 'Dark Figure' of Crime*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (1967) (exploring the subtle meanings of the difference between official police reports and victim survey data, or the "dark figure" of crime); see also Thorsten Sellin, *The Significance of Records of Crime*, 67 L. Q. 489, 491 (1951). Adolphe Quetelet is often credited with first raising the non-reporting problem. See ADOLPHE QUETELET, RESEARCH ON THE PROPENSITY FOR CRIME AT DIFFERENT AGES 17 (Anderson Publ'g Co., 1984) (1833) (bemoaning the gap in offenses "known and adjudicated" and those offenses actually committed).
- 6 See, e.g., James Garofalo, *Police, Prosecutors, and Felony Case Attrition*, 19 J. CRIM. JUST. 439, 440 (1991); Marianne Hester, *Making it Through the Criminal Justice System: Attrition and Domestic Violence*, 5 SOC. POL'Y & SOC'Y 79, 83-4 (2005); S. Caroline Taylor & Leigh Gassner, *Stemming the Flow: Challenges for Policing Adult Sexual Assault With Regard to Attrition Rates and Under-Reporting of Sexual Offences*, 11 POLICE PRAC. & RSCH. 240, 240 (2010); Rodney F. Kingsnorth, Randall C. MacIntosh, & Sandra Sutherland, *Criminal Charge or Probation Violation? Prosecutorial Discretion and Implications for Research in Criminal Court Processing*, 40 CRIMINOLOGY 553 (2002) (highlighting prosecutorial discretion in pursuing different avenues for domestic violence cases).
- 7 Our notion of *remainders of justice* runs parallel, at times, with Robinson and Cahill's construct of deviations from desert or doing justice, *supra* note 3.

- 8 This definition of justice remainders is expansive but excludes omissions to punish *mala prohibita* that are not morally wrongful. The question when there is a moral duty to do what the law requires is a central question in legal philosophy. See Richard Dagger & David Lefkowitz, *Political Obligation*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2014). Though there is controversy about when it is wrong to break the law, it is uncontroversial that law-breaking is not always morally wrong. Civil disobedience is sometimes justified. There are justifications for breaking laws that unjustly intrude into personal decisions. When violation of a legal prohibition is not morally wrong, the state's omission to enforce this legal prohibition does not generate justice remainders. In the decades leading up to *Lawrence v. Texas*, for example, Texas's law against consensual, adult homosexual sex was not widely enforced. Texas's failure to prosecute violations of this criminal prohibition did not generate justice remainders, since the prohibited conduct was morally permissible and the state lacked the authority to change its moral status. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”); see also Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1896 (2004) (“*Lawrence* ... [is] a story about how ... criminalization ... can cast ... individuals into grossly stereotyped roles, which become the source and justification for treating those individuals less well than others.”).
- 9 See, e.g., Wendy Larcombe, *Sex Offender Risk Assessment: The Need to Place Recidivism Research in the Context of Attrition in the Criminal Justice System*, 18 VIOLENCE AGAINST WOMEN 482, 483 (2012); Sharon B. Murphy, Victoria L. Banyard & Erin Dudley Fennessey, *Exploring Stakeholders' Perceptions of Adult Female Sexual Assault Case Attrition*, 3 PSYCH. VIOLENCE 172, 173-74 (2013). There are quite obviously more remainders from misdemeanor wrongdoing that contribute to the sum of justice undone. Our concern, though, remains largely with serious crimes.
- 10 The “sum of justice undone” and “sum of justice remainders” are used interchangeably in this Article. More substantively, the idea of “justice remainders” and the “sum of justice undone” is inspired by the normative work of Bernard Williams on moral remainders. See, e.g., Bernard Williams, *Ethical Consistency*, 39 PROC. ARISTOTELIAN SOC. 103, 110 (1965). Brian Forst's thoughts on “errors of justice” are inspirational as well, but inspire a marked departure from his welfare economics frame of reference, i.e., his focus on costs and optimal theories of errors. See FORST, *supra* note 3, at 3 (conceiving of errors of justice as costs). The idea for a remainder originates from a century old concern with the recognition of unreported crime, combined with modest criminal process clearance rates, and a host of other factors noted in this Article. For early discussions of un-reporting in the United States, see, for example, LOUIS N. ROBINSON, HISTORY AND ORGANIZATION OF CRIMINAL STATISTICS IN THE UNITED STATES 3 (1911); Louis N. Robinson, *The Improvement of Criminal Statistics in the United States*, 17 AM. STAT. ASSOC. 157 (1920). Estimates of the relationship between reported and unreported crime were highlighted more than fifty years ago in THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE (1967) (“An important finding of the survey is that for the Nation as a whole there is far more crime than ever is reported.”). See also BUREAU OF JUST. STATISTICS, NAT'L CRIME VICTIMIZATION SURV., VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010 (2012) (showing explanations offered for not reporting included: dealt with in another way/personal matter (34%); other reason or not one most important reason (18%); not important enough to victim to report (18%); police would not or could not help (16%); and fear of reprisal or getting offender in trouble (13%)).
- 11 The complexity of this equation comes not only from its many levels of analysis. The equation also must control for factors before, during, and after the criminal process. And these different levels along discrete periods of time must then accommodate variance by crime type.
- 12 One view of the normative foundation of justice remainders is, as noted earlier, found in Robinson and Cahill's detailed portrait of desert-based compromises in criminal law and the criminal justice system. See *supra* note 3. The empirical foundation for a recognition of certain justice remainders is also impressive. Most significant is the work of Mark A. Cohen who, for decades, has systematically explored the many diverse and often neglected costs to victims (along with other related crime and justice costs). See, e.g., Mark A. Cohen, *A Note on the Cost of Crime to Victims*, 27 URB. STUD. 139, 139 (1990); Ted R. Miller, Mark A. Cohen, & Shelli B. Rossman, *Victim Costs of Violent Crime and Resulting Injuries*, 12 HEALTH AFFS. 186, 186 (1993); TED R. MILLER, MARK A. COHEN & BRIAN WIERSEMA, VICTIM COSTS AND CONSEQUENCES: A NEW LOOK 1, 1 (1996) (discussing a new consideration of tangible and intangible

losses to victimization); Mark A. Cohen, *The Crime Victim's Perspective in Cost-Benefit Analysis: The Importance of Monetizing Tangible and Intangible Crime Costs*, in COSTS AND BENEFITS OF PREVENTING CRIME (Brandon C. Welsh ed., 2001) (demonstrating a range of views on the costs and benefits of crime control).

¹³ See the data tables in BUREAU OF JUST. STATISTICS, NAT'L CRIME VICTIMIZATION SURV., 1993-2018 (2019).

¹⁴ See UNIFORM CRIME REPORTS, FBI (2018), <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-1>. For yearly victimization data, see *id.* The notable difference between these two measures, over time, may be seen in Figure One below.

Figure One

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

¹⁵ See BUREAU OF JUST. STATISTICS, NAT'L CRIME VICTIMIZATION SURV., 1993-2018 (2019). Based on the 2018 survey, less than half (43%) of violent victimizations were reported to police, slightly less (and not statistically significant) from 2017 survey data (45%). *Id.* For thoughtful commentary on the convergence and divergence of these measures, see UNDERSTANDING CRIME STATISTICS: REVISITING THE DIVERGENCE OF THE NCVS AND THE UCR 4 (James P. Lynch & Lynn A. Addington eds., 2006); Janet L. Lauritsen, Maribeth L. Rezey & Karen Heimer, *When Choice of Data Matters: Analyses of US Crime Trends, 1973-2012*, 32 J. QUANTITATIVE CRIMINOLOGY 335, 335 (2016).

¹⁶ For reasons of convenience, the word “state” is used throughout this Article to represent the government and its agents and functionaries. Its usage is not intended to raise any profound questions of political sociology. Cf. BERTRAND BADIE & PIERRE BIRNBAUM, *THE SOCIOLOGY OF THE STATE* ix-x (1983).

¹⁷ For a discussion of moral remainders, see BERNARD WILLIAMS, *MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980* 61 (1981); Williams, *supra* note 10. Any accounting of remainders by the state would likely contrast person and societal remainders with system-related remainders. The total of these three remainder categories equals the sum of justice undone. In this Article, remainders are not seen as errors, as Brian Forst would have it. See FORST, *supra* note 3, at 4. Remainders are also not a “departure from an optimal outcome” as welfare economics would have it. The empirical notion of a remainder is captured, at least in part, by the tangible and intangible costs that Cohen and his colleagues have detailed. See note 12, *supra*.

¹⁸ See Leslie W. Kennedy, *Going it Alone: Unreported Crime and Individual Self-Help*, 16 J. CRIM. JUST. 403, 411 (1988) (exploring self-help action by victims in the absence of more formal alternatives); Sarah E. Ullman & Henrietta H. Filipas, *Correlates of Formal and Informal Support Seeking in Sexual Assault Victims*, 16 J. INTERPERSONAL VIOLENCE 1028, 1029 (2001) (stating that victims seeking informal support were more likely to receive more positive social reactions).

¹⁹ There is a roughly comparable recasting for those caught in the web of the criminal process. Consider, for example, how arrestees are perceived with respect to culpability. See, e.g., Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987 (2019).

²⁰ Compare with local public initiatives that provide services to victims and survivors, for example, *Family Justice Centers*, NYC.GOV, <https://www1.nyc.gov/site/ocdv/programs/family-justice-centers.page> (last visited Nov. 23, 2020). See also, e.g., Casey Gwinn, Gael Strack, Susan Adams, Rebecca Lovelac & Deborah Norman, *The Family Justice Center Collaborative Model*, 27 ST. LOUIS UNIV. PUB. L. REV. 79, 79-82 (2007).

²¹ See Christina A. Byrne, Ira E. Hyman, Jr. & Kaia L. Scott, *Comparisons of Memories for Traumatic Events and Other Experiences*, 15 APPLIED COGNITIVE PSYCH. 119, 119, 127, 129 (2001) (exploring the effect of traumatic

experiences on memory and recall); Cristina S. Mesquita & Ingela C. Maia, *What Is Told When the Story Is Retold? Consistency of Victimization Reports in Psychiatric Patients*, 59 SCANDINAVIAN J. PSYCH. 311, 311 (2018).

22 See notes to Section III.A, *infra*.

23 The moral legitimacy of a legal system or a part of a legal system must be distinguished from its perceived legitimacy. See, e.g., Jeffrey Fagan, *Legitimacy and Criminal Justice*, 6 OHIO ST. J. CRIM. LAW 123, 129, 134, 138 (2008); Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 218, 240 (2012); Mark H. Moore, *The Legitimation of Criminal Justice Policies and Practices*, 1 PERSPS. ON CRIME & JUST. 47, 50-56 (1996-97).

24 The scope of this Article does not permit an exploration of certain important dimensions of victimization, i.e., multiple re-victimization; victims who are at the same time charged with offenses; and the extent to which victims have a moral obligation to come forward.

25 See Michael Planty, Lynn Langton, Christopher Krebs, Marcus Berzofsky & Hope Smiley-McDonald, *Female Victims of Sexual Violence 1994-2010*, DEP'T OF JUST.: BUREAU OF JUST. STAT. (2013); Alan J. Lizotte, *The Uniqueness of Rape: Reporting Assaultive Violence to the Police*, 31 CRIME & DELINQ. 169, 171-73 (1985); Linda S. Williams, *The Classic Rape: When Do Victims Report?*, 31 SOC. PROBS. 459, 459 (1984); see also CATHY CARUTH, UNCLAIMED EXPERIENCE: TRAUMA, NARRATIVE, AND HISTORY (1996) (discussing trauma and victimization in general); see generally DANIEL BROWN, ALAN W. SCHEFLIN & D. CORYDON HAMMOND, MEMORY, TRAUMA TREATMENT, AND THE LAW (1998); SEXUAL ABUSE RECALLED: TREATING TRAUMA IN THE ERA OF THE RECOVERED MEMORY DEBATE (Judith L. Alpert ed. 1995).

26 Over the past decade, consistently less than half of all violent crime and less than twenty-five percent of all property crime were cleared. The Uniform Crime Reporting program requires that three specific conditions be met for a crime to be cleared: At least one person has been arrested, charged with the commission of the offense, and turned over to the court for prosecution. See *Crime in the United States*, FED. BUREAU OF INVESTIGATION (2017), <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/clearances>. For an excellent discussion of police clearance rates, see Dale O. Cloninger & Lester C. Sartorius, *Crime Rates, Clearance Rates and Enforcement Effort: The Case of Houston, Texas*, 38 AM. J. OF ECON. & SOCIO. 389, 389 (1979) (exploring how police expenditures determine clearance rates).

27 The idea of a “responsibility deficit,” raised in the broader context of corporate moral agency, comes from the brilliant work of Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171, 194 (2007) (“The responsibility of enactors may leave a deficit in the accounting books, and the only possible way to guard against this may be to allow for the corporate responsibility of the group in the name of which they act.”). For a contrarian view, see John Hasnas, *The Phantom Menace of the Responsibility Deficit*, in THE MORAL RESPONSIBILITY OF FIRMS 6 (Eric W. Orts and N. Craig Smith eds., 2017).

28 See Marvin E. Wolfgang, Robert M. Figlio, Paul E. Tracy & Simon I. Singer, NAT'L SURV. OF CRIME SEVERITY 50, 50 (1985). Significant literature has developed around seriousness scaling of offenses following the National Survey. See, e.g., Stephen D. Gottfredson, Kathy Young & William S. Laufer, *Additivity and Interactions in Offense Seriousness Scales*, 17 J. RSCH. CRIME & DELINQ. 26 (1980); Nicole Leeper Piquero, Stephanie Carmichael & Alex R. Piquero, *Research Note: Assessing the Perceived Seriousness of White-Collar and Street Crimes*, 54 CRIME & DELINQ. 291, 306 (2008); Kristy Holtfreter, Shanna Van Slyke, Jason Bratton & Marc Gertz, *Public Perceptions of White-Collar Crime and Punishment*, 36 J. CRIM. JUST. 50 (2008).

29 Among the accounts addressed here are moral education accounts, e.g., Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 209 (1984); expressivist accounts, e.g., R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001); Kantian retributivism, as reconstructed in ARTHUR RIPSTEIN,

FORCE AND FREEDOM 300-24 (2009); fair-play based retributivism, e.g., Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 477 (1968); and non-consequentialist deterrence theories, e.g., Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 320-21 (2004); Anthony Ellis, *A Deterrence Theory of Punishment*, 53 PHIL. Q. 337, 338 (2003); Claire Finkelstein, *Punishment as Contract*, 8 OHIO ST. J. CRIM. L. 319, 330 (2011); Warren Quinn, *The Right to Threaten and the Right to Punish*, 14 PHIL. & PUB. AFF. 327, 336 (1985).

- 30 Among the serious prohibitions discussed here are prohibitions on wrongful violence and prohibitions on serious forms of property crime. Though failure to punish any *malum in se* crime can result in a justice remainder, the normative arguments of this Article concern only offenses that do substantial harm to an individual victim.
- 31 See, e.g., Jennifer Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCH. SCI. 383, 384 (2006) (“Defendants whose appearance was perceived as more stereotypically Black were more likely to receive a death sentence than defendants whose appearance was perceived as less stereotypically Black.”). For discussion about implicit bias, see Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1514 (2005).
- 32 The priority should recognize the most rigorous research and findings, even when results run contrary to intuitions, hypotheses, and, at times, reinforcing anecdotal evidence. See, e.g., Greg Ridgeway, *Assessing the Effect of Race Bias in Post-Traffic Stop Outcomes Using Propensity Scores*, 22 J. QUANTITATIVE CRIMINOLOGY 1, 26-27 (2006); John MacDonald, Jeffrey Fagan & Amanda Geller, *The Effects of Local Police Surges on Crime and Arrests in New York City*, 11 PLOS ONE, 1, 10-11 (2016); Karen F. Parker, John M. MacDonald, Geoffrey P. Alpert, Michael R. Smith & Alex R. Piquero, *A Contextual Study of Racial Profiling: Assessing the Theoretical Rationale for the Study of Racial Profiling at the Local Level*, 47 AM. BEHAV. SCIENTIST 943 (2004); Richard Berk, Azusa Li & Laura Hickman, *Statistical Difficulties in Determining the Role of Race in Capital Cases: A Re-analysis of Data from the State of Maryland*, 21 J. QUANTITATIVE CRIMINOLOGY 365, 386 (2005).
- 33 For discussion about criminal justice accommodation to crime rates, see Mahesh K. Nalla, *Perspectives on the Growth of Police Bureaucracies, 1948-1984: An Examination of Three Explanations*, 3 POLICING & SOC'Y 51, 54 (1992); Michael J. Greenwood & Walter J. Wadycki, *Crime Rates and Public Expenditures for Police Protection: A Reply*, 33 REV. SOC. ECON. 81, 81 (1975); Paul M. Zipin, Rodney H. Mabry & Carl L. Dyer, *Crime Rates and Public Expenditures for Police Protection: A Comment*, 32 REV. SOC. ECON. 222, 223 (1974); YongJei Lee, John E. Eck & Nicholas Corsaro, *Conclusions From the History of Research Into the Effects of Police Force Size on Crime--1968 Through 2013: A Historical Systematic Review*, 12 J. EXPERIMENTAL CRIMINOLOGY 431, 446 (2016); Michael L. Carriaga & John L. Worrall, *Police Levels and Crime*, 88 POLICE J.: THEORY, PRAC. & PRINCIPLES 315, 328 (2015).
- 34 Many years before sophisticated official reporting practices and crime victimization surveys, Edwin Sutherland raised concerns with attrition. See EDWIN SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* 25 (1955) (“Obviously a large proportion of the crimes committed go undetected, others are detected but not reported, others are reported but not officially recorded.”). It is no small feat to craft a proportional criminal justice funnel, from victimization and entry to the system, to a sentence of some form of correctional supervision.
- 35 The size, scale, and cost of the criminal justice system assumes a strong pull towards efficiency. This cost-benefit pull accommodates the dark figure of crime. See, e.g., Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 185 (2014) (discussing the efficiency gains of the criminal justice system); MARK A. COHEN, *THE COSTS OF CRIME AND JUSTICE* 6 (2005); see also Biderman & Reiss, *supra* note 5, at 9.
- 36 There is a long stream of scholarship considering diversion and exit from the criminal justice system. For an early treatment, see Franklin E. Zimring, *Measuring the Impact of Pretrial Diversion from the Criminal Justice System*, 41 U. CHI. L. REV. 224, 225-26 (1974).

- 37 For all of the right reasons, factual guilt is a welcome subordinate for legal guilt. See William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 336 (1995).
- 38 On expressions of regret in the face of conflicting moral demands, see Williams, *supra* note 10, at 110. On trade-offs, see Nicolas Cornell, *The Aesthetic Toll of Nudging*, 14 GEO. J.L. & PUB. POL'Y 841, 842-43 (2016). See also Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 782 (1993).
- 39 Alan Strudler, *Mass Torts and Moral Principles*, 11 LAW & PHIL. 297-330, 318 (1992) (“Regret is no mere subjective impression of discomfort. To feel regret genuinely is to wish to convey it.”).
- 40 *Id.* at 319 (arguing regret is “an essential element in a social commitment to norms of moral concern, a commitment required to protect the credibility and hence the moral authority of law”).
- 41 Once again noting exceptions, such as the work of those detailing the compromises of desert, *e.g.*, ROBINSON & CAHILL, *supra* note 3, at 21, and those quantifying costs of victims and victimization, *e.g.*, Cohen, *supra* note 12, at 139.
- 42 Remainders are all too familiar to hard retributivists who would counter desert theorists by saying that some justice is better than none, even if distributed in ways that are offensively unequal. Hard retributivists argue that inequalities are no more intended than traffic accidents--unintended consequences of the pursuit of justice. Justice is personal. So too is guilt. That some escape justice in ways that are unequal is not an argument for forgoing the delivery of justice. It was Ernest van den Haag who famously said that unequal justice is always preferred to equal injustice. The skewed distribution of punishment should not diminish our measured condemnation of individual wrongdoers, or so the argument goes. See William S. Laufer & Nien-he? Hsieh, *Choosing Equal Injustice*, 30 AM. J. CRIM. L. 343, 343-44, 357 (2003) (countering the hard retributivist position taken by Van den Haag). In calling for systematic justice remainders to be remedied, as we do in Part III, *infra*, we do not mean to endorse this hard retributivist line. Rather, we would suggest that the state may appropriately aim at reducing justice remainders while also aiming to avoid systematic disparities in the frequency with which offenders from different social groups receive punishment. Moreover, we argue that among the most urgent justice remainders to address are those that involve systematic inequality in the degree to which criminal law effectively protects different classes of victims.
- 43 See, *e.g.*, Ben Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 262-63 (2018) (distinguishing mass criminalization from over-criminalization); DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 1-4 (2008) (reviewing the amount of criminal law, number of crimes, and amount of punishment without mention of crime victims or any other remainders of justice).
- 44 Cf. Roger Bowles, Maria Garcia Reyes & Nuno Garoupa, *Crime Reporting Decisions and the Costs of Crime*, 15 EUR. J. CRIM. POL'Y & RSCH. 365, 376 (2009) (exploring the differences in reported and unreported offenses); Ziggy MacDonald, *Revisiting the Dark Figure: A Microeconomic Analysis of the Underreporting of Property Crime and its Implications*, 41 BRIT. J. CRIMINOLOGY, 127, 128 (2001).
- 45 For a fascinating treatment of the victim in retributive theory, and the role of impunity, discussed as “impunidad,” see George Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 6360 (1999). Cf. Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 67 (1999) (“[V]ictims should and must be ignored if you are claiming to be doing retributive theory.”).
- 46 Cf. Brian Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, 74 ALB. L. REV. 1209, 1214-15 (2011).

- 47 Daniel Epps, *The Consequences of Errors in the Criminal Justice Theorem*, 128 HARV. L. REV. 1065, 1117 (2015). For an outstanding critique of Epps, see Laura I. Appleman, *A Tragedy of Errors: Blackstone, Procedural Asymmetry, and Criminal Justice*, 128 HARV. L. REV. F. 91, 92 (2015).
- 48 See, e.g., Michael Tonry, *Making American Sentencing Just, Humane, and Effective*, 46 CRIME & JUST. 441, 442 (2017) (reviewing the current failures of sentencing practices).
- 49 See, e.g., ROBINSON & CAHILL, *supra* note 3, at 17; Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1280 (2004); JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 3-4, 8 (2015) (exploring the ways in which felony records are permanent). For a general discussion of these criminal justice challenges, see FREDA ADLER, GERHARD O.W. MUELLER & WILLIAM S. LAUFER, CRIMINAL JUSTICE 9, 21 (6th ed., 2012).
- 50 Robinson and Cahill's work is really the lone exception in recognizing this kind of compromised justice, which they framed by principles of desert. See ROBINSON & CAHILL, *supra* note 3, at 21.
- 51 When crime statistics were first discussed by criminologists in the United States, Edwin H. Sutherland recognized that much of crime is concealed:
- Some are known only to the person who commits them, and of the others some are concealed because of pity for the guilty party or his relatives, some because of the annoyance or publicity that would be produced, some because of the fear of the offender, some because of the distrust of the police or courts, and some because the identity of the offender is not known though the fact of the crime is.
- SUTHERLAND, *supra* note 34, at 33. Thinking about this list prompted speculation that the social consequences of these and other crimes are probably greater than the most serious of all crimes.
- 52 Our argument presupposes an expressive responsibility on the part of the state. On the expressive aspects of state action, see generally Nicolas Cornell, *A Third Theory of Paternalism*, 113 MICH. L. REV. 1295, 1315-16 (2014); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1505-06 (2000); Alan Strudler, *The Power of Expressive Theories of Law*, 60 MD. L. REV. 492, 495-96 (2001); Kristin Voigt, *Relational Equality and the Expressive Dimension of State Action*, 44 SOC. THEORY & PRAC. 437, 437-38 (2018).
- 53 The lack of such a public record of wrongdoing is especially troubling on moral education and expressivist theories of the value of criminal punishment. On these accounts, we argue, when the State fails to provide public recognition of serious wrongdoing, it fails to express adequately society's commitment to the rights of victims. See *infra* Part III.A.
- 54 See, e.g., Christopher Peterson & Martin E.P. Seligman, *Learned Helplessness and Victimization*, 39 J. SOC. ISSUES 103, 103, 113 (1983) (connecting the idea of learned helplessness to the ultimate numbness of victimization).
- 55 Herbert G. Kelman, *Violence Without Moral Restraint: Reflections on the Dehumanization of Victims and Victimizers*, 29 J. SOC. ISSUES 25, 42-43 (1973); DEBORAH E. LIPSTADT, BEYOND BELIEFF 3, 17, 142, 224, 225 (1986) (considering the complex denial of genocidal death through the lens of the media); William S. Laufer, *The Forgotten Criminology of Genocide*, 8 ADVANCES CRIMINOLOGICAL THEORY 61, 77-79 (1999) (arguing that criminological research has generally ignored genocide, but that scientific study is needed to better understand victimization and perpetration).
- 56 CATHY CARUTH, UNCLAIMED EXPERIENCE: TRAUMA, NARRATIVE AND HISTORY 11 (1996) ("Through the notion of trauma, I will argue, we can understand that a rethinking of reference is aimed not at eliminating history

but a resituating it in our understanding, that is, at precisely permitting history to arise where immediate understanding may not.”).

- 57 Sykes and Matza explore a range of moral justifications or “techniques of neutralization.” See Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOCIO. REV. 664, 667-70 (1957); Shadd Maruna and Heith Copes, *What Have We Learned From Five Decades of Neutralization Research?*, 32 CRIME & JUST. 221, 232-33, 272 (2005). For a fascinating update to the original work of Sykes and Matza, see DELINQUENCY AND DRIFT REVISITED: THE CRIMINOLOGY OF DAVID MATZA AND BEYOND 44, 48, 54 (Thomas G. Blomberg, Francis T. Cullen, Christoffer Carlsson & Cheryl Lero Jonson eds., 2018).
- 58 John M. Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERS. & SOC. PSYCH. 377, 378, 381-82 (1968); BIBB LATANÉ & JOHN M. DARLEY, THE UNRESPONSIVE BYSTANDER: WHY DOESN'T HE HELP? 5, 80, 91 (1970); Leonard Bickman & Dennis P. Rosenbaum, *Crime Reporting as a Function of Bystander Encouragement, Surveillance, and Credibility*, 35 J. PERS. & SOC. PSYCH. 577, 584-85 (1977).
- 59 John T. Jost & Assaad E. Azzi, *Microjustice and Macrojustice in the Allocation of Resources Between Experimental Groups*, 136 J. SOC. PSYCH. 349, 361-62 (1996); John T. Jost, Mahzarin R. Banaji & Brian A. Nosek, *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCH. 881, 883, 885, 887 (2004); John T. Jost & Diana Burgess, Attitudinal Ambivalence and the Conflict Between Group and System Justification Motives in Low Status Groups, 26 PERS. & SOC. PSYCH. BULLETIN 293, 294-95, 304 (2000).
- 60 See Kennedy, *supra* note 18, at 411. Living with remainders of justice finds connections to and parallels with our failures or omissions to act. Remainders and omissions raise moral but less-than-obvious legal imperatives. We know that there are countless in peril and abject need who may deserve our attention, compassion, and human connection. For all the moral fuss, though, we rarely bear a legal duty and relation. It is most often said that it is not our task to recognize, and thus ensure, any semblance of public adjudication.
- 61 Eric P. Baumer, *Neighborhood Disadvantage and Police Notification by Victims of Violence*, 40 CRIMINOLOGY 579, 581, 586, 604-06 (2002); Ronet Bachman & Ann L. Coker, *Police Involvement in Domestic Violence: The Interactive Effects of Victim Injury, Offender's History of Violence, and Race*, 10 VIOLENCE & VICTIMS 91, 102 (1995); Callie M. Rennison, *An Investigation of Reporting Violence to the Police: A Focus on Hispanic Victims*, 38 J. CRIM. JUST. 390, 396-97 (2010); see also Richard A. Starrett, Michael P. Connolly, James T. Decker & Adelina Araujo, *The Crime Reporting Behavior of Hispanic Older Persons: A Causal Model*, 16 J. CRIM. JUST. 413, 415 (1988) (finding that minority older people are victimized more often, report crime less often, and are at greater risk).
- 62 John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1774, 1776 (1998).
- 63 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *352 (“[A]ll presumptive evidence of felony should be admitted cautiously; for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.”); see also Alexander Volokh, *Guilty Men*, 146 U. PA. L. REV. 173, 179 (1997) (“The most celebrated divine commandment related to punishing the innocent is, of course, Blackstone's.”); Michael DeKay, *The Difference Between Blackstone-like Error Ratios and Probabilistic Standards of Proof*, 21 LAW & SOC. INQUIRY 95, 131 (1996) (comparing Blackstone's Ratio to other standards). For contrasting opinions outside of the United States, see Moulin Xiong, Richard G. Greenleaf & Jona Goldschmidt, *Citizen Attitudes Toward Errors in Criminal Justice: Implications of the Declining Acceptance of Blackstone's Ratio*, 47 INT. J.L. CRIME & JUST. 14, 16 (2017).
- 64 It is argued that factual innocence should play a role consistent with the elevated rhetoric used in the criminal process. See William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 419-20 (1995).

- 65 An unusually critical take on the Ratio is offered by Daniel Epps, *The Consequences of Errors in the Criminal Justice Theorem*, 128 HARV. L. REV. 1065, 1145 (2015). For an outstanding and moving critique of Epps, see Laura I. Appleman, *A Tragedy of Errors: Blackstone, Procedural Asymmetry, and Criminal Justice*, 128 HARV. L. REV. F. 91, 92 (2015).
- 66 Richard L. Lippke, *Punishing the Guilty, Not Punishing the Innocent*, 7 J. MORAL PHIL. 462, 464 (2010).
- 67 To estimate the sum of justice undone, this Article is committed to some reconciliation over false negatives in the criminal justice system, rather than false positives. That quantum of justice that remains undistributed from false negatives, we maintain, is largely ignored. A legion of false positive advocates forms a very well-deserved and increasingly vocal lobby. See discussion over innocentism *infra*; see also Nicholas Scurich, *Criminal Justice Policy Preferences: Blackstone Ratios and the Veil of Ignorance*, 26 STAN. L. & POL'Y REV. 23, 32 (2015) (erroneous convictions were seen as worse than erroneous acquittals by participants); cf. LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW 2, 75 (2006) (raising concerns with the Ratio's preference for criminal defendants over victims).
- 68 See Appleman, *supra* note 47, at 91 (“[T]he implications of [Epps'] Article, if taken to their rational conclusion, point to eradicating the asymmetry currently favoring defendants in criminal procedure. This is an extremely troubling result.”).
- 69 Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 937 (2002) (“Therefore, retributivism necessarily uses crime victims as the means to attain retributive punishment and the treatment of offenders as ends in themselves.”).
- 70 See Kate B. Wolitzky-Taylor, Heidi S. Resnick, Jenna L. McCauley, Ananda B. Amstadter, Dean G. Kilpatrick & Kenneth J. Ruggiero, *Is Reporting of Rape on the Rise? A Comparison of Women With Reported Versus Unreported Rape Experiences in the National Women's Study-Replication*, 26 J. INTERPERSONAL VIOLENCE 807 (2011) (“[T]he overall prevalence of reporting (15.8%) has not significantly increased since the 1990s.”); Michael Planty & Kevin J. Strom, *Understanding the Role of Repeat Victims in the Production of Annual U.S. Victimization Rates*, 23 J. QUANTITATIVE CRIMINOLOGY 179 (2007); Kim M. Feldhaus, Debra Houry & Robin Kaminsky, *Lifetime Sexual Assault Prevalence Rates and Reporting Practices in an Emergency Department Population*, 36 ANNALS EMERGENCY MED. 23 (2000); Caroline Akers & Catherine Kaukinen, *The Police Reporting Behavior of Intimate Partner Violence Victims*, 24 J. FAM. VIOLENCE 159 (2009); Ronet Bachman, *The Factors Related to Rape Reporting Behavior and Arrest: New Evidence from the National Crime Victimization Survey*, 25 CRIM. JUST. & BEHAV. 8, 11, 19-20 (1998).
- 71 Annual National Crime Victimization Survey sexual assault data vary considerably year-to-year. Consider the variation between the 2017 (393,980) and 2018 (734,630) numbers. NAT'L CRIME VICTIMIZATION SURV., *supra* note 15, at 4. The UCR numbers remained comparatively stable from 2017 (128,022) to 2018 (131,560). The reasons for non-reporting are all too familiar and understandable. See, e.g., Richard B. Felson, Steven F. Messner, Anthony W. Hoskin & Glenn Deane, *Reasons for Reporting and Not Reporting Domestic Violence to the Police*, 40 CRIMINOLOGY 617 (2002); Richard B. Felson & Paul-Phillipe Paré, *The Reporting of Domestic Violence and Sexual Assault by Nonstrangers to the Police*, 67 J. MARRIAGE & FAM. 597 (2005); Martin Greenberg, Chauncey Wilson, R. Barry Ruback & Michael Mills, *Social and Emotional Determinants of Victim Crime Reporting*, 4 SOC. PSYCH. Q. 364 (1979); Jochem Tolsma, Joris Blaauw & Manfred te Grotenhuis, *When Do People Report Crime to the Police? Results from a Factorial Survey Design in the Netherlands, 2010*, 8 J. EXPERIMENTAL CRIMINOLOGY 117 (2012).
- 72 See Victoria L. Pitts & Martin D. Schwartz, *Promoting Self-Blame Among Hidden Rape Survivors*, 17 HUMAN. & SOC'Y 383, 384 (1993) (focusing on acquaintance rape that is not reported or considered rape by the victim); Mary P. Koss, *The Hidden Rape Victim: Personality, Attitudinal, and Situational Characteristics*, 9 PSYCH. WOMEN Q. 193 (1985); Mary P. Koss, Christine A. Gidycz & Nadine Wisniewski, *The Scope of Rape: Incidence and Prevalance of Sexual Aggression and Victimization in a National Sample of Students in Higher Education*, 55 J. CONSULTING & CLINICAL PSYCH. 162 (1987); Heather L. Littleton, Deborah L. Rhatigan & Danny Axsom, *Unacknowledged Rape:*

How Much Do We Know About the Hidden Rape Victim?, 14 J. AGGRESSION, MALTREATMENT & TRAUMA 57 (2006); see also Catherine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431 (2016) (discussing rape as a construct).

73 See DAVID CANTOR, BONNIE FISHER, SUSAN CHIBNALL, REANNE TOWNSEND, HYUNSKI LEE, CAROL BRUCE & GAIL THOMAS, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT (2016), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/Methodology_Report_for_AAU_Climate_Survey_4-12-16.pdf; BONNIE S. FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>; Bonnie S. Fisher, Leah E. Daigle, Francis T. Cullen & Michael G. Turner, *Reporting Sexual Victimization to the Police and Others: Results From a National-Level Study of College Women*, 30 CRIM. JUST. & BEHAV. 6 (2003).

74 See *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. 12 (2010) (statement of Michelle M. Dempsey, Associate Professor of Law, Villanova University); Patricia A. Frazier & Beth Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives*, 20 LAW & HUM. BEHAV. 607, 617 (1996) (reviewing the significant attrition in prosecuting rape cases); see also Cassia Spohn & Katharine Tellis, *The Criminal Justice System's Response to Sexual Violence*, 18 VIOLENCE AGAINST WOMEN 169, 170 (2012).

75 Koss et al., *supra* note 72; see also Alan Lizotte, *Uniqueness of Rape: Reporting Assaultive Violence to the Police*, 31 CRIME & DELINQ. 169 (1985); Matt DeLisi, Daniel E. Caropreso, Alan J. Drury, Michael J. Elbert, Jerry L. Evans, Timothy Heinrichs & Katherine M. Tahja, *The Dark Figure of Sexual Offending: New Evidence from Federal Sex Offenders*, 6 J. CRIM. PSYCH. 3, 12 (2016).

76 NAT'L CRIME VICTIMIZATION SURV., *supra* note 15, at 8.

77 *Id.* at 7 (showing that motor vehicle theft reporting in 2018 was 78.6%, and in 2017 was 79.0%).

78 See Cheryl Regehr, Ramona Alaggia, Jane Dennis, Annabel Pitts & Michael Saini, *Interventions to Reduce Distress in Adult Victims of Sexual Violence and Rape: A Systematic Review*, 3 CAMPBELL SYSTEMATIC REVIEWS 1, 9 (2013); see also Ross Macmillan, *Violence and the Life Course: Consequences of Victimization for Personal and Social Development*, 27 ANN. REV. SOCIO. 1, 6 (2001) (exploring life course development and psychological distress); Lawrence J. Cohen & Susan Roth, *The Psychological Aftermath of Rape: Long-Term Effects and Individual Differences in Recovery*, 5 J. SOC. & CLIN. PSYCH. 525, 526 (1978) (discussing the chronic difficulties facing rape victims, such as nightmares, disruptions in close relationships, depression, guilt, and shame); Sarah E. Ullman, Henrietta H. Filipas, Stephanie M. Townsend & Laura L. Starsynski, *Psychosocial Correlates of PTSD Symptom Severity in Sexual Assault Survivors*, 20 J. TRAUMATIC STRESS 821 (2007) (symptoms of PTSD include self-blame, avoidance coping, and negative social reactions moderated only by victims perception of control over their recovery process); Lilia M. Cortina & Sheryl Pimlott Kubiak, *Gender and Posttraumatic Stress: Sexual Violence as an Explanation for Women's Increased Risk*, 115 J. ABNORMAL PSYCH. 753 (2006) (contending that gender differences in PTSD symptoms are closely related to history of sexual violence).

79 See Courtney A. Ahrens & Rebecca M. Campbell, *Assisting Rape Victims as They Recover from Rape: The Impact on Friends*, 15 J. INTERPERSONAL VIOLENCE 959, 982 (2000) (offering an important discussion on measuring victim validation).

80 The state's comfort with the status quo in the face of regular justice remainders should strengthen and empower the moral account.

- 81 See, e.g., Shana L. Maier, “I Have Heard Horrible Stories ...”: Rape Victim Advocates’ Perceptions of the Revictimization of Rape Victims by the Police and Medical System, 14 VIOLENCE AGAINST WOMEN 786 (2008); Jan Jordan, *Worlds Apart? Women, Rape and the Police Reporting Process*, 41 BRIT. J. CRIMINOLOGY 679 (2001).
- 82 See, e.g., Susan E. Borja, Jennifer L. Callahan & Patricia J. Long, *Positive and Negative Adjustment and Social Support of Sexual Assault Survivors*, 19 J. TRAUMATIC STRESS 905, 906 (2006); Laura L. Starzynski, Sarah E. Ullman, Henrietta H. Filipas & Stephanie M. Townsend, *Correlates of Women’s Sexual Assault Disclosure to Informal and Formal Support Sources*, 20 VIOLENCE & VICTIMS 417 (2005).
- 83 See Tamara G.J. Leech & Marci Littlefield, *Social Support and Resilience in the Aftermath of Sexual Assault: Suggestions Across Life Course, Gender, and Racial Groups*, in SURVIVING SEXUAL VIOLENCE: A GUIDE TO RECOVERY AND EMPOWERMENT 296, 296-317 (Thema Bryant-Davis ed., 2011); see also Shelly P. Harrell, *Writing Your Way to Peace and Power: Empowerment Journaling as a Pathway to Healing and Growth*, in SURVIVING SEXUAL VIOLENCE, *supra*, at 328, 328-48 (identifying journaling as an evidence-based method of healing from sexual trauma).
- 84 See JENNIFER L. DUNN, JUDGING VICTIMS: WHY WE STIGMATIZE SURVIVORS AND HOW THEY RECLAIM RESPECT 1 (2010); Tami Spry, *In the Absence of Word and Body: Hegemonic Implications of “Victim” and “Survivor” in Women’s Narratives of Sexual Violence*, 13 WOMEN & LANGUAGE 27 (1995).
- 85 See, e.g., Courtney E. Ahrens, Janna Stansell & Amy Jennings, *To Tell or Not to Tell: The Impact of Disclosure on Sexual Assault Survivors’ Recovery*, 25 VIOLENCE & VICTIMS 631 (2010); Sarah E. Ullman, *Correlates and Consequences of Adult Sexual Assault Disclosure*, 11 J. INTERPERSONAL VIOLENCE 554, 555 (1996) (discussing the importance of disclosure, more broadly, in the therapeutic process).
- 86 Jan Jordan, *From Victim to Survivor--and From Survivor to Victim: Reconceptualizing the Survivor Journey*, 5 SEXUAL ABUSE IN AUSTL. & N.Z. 48, 49 (2013).
- 87 JUDITH L. HERMAN, TRAUMA AND RECOVERY: FROM DOMESTIC ABUSE TO POLITICAL TERROR 73 (1992) (“Not surprisingly, the result is that most rape victims view the formal social mechanisms of justice as closed to them, and they choose not to make any official report or complaint.”); see also Debra Patterson, Megan Greeson & Rebecca Campbell, *Understanding Rape Survivors’ Decisions Not to Seek Help from Formal Social Systems*, 34 HEALTH & SOC. WORK 127 (2009) (finding that survivors did not believe formal social systems would help them in the aftermath of a rape).
- 88 See Edna Erez & Joanne Belknap, *In Their Own Words: Battered Women’s Assessment of the Criminal Processing System’s Responses*, 13 VIOLENCE & VICTIMS 251, 263-64 (1998).
- 89 HERMAN, *supra* note 87, at 8; see also JOANNE BELKNAP, THE INVISIBLE WOMAN: GENDER, CRIME, AND JUSTICE 7 (Sabra Horne et al. eds., 2nd ed. 2001) (discussing the state of women and girls in criminology and criminal justice).
- 90 See, e.g., Cohen, *supra* note 12; Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, 38 CRIME & JUST. 347, 347-52 (2009); see also Patricia D. Rozee & Mary P. Koss, *Rape: A Century of Resistance*, 25 PSYCH. WOMEN Q. 295 (2001) (offering an overview of feminist contributions to the reframing and redefinition of rape during the 20th century).
- 91 Monica Thompson, *Life After Rape: A Chance to Speak*, 15 SEXUAL & RELATIONSHIP THERAPY 325 (2000) (discussing long-term strategy for survivor transcendence).

- 92 See Heather Littleton, Katherine Buck, Lindsey Rosman & Amie Grills-Taquechel, *From Survivor to Thriver: A Pilot Study on an Online Program for Rape Victims*, 19 COGNITIVE & BEHAV. PRAC. 315, 315-16, 319 (2012).
- 93 This overlap regarding the proper state response to remainders is all the more striking in light of the sharp *divergence* among normative accounts in their implications about other issues, e.g., about how different types of crime should be sentenced. On the divergence of normative accounts of just sentencing policy, see PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 5, 6 (2008).
- 94 This definition of “remainder of justice” closely parallels Forst’s definition of an “error of justice.” FORST, *supra* note 3, at 4 (“An error of justice is any departure from the optimal outcome for a criminal case.”). The arguments in this Article, though, are not founded on a utilitarian conception of optimal outcomes.
- 95 The pattern of omission to punish sexual violence discussed in Part II, *supra*, is an example of a systematic justice remainder.
- 96 See, e.g., Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 235, 288-90 (2003); see also Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771, 817 (2017) (arguing that prosecutorial analytics can help prosecutors make wiser charging decisions without implicating constitutional concerns); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 259, 272-76 (1980) (examining factors governing the discretion of federal prosecutors).
- 97 The homeless may be an example of a group whose rights lack effective protection from the legal system. Crimes against the homeless are extremely common. See Barrett A. Lee & Christopher J. Schreck, *Danger on the Streets: Marginality and Victimization Among Homeless People*, 48 AM. BEHAV. SCIENTIST 1055, 1067-68 (2005) (describing survey study of 2,401 homeless people in the United States that found that 54% had been crime victims while homeless, and 49.5% had been victims of theft). One possible reason for this high rate of victimization is that police may be less inclined to investigate crimes against homeless people. See *id.* at 1056 (“Police tend to stress maintaining order in such settings [skid rows] rather than responding to specific complaints.”).
- 98 For a simple review of different reforms across the criminal justice system, see ADLER ET AL., *supra* note 49, at 6, 18.
- 99 The theories of criminal law discussed in this Part are normative theories. They aim to explain how criminal punishment could be justified, and they defend principles that a criminal justice system ought to follow. They do not attempt either to explain or to justify the current practices of the American criminal justice system. It is not universally agreed that criminal punishment is justified. For a skeptical view of the justification of criminal law, see DAVID BOONIN, *THE PROBLEM OF PUNISHMENT* 28-30 (2008). See also John Hasnas, *The Problem of Punishment*, in *RETHINKING PUNISHMENT IN THE ERA OF MASS INCARCERATION* 15, 15-16 (Chris W. Surprenant ed., 2017) (suggesting that criminal punishment is not morally justified in a liberal society).
- 100 For the standard definition of “side constraint,” see ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 28-33 (1974). In accepting ethical side constraints, non-consequentialist theories of criminal law deny that there is a measure of social welfare that the state should always aim to maximize. For an example of a consequentialist theory of punishment that advocates maximizing social welfare even when doing so requires threatening or imposing draconian punishments, see Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 184 (1968).
- 101 On this consensus, see VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* 18 (2011), stating:

One objection that is often made to consequentialist theories of punishment is that they cannot motivate attractive limits on state punishment, or they cannot motivate those limits in the right way. It seems unfair to punish innocent people in order to deter crimes, and offenders ought only to be punished proportionately for what they have done.

Id. That utilitarian forms of consequentialism, in particular, sometimes condone intentional punishment of the innocent has been taken as a decisive objection to utilitarianism. For example, see H.L.A. Hart, *The Presidential Address: Prolegomenon to the Principles of Punishment*, 60 PROC. ARISTOTELIAN SOC. 1, 11 (1959-60), arguing that if a government intentionally punishes the innocent for the sake of aggregate welfare, “[w]e should be conscious of choosing the lesser of two evils, and this would be inexplicable if the principle sacrificed to utility were itself only a requirement of utility.” See also G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1, 17 (1958) (“But if someone really thinks, *in advance*, that it is open to question whether such an action as procuring the judicial execution of the innocent should be quite excluded from consideration--I do not want to argue with him; he shows a corrupt mind.” (footnote omitted)).

- 102 The convergence this Part identifies is limited to the two types of systematic justice remainder identified above. There may be less convergence among normative theories about the value of addressing justice remainders of other types. For example, some relatively minor *mala in se* offenses merit proportionate punishment even though they are not serious offenses. The state's omission to punish these offenses constitutes a justice remainder. Normative theories of criminal law may diverge about whether and to what degree this justice remainder merits the state's attention.
- 103 See, e.g., Hampton, *supra* note 29, at 212. For other examples of moral education theories of punishment, see generally Dan Demetriou, *Justifying Punishment: The Educative Approach as Presumptive Favorite*, 31 CRIM. JUST. ETHICS 1 (2012) (arguing that the educative approach is the best way to justify punishment); Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263 (1981) (defending and promoting a “paternalistic” theory of punishment as superior to other justifications for punishment).
- 104 See, e.g., DUFF, *supra* note 29, at 88-89.
- 105 Hampton, *supra* note 29, at 212.
- 106 See *id.* To send this message effectively, punishment must not destroy the criminal's autonomy. See *id.* at 222. It also must not be cruel, since a punishment that puts the state “into the moral gutter” cannot provide effective moral instruction. *Id.* at 223.
- 107 See *id.* at 212 (“When the state makes its criminal law and its enforcement practices known, it conveys an educative message not only to the convicted criminal but also to anyone else in the society who might be tempted to do what she did.”).
- 108 See *id.* at 217 (“If the point of punishment is to convey to the criminal (and others) that the criminal *wronged* the victim, then punishment is implicitly recognizing the victim's plight, and honoring the moral claims of that individual.”).
- 109 See DUFF, *supra* note 29, at 108.
- 110 *Id.* at 91.
- 111 *Id.* at 107-08.
- 112 *Id.* at 108-09. Duff suggests that criminal mediation, certain forms of probation, and mandatory community service are able to fulfill this function. *Id.* at 96-99, 102-05.

- 113 This goal mirrors classic restorative justice principles and practices. *See, e.g.,* John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 1-4 (1999).
- 114 DUFF, *supra* note 29, at 109-12. On Duff's view, the punishments that best facilitate reconciliation are those that require the offender's active participation.
- 115 *Id.* at 64.
- 116 "To remain silent in the face of their crimes would be to undermine--by implication to go back on--its declaration that such conduct is wrong." *Id.* at 28. Duff implicitly acknowledges that a criminal prohibition that lacks punishment is an intelligible possibility. For another acknowledgment of this point, see H.L.A. HART, THE CONCEPT OF LAW 34 (1961) ("In the case of the rules of the criminal law, it is logically possible and might be desirable that there should be such rules even though no punishment or other evil were threatened."). *See also* Robert C. Hughes, *Law and the Entitlement to Coerce*, in PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW (Wil Waluchow & Stefan Sciaraffa eds., 2013) (arguing that the absence of coercive enforcement for a legal prohibition does not always imply that the government does not take it seriously).
- 117 Both theories acknowledge that punishment can fail to communicate its message successfully even when an offender is punished. *See* DUFF, *supra* note 29, at 117-18, 121-25 (highlighting the distinction between the shame of public judgment and repentance caused by recognition of moral wrong); Hampton, *supra* note 29, at 230-32. When the punished criminal chooses not to listen to the message the state is sending, the message the state sends to society at large may still be received.
- 118 A possible example is the failure of criminal law to enforce the rights of the homeless effectively, as indirectly evidenced by the extremely high rate of victimization among the homeless. *See* Lee & Schreck, *supra* note 97. Another possible example is failure to enforce the rights of undocumented immigrants, who may be reluctant to report crimes either because they fear being reported to immigration authorities or because they expect police to be unhelpful. *See* Jacob Bucher, Michelle Manasse & Beth Terasawa, *Undocumented Victims: An Examination of Crimes Against Undocumented Male Migrant Workers*, 7 SW. J. CRIM. JUST. 159, 163 (2010); *see also* Nalini Junko Negi, Alice Cepeda & Avelardo Valdez, *Crime Victimization Among Immigrant Latino Day Laborers in Post-Katrina New Orleans*, 35 HISP. J. BEHAV. SCI. 354, 362 (2013) ("A majority of the LDLs [Latino day laborers] in this study stated that they did not report robberies to law enforcement for fear of being deported. Others indicated feeling that their complaints would not be taken seriously because of their undocumented immigration status."). Regarding the legal system's protection of victims of different races or perceived races, *see* Section III.D, *infra*.
- 119 *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT OF JUST., UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES, 2018 2 (2019) (reporting that in 2018 62.3% of murders and non-negligent manslaughters were cleared, either by an arrest or by exceptional means, i.e. by identification of a suspected offender with enough evidence to bring a charge, followed by an exceptional circumstance preventing arrest).
- 120 The state might omit to punish murder for a wide variety of reasons--murderers not being apprehended, errors by police or prosecutors, difficulty satisfying the standard of proof, uncertainty whether a killing was a purposeful act and not in self-defense, etc.
- 121 For example, suppose that there are only two ways the state could reliably punish the theft of bicycle parts: to install surveillance cameras wherever bicycles are publicly parked, or to create a legal presumption that bike parts offered for sale without the manufacturer's packaging are stolen goods. The state might judge widespread installation of surveillance cameras unduly intrusive. It might judge a prohibition on sales of secondhand goods an undue intrusion on economic liberty; some people may want to sell their old bikes for parts. Given the difficulty of punishing theft of bike parts without an undue intrusion on privacy or economic liberty, the state might rarely prosecute theft of bike parts, though it regularly

prosecutes other thefts of similar magnitude, e.g., shoplifting. This pattern in enforcement would not signal that theft of bike parts matters less than shoplifting. It would signal only that theft of bike parts is more difficult to prosecute.

- 122 On omissions to investigate sexual assault, see notes 217-21, *infra*.
- 123 See, e.g., Jacinta M. Gau & Travis C. Pratt, *Broken Windows or Window Dressing? Citizens' (In)ability to Tell the Difference Between Disorder and Crime*, 7 CRIMINOLOGY & PUB. POL'Y 163 (2008); BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001).
- 124 Indeed, much has been written about the profound costs in public perception of broken windows since Wilson and Kelling's publication, James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29. See, e.g., Patrick J. Carr, Laura Napolitano & Jessica Keating, *We Never Call the Cops and Here is Why: A Qualitative Examination of Legal Cynicism in Three Philadelphia Neighborhoods*, 45 CRIMINOLOGY 445, 467-68 (2007); James E. Hawdon, John Ryan & Sean P. Griffin, *Policing Tactics and Perceptions of Police Legitimacy*, 6 POLICE Q. 469-91 (2003); Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999); Eric A. Stewart, *Either They Don't Know or They Don't Care: Black Males and Negative Police Experiences*, 6 CRIMINOLOGY & PUB. POL'Y 123 (2007). For a systematic review of disorder policing, see ANTHONY BRAGA, BRANDON WELSH & CORY SCHNELL, *DISORDER POLICING TO REDUCE CRIME: CAMPBELL COLLABORATION 1* (2019) ("Policing disorder is associated with reductions in crime, but only when community and problem-solving tactics are used. Aggressive, order maintenance based approaches are not effective.").
- 125 See Jeffrey W. Spears & Cassia C. Spohn, *The Genuine Victim and Prosecutors' Charging Decisions in Sexual Assault Cases*, 20 AM. J. CRIM. JUST. 183, 197 (1996) (finding that prosecutors' charging decision in sexual assault cases are affected by victim stereotypes about credibility and morality); Amy Dellinger, *A Gateway to Reform? Policy Implications of Police Officers' Attitudes Toward Rape*, 33 AM. J. CRIM. JUST. 44, 45 (2008) (police are swayed by characteristics of rape victims more so than evidence and the law when exercising investigatory discretion); Rose Corrigan, *The New Trial by Ordeal: Rape Kits, Police Practices, and the Unintended Effects of Policy Innovation*, 38 LAW & SOC. INQUIRY 920, 920 (2013) ("Unless police resistance to taking rape seriously is confronted and addressed, even well-intentioned policy reforms such as SANE programs may end up undermining--rather than enhancing-- fair and thorough investigation of sexual assault allegations."). For a systematic review of Sexual Assault Nurse Examiners ("SANE"), see CLARE TOON & KURINCHI GURUSAMY, *FORENSIC NURSE EXAMINERS VS DOCTORS FOR THE FORENSIC EXAMINATION OF RAPE AND SEXUAL ASSAULT COMPLAINANTS: CAMPBELL COLLABORATION 2*, 5-6 (2014) (comparing the reliability and efficacy of SANEs with non-SANE health professionals, and finding that rape kits completed by SANEs were significantly more likely to be admissible in court).
- 126 See, e.g., Debra Patterson, *The Linkage Between Secondary Victimization by Law Enforcement and Rape Case Outcomes*, 26 J. INTERPERSONAL VIOLENCE 328 (2011) (considering the importance of pursuing rape prosecutions). This is an instance of the principle that inaction can signal that a verbally expressed moral commitment is either insincere or incomplete. See Seana Valentine Shiffrin, *Lecture 1: Democratic Law*, in THE TANNER LECTURES ON HUMAN VALUES 37, 153 (Mark Matheson ed., 2018). ("Hence, to an observer--and particularly to the putative object of those beliefs, attitudes, and stances-- the absence of the relevant action *by me* (and *by us*) may reasonably suggest a failure of full and sincere affirmation.").
- 127 An investigation that initially appears unlikely to yield a conviction may become more promising as it proceeds.
- 128 On "evidence-based" prosecution, see Section IV.B and notes 192-97, *infra*.
- 129 See Becker, *supra* note 100, at 184.

- 130 For more discussion of the proportionality requirement in moral education and expressivist theories, see Section IV.A, *infra*.
- 131 See Mitchell N. Berman, *Modest Retributivism*, in LEGAL, MORAL, AND METAPHYSICAL TRUTHS: THE PHILOSOPHY OF MICHAEL S. MOORE 35 (Kimberly Kessler Ferzan & Stephen J. Morse eds., 2016) (“Plausibly, and only to a first approximation, the core retributivist claim—the claim that distinguishes retributivist views from their nonretributivist alternatives—holds that it is intrinsically valuable or right to furnish wrongdoers with the negative consequences that they deserve.”).
- 132 Retributivism is sometimes associated with the *lex talionis*. See *Exodus* 21:23-24 (King James) (“Thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.”). But no serious retributivist, current or historical, defends a literal application of this formula. Applying the *lex talionis* literally would be obviously unfair. See, e.g., Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25, 25 (1992) (“LT cannot be thought to require that *the very same action* that constituted the offense should be visited as punishment on the offender”); Alec Walen, *Retributive Punishment*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2016) (characterizing the literal application of the *lex talionis* as implausibly lenient in some cases, e.g. very small thefts, and implausibly harsh in others, e.g. rape and torture). Moreover, to apply the *lex talionis* literally to all cases would be impossible. See K.G. Armstrong, *The Retributivist Hits Back*, 70 MIND 471, 486 (1961). The *lex talionis* is most charitably interpreted as setting an upper bound on permissible punishment. *Id.*
- 133 IMMANUEL KANT, METAPHYSICS OF MORALS 6:333 (Mary J. Gregor trans., 1996) (1797). Kant's theory of punishment is notoriously difficult to interpret. Our discussion will follow the interpretation offered in RIPSTEIN, *supra* note 29.
- 134 RIPSTEIN, *supra* note 29, at 311.
- 135 *Id.* at 313.
- 136 *Id.* at 314.
- 137 *Id.* at 316. The exclusion from the property system may be temporary. See KANT, *supra* note 133, at 6:333. On Kant's view, exclusion from the property system does not necessarily entail incarceration, but it does entail compelled labor for the state.
- 138 RIPSTEIN, *supra* note 29, at 317. This is a charitable reconstruction of Kant's theory rather than an interpretation of Kant's text. Kant endorses the death penalty for murder, KANT, *supra* note 133, at 6:333, and castration as the punishment for rape, *id.* at 6:363.
- 139 RIPSTEIN, *supra* note 29, at 307.
- 140 Such crimes include “theft, murder, burglary, rape, and counterfeiting.” *Id.* at 310.
- 141 The Kantian account provides limited guidance about which justice remainders are avoidable. Some crimes cannot be punished due to lack of evidence, but how should the state respond to unavoidable resource constraints that force it to choose between investigation and prosecution of serious crimes and other priorities? Ripstein maintains that it would be objectionable for the state to omit punishment because of the discretionary whims of public officials but that the Kantian

account of punishment takes no stand on the question of what public resources should be devoted to law enforcement or what crimes should have priority. *Id.* at 321.

- 142 See, e.g., MICHAEL MOORE, *PLACING BLAME* 91 (1987) (“For a retributivist, the moral responsibility of an offender also gives society the *duty* to punish.”). Or consider the retributivist principle suggested but not asserted in Mitchell N. Berman, *Rehabilitating Retributivism*, 32 *LAW & PHIL.* 83, 92 (2013) (“That A deserves O on account of B means (a) given B, that A experience O (or that O obtain for A) is better than that A not experience O (or that O not obtain for A); and (b) if there is any agent or institution, X, with responsibility over the relevant domain, then X has a duty of justice to cause O to obtain for A.”). If the government has responsibility over certain domains of conduct, this retributive principle would imply that government has a duty to punish.
- 143 Morris, *supra* note 29, at 477. Morris later adopted a moral education theory of punishment. Morris, *supra* note 103, at 264-65. Others have defended “fair play” theories of punishment akin to Morris’s. See Richard Dagger, *Punishment as Fair Play*, 14 *RES PUBLICA* 259, 261 (2008); Richard Dagger, *Playing Fair with Punishment*, 103 *ETHICS* 473, 473-76 (1993); Wojciech Sadurski, *Distributive Justice and the Theory of Punishment*, 5 *OXFORD J. LEGAL STUD.* 47, 52-53 (1985).
- 144 Morris, *supra* note 29, at 477.
- 145 *Id.* One might object that for people with no inclination to violence, compliance with laws against violence is not burdensome. For a reply to this objection, see Sadurski, *supra* note 143, at 54-56.
- 146 Morris, *supra* note 29, at 477-78.
- 147 It is only the wrong against the community that punishment aims to correct, on Morris’s account. Criminal punishment, as such, does not aim to repair the injury to the victim.
- 148 Morris, *supra* note 29, at 478.
- 149 *Id.*
- 150 *Id.*
- 151 Presumably, there are other ways in which the selective use of the pardon power could be objectionable. For example, it would be objectionable for political favoritism or ethnic prejudice to influence who is pardoned.
- 152 Ellis, *supra* note 29, at 341; Quinn, *supra* note 29, at 336.
- 153 For a non-consequentialist deterrence theory with a different structure, see TADROS, *supra* note 101, at 16-17.
- 154 See Quinn, *supra* note 29, at 360 (“To say that the right to establish a genuine threat is prior to the right to punish ... is to make two claims: first, that the right to set up the threat can be established without first raising the question of the right to punish and, second, that the right to the threat implies the right to punish.”). On Ellis’s model of deterrence, the state’s threat to punish crime involves establishing a system in which punishment of detected offenses is nearly automatic. See Ellis, *supra* note 29, at 341 (“So one agent might be authorized to apprehend suspected aggressors, another might be authorized to decide whether they really were aggressors, and another might be authorized to administer punishment if appropriate. But no one would have authority to deactivate his part of the system except in special circumstances.”).

- 155 Ellis, *supra* note 29, at 342. Quinn defends only a right to punish, not a duty or an obligation for the state to punish. Quinn, *supra* note 29, at 364. He allows, however, that it may be appropriate for the state to make punishment of certain crimes mandatory. *Id.* at 372.
- 156 A rarely imposed but severe punishment may be an effective deterrent. *See* Becker, *supra* note 100, at 204. Non-consequentialist theories of punishment grounded on the right to collective self-defense cannot condone grossly disproportional punishments. The harm threatened or imposed on a wrongful attacker to prevent an attack should be proportionate to (or milder than) the threatened harm. *See* Quinn, *supra* note 29, at 347. A rarely imposed punishment that is proportional to the harm a crime does is unlikely to be an effective deterrent if the harm a crime does is comparable in magnitude to the benefit of the crime to offenders.
- 157 *See* Finkelstein, *supra* note 29, at 332.
- 158 *Id.*
- 159 *Id.* at 332-33.
- 160 *Cf.* THOMAS HOBBS, LEVIATHAN 76 (Edwin Curley ed., Hackett 1994) (1651) (asserting that life in the absence of effective government would be “nasty, brutish, and short.”).
- 161 *See, e.g.,* Dolovich, *supra* note 29, at 366. Unlike Finkelstein's social contract theory, Dolovich's theory makes use of a Rawlsian “veil of ignorance.” *See id.* at 368.
- 162 *Id.* at 367-68.
- 163 *Id.* at 390-94.
- 164 *See* Finkelstein, *supra* note 29, at 334 (“In response to the question, ‘In light of what is my punishment justified?’ we can say to the offender: ‘Your punishment is justified because the benefits of a deterrent scheme that enabled you to protect your property have been great enough to you, throughout your life, that they overwhelm even the disvalue you are presently experiencing from your ten-year sentence.’”); Dolovich, *supra* note 29, at 382 (arguing that a Rawlsian social contract model calls for the legal system to adopt a “leximin” principle, i.e. a principle of taking actions that benefit the least well-off members of society).
- 165 The calculation will take a different form on contractarian theories that use a “veil of ignorance,” like Dolovich's, and those that do not, like Finkelstein's. On Finkelstein's account, a regime of punishment is justified if all rationally self-interested, risk-averse people would consent to it knowing their social position but not knowing what their future actions will be. *See* Finkelstein, *supra* note 29, at 331-32. People who know that they are homeless, but who do not know whether they will become thieves (or whether they will be wrongly convicted of theft), will not consent to punishment of theft if the harm of being punished for theft as the proposed law provides exceeds whatever direct or indirect benefit they get from the institution of this punishment. On Dolovich's account, the principle of justice for criminal law is the one that rationally self-interested, risk-averse people would consent to not knowing their social position. Among the unknown features “behind the veil” are one's class, one's race or perceived race, whether one is a crime victim, and whether one is (either rightly or wrongly) punished for a crime. *See* Dolovich, *supra* note 29, at 357-58. The parties to this hypothetical contract will prioritize security and bodily integrity. *Id.* at 355. They will aim to adopt principles of criminal justice that improve the circumstances of the least well-off people. *Id.* at 382. Instituting punishment of theft without protecting everyone's property effectively creates a class of people who are very badly off: those who are (rightly or wrongly) punished for theft but who do not benefit from secure property rights. The risk-averse parties to the

hypothetical choice situation will avoid the risk of becoming badly-off in this way by demanding either that theft not be punished or that everyone's property rights be protected effectively.

- 166 See Dolovich, *supra* note 29, at 329-30 (“[B]ecause political power in a liberal democracy is exercised over citizens in the name of the people themselves, if this exercise of power is to be legitimate, it must be justifiable in terms all society's members could reasonably be expected to accept.”); see also JOHN RAWLS, *POLITICAL LIBERALISM* 137 (1993) (“To this political liberalism says: our exercise of political power is fully proper only when exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. This is the liberal principle of legitimacy. To this it adds that all questions arising in the legislature that concern or border on constitutional essentials, or basic questions of justice, should also be settled, so far as possible, by principles and ideals that can be similarly endorsed.”).
- 167 Federal crimes against “vulnerable victims” receive a two-level sentencing enhancement. U.S. SENT'G GUIDELINES MANUAL § 3A1.1(b) (U.S. SENT'G COMM'N 2018).
- 168 See Dolovich, *supra* note 29, at 394-98.
- 169 *Id.* at 414-15.
- 170 See, e.g., Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 262-65 (2008); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW: PROCEDURAL JUSTICE, LEGITIMACY, AND COMPLIANCE* 123 (1990).
- 171 Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOC. REV. 857, 873 (2016) (“[S]hould we wish to understand why some crime goes unreported in the black community, we should try to understand resident's collective memory regarding police violence in their city and others.”).
- 172 For an astute critique that appears to undermine the conclusions of Desmond and colleagues, see Michael Zoorob, *Do Police Brutality Stories Reduce 911 Calls? Reassessing an Important Criminological Finding*, 85 AM. SOC. REV. 176, 177, 181 (2020).
- 173 Cf. Barak Ariel, Alex Sutherland, Darren Henstock, Josh Young, Paul Drover, Jayne Sykes, Simon Megicks & Ryan Henderson, *Increases in Police Use of Force in the Presence of Body-Worn Cameras are Driven by Officer Discretion: a Protocol-Based Subgroup Analysis of Ten Randomized Experiments*, 12 J. EXPERIMENTAL CRIMINOLOGY 453, 461 (2016).
- 174 See Lawrence W. Sherman, *Targeting American Policing: Rogue Cops or Rogue Cultures?*, CAMB. J. EVID.-BASED POLIC. ONLINE (2020), <https://link.springer.com/article/10.1007/s41887-020-00046-z> (discussing George Floyd); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS* 1 (2010); Steven F. Messner, Robert D. Baller & Matthew P. Zevenbergen, *The Legacy of Lynching and Southern Homicide*, 70 AM. SOC. REV. 633, 633, 649 (2005) (exploring the relation between lynching on homicide levels in the South); Evan T. Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remediating Prosecutorial Discrimination against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 162-63 (arguing for the commutation of death sentences given to defendants whose victims' lives have been overvalued on the basis of race should be pared with damages for families of murder victims who lives have been undervalued on the basis of race).
- 175 See SAMUEL WALKER, CASSIA SPOHN & MIRIAM DELONE, *THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA* 31 (2018) (discussing discrimination along a continuum).

- 176 See, e.g., Jordan E. DeVlyder, Jodi J. Frey, Courtney D. Cogburn, Holly C. Wilcox, Tanya L. Sharpe, Hans Y. Oh, Boyoung Nam & Bruce G. Link, *Elevated Prevalence of Suicide Attempts Among Victims of Police Violence in the USA*, 94 J. URB. HEALTH 629, 632 (2017); Mitchell P. Schwartz, *Compensating Victims of Police-Fabricated Confessions*, 70 U. CHI. L. REV. 1119, 1119 (2003); Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NATL. ACAD. SCI. 16793, 16793-94 (2019).
- 177 For a glimpse into the world of victimization untold, see JILL LEOVY, GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA 6, 8 (2015); Margaret McKeown & Jill Leovy, *Interview Re: GhettoSide--A True Story of Murder in America*, 50 INTL. SOC'Y BARRISTERS Q. 21 (2017).
- 178 Stephen L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 447 (1988) (tackling the devaluation of Black lives in relation to the Bernard Goetz case).
- 179 See, e.g., John H. Blume, Theodore Isenberg & Sheri Lynn Johnson, *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1782-83 (1997-98); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 784-85 (1983); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC. 437, 473 (1984).
- 180 For an excellent review of the empirical approach taken in McCleskey, see DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 399-400 (1990); Samuel R. Gross, *David Baldus and the Legacy of McCleskey v. Kemp*, 97 IOWA L. REV. 1905, 1912 (2011).
- 181 Eberhardt et al., *supra* note 31, at 385.
- 182 Ellis P. Monk, *The Cost of Color: Skin Color, Discrimination, and Health Among African-Americans*, 121 AM. J. SOCIO. 396, 402-03, 405 (2015); Ellis P. Monk, *The Color of Punishment: African Americans, Skin Tone, and the Criminal Justice System*, 42 ETHNIC & RACIAL STUD. 1593, 1596 (2019).
- 183 Lisa L. Miller, *The Invisible Black Victim: How American Federalism Perpetuates Racial Inequality in Criminal Justice*, 44 LAW & SOC'Y REV. 805, 806 (2010).
- 184 See generally MARK A. COHEN, *THE COSTS OF CRIME AND JUSTICE* 10-11 (2014) (an excellent treatment of costs of crime and criminal process); Kathryn E. McCollister, Michael T. French & Hai Fang, *The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation*, 108 DRUG & ALCOHOL DEPENDENCE 98, 105 (2010) (a good review of crime costing literature); Mark A. Cohen, Alex R. Piquero & Wesley G. Jennings, *Studying the Costs of Crime Across Offender Trajectories*, 9 CRIMINOLOGY & PUB. POL'Y 279, 281-82 (2010) (a study linking offender trajectories to monetary costs associated with criminal offending).
- 185 There is a further question of how private individuals and organizations should respond to justice remainders. Private action may help to reduce justice remainders, e.g., by providing social support to victims and witnesses who choose to come forward.
- 186 See Michael Tonry, *Evidence, Ideology, and Politics in the Making of American Criminal Justice Policy*, 42 CRIME & JUST. 1, 14 (2013); Daniel P. Mears & J.C. Barnes, *Toward a Systematic Foundation for Identifying Evidence-Based Criminal Justice Sanctions and Their Relative Effectiveness*, 38 J. CRIM. JUST. 702, 708 (2010).

- 187 For a critical and thoughtful take on system capacity, see Allen E. Liska, Joseph J. Lawrence & Michael Benson, *Perspectives on the Legal Order: The Capacity for Social Control*, 87 AM. J. SOCIO. 413, 413 (1981); Henry Pontell, *System Capacity and Criminal Justice: Theoretical and Substantive Considerations*, in RETHINKING CRIMINOLOGY 131, 131-43 (Harold E. Pepinsky ed., 1982).
- 188 For some of the leading thinking about the challenges to law enforcement, see Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57, 57 (2012).
- 189 See Malcolm M. Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. REV. 673, 686-87 (2018); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1085-87 (1984) (discussing how plea bargaining affects criminal court efficiency).
- 190 See Tom Tyler, *Legitimacy in Corrections: Policy Implications*, 9 CRIMINOLOGY & PUB. POL'Y 127, 131 (2010); see generally FREDA ADLER, GERHARD O.W. MUELLER & WILLIAM S. LAUFER, CRIMINOLOGY (10th ed. 2020).
- 191 This concern remains no matter how genuine the reforms. See Robert Lorinskas, David Kalinich & Dennis Banas, *Symbolism and Rhetoric: The Guardians of Status Quo in the Criminal Justice System*, 10 CRIM. JUST. REV. 41, 41 (1985) (“[M]uch of what appeared to be changes in philosophies or processes of criminal justice agencies may have merely been symbolism or window dressing.”).
- 192 See, e.g., Anthony A. Braga, Brandon Turchan, Andrew V. Papachristos & David M. Hureau, *Hot Spots Policing of Small Geographic Areas Effects on Crime*, 15 CAMPBELL SYSTEMATIC REVIEWS. 1, 44-45 (2019); Lawrence W. Sherman, *The Rise of Evidence-Based Policing: Targeting, Testing, and Tracking Police Services*, 42 CRIME & JUST. 377, 383-84 (2013); Lawrence W. Sherman, Patrick R. Gartin & Michael E. Buerger, *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*, 27 CRIMINOLOGY 27, 31 (1989).
- 193 See, e.g., Lynette Feder, David B. Wilson & Sabrina Austin, *Court-Mandated Interventions for Individuals Convicted of Domestic Violence*, 4 CAMPBELL SYSTEMATIC REVIEWS. 1, 18 (2008).
- 194 See, e.g., Patrice Villettaz, Gwladys Gillieron & Martin Killias, *The Effects on Re-offending of Custodial vs. Noncustodial Sanctions: An Updated Systematic Review of the State of Knowledge*, 11 CAMPBELL SYSTEMATIC REVIEWS. 1, 59 (2015).
- 195 See, e.g., Robert Heaton & Stephen Tong, *Evidence-Based Policing: From Effectiveness to Cost Effectiveness*, 10 POLICING 60, 67-69 (2016); Elizabeth Drake, Steve Aos & Marna Miller, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State*, 4 VICTIMS & OFFENDERS 170, 171-72, 183, 192, 194 (2009).
- 196 See Sections III.A-B, *supra*. Consider, for example, innovations in victim-centered prosecutorial policies with domestic violence cases. See, e.g., Eve S. Buzawa & Aaron D. Buzawa, *Evidence-Based Prosecution: Is it Worth the Cost*, 12 CRIMINOLOGY & PUB. POL'Y 491, 501-02 (2013) (reviewing innovative prosecutorial programs, such as mandatory charging and “no-drop” policies, inside and outside specialized domestic violence courts).
- 197 A 2015 survey of advocates, service providers, and attorneys identified four major reasons that survivors of sexual assault and domestic violence do not call the police. One of these was that “survivors’ goals do not align with those of the criminal justice system or how it operates.” AMERICAN CIVIL LIBERTIES UNION, RESPONSES FROM THE

FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING 29-31 (2015), https://www.aclu.org/sites/default/files/field_document/2015.10.20_report_-_responses_from_the_field.pdf.

- 198 Cf. Ernest van den Haag, *Can Any Legal Punishments of the Guilty Be Unjust to Them?*, 33 WAYNE L. REV. 1413, 1416-17 (1986-87) (arguing that a disproportionate punishment is *ipso facto* unjust to the crime committed, but not to the criminal who suffers it).
- 199 In Morris's retributivist account of punishment, punishment must respect offenders' status as human beings even to count as punishment. See Morris, *supra* note 29, at 488 ("The system of punishment we imagine may more and more approximate a system of sheer terror in which human beings are treated as animals to be intimidated and prodded. To the degree that the system is of this character it is, in my judgment, not simply an unjust system but one that diverges from what we normally understand by a system of punishment."). Note that a punishment may be cruel in the moral sense whether or not courts deem it to be "cruel and unusual" in the constitutional sense. See U.S. CONST. amend. VIII. For an argument that courts ought to interpret the word "cruel" according to its ordinary moral meaning, see Mark Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 609-11 (1998).
- 200 See *supra* note 132.
- 201 See Quinn, *supra* note 29, at 348; Ellis, *supra* note 29, at 343-47. Quinn denies that the threatened punishment must be *exactly* proportional to the crime. See Quinn, *supra* note 29, at 348.
- 202 See Section III.C, *supra*.
- 203 See Hampton, *supra* note 29, at 211.
- 204 *Id.* at 212 ("But the state also wants to use the pain of punishment to get the human wrongdoer to reflect on the moral reasons for that barrier's existence, so that he will make the decision to reject the prohibited action for *moral* reasons, rather than for the self-interested reason of avoiding pain.").
- 205 *Id.* at 223 ("And it seems difficult if not impossible for the state to convey this message if it is carrying out cruel and disfiguring punishments such as torture or maiming. When the state climbs into the moral gutter with the criminal in this way it cannot credibly convey either to the criminal or to the public its moral message that human life must always be respected and preserved, and such actions can even undercut its justification for existing."). Hampton explicitly suggests that a moral education theory of punishment speaks against many contemporary forms of incarceration. *Id.* at 228 ("And I would argue that it speaks in favor of this theory that it rejects many forms of incarceration used today as legitimate punishments, insofar as they tend to make criminals morally worse rather than better.").
- 206 See DUFF, *supra* note 29, at 144.
- 207 On the effects of solitary confinement, see Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 476 (2006) ("Solitary confinement produces a higher rate of psychiatric and psychological health problems than 'normal' imprisonment. This has been shown especially convincingly in studies with randomly selected samples and control groups of nonisolated prisoners."). The U.S. Supreme Court recently weighed in on the inhumanity of certain aspects of solitary confinement. In a statement respecting the denial of certiorari in *Apodaca v. Raemisch*, 139 S. Ct. 5 (2018), Justice Sotomayor wrote:
- A punishment need not leave physical scars to be cruel and unusual. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958). As far back as 1890, this Court expressed concerns about the mental anguish caused by solitary confinement. These petitions address one aspect of what a prisoner subjected to solitary confinement may experience: the denial of even a moment

in daylight for months or years. Although I agree with the Court's decision not to grant certiorari in these cases because of arguments unmade and facts underdeveloped below, I write because the issue raises deeply troubling concern.

Id. at 6 (footnote omitted).

- 208 Fear of violence is not an inevitable feature of a correctional institution that houses violent offenders. In 2015, Norway's maximum-security Halden Prison housed 251 prisoners, nearly half of them convicted of violent offences. Halden successfully relies on interpersonal relationships between staff and inmates to prevent violent conflict. See Jessica Benko, *The Radical Humaneness of Norway's Halden Prison*, N.Y. TIMES (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html> (“Dynamic security focuses on preventing bad intentions from developing in the first place The inmates have the opportunity to act out, but somehow they choose not to. In five years, the isolation cell furnished with a limb-restraining bed has never been used.”).
- 209 For argument that some serious (but non-violent) crimes should not be punished with imprisonment, see Robert C. Hughes, *Imprisonment and the Right to Freedom of Movement*, in *RETHINKING PUNISHMENT IN THE ERA OF MASS INCARCERATION* (Chris W. Suprenant ed., 2019).
- 210 On conditions of incarceration, see generally Sharon Dolovich, *Incarceration American Style*, 3 HARV. L. & POL'Y REV. 237 (2009).
- 211 There are exceptions. On a classical utilitarian account of punishment, for example, the state has reason to punish when, and only when, punishment would have good effects. See, e.g., JEREMY BENTHAM, *PRINCIPLES OF MORALS AND LEGISLATION* 170 (1780) (“But all punishment is mischief: all punishment in itself is bad. Upon the principle of utility, if it ought at all to be admitted in as far as it promises to exclude some greater evil.”); see also GEORGE EDWARD MOORE, *PRINCIPIA ETHICA* §§ 128-133 (1903) (arguing that retributive punishment can be good without arguing that any person or institution has a duty to impose it).
- 212 Moral education and expressivist theories of punishment yield a different analysis. Omitting to punish serious crime does not distort the message of criminal law when the public understands that punishing these crimes justly would be infeasible. Moral education-related reasons for expressing regret for inability to punish justly are discussed in Section IV.C, *infra*.
- 213 See JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 84-85 (1990) (arguing that when someone justifiably breaks a promise because of a conflicting obligation, it is appropriate to feel remorse and to make amends with the promisee); see also Williams, *supra* note 10, at 113 (arguing that regret is an appropriate response to a failure to fulfill a moral requirement, even when the failure is justified by a conflicting moral requirement).
- 214 Thomson uses the term “moral residue.” See THOMSON, *supra* note 213, at 84-85. Williams uses the term “remainder.” See Williams, *supra* note 10, at 117. Though moral residues are most often understood as moral consequences of the infringement of a right, they can be understood in other ways. See John Oberdiek, *Lost in Moral Space: On the Infringing/Violating Distinction and its Place in the Theory of Rights*, 23 LAW & PHIL. 325, 332-33 (2004).
- 215 See Section III.A, *supra*.
- 216 One promising avenue for the state to satisfy this obligation may come from a reconceptualization of restorative justice principles in relation to justice remainders. The conventional restorative relationship of the offender and victim seeks a special kind of rapprochement in restorative justice processes. We suggest that the relationship be reconsidered, proportionally, as the community and victim. In the absence of any formal response by the state, restoration and, thus, validation comes from community recognition and reconciliation with an aggrieved victim. For a systematic review of restorative paradigms, see Heather Strang, Lawrence W. Sherman, Evan Mayo-Wilson, Daniel Woods & Barak Ariel,

Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review, 9 CAMPBELL SYSTEMATIC REVIEWS 2, 5 (2013) (noting that face-to-face Restorative Justice Conferences (RJCs) between offenders and victims “cause a modest but highly cost-effective reduction in repeat offending Victims’ satisfaction with the handling of their cases is consistently higher for victims assigned to RJCs than for victims whose cases were assigned to normal criminal justice processing”).

- 217 Jeanne Gregory & Sue Lees, *Attrition in Rape and Sexual Assault Cases*, 36 BRIT. J. CRIMINOLOGY 1, 2-3 (1996) (describing the process of “no-criming”); Megan A. Alderden & Sarah E. Ullman, *Gender Difference or Indifference? Detective Decision Making in Sexual Assault Cases*, 27 J. INTERPERSONAL VIOLENCE 3, 4-5 (2012).
- 218 See Rebecca Campbell, Hannah Feeney, Giannina Fehler-Cabral, Jessica Shaw & Sheena Horsford, *The National Problem of Untested Sexual Assault Kits (SAKs): Scope, Causes, and Future Directions for Research, Policy, and Practice*, 18 TRAUMA VIOLENCE & ABUSE 363, 367-68 (2015).
- 219 Karen Rich & Patrick Seffrin, *Police Interviews of Sexual Assault Reporters: Do Attitudes Matter?*, 27 VIOLENCE & VICTIMS 263, 263 (2012); Brandon Stahl, Jennifer Bjorhus & MaryJo Webster, *When Rape is Reported and Nothing Happens*, MINNEAPOLIS STAR TRIB. (July 22, 2018), <http://www.startribune.com/when-rape-is-reported-in-minnesota-and-nothing-happens-denied-justice-special-report-part-one/487130861/> (reporting that in sexual assault cases filed in a two-year period in Minnesota, the investigator never interviewed the victim in “about one-third” of the cases reviewed).
- 220 See Campbell et al., *supra* note 218, at 370 (“Other research suggests that police often make a general determination as to whether they believe a sexual assault victim and feel a case is credible before they invest effort into an investigation, as opposed to beginning with an investigation and then, depending on how the facts unfold, making a determination as to the merits of the case.” (emphasis omitted)).
- 221 See Lesley McMilian & Michelle Thomas, *Police Interviews of Rape Victims: Tensions and Contradictions*, in RAPE: CHALLENGING CONTEMPORARY THINKING 255 (Miranda Horvath & Jennifer Brown eds., 2009) (showing the depersonalized nature of sexual assault investigations in a hectic hospital setting). To counter victim neglect, consider a nursing innovation called SANE (Sexual Assault Nurse Examiner). See Courtney E. Ahrens, Rebecca Campbell, Sharon M. Wasco, Gloria Aponte, Lori Grubstein & William S. Davidson II, *Sexual Assault Nurse Examiner (SANE) Programs: Alternative Systems for Service Delivery for Sexual Assault Victims*, 15 J. INTERPERSONAL VIOLENCE 921, 921-23 (2000); Rebecca Campbell, Debra Patterson & Lauren F. Lichty, *The Effectiveness of Sexual Assault Nurse Examiner (SANE) Programs: A Review of Psychological, Medical, Legal, and Community Outcomes*, 6 TRAUMA VIOLENCE & ABUSE 313, 313-14 (2005).
- 222 See W. David Ball, *E Pluribus Unum: Data and Operations Integration in the California Criminal Justice System*, 21 STAN. L. & POL’Y REV. 277, 280-81 (2010); Dana DeHart & Cheri Shapiro, *Integrated Administrative Data & Criminal Justice Research*, 42 AM. J. CRIM. JUST. 255, 256 (2017); J. Clark Kelso, *Integrated Criminal Justice Technologies: An Introduction*, 30 MCGEORGE L. REV. 1, 1-2 (1998). More can be done to address remainders than to address other miscarriages. See, e.g., Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1504-05 (2011). In this respect, there are lessons to be learned from data integration efforts with specific classes of offenses. See SALLY S. SIMPSON & PETER CLEARY YEAGER, BUILDING A COMPREHENSIVE WHITE-COLLAR VIOLATIONS DATA SYSTEM: FINAL TECHNICAL REPORT 100-04 (2015).
- 223 As technology improves, scholars are increasingly recognizing the many legitimate concerns with the use of such certain criminal justice data. See Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1123 (2017); Andrew Guthrie Ferguson, *Illuminating Black Data Policing*, 15 OHIO ST. J. CRIM. L. 503, 509 (2018); Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 Minn. L. Rev. 541, 545-55 (2016); Ric Simmons, *Quantifying Criminal Procedure: How to Unlock the Potential of Big Data in Our Criminal Justice System*, 2016 MICH. ST. L. REV. 947, 969; Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 540-41 (2015); BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING,

POLICING, AND PUNISHING IN AN ACTUARIAL AGE 173-83 (J. Alex Schwartz ed., 2007); Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 500 (2012) (discussing prediction tactics generally). *See generally* Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109 (2017) (discussing how data-driven predictive policing will result in racial discrimination).

- 224 On this obligation, see MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N 1983).
- 225 *See generally* MICHELLE MADDEN DEMPSEY, PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS (Andrew Ashworth ed., 2009) (offering a frequently referenced typology of victim-centered domestic violence prosecutorial strategies).
- 226 *See* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1861-65 (1996); Richard R. Peterson, *Victim Engagement in the Prosecution of Domestic Violence Cases*, 12 CRIMINOLOGY & PUB. POL'Y 473 (2013); Robert C. Davis, Chris S. O'Sullivan, Donald J. Farole, Jr. & Michael Rempel, *A Comparison of Two Prosecution Policies in Cases of Intimate Partner Violence: Mandatory Case Filing Versus Following the Victim's Lead*, 7 CRIMINOLOGY & PUB. POL'Y 633, 634 (2008).
- 227 *See, e.g.*, Mary A. Finn, *Evidence-Based and Victim-Centered Prosecutorial Policies: Examination of Deterrent and Therapeutic Jurisprudence Effects on Domestic Violence*, 12 CRIMINOLOGY & PUB. POL'Y 443, 443 (2013) ("Nearly three quarters of prosecutors surveyed in more than 200 domestic violence courts reported that they often or always proceeded with a case regardless of the victim's willingness to support prosecution.") (citation omitted).
- 228 *Id.* at 466; *see also* Buzawa & Buzawa, *supra* note 196, at 495 ("An evidence-based approach has intrinsic appeal for several reasons. First, it expressly recognizes that prosecutors, although they need to protect the rights of individuals, must place the rights of society in a paramount position in exercising their discretion [ABA Standards 3-1.2(b)]. The state has a heavy interest in punishing and preventing the occurrence of violent crime."). For a systematic review of the effectiveness of court-required interventions, *see* Feder et al., *supra* note 193 (discussing how data "does not offer strong support that court-mandating treatment to misdemeanor domestic violence offenders reduces the likelihood of further reassault").
- 229 *See generally* Lawrence W. Sherman, David P. Farrington, Brandon C. Welsh & Doris Layton MacKenzie, *Preventing Crime*, in EVIDENCE-BASED CRIME PREVENTION 1 (Lawrence W. Sherman, David P. Farrington, Brandon C. Welsh & Doris Layton MacKenzie eds., rev. ed. 2006); CYNTHIA LUM & CHRISTOPHER S. KOPER, EVIDENCE-BASED POLICING: TRANSLATING RESEARCH INTO PRACTICE 133-42 (2017); Scott W. Henggeler, Colleen A. Halliday-Boykins, Phillippe B. Cunningham, Jeff Randall, Steven B. Shapiro & Jason E. Chapman, *Juvenile Drug Court: Enhancing Outcomes by Integrating Evidence-Based Treatments*, 74 J. CONSULTING & CLINICAL PSYCH. 42 (2006); Klingele, *supra* note 223, at 575-76. For a host of systematic reviews of evidence-based programs in criminal justice, *see* THE CAMPBELL COLLABORATION, <https://campbellcollaboration.org> (last visited Sept. 27, 2020).
- 230 *See, e.g.*, Cohen, *supra* note 12.
- 231 William S. Laufer, *Where Is the Moral Indignation Over Corporate Crime?*, in REGULATING CORPORATE CRIMINAL LIABILITY 19, 21 (Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, Klaus Tiedemann & Joachim Vogel eds. 2014).