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Recommended Citation

Donald Braman, Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America, 53 UCLA L. Rev. 1143 (2006).

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PUNISHMENT AND ACCOUNTABILITY: UNDERSTANDING AND REFORMING CRIMINAL SANCTIONS IN AMERICA

Donald Braman*

The vast majority of Americans favor sanctions that require offenders to engage in responsible behavior—to work, pay restitution, or support dependents; to participate in a mandatory job training, literacy, or drug treatment program; or to meet some other prosocial obligation. While this intuitive preference crosses political and ideological divides, nothing in our classical theories of punishment properly accounts for or develops this intuition. In this Article, Donald Braman explores the popular preference for and the benefits that attach to these accountability-reinforcing sanctions. Reviewing existing and original ethnographic, interview, and survey data, he describes why these sanctions have such broad appeal, and he advances a theory that suggests a number of benefits that are generally ignored when evaluating sanctions in terms of deterrence and rehabilitation. He concludes by reviewing and suggesting ways to reform existing punishment practices in light of accountability concerns.

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INTRODUCTION

Take a trip to a neighborhood where crime rates are high, and you will find that the debates and theories popular with legal academics have little bearing on the concerns of ordinary people. Few who live in crime-ridden neighborhoods are worked up over restrictions on the rights of criminal

suspects and defendants,[1] even fewer would demand any kind of decriminalization,[2] and just about no one is overwrought about the decline of judicial discretion.[3] But neither are they eager for more intrusive law enforcement,[4] broader criminalization,[5] or further restrictions on judicial autonomy.[6] And when talking about the way criminal punishment affects their lives, their approach is remarkably innocent of theoretical debates over the primacy of deterrence or retribution.[7] Although they care about crime and punishment, their concerns run along different lines.

These concerns emerge fairly quickly when talking with someone like Londa,[8] who is caring for her daughter and two sons fathered by her incarcerated ex-husband: "What does he do for them or for me? Nothing. . . . At least have him do something for the [kids]. Or anything, or anybody, you know? Something for the community. They all need to be doing *something*."[9] Or when talking with Barbara, who lives across town from Londa and is caring for her grandnephew while his father is incarcerated. She vehemently objects to sanctions she sees as fostering, instead of fighting, irresponsible behavior: "He doesn't do a thing in there. . . . You have to make these boys do the right thing. They won't do it

1. *Cf.* DAVID COLE, NO EQUAL JUSTICE (1999) (arguing for more expansive rights for criminal suspects and defendants).

2. *Cf.* SAM STALEY, DRUG POLICY AND THE DECLINE OF AMERICAN CITIES (1992) (arguing for the decriminalization of drug possession); Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571 (1995) (same).

3. *Cf.* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998) (reviewing sentencing practices after the Federal Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 (2000)), and arguing that federal judges have too little discretion).

4. *Cf.* TRACEY L. MEARES & DAN M. KAHAN, URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES (1999) (arguing that police should be allowed to conduct unannounced searches of apartments with prior consent).

5. *Cf.* RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997) (defending expansive drug laws).

6. *Cf.* Alberto Gonzales, U.S. Att'y Gen., Sentencing Guidelines Speech (June 21, 2005), *available at* http://www.usdoj.gov/ag/speeches/2005/06212005victimsofcrime.htm (urging Congress to further restrict judicial discretion in the wake of *United States v. Booker*, 543 U.S. 220 (2005), which granted judges too much discretion in sentencing).

7. *Cf.* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001) (arguing for the priority of welfare concerns over fairness concerns when assessing legal policies).

8. Interviews were conducted in the course of two research projects. The research methods and findings of the first project, an investigation of the effects of criminal sanctions on family and community life, are reported in DONALD BRAMAN, DOING TIME ON THE OUTSIDE (2004). The methods and findings of the second project are reported at The Cultural Cognition Project, http://research.yale.edu/culturalcognition (last visited Apr. 1, 2006).

9. Interview with Londa, in Wash., D.C. (June 7, 1998) (on file with author).

on their own."[10] Similar sentiments are echoed by Carl, a former cop in Londa's community who was mugged by drug addicts while searching for his crack-addicted son, and who has spent his life savings taking care of his grandsons and trying to get his son into treatment. He too is distressed by how unconstructive punishment has become: "The whole approach is not right. . . . It's not right, and everyone who's involved knows it's not right. Just look what it's doing to our community. . . . If we can't make them participate [in drug treatment] while they're in custody, you have to ask what the point is."[11] Londa, Barbara, Carl, and many others are dismayed by the criminal justice system's failure to require offenders to meet any kind of constructive obligation at all.

While one might imagine that these attitudes are limited to the inner city, in fact they extend to a substantial majority of Americans.[12] Traveling the country for a project on American values and the law, I interviewed as diverse an array of citizens as one is likely to find.[13] And while they disagree on many subjects, the concerns expressed in communities far less intimate with crime and punishment are strikingly similar to those voiced by inner-city residents. Carla, a conservative young mother who lives in a gated community, for example, wants to make "moral" behavior a required part of punishment: "Make them do something for society."[14] Paul, a self-described part-time mechanic and full-time hunter in rural Louisiana protested that "giving grown men food, shelter, and entertainment, that's not right. . . . They need to be put to work."[15] And George, a conservative mid-level corporate manager in California, thinks that the state's failure to force offenders to contribute something back to society is not just a waste, but fundamentally wrong: "I wouldn't call that justice. . . . [T]hey should have to do *something*."[16]

I suspect that most readers will intuitively grasp the sense of justice invoked: Offenders should be held accountable in more meaningful and productive ways. But nothing in our classical theories of punishment properly accounts for or develops this intuition. Couched in terms that are neither liberal nor conservative, hard to map onto theories of deterrence,

10. Interview with Barbara, in Wash., D.C. (May 12, 1999) (on file with author).
11. Interview with Carl, in Wash., D.C. (Apr. 19, 2000) (on file with author).
12. *See infra* Part III (analyzing public opinion in greater detail).
13. These interview participants were chosen because they had diverse values. *See* The Cultural Cognition Project, *supra* note 8 (describing those orienting values and related projects for which the interview data were collected).
14. Interview with Carla, in Midlothian, Va. (Aug. 24, 2004) (on file with author).
15. Interview with Paul, in Lake Charles, La. (July 12, 2004) (on file with author).
16. Interview with Geroge, in Carmel, Cal. (June 7, 1998) (on file with author).

retribution, or rehabilitation, the views of ordinary Americans are more nuanced than conventional labels suggest. It should come as no surprise that ordinary people know more than the experts do about what it is they want from the law, but it is puzzling to see the theory and practice of punishment in America so unmoored from the experiences and concerns of people who are the object of the law's protection.

In this Article, I investigate a popular preference for what I call "accountability-reinforcing sanctions." For the people I have spoken with, the desire for greater offender accountability can mean many things: requiring offenders to complete involuntary drug treatment, apologize to and compensate victims, participate in mandatory education or job-training programs, meet mandatory work requirements, support dependants, pay taxes, or comply with some other prosocial obligation. But it cannot mean—and this is what many find so distressing about what criminal sanctions now entail—being excused from responsibilities and thus drawing down the social and material resources of others.

As I argue in Part I, this popular preference for more demanding accountability-reinforcing sanctions is justifiable on independent normative grounds. Perhaps its foremost justification is that accountability furthers norms of cooperation and responsible behavior. When individuals feel that free riders will be forced back into a cooperative stance, prosocial norms are strengthened and other community members are encouraged to reciprocate with socially-responsible behavior themselves. But when free riders are excused from their obligations by forced inactivity—as most offenders now are—these norms suffer and free riding gains legitimacy.

Furthermore, unlike our current regime of accountability-frustrating sanctions, accountability-reinforcing sanctions produce a number of positive secondary effects that promote prosocial norms. For example, in communities where sanctions currently excuse offenders from many basic social obligations, enforcing more responsible behavior makes social ties more predictable and rewarding, thereby bolstering relationships that help with informal norm enforcement. They also help communities defend against many of the stigmatizing effects associated with our current regime of sanctions, effects that cast aspersions on the character and abilities of all those who live in communities where crime and punishment are common. And, by more closely approximating the form of punishment that citizens consider to be just, sanctions that feature this more demanding form of accountability encourage greater compliance with and cooperation within the law.

The preference for and potential benefits of accountability-reinforcing sanctions beg the question of why they are so rare today, a question I explore in Part II. A look at the evolution of sanctions in America reveals that early American forms of punishment, including the early penitentiary, while responsive to these concerns, were also brutal and, quite often, racist. Over time, as reformers restrained the criminal law from furthering inegalitarian and antisocial norms, they also inadvertently undermined its ability to enforce egalitarian and prosocial norms as well. Americans thus look back on the steady move toward mass detention with mixed emotions: Although less overtly cruel or racially exploitative, punishment today also lacks some basic tools for countering social disorder and furthering offender accountability.

This, of course, is not the standard reading of the history of American punishment. The reigning explanation of the rise of incarceration is provided by theories of popular punitiveness. According to the proponents of this theory, it is the public who has driven punishment toward irrationally punitive sentences, despite the burdens that they place on disadvantaged communities, the nearly unanimous opposition of experts, and the immense burden on the public fisc. But as I argue in Part III, an alternative account, one that recognizes the public's desire for greater accountability, proves both more accurate and more promising. A desire for greater offender accountability explains, for example, the mixture of disgust and nostalgia that many feel for early American sanctions. Moreover, a growing body of public opinion research indicates broad opposition to sanctions that are merely punitive, and broad support for sanctions that force offenders into responsible action. Indeed, much of what we know about public sentiment from ethnographic, historical, and public opinion data on punishment appears incoherent without reference to accountability.

Are there ways to give accountability greater weight in the structuring of criminal sanctions while avoiding historical abuses? In Part IV, I describe several practical efforts that can be made both more productive and satisfying in light of accountability concerns: the victim compensation movement; the shift toward mandatory drug treatment, education, and job training; the increased interest in correctional labor; the continued popularity of intensive sanctions; and the rising interest in restorative justice. Revisiting each of these efforts with a richer conception of the role of accountability in punishment can help us to see their promise, their

limitations, and the ways in which they might be altered or combined to better effect.

I. PUNISHMENT AND ACCOUNTABILITY

Promises to hold offenders more accountable pervade our political discourse, and our criminal justice system has experimented with a variety of means to this end. But despite their ubiquity today and historically, there is little to suggest that accountability concerns are well understood by contemporary legal theorists or practitioners. We have very thin explanations for why accountability-reinforcing sanctions should be desirable, little to say about what features of punishment actually further accountability in practice, and few discussions of how these accountability-related concerns relate to longstanding accounts of punishment.

In this part, I describe features of accountability that often are overlooked in discussions of punishment—features that relate to both popular concerns about, and the practical social effects of, specific forms of punishment. Rather than focusing on the typical understanding of offender accountability as imposing some generically costly consequence for actions barred by criminal laws, I focus on the extent to which criminal sanctions reinforce broader norms of social accountability. Different sanctions may impose similar costs on an offender, but may also allow for, encourage, or enforce other irresponsible behavior that injures nonoffenders. To the extent that punishment focuses narrowly on the costs internalized by offenders, it will often miss these concerns about broader accountability-related aspects of punishment, and fail to reflect consideration of the practical effects that reinforcing or frustrating accountability may have. Focusing on accountability can broaden our conception of the fairness, utility, and expressive qualities of sanctions beyond the typical considerations provided by classical theories of punishment.

A. Accountability as a Preference

1. In the Inner City

If you want to know what is missing from the theory and practice of punishment today, visit just about any inner-city neighborhood and spend some time talking about criminal sanctions with the families who live there. In public housing projects and Section 8 tenements around the country, you will find people coping with the double burdens of crime and

mass incarceration. Sit down with the mothers on one of the blocks where crime and punishment have made men scarce and you are likely to hear stories like Londa's.

Londa lives in a small housing project in our nation's capital with her three children, and she is intimately familiar with both the burdens of criminal sanctions and the social ills at which they are directed. Derek, her ex-husband and the father of her children, is incarcerated on a drug-related burglary charge. For her, for their children, and for their extended families, Derek's incarceration is decidedly unjust—unjust not so much for Derek as for them, unjust because it holds him *unaccountable* in ways that matter. Londa's complaint is one that I heard over and over in talking to families in the inner city: "Out here, I have to pay the bills, I have to raise the kids on my own, I have to go to work. He doesn't help with any of that. He doesn't even have to get drug treatment."[17] Her prescription is one I heard many times as well:

> They need to make all these guys participate [in programs,] not just [the] people who want it. They look at people who want the help, and they help them first, and then if we have some time, then we'll get to the other people that didn't come and sign up, you know? That's wrong. That's wrong. Everybody should have to do the program.[18]

When I asked Londa what she meant by "program," she described both a program that addresses addiction and programs that require offenders to work.

After years of trying, Londa found she just couldn't face another cycle of addiction, arrest, incarceration without treatment, and release, so she filed for divorce. Londa is distraught about what it will mean for her children to grow up with a father in prison, and she is painfully aware that her family has come to fit the stereotype of a broken family that hangs over everyone in her community. The stereotypes of irresponsible, poverty-stricken, fatherless families are, she and many others in her community feel, reinforced by state-sanctioned punishments that further irresponsibility, poverty, and family disintegration. After over a decade of trying to keep her family together, Londa feels the frustration with Derek's unaccountability to her and their children, and the loss that comes with divorce, all the more keenly.

17. Interview with Londa, *supra* note 9.
18. *Id.*

Londa's complaint, to be clear, is not just that there are not enough resources devoted to offender rehabilitation, but that our current approach, even where it devotes resources to offender rehabilitation, is wrong. It's not enough to provide offenders with *optional* services; the state should *require* offenders to behave more responsibly. "A lot of these guys, they just aren't going to do anything unless they have to. So unless you want the same thing over and over, with them doing the same thing, you have to make them do it, [even] the ones that don't want to."[19] And this, she believes, is important to members of the community, particularly the family, even if it fails to help the offender. "Even if it doesn't stick, if they backslide or whatever, you still want to know that they are going to do the process, you know? That, just even you knowing that they [are] doing something, it gives you that little positive to think about, [and] that's important."[20] Londa and others in Derek's family would love for Derek to leave his drug habit behind for good,[21] but even if he fail to do so, they want the state to make him try.

Nor is Londa's complaint unusual. Among the families I spoke with, the complaint about offenders abandoning their responsibilities—from work to parenting to getting treatment for addiction—was an integral part of the nearly universal complaint about the cost that this abandonment imposed on others. Like Londa, many wanted to know why their neighbors, friends, and relatives, who clearly had drug problems, were not required to complete a drug treatment program. But they also wanted to know why offenders simply sat around all day doing nothing. Why couldn't the state force them into some kind of productive activity—either community service or paid labor that helps to compensate victims, support dependants, or at the very least contribute to the tax base. They were frustrated both with offenders

19. *Id.*

20. *Id.*

21. Derek's sister, for example, asked a question that echoed concerns paralleled by others in her neighborhood:

> [Wealthy people] got people, big people, helping them, pulling them out of situations. And when people, little people, get like that, that's a different story. For them, they get thrown away in jail and locked up, while people that's on in high places, they'll take them somewhere privately to a program, and then they get clean. Then they're around positive people and live in positive areas. But they don't do the same thing for people that's small people—they just throw them away in jail instead of them trying to say, "Well . . . [i]f you spend such and such time in jail, and then you go from jail to a program . . . until you prove to me that I can trust you to go from step one to step two to step three." You know? That's what I believe. That's what I see. I mean, why they don't see that?

BRAMAN, *supra* note 8, at 58.

for engaging in behavior that effectively rendered them unable to meet their obligations and with the state for failing to push offenders to engage in responsible behavior.

For example, Mildred, whose son is a prisoner, assists with the care of her grandchildren. She noted that she and other nonoffenders were doing the work of all those moving in and out of prison: "It gets you frustrated to the point where you begin to dislike your own family. You begin to think that all the sacrifices you made, all that work you put in, it don't amount to nothing."[22] Most, like Mildred, had little patience for offenders or the state. Both, she and others felt, were not doing what they should. The criminal justice system, for many, seemed to be part of a (possibly intentional) program that was disassembling their families and communities.

Those who work on the frontlines of the criminal justice system are often aware of these concerns, in no small part because they often live in the same communities and have relatives caught up in the criminal justice system themselves. Carl, the former police officer who once worked a beat in Londa's neighborhood, certainly felt this way. He has spent his retirement savings taking care of his grandsons while their father serves a prison sentence for possession of crack cocaine, and he is frustrated with how unproductive sanctions have become. "You can't just do this to a family, to a whole community and expect it to function. It's not right. You have got to find a way to get [offenders] to start doing the things they need to do."[23] Carl's complaint is one that is both personal and more broadly political. He views the state's indifference to his son's addiction as part of a broader indifference to the erosion of the basic structure of family and community life in low-income neighborhoods like his.

Barbara, who lives across town from Londa, has similar concerns about her nephew's incarceration. After her sister's death and her nephew's arrest, Barbara is the only one left in the family able to take care of her nephew's son—a child she loves but whose expenses force her to trade off food, rent, and electricity on a regular basis.[24] Like many inner-city residents, Barbara is a crime victim who insists that she is "tough on crime."[25] But she also vehemently objects to sanctions that she see as fostering, instead of fighting, irresponsible behavior. She's not upset that her nephew is being punished: "I believe that if you do the crime you had

22. Interview with Mildred, in Wash., D.C. (Dec. 3, 1999) (on file with author).
23. Interview with Carl, *supra* note 11.
24. *See* BRAMAN, *supra* note 8, at 97–98 (describing Barbara's account in greater detail). Many of the expenses that she has trouble meeting are medical.
25. Interview with Barbara, *supra* note 10.

better do the time."[26] But Barbara is upset that his sentence is so long and unproductive: "He doesn't do a thing in there."[27] She is frustrated both with her nephew for putting himself in a position in which he is incapable of acting responsibly and with the criminal justice system for enforcing his irresponsibility:

> He can work. He's not disabled or anything. I don't know why they can't just put all of them to work. . . . The thing that really ticks me off is they take the bread winner out of the house, [but don't think about] the earnings or the medical expenses or clothing or whatever that he was contributing. . . . They take away but they don't give back.[28]

This attitude, neither strictly liberal nor conservative, doesn't shy from punishing offenders, but suggests that there are some qualities of just punishment that are missing from incarceration alone. Strikingly common in high-crime communities, Barbara's objection is that existing sanctions fail to consider nonoffenders when evaluating whether or not a sanction is truly just.

Others I spoke with were concerned about the failure of sanctions to push offenders into greater responsibility-taking in general. A reverend, whose congregation is a few blocks from Londa's home, speaks eloquently about the effects of removing so many young men from the community:

> You can't have a community where all the young men are in prison. You can't have families where the fathers are removed from their place as providers for the family. Just walk down the street out there and you see what I'm saying. That is the reality people have to live with here. . . . Now everyone wants to fight crime, that's a given in this community because there are more victims than criminals—everyone in this community is a victim [of crime] in one way or another. So no one is opposed to serving justice to the people who are doing wrong. But what you see is not justice.[29]

The reverend suggests that many in his congregation view mass incarceration as unjust not only to the offender or to his family, but to the community as a whole.

What is missing from many discussions of punishment, both among liberal and conservative elites, is this intuition that sanctions are, in social

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26. Interview with Barbara, *supra* note 10.
27. BRAMAN, *supra* note 8, at 97–98.
28. Interview with Barbara, *supra* note 10.
29. Interview with Reveredn Mobley, in Wash., D.C. (Oct. 14, 1999) (on file with author).

terms, both too injurious to disadvantaged communities and insufficiently demanding of offenders. Most of the people who live in communities where both crime and punishment are common aren't opposed to being tough on offenders, even to incarcerating offenders who are violent or at a high risk of committing another offense. But they are distraught by a lack of any prosocial demands made of those offenders, in or out of prison.

2. Across America

Forcing offenders to behave responsibly is an understandable preference in the inner city—those who live there are overexposed to what economists might describe as the negative "externalities"[30] of punishment. But residents in very different communities voice a strikingly similar set of preferences. Over the last two years, I've traveled the country interviewing as diverse a sample of Americans as one is likely to find, and while they disagree on many subjects—abortion, gun control, and environmental regulation, for example—on the issue of punishment they generally voice similar disappointment with sanctions that fail to demand some form of responsible behavior from offenders.[31]

This was true not only in areas that had urban, wealthy, or progressive residents, but also in relatively conservative neighborhoods isolated from poverty and crime. Janice, a "traditionalist" mother of three who lives and works on a military base in southern Virginia, finds the idea of extended periods of empty detention decidedly unsatisfying: "I feel like they are doing nothing, you know, or worse. . . . Why not make them do something good for a change?"[32] No one in her family is in prison, and a change in criminal sanctions would have only a very indirect impact on her life. Nonetheless, she too finds the idea of idleness itself upsetting. "Honestly," she says, "I like the idea of making them work."[33]

Carla, a self-described suburban "soccer mom" who lives in a gated community nearby has little time for sanctions that she sees as encouraging idleness: "There should be some real consequence [for committing a crime]. You know the old saying, 'idle hands are the devil's workshop.' I believe

30. *See, e.g.*, E.J. MISHAN, COST-BENEFIT ANALYSIS: AN INFORMAL INTRODUCTION 119 (3d ed. 1982) (defining an externality as a "direct effect on another's profit or welfare arising as an incidental by-product of some . . . activity").

31. Interview participants were chosen because they had diverse values. *See supra* note 13.

32. Interview with Janice, in Williamsburg, Va. (Aug. 8, 2004) (on file with author).

33. *Id.*

that, so there's a lot of room for improvement there in my opinion."[34] Part of the problem, Carla believes, is that sanctions send confusing signals, asking offenders to pay for their crimes by doing something that seems wrong: doing nothing at all. "If you think about it, that's mixed up. It's like a mixed message."[35] Carla also believes that everyone is redeemable, a position supported by her faith: "God never gives up on a person just like a parent never gives up on a child. There are consequences, and your child may not like them, in fact may rebel against them, but it is your job to make sure that they know right from wrong. . . . [Part of that] involves making sure that they do the right thing so that they learn by doing."[36]

Paul, who lives in rural Louisiana, likes the idea of making offenders work too, but he views punishment from the perspective of someone who values self-sufficiency and individual responsibility. A bit of a traditionalist and a bit of a libertarian, Paul is a fan of small government and opposed to social welfare programs, and he does not think that prisoners deserve the option of a work program for their own benefit. Instead, for him it's a question of fairness: "They have a roof over their head, they get three meals a day, they get television or whatever. . . . You and me, we have to work for that. They need to be put to work."[37] He feels strongly that there should be consequences for harming others, but he sees prisons as expensive and largely counterproductive, allowing people with bad tendencies to spend time socializing and learning how to evade the law more effectively, "like training for how to be a criminal."[38] If they're not violent, he says, they should work outside of the prison to pay for what they did.

George, the conservative mid-level corporate manager from California who finds prisoner idleness to be unjust, is also adamant about demanding that offenders do things that benefit others. For violent or dangerous offenders, they should be in prison, but they should also be working, either by contracting prison labor or by having them work for the state:

> If you can have them work at a real job, great. But if there's not paying jobs, they shouldn't just sit around. . . . The way I see it, they took and they should have to put something back. Have them pick up trash on the highway. Have them put out wildfires. But you need to have them doing something besides just spending our tax dollars,

34. Interview with Carla, *supra* note 14.
35. *Id.*
36. *Id.*
37. Interview with Paul, *supra* note 15.
38. *Id.*

> watching cable, and lifting weights. I guess I take that [phrase] "pay your debt to society" seriously.[39]

If someone commits a nonviolent crime, George says, "Make him work and pay for it."[40] Even when it comes to chronic drug addicts who repeatedly offend, he wants more from punishment: "Send that guy to a program, clean him up, then make him work to pay back for what he did."[41] Asked why he wouldn't incarcerate these offenders, his reasoning is straightforward: "They don't do anything in prison. He's not working and paying taxes to support me, so why should I work and pay taxes to support him?"[42]

Annie, a lawyer who lives in Boston, is also interested in pushing offenders into some form of responsible, constructive behavior as a way of making the most of the necessity of state control. She is distressed by the way the state captures and then squanders human capital from neighborhoods where it is desperately needed. "Instead of locking them up, which is such a waste, have them do something constructive. I mean, all this human warehousing is wrong, because that's what it is, it's human warehousing, just taking them out of their neighborhoods and stacking them up in prison."[43] The neighborhoods they come from should be protected from crime, she believes, by some form of punishment that is less destructive and wasteful. "I just can't believe that this is the best we can do. I mean whatever happened to all the programs that we used to have? You know? Why aren't they doing something positive?"[44] Moreover, as many egalitarian respondents I interviewed pointed out, mass incarceration seems particularly offensive because it removes human capital from the families and communities who can least afford the loss. "The real tragedy is that there are so many fathers in prison. Why don't politicians ever talk about that? Why is it just 'lock them up'?"[45]

In short, the preference for enforcing responsible behavior stems from many motivations, and these motivations appear to vary from person to person. A single mother like Londa living in our nation's capital; a conservative businessman like Carl, living in a posh neighborhood three thousand miles away; and a rural blue-collar worker like Paul, living on the

39. Interview with George, *supra* note 16.. In California, crews from juvenile detention camps and low-security prisons sometimes assist in fighting wildfires.
40. *Id.*
41. *Id.*
42. *Id.*
43. Interview with Annie, in __ (Aug. 24, 2004) (on file with author).
44. *Id.*
45. *Id.*

bayou in Louisiana, are unlikely to share all of each other's interests, intuitions, and insights about how society should be structured, how Americans should conduct their lives, or the moral architecture that justifies a particular punishment. But despite their diverse motivations, they agree on a surprising number of sanctions.

B. Accountability and Traditional Punishment Theory

What, if anything, can these accountability-related concerns teach legal theorists? One set of lessons suggests that the terms in which we typically discuss punishment—retribution, desert, deterrence, expressive condemnation, and rehabilitation—miss important and widespread concerns. Attending to these concerns can help theorists think in terms that are still consistent with their broader commitments but better reflect the diversity of considerations that most people bring to bear when they evaluate the form punishment takes.

1. Fairness Concerns Exceeding Retribution

The preference for accountability is not, for example, reducible to traditional conceptions of retributivism, at least not in the classical sense.[46] While many of those interviewed were interested in increasing the fairness of punishment,[47] they viewed fairness as more than simply delivering to the offender "what his actions are worth."[48] As Londa's complaint makes clear, she is at least as interested in what she, her children, and her community deserve[49] as she is in what her husband deserves.[50] Nor does the idea that

46. *See* IMMANUEL KANT, THE PHILOSOPHY OF LAW 194–98 (W. Hastie trans., Lawbook Exchange ed. 2002) (1887) ("But what is the mode and measure of Punishment which Public Justice takes as its Principle and Standard? It is just the Principle of Equality, by which the pointer of the Scale of Justice is made to incline no more to one side than the other."); RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT (1979); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968) (arguing that punishment must right the unfair advantage that lawbreakers gain over those who respect that law); *see also* ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 363–97 (1981) (suggesting that the level of punishment should vary according to the level of responsibility and the harm caused).

47. *Cf.* Morris, *supra* note 46, at 477–78 (describing punishment as an attempt to achieve a fair balance of burdens in light of the offender's failure to shoulder the burden of lawful behavior to which other citizens submit).

48. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 102 (John Ladd trans., Bobbs-Merrill ed. 1965) (1797).

49. *Cf.* Jean Hampton, *The Retributive Idea*, *in* FORGIVENESS AND MERCY 111, 125 (Jeffrie G. Murphy & Jean Hampton eds., 1988) (describing one of the expressive functions of the law as

offenders should be required to engage in some form of prosocial activity appear consistent with the notion that the offenders, by committing crimes, commit themselves to having the same or a similar harms committed against them.[51] Many of the interviewees' responses reflect the notion that requiring an offender to complete some form of prosocial action is, in many instances, part of just punishment. Retribution is an important part of the public's complex conception of justice, but it does not exhaust it.

2. Welfare Concerns Exceeding Deterrence

Nor does the preference for accountability-reinforcing sanctions appear to be reducible to concerns about deterrence, either.[52] Indeed, although many of those interviewed decried the disutility of punishment when describing their preference for accountability-reinforcing sanctions, even connecting individual sanctions to welfare-related concerns, few connected their preference with the cost-benefit calculus of those contemplating a criminal act. Instead, they complained about the loss of a resource to their families, communities, and society as a whole.[53] This preference is difficult to reduce to deterrence because it extends beyond the cost-benefit analyses of those contemplating a crime—beyond the expected utility of crime to a broader utility of punishment that incorporates but is not limited to deterrence effects.

restoring public status to victims); Morris, *supra* note 46, at 477–78 (arguing that punishment must right the unfair advantage that lawbreakers gain over those who respect that law).

50. Interview with Londa, *supra* note 9 ("What does he do for them or for me? Nothing. . . . At least have him do something for the [kids]. Or anything, or anybody, you know? Something for the community. They all need to be doing *something*."); *cf.* Michael S. Moore, *The Moral Worth of Retribution: New Essay in Moral Psychology*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 181 (Ferdinand Schoeman ed., 1987) ("A retributivist punishes because, and only because, the offender deserves it.").

51. This is a well-worn complaint against the classical retributivist theories. *See, e.g.*, C.L. TEN, CRIME, GUILT, AND PUNISHMENT (1987).

52. *See* JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation*, *in* THE UTILITARIANS 170 (Dolphin Books 1961) (describing punishment as deterring potential offenders by raising the costs associated with criminal acts); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (formalizing the argument for deterrence in the language of neoclassical economics).

53. *See supra* note 43 and accompanying text. ("Instead of locking them up, which is such a waste, have them do something constructive.").

3. Expressive Concerns Exceeding Condemnation

While there is often an expressive element to the interest in accountability-reinforcing sanctions, it is one that is broader than traditional expressivist accounts of punishment suggest. Expressive theories hold that punishment conveys the importance of the norms marked out by the law to the degree of condemnation that a sanction conveys.[54] However, the public's preference for accountability-reinforcing sanctions indicates that punishment can convey social meaning along other dimensions as well. When, for example, the citizens of California vote by popular referenda to implement mandatory labor requirements throughout its prison system, it seems likely that they are attempting to do more than express condemnation; they are also trying to convey an additional normative sentiment: Offenders cannot escape the constraint of responsible behavior through punishment. Indeed, the impulse behind laws establishing requirements, such as victim compensation, restitution, mandatory drug treatment, mandatory education, mandatory child support, anger management classes, public apologies, and the like, are best thought of as expressing something in addition to "vindictive resentment."[55] Punishment is a mechanism through which citizens can both condemn criminal acts and protect norms governing responsible behavior outside of the scope of the criminal law.

4. Beyond the Rehabilitative Ideal

Accountability-related concerns are also distinct from one of the central progressive accounts of punishment: the rehabilitative ideal.

54. As James Fitzjames Stephen noted:

> Some men, probably, abstain from murder because they fear that, if they committed murder, they would be hung. Hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is, that murderers are hung with the hearty approbation of all reasonable men.

JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (1863). *See also e.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 U. CHI. L. REV. 591, 598 (1996) ("Under the expressive view, the signification of punishment is moral condemnation."). I do not mean to say that traditional expressive accounts insist that the only meaning that punishment conveys is condemnation, but rather that the other meanings that are widely discussed are all tightly clustered around this meaning. Thus, while Joel Feinberg concedes that "[i]t is much easier to show that punishment has a symbolic significance than to state exactly what it is that punishment expresses," he does not venture beyond adding "vindictive resentment" to "strong disapproval." JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 100 (1970).

55. FEINBERG, *supra* note 54, at 100.

Whereas rehabilitative theories focus on endowing offenders with the capacity to support themselves lawfully and the psychological fortitude to resist illicit temptations,[56] the interest in accountability is independent of these kinds of therapeutic effects.[57] Indeed, as I describe in greater detail below, it is precisely the focus on the offender's obligation to behave responsibly *without any necessary benefit to the offender* that allows individuals with diverse motivations to agree on the desirability of accountability-reinforcing sanctions.

C. The Utility of Accountability

As I describe in greater detail in Part III, there is a wealth of public opinion data suggesting that the preference for enforcing responsible behavior is widely shared across ideological and political lines. While popularity is not, in and of itself, a compelling justification for a law or policy,[58] an intuition that is widely shared should not be dismissed out of hand. When a sizeable majority of citizens with diverse interests and

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56. *See, e.g.*, KARL MENNINGER, THE CRIME OF PUNISHMENT 253–68 (1968); BARBARA WOOTTON, CRIME AND THE CRIMINAL LAW: REFLECTIONS OF A MAGISTRATE AND SOCIAL SCIENTIST (1963); Karl Menninger, *Therapy, Not Punishment*, *in* PUNISHMENT AND REHABILITATION 132 (Jeffrie G. Murphy ed., 1973); Richard Wasserstrom, *Some Problems with Theories of Punishment*, *in* JUSTICE AND PUNISHMENT 173, 180 (J.B. Cederblom & William L. Blizek eds., 1977) (noting a view among psychiatrists that "we ought never punish persons who break the law and that we ought instead to do something much more like what we do when we treat someone who has a disease."); *see also* FRANCES A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 23, 25 (1981) (describing the rehabilitative ideal as deriving from confidence "in the social capacities of public education" and "institutional therapeutic programs"); DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY (1990) (describing the shift in criminological thought).

57. Perhaps they felt, as Kyron Huigens does, that "this therapeutic approach to crime is paternalistic: it infantilizes where we ought to insist on adult accountability." Kyron Huigens, *Dignity and Desert in Punishment Theory*, 27 HARV. J.L. & PUB. POL'Y 33, 35 (2003).

58. Indeed, the law often guards policy choices against the majoritarian influence because popularity is so imperfectly aligned with carefully considered conceptions of justice and utility. This is apparent in not only the protection of the Constitution from tampering by a simple majority, but also by the protection of presidential veto from a simple majority in Congress. *See, e.g.*, THE FEDERALIST NO. 73, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing the desirability of requiring a supermajority to override a presidential veto). As Hamilton wrote:

> It is to be hoped that it will not often happen that improper views will govern so large a proportion as two thirds of both branches of the legislature at the same time; and this, too, in defiance of the counterpoising weight of the executive. It is at any rate far less probable that this should be the case than that such views should taint the resolutions and conduct of a bare majority.

Id.

perspectives shares a preference, it is worth asking whether there might be a good reason to honor it.

As it turns out—at least in this instance—there are several. Our best understanding of human behavior and organization suggests that this family of accountability-reinforcing sanctions can help vulnerable communities address the core collective-action problems they confront on a daily basis.[59]

1. Punishment and Collective Action

Traditional utilitarian accounts of the criminal law can be thought of as furnishing a solution to a basic collective-action problem. To better achieve their collective potential, individuals cooperate around a set of established norms; those who free ride on the trust, cooperation, and responsibility-taking of others create a collective-action problem.[60] To solve this problem, communities raise the cost of free riding by punishing defectors, which creates a balance of incentives that once again favors cooperation. On this account, the main question is whether the expense and degree of the suffering inflicted by punishment achieve an optimal balance of benefits through deterrence to outweigh the costs of imposing the punishment.[61]

The approach taken here complicates this account by recasting both crime and punishment as interventions into the social ecology of collective action,[62] and by developing a more realistic account of the ways in which

59. But before I describe these, let me be clear that this is not a claim that citizens endorse (or even conceive of punishment in terms of) the defense that I offer here. The defense that I offer does not depend in any analytic sense on the public agreeing with or even understanding the normative account that I offer. The central normative argument for accountability-reinforcing sanctions is not that they are popular or that they conform to a particular conception of justice, but that on net they provide real-world benefits.

60. *See* Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, CAL. L. REV. 1513, 1514 (2002) (characterizing the most general collective-action problem as one in which "individuals . . . must decide whether to contribute to the collective good of respect for one another's persons and property or instead to engage in opportunistic acts of predation"); *cf.* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

61. *See* BENTHAM, *supra* note 52, at 162 ("[A]ll punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."); John J. Donohue, *Fighting Crime: An Economist's View*, MILKEN INST. REV. Mar. 2005 (1st Qtr.), at 46, 48, *available at* http://islandia.law.yale.edu/donohue/Milken%20Institute%20Article.pdf ("To determine whether the current level of incarceration makes sense, one must ask whether the benefits at the margin in terms of less crime exceed the costs to society.").

62. *See* Calvin Morrill et al., *Seeing Crime and Punishment Through a Sociological Lens: Contributions, Practices, and the Future*, 2005 U. CHI. LEGAL F. 289, 299–302 (Tracey Meares describing this ecological approach to criminal law).

actors in a community respond to these interventions. The goal of collective action is still to allow individuals to make the most of their capacities by furthering cooperation and discouraging free-ridership. But the question for analysts under this more complex account of punishment is not merely about whether and how much to punish, but about the diverse effects—many of them indirect—that punishment can have on collective action.

2. Norms and Networks

Punishment, for example, can influence collective action through its effects on social norms. As numerous studies have demonstrated over a wide variety of settings, humans are more likely to cooperate if they think that others are cooperating. Conversely, they are more likely to free ride if they think that others are free riding as well.[63] So when a person commits a criminal act, he not only creates the typical harms associated with crime, but he also imposes a cost of eroding social cooperation—a cost diffused throughout the community as an increase in the probability that others in the community will follow suit. Contemporary criminal theory thus looks to a host of state actions to encourage social cooperation for precisely this reason.[64]

These concerns are consistent with several features of substantive criminal law. The criminalization of solicitation, attempt, and conspiracy, for example, can be thought of as addressing not the direct harm resulting from the commission of a crime, but the broader normative harm of defection implicit in inchoate crimes. Thus while attempt may involve no direct material harm, defection from norms that the law protects may itself

63. *See, e.g.*, Samuel Bowles et al., Homo reciprocans*: A Research Initiative on the Origins, Dimensions, and Policy Implications of Reciprocal Fairness* 4 (1997), http://www.umass.edu/preferen/gintis/homo.pdf (describing empirical research indicating that "a majority of individuals . . . respond to the cooperation of others by maintaining or increasing their level of cooperation"); Ernst Fehr & Simon Gächter, *Reciprocity and Economics: The Economic Implications of Homo Reciprocans*, 42 EUR. ECON. REV. 845, 855 (1998) (noting that reciprocity studies suggest a model of collective action in which individuals prefer to contribute if they believe that others are inclined to contribute, but to free ride if they believe that others are inclined to free ride); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71 (2003) (describing the legal and policy implications of reciprocity findings).

64. *See* Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859, 1860 (1999) ("The 1990s are likely to be remembered as the decade in which criminal law discovered (or perhaps rediscovered) the power of *social norms* as a regulatory device.").

be a harm.[65] Solicitation and conspiracy may also be considered pernicious, for they signal both defection from licit norms and the establishment of cooperation around illicit norms.[66] They are thus doubly harmful, not only producing the kind of defection that can drive a community toward noncooperation, but moving toward the establishment of cooperation around antisocial norms.[67]

Protecting the norm of prosocial cooperation has also featured prominently in recent discussions of street-level law enforcement. The "New Policing" is, in many respects, the result of a search for cost-effective ways to increase collective reciprocation of respect and responsibility-taking in a community. As community members perceive others in their community (police and other citizens) cooperating around the enforcement of licit norms, they, in turn, become more likely to reciprocate by complying with and helping to enforce the law themselves.[68] Order-maintenance policing thus shapes collective action by altering perceptions of norm-compliance and building relationships that enable desirable cooperation.

a. Downstream Effects

An extension of this framework to punishment suggests a number of predictable effects that punishment is likely to have on collective action.[69] One of these can be characterized as a "downstream effect" on social norms: Because adherence to norms of responsible behavior depends in part on the perception that others are also adhering to those norms, sanctions that force offenders out of cooperation and into free-ridership decrease the likelihood of cooperation and increase the likelihood of free-ridership among others in the community.

Consider, for example, what has happened with Londa's husband, Derek. His individual drug use and thieving directly drives up the rate of free-ridership in his community, making others less trusting and perhaps even more likely to free ride themselves. But his incarceration, while attempting to curb these harms by imposing a cost on Derek for defecting,

65. This also suggests why impossibility is generally not exculpatory, as the attempt to free ride can have this effect as well.

66. *Cf.* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307 (2003) (arguing that the various harmful social effects of conspiracy make it especially worthy of punishment).

67. *Cf.* Kahan, *supra* note 60, at 1513–15 (describing community policing as guarding against norms of low cooperation).

68. Kahan, *supra* note 60 (discussing reciprocity and community policing).

69. I thank Ryan Goodman for noting the relationship between these effects.

reinforces them by creating other forms of free-ridership. His failure to compensate his victims or the community at large for the harm he has caused signals defection from basic social obligations; his continued failure to be a responsible father, spouse, brother, and son while incarcerated signals defection from familial obligations. This signal reaches not only members of his family, but others in his community as well. His failure to reform himself, to work, to pay taxes, or to vote, signals a further defection from his obligations to his family, community, and society at large. While his detention may deter free-ridership in some ways, it also promotes free-ridership by forcing these irresponsible behaviors. Indeed, Derek, while incarcerated, becomes a free rider extraordinaire, costing everyone something and contributing little or nothing in return.

Bear in mind, too, that in Londa's neighborhood incarceration and the free-ridership that it entails doesn't just *influence* the norm among young men—statistically speaking, it *is* the norm. Nearly every house on her block has a family member who has been or is behind bars.[70] In the year during which Derek was arrested, there were sixty-four arrests for drug possession and distribution within a two-block radius of her residence.[71] Over 120 men living within the same two-block radius were admitted to the D.C. Correctional system during that time, about one-quarter of them on drug possession or distribution charges. Many others, like Londa's husband Derek, were incarcerated on other charges related to drug addiction.[72]

Multiply Derek's defections by the millions of men who spend time in prison or jail each year, and one begins to grasp how incarceration can alter basic norms related to family, community, and citizenship in many already-disadvantaged communities.[73] Humans are social in that they predictably adapt their behavior to what they perceive to be the "going rate"[74]—what constitutes acceptable and responsible behavior in the relevant reference group. In communities where most fathers spend time in prison or jail, and where doing so means not being present for one's spouse, providing for one's children, working, paying taxes, voting, paying one's debts, or

70. *See* BRAMAN, *supra* note 8, at 21 (describing the high incarceration rate in Londa's Washington, D.C. neighborhood).

71. *See id.* (citing to D.C. Police Dep't Data (on file with author)).

72. Usually fugitive, larceny, burglary, or robbery charges. *Id.* at n.4.

73. *See id.* at 38, 159 (describing the effects of incarceration on social norms in low-income neighborhoods).

74. *See, e.g.*, ARLIE RUSSELL HOCHSCHILD, THE SECOND SHIFT 51 (1999) (describing husbands who use the "going rate" of behavior among other men they know to justify contributing less effort than their wives to their marriages).

compensating one's victims, the going rate for responsible behavior is discernibly lowered.

b. Upstream Effects

Punishment can also have significant "upstream effects" on the willingness of individuals to enter into relationships that enable cooperation and curb free-ridership: Family, work, church, and other centers of community life are the principal ties through which prosocial norms are transmitted and enforced. The best evidence we have suggest that these ties are not only essential to the long-term health of communities and all those who live in them, but also to long-term crime reduction.[75] But where individuals perceive others to be defecting from the obligations that arise within such relationships, they become less likely to enter into them and more likely to exit them.

In communities like Londa's—where incarceration is common—many individuals have learned that they cannot rely on one another for the fundamental exchanges of care and material goods. This is so because the criminal justice system prevents so many men from contributing to and participating in the long-term reciprocal relationships in which such exchanges occur.[76] A substantial body of empirical work now describes how accountability-frustrating sanctions have been exerting an increasingly corrosive force on the social ties of citizens in low-income communities, often operating in ways that frustrate the intent of the law.[77]

Indeed, the reason that Derek is no longer Londa's husband is because she could no longer sustain her commitment to their relationship in light of his failure to meet his responsibilities. What happens when millions of women and children have experiences like Londa and her children? The effects are evident, a series of recent studies now suggest, in the increased

75. *See, e.g.*, ROBERT D. PUTNAM, BOWLING ALONE (2000) (describing the importance of informal relationships to individual and collective well-being); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 46 (1996) (describing the effects of declining social ties on crime); Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918, 918 (1997) (reporting evidence that "social cohesion among neighbors combined with their willingness to intervene on behalf of the common good" is strongly correlated with reduced levels of violent crime).

76. *See, e.g.*, BRAMAN, *supra* note 8, at 154–58 (reviewing the literature and describing its relevance to criminal sanctions).

77. *See* JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (2005) (reviewing this literature); Spencer De Li & Doris Layton MacKenzie, *The Gendered Effects of Adult Social Bonds on the Criminal Activities of Probationers*, 28 CRIM. JUST. REV. 278 (2003).

fragility and transience of families in neighborhoods where incarceration is common; in the subtle corrosion of relational norms governing the behavior of romantic partners; and in the diminished resources that individuals have access to in a family or community where trust becomes scarce.[78] While incarceration is not solely responsible for the steady decline in the number and strength of positive social ties in communities with high incarceration rates, it is a significant contributor to that decline.[79]

By pushing offenders back into a cooperative stance, accountability-reinforcing sanctions can foster the perception of adherence to—and thus strengthen—the norm of cooperation and responsibility-taking. This, in turn, encourages continued participation in the social networks essential to healthy family and community life. Recall that in Londa's neighborhood this would not be an effect at the margins; it would alter the behavior of a substantial majority of young men. What we know of human behavior and social organization suggests that requiring offenders to engage in responsible behaviors—completing drug treatment, working, compensating their victims, supporting their children, paying taxes—would have significant effects that extend well beyond the offenders themselves.

This is one of my central claims about punishment and accountability: By reassuring individuals in a community that the state will push offenders back into responsible behavior, accountability-reinforcing sanctions can help to increase the likelihood that others in the community will also behave responsibly. This, in turn, will make it more likely that individuals will enter into and remain in the prosocial relationships that sustain and are sustained by that behavior.

3. Fairness

Punishment also shapes collective action through its effect on perceptions of fairness. The importance of perceptions of fairness to

78. *See, e.g.*, Leonard M. Lopoo & Bruce Western, *Incarceration and the Formation and Stability of Marital Unions*, 67 J. MARRIAGE & FAM. 721, 731 (2005) (finding that, after controlling for other factors, incarceration increases the likelihood that a man will divorce by 360 percent); Bruce Western & Sara McLanahan, *Fathers Behind Bars: The Impact of Incarceration on Family Formation*, 2 CONTEMP. PERSPECT. FAM. RES. 309 (2000) (reporting similar findings on the effects of incarceration in nonmarital romantic relationships); *see also* BRAMAN, *supra* note 8, at 86–88, 162–63 (describing the effects of incarceration on community norms regarding romantic and marital relationships).

79. *See* BRAMAN, *supra* note 8, at __.

cooperation, long assumed by prominent legal theorists,[80] has been thoroughly established across a broad array of recent empirical studies by Tom Tyler, John Darley, Janice Nadler, and others.[81] When citizens perceive the state to be furthering injustice, these studies suggest, they are less likely to obey the law, assist law enforcement, or enforce the law themselves.

The collective action effect at stake here is a familiar one: Individual residents in a community would all be better off were they to help one another and the state with law enforcement. But because today's sanctions are perceived to be unjust—to innocent citizens as much as to offenders themselves—legal actors and residents in high-crime neighborhoods are forced to weigh the perceived injustice of crime against the injustice of punishment, which undermines cooperation with the law and the criminal justice system. To the extent that it fails to meet the public's expectations of just punishment, our current regime of sanctions works against the legitimacy of the law itself.

This occurs in some very predictable ways: Londa, for example, was unwilling to report her husband for stealing their television, stereo, and other valuables to support his crack habit. This is not because she does not want to force him into drug treatment—she would love to. She resists because a regime in which long-term detention is unlikely to include drug treatment seems to be unnecessarily injurious not only to Derek, but to her, their children, and the community at large.[82] But if she thought that she could force Derek into drug treatment, she would: "In a second. I wouldn't even have to think about it."[83]

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80. *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 25 (1968) (arguing that specific laws failing to satisfy the public's taste for justice can undermine confidence in the law more generally).

81. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3–4 (1990) (noting that cooperation with the law and its enforcement is dependent on individuals' perceptions that the law is "just"); Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1399 (2005) (reviewing the literature and reporting new experimental evidence that "the perceived legitimacy of one law or legal outcome can influence one's willingness to comply with unrelated laws"); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997) (arguing that citizens are less likely to view the law as a moral authority that guides their own behavior in general when they perceive specific laws as failing to reflect popular notions of justice); *see also* Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1185 (2004) ("As penalties increase, people may not be as willing to enforce them because of the disproportionate impact on those caught.").

82. Note that this aversion to helping enforce the law has spillover effects: Londa's husband is not just stealing her television, but he is also borrowing money that he will not pay back from friends and family, stealing cars, and burglarizing homes in his neighborhood.

83.

Fairness concerns shape more extended forms of noncooperation as well. Londa, for example, has a host of material incentives to report the drug dealers in her neighborhood: They may sell drugs to her husband or, in time, her children; their clients engage in other criminal acts (of which she herself has been a victim); and they set a bad example for her husband, her children, and her community (the social norms effect described above). But she also knows them as the brothers and sons of her friends, and she can extrapolate from her own experience to theirs:

> I don't think I could get behind taking so many years from them. You know, I know that getting locked up, it doesn't help, because that's what Derek d**id.** If anything, I think prison just made things worse. What they need is to give them some structure—they have kids, a lot of them, you know.[84]

While there are many reasons why Londa does not call the police to report what she knows, she has to weigh this against the perceived injustice that these men, their families, and their communities would face.

As many legal commentators have noted, the effects of perceived injustice can extend beyond less cooperative citizens to under-enforcement in the courtroom as well.[85] Few jurors or judges, for example, believe that selling crack cocaine or possessing heroin should be legal, but at least some justifiably balk at the socially destructive sanctions that result from conviction.[86] They know, just as Londa and many others in her community know, that the sanctions available to them are unfair not (or not only) to the offender, but to the offender's family and community.

D. The Rarity of Accountability-Reinforcing Sanctions

But if broader accountability-related concerns are common and the effects of accountability-related aspects of sanctions are consequential, why do we have a blight of accountability-frustrating sanctions today? The narrow focus of our theoretical discourse is only a partial explanation of why sanctions that foster irresponsible behavior dominate the contemporary punishment landscape. A more detailed answer will

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85. *See* Teresa L. Conaway et al., *Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U. L. REV. 393 (2004) (documenting more than one hundred articles on jury nullification published in the last ten years).

86. *See, e.g.*, United States v. Clary, 846 F. Supp. 768, 774 (E.D. Mo. 1994), *rev'd*, 34 F.3d 709 (8th Cir. 1994) (refusing to sentence a drug offender in accordance with the sentencing guidelines on grounds that the guidelines were motivated by "unconscious racism" and thus violated the Equal Protection Clause).

necessarily reference the practical and symbolic obstacles that have accrued to accountability-reinforcing sanctions over the course of American history. Understanding this history and the slow eclipse of broader accountability-related concerns is a prerequisite to a fuller explanation, and it is to this that I now turn.

II. THE SECRET HISTORY OF ACCOUNTABILITY

Things look bleak for the American criminal justice system. Housing one out of every four prisoners on the planet,[87] draining state budgets of funds desperately needed for education, housing, and healthcare,[88] and with some of the highest recidivism rates in history,[89] it's fair to say that we've reached a dead end. Bizarrely, we spend tens of billions of dollars keeping young men from our most impoverished communities idle,[90] asking nothing of them for their dependants, their communities, often not even for their victims.

It wasn't always so.[91] In particular, colonial American sanctions and the early penitentiary shared a concern for the social obligations of offenders. They endeavored to use the power of the state not only to inflict hardship, but also to force offenders back into responsible forms of behavior. But the route to mass imprisonment reveals not just an enduring preference for accountability, but also a lineage of embarrassing ancestors that have given a bad name to both socially constructive sanctions and the use of state power to coerce productivity. From brutally exploitative convict leasing to exceptionally impolitic rehabilitative programs, succeeding generations of reformers created a series of crises over the social meaning of

87. *See* Dan Gardner, *Bars and Stripes*, OTTAWA CITIZEN, Mar. 16, 2002, at __.

88. *See Market Call: Tough Call: Should States Offer Criminals Early Release to Save Money?* (CNNFN television broadcast Nov. 17, 2003).

89. *See* PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, NCJ 193427, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002) ("Among nearly 300,000 prisoners released in 15 States in 1994, 67.5% were rearrested within 3 years.").

90. The United States spends an estimated sixty billion dollars annually on corrections, with costs rising steadily each year. *See* Peter Slevin, *Prison Experts See Opportunity for Improvement*, WASH. POST, July 26, 2005, at A3.

91. I begin with the work of historians of American law, but evidence of accountability-reinforcing sanctions can be found in descriptions of punishment in many societies. *See, e.g.*, KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 135 (1941) (noting that much of Cheyenne law was intended to instill in the individual a commitment to "fulfilling his obligations with greater consideration"); WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND 184 (1990) (arguing that "[t]he balanced-exchange model, to give it a name, served as a kind of constitutive metaphor").

criminal sanctions. But as reformers sought to rid punishment of what they viewed as its undesirable or ideologically offensive attributes, they also inadvertently pared away the accountability-reinforcing aspects of earlier sanctions. The brutal and unpopular company that accountability has kept helps to explain why it now plays a relatively covert role in American punishment.

A. A Colonial Contrast

In colonial America, many formal and informal sanctions focused attention on the claims that others in the community had on the offender.[92] The most typical forms of punishment were fines, the posting of bond, and sureties,[93] with shaming,[94] corporal punishment, banishment, and the death

92. While I will make some general claims about colonial law (none of which are particularly novel), I take the issue of historical specificity and diversity to heart. As Douglas Greenberg has noted:

> Any discussion of crime and criminal justice in early American society must begin by recognizing the distinctions among the various colonies. There were substantial differences in their social arrangements, populations, ideologies, institutional developments, and economic organization. Moreover, sometimes such variations could be as profound within a single colony as they were among all of them. Indeed, it is probably inaccurate to speak of colonial society at all; we would do better to understand the experience of seventeenth- and eighteenth-century Americans as having taken place in a congeries of societies that shared the umbrella of the British Empire and little else. Any generalization at all about these societies—to say nothing of a generalization about so delicately influenced and locally colored a question as crime and law enforcement—is almost inevitably subject to challenge and exceptions.

Douglas Greenberg, *Crime, Law Enforcement, and Social Control in Colonial America*, 26 AM. J. LEGAL HIST. 293, 296 (1982). This diversity, however, supports, rather than undermines, one of my claims: that our colonial forebears, as a whole, had a greater array of sanctions available to them than do most American jurisdictions today.

93. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 38–39 (1993). A common combination of both formal and informal sanction was the assessing of bonds of surety for good behavior against the properties of the defendant and two members of the community willing to speak on the defendant's behalf. These bonds or sureties, which friends pledged to pay if the offender did not maintain his good behavior, helped draw the community into the policing of the offender. *See* AM. HISTORICAL ASS'N, AMERICAN LEGAL RECORDS: CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA, at ix, lxxi (Peter Charles Hoffer & William B. Scott eds., 1984). ("Fines were regularly imposed upon moral offenders to curb disorderliness, drunkenness, swearing, and fornication. Bonds for good behavior were . . . routinely assessed . . . . The two sureties required from neighbors, friends, or superiors to pressure the defendant to keep his pledge show that in deterrence, as in arrest and trial, the criminal justice system of the county depended upon the active assistance of the community."). In many areas these sanctions accounted for more than all the other punishments combined. *Id.* at lxxi.

94. *See* Kahan, *supra* note 54, at 630–49 (describing the use of shame sanctions); *Developments in the Law—Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1872–75 (1998) (same).

penalty also employed, though less frequently.[95] Combinations of these punishments were common and, as Lawrence Friedman puts it, "rubbing the noses of offenders in community context [was] an essential part of the process."[96]

Rather than reducing the social contributions of offenders, most early American sanctions sought to increase them. Reminding offenders of and requiring them to meet their responsibilities was achieved through a variety of sanctions that relied heavily on social control rather than expensive physical infrastructure. For example, a man convicted of stealing a hog in colonial Maryland was ordered both to "make restitution for the slaughtered animal . . . [and] to see that the county bridge was repaired before the next meeting of the court."[97] And when Jane Lynch was convicted of stealing in Philadelphia in 1760, she was ordered "whipt on Wednesday next at the Carts tail round four Squares of the City,"[98] fined, ordered to make restitution, and required to post bond "for her good Behaviour for twelve months."[99]

Imprisonment was exceedingly rare. Where it was employed, it was generally detention for other legal purposes,[100] and when employed as a sanction it was usually accompanied by other more common measures. When, for example, Charles Sheepey was convicted of rape in 1687 in West New Jersey, he was sentenced to be whipped for an hour in an open cart while driven through town, and then held "in Irons for the Space of

95. *See* ALICE MORSE EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS 72–75 (Chicago, Herbert S. Stone & Co. 1896) (describing corporal punishments in the colonial era).

96. *See* FRIEDMAN, *supra* note 93, at 48.

97. Greenberg, *supra* note 92, at 303. As Greenberg notes, the forced labor was related to the high value placed on labor, particularly in the Mid-Atlantic colonies of Maryland and Virginia. *Id.*; *see also* RAPHAEL SEMMES, CRIME AND PUNISHMENT IN EARLY MARYLAND 67 (Patterson Smith Publ'g Corp. 1970) (1938) (describing the same incident).

98. FRIEDMAN, *supra* note 93, at 38–39 n.35 (citing Mayor's Court of Philadelphia, Jan. Sess. (1760), *microformed on* American Trial Court Records Series, Ser. 1 (Temple University School of Law)).

99. *Id.*

100. *See* DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 48 (1971). Rothman writes:

> When crimes did occur, colonial towns, like their counterparts in England, meted out a wide range of punishments. The most popular sanctions included fines, whippings, mechanisms of shame (the stock and public cage), banishment, and of course, the gallows. What was not on the list was imprisonment. The local jails held men (and it was almost always men) going through the process of judgment, that is, those awaiting trial or convicted but not yet punished, or men who were in debt without having satisfied their obligations.

Id.

three Moneths,"[101] during which he would be whipped three more times and would have to work for his keep.[102]

European-style "houses of correction" and "workhouses," which held offenders of many types, were more common than jail or prison—and these, too, focused the state's power on forcing offenders into responsible action.[103] In New Hampshire, for example, the workhouse was constructed for the "Keeping, Correcting and setting to Work of Rogues, Vagabonds, and common Beggars, and other Lewd, Idle and Disorderly Persons," as well as those who "neglect their Callings, Mispend what they earn, and do not provide for themselves, or the support of their Families."[104] Those sentenced to lodge in these houses were expected to "provide themselves Bedding food, and other Ne[ce]ssarys."[105] Indeed, in many workhouses, as in some debtors' prisons, inmates were expected to leave the premises during the day to earn their keep and make good on their obligations to others.[106]

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101. FRIEDMAN, *supra* note 93, at 48 n.90 (citing H. CLAY REED & GEORGE J. MILLER, THE BURLINGTON COURT BOOK: A RECORD OF QUAKER JURISPRUDENCE IN WEST NEW JERSEY, 1680–1705, at 79–80 (1944).

102. *Id.*

103. *See* PIETER SPIERENBURG, THE PRISON EXPERIENCE: DISCIPLINARY INSTITUTIONS AND THEIR INMATES IN EARLY MODERN EUROPE (1991) (noting that the prison workhouse had been established by the mid-sixteenth century in Europe and became commonplace by the mid-seventeenth century); *see also* Pieter Spierenburg, *The Body and the State*, *in* THE OXFORD HISTORY OF THE PRISON 49, 64 (Norval Morris & David J. Rothman eds., 1995) (noting that it was the "obligation to work [that] distinguished prisons from almshouses, asylums, and hospitals, as well as from workhouses, whose inmates worked voluntarily and not as punishment").

104. Act of May 14, 1718, ch. 15, 2 N.H. Laws 266, 266 (repealed 1792), *reprinted in* LAWS OF NEW HAMPSHIRE 266 (Albert Stillman Batchellor ed., 1913); *see* also FRIEDMAN, *supra* note 93, at 49 (describing workhouses as "halfway between a poorhouse and a jail"). Seán McConville has noted that in Europe as well, the "vagabond was . . . deemed to be a particularly dangerous threat to social harmony and stability" mostly because he "could but would not work." Seán McConville, *Local Justice: The Jail*, *in* THE OXFORD HISTORY OF THE PRISON, *supra* note 103, at 297, 313. Here, again, the notion of labor is not merely retributive, but takes on distinct meanings in different contexts:

> Henry VIII and his successors—notably Elizabeth I—brought in various remedial and conservative laws. In essence these provided upkeep for the deserving poor, work for those who were unemployed, and punishment for those who could but would not work. The house of correction and the poorhouse thus rapidly became rivals of the jail.

Id. While criminalizing willful unemployment would be unacceptable today, it is important to note that work can take on different meanings depending on whether it is voluntary or not. Indeed, early modern European policies bear striking similarities to contemporary welfare policies, except that criminal offenders are not required to work whereas noncriminals are.

105. The Great Law Or the Body of Laws of the Province of Pennsilvania and territorys thereunto Belonging past at an Assembly at Chester alias Upland the 7th day of the 10th Month December 1682, *reprinted in* 1 THE STATUTES AT LARGE OF PENNSYLVANIA IN THE TIME OF WILLIAM PENN, 1680–1700, at 128 (Gail McKnight Beckman ed., 1976).

106. *See* SPIERENBURG, *supra* note 103, at 141–42.

These brief descriptions simply illustrate what extensive accounts of the period describe in great and vivid detail: At our nation's birth, fines, bonds, sureties, mandatory labor, shaming, and corporal punishment were preferred; imprisonment was rare and, in and of itself, generally considered inappropriate as a punishment.[107] In almost every case, the colonial offender was not only expected to suffer pain or discomfort, but to labor alongside other community members, putting his hand to the "common weal."[108] "[T]o force inmates to labor,"[109] to make good on their debts, and to publicly apologize for their wrongs struck early Americans as not only pragmatic, but just. On the other hand, to hold an able-bodied individual idle at community expense, to demand nothing in the way of (indeed to inhibit) responsible behavior, would have been considered not merely costly or inefficient, but morally wrong—a compounding of the injustice already wrought by the offender.[110]

B. Original Meanings: Incarceration and Early American Penal Reform

The shift from colonial to postcolonial status was accompanied by a philosophical shift that changed the meanings of corporal punishment and incarceration. This shift led to reform of the criminal justice system and the rapid rise of imprisonment to preeminence over the diverse array of early American sanctions.

The first generation of American statesmen, as David Rothman has described, rejected not only the political framework of their colonial forbearers, but also the content and consequences of their criminal codes.[111] To many early reformers, colonial methods of corporal punishment threatened the public with a brutality unbefitting this more enlightened

107. What made imprisonment severe was poverty: Those who were imprisoned were expected to supply their own food and clothing, rely on the kindness of others, or perish.

108. This sensibility is captured in the criminal sanctions proposed by Jefferson in his *Notes on the State of Virginia* which emphasized "[f]orfeiture of lands and goods" to the Commonwealth and mandatory "labour . . . for the public." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 271 (J.W. Randolph 1853) (1787).

109. ROTHMAN, *supra* note 100, at 25.

110. *See* GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 50 (Russell & Russell 1968) (1939) ("Confinement without labor would be no punishment, and the first requirement therefore, is to force the inmates to work under strict discipline. If the government finds itself financially unable to carry out a particular branch of production, the prisoners should be put to work on less expensive material.").

111. *See* ROTHMAN, *supra* note 100, at 59 ("Armed with patriotic fervor, sharing a repugnance for things British and a new familiarity with and faith in Enlightenment doctrines, they posited that the origins and persistence of deviant behavior would be found in the nature of the colonial criminal codes.").

nation.[112] Enlightenment theories of criminal sanctions gained ground; by the end of the eighteenth century, reformers like William Bradford[113] and Thomas Eddy[114] were drawing on the works of Montesquieu[115] and Beccaria[116] to argue for a reform of punishments in line with principles of deterrence, proportionality, and the least necessary punishment.[117]

Repulsed by the draconian punishments imposed (or attempted) under British colonial rule, and inspired by theories of the perfectibility of man,[118] reformers reconceived imprisonment. Rather than offensive enforced

112. For example, the Constitution of Pennsylvania of 1776 provided that "[t]he penal laws . . . shall be reformed . . . and punishments made in some cases less sanguinary, and in general more proportionate to the crime." PA. CONST. of 1776, amend. VIII.

113. Bradford served as Pennsylvania's Attorney General from 1780–1791 and as the U.S. Attorney General from 1794–1795. Between those posts, he authored an influential treatise advocating the reform of criminal sanctions. *See* WILLIAM BRADFORD, AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA (1793), *reprinted in* 12 AM. J. LEGAL HIST. 122 (1968).

114. *See, e.g.*, THOMAS EDDY, AN ACCOUNT OF THE STATE PRISON OR PENITENTIARY HOUSE, IN THE CITY OF NEW-YORK (1801) (drawing heavily on Beccaria and Montesquieu in his arguments for reform). Eddy helped prepare the bill that established the Newgate prison, oversaw the erection of the facility, and served as its first director. *See generally* SAMUEL L. KNAPP, THE LIFE OF THOMAS EDDY (N.Y., Conner & Cooke 1834). The prison, opened in 1797 to high hopes characteristic of the times, was generally regarded as a failure, and closed in 1828 after numerous riots.

115. Montesquieu's *The Spirit of Laws* had been in translation for some time and was one of the most frequently cited and influential texts at the time of the founding. *See generally* BARON DE MONTESQUIEU, THE SPIRIT OF LAWS, BK. VI, at 101–36 (Thomas Nugent trans., 2d ed. 1752) (1748) (describing "Consequences of the Principles of different Governments with respect to the Simplicity of civil and criminal Laws, the Form of Judgments, and the inflicting of Punishments").

116. Beccaria's *On Crimes and Punishments* (in translation in America by 1777) was a favorite of the time. *See* GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 152 (Vintage 1979) (1978) (describing Beccaria as Jefferson's "principal modern authority for revising the laws of Virginia").

117. Bradford, for example, wrote:

> The general principles upon which penal laws ought to be founded appear to be fully settled. . . . Among these principles some have obtained the force of axioms, and are no longer considered as the subjects either of doubt or demonstration. "*That the prevention of crimes is the sole end of punishment*," is one of these: and it is another, "*That every punishment which is not absolutely necessary for that purpose is a cruel and tyrannical act*." To these may be added a third, (calculated to limit the first) which is, "*That every penalty should be proportioned to the offence*."

BRADFORD, *supra* note 113, at 126. Bradford goes on to review the history of Pennsylvania law and describe the effects of various sentencing regimes on the behavior of both criminals and juries, the latter of which often found guilty defendants innocent in "humane struggles . . . to save the offender from death." *Id.* at 141.

118. In the competing models of the penitentiary, the young nation had arguably transformed criminal sanctions into an Enlightenment-style experiment, a scientific application of newly discovered human truths to the problems of the modern era. *See generally* MICHAEL MERANZE, LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760–1835 (1996) (describing the emergence of the penitentiary model).

idleness, incarceration would allow for a concentrated dose of social control: "Remove him from the family and community and place him in an artificially created and therefore corruption-free environment. Here he [can] learn all the vital lessons that others had ignored, while protected from the temptations of vice."[119] Thus, the penitentiary was born.

Adopted first at the Auburn prison in New York and then in a rival form in Philadelphia,[120] the modern penitentiary was soon widely praised, studied, and imitated.[121] The sanction of the penitentiary was "publickly and disgracefully imposed,"[122] and social control over the offender was then reasserted through highly regimented days in which movement and activity was organized to the last detail, and prisoners were (in theory) perfected through long hours of silent labor, mass, and educational instruction.[123]

Although distinct in form from colonial sanctions in some aspects, the early penitentiary was similar in that it sought to return the wayward criminal to the ways of the virtuous citizen through the enforcement of responsible behavior.[124] Precisely because it repackaged social control in what appeared to be a more modern, efficient, and humane design, enthusiasm for the new system of convict reform was overwhelming.[125] While southern and western states held out longer, most penal reformers in

119. ROTHMAN, *supra* note 100, at 71.

120. In Auburn, labor was "congregate," with inmates working together. In Pennsylvania the "separate" system prevailed, with inmates isolated from one another for the duration of their sentence. While both models had their proponents, the Auburn model was more widely adopted. *See id.* at 79–88.

121. *See id.* at 88 (noting that the Auburn and Pennsylvania systems "became the blueprints for constructing and arranging new prisons").

122. NEGLEY K. TEETERS & JOHN D. SHEARER, THE PRISON AT PHILADELPHIA: CHERRY HILL: THE SEPARATE SYSTEM OF PENAL DISCIPLINE, 1829–1913, at 6 (1957) (citing Penn. Mercury, Sept. 8, 1786, at 2); *see also* Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 342–53 (1998) (reviewing literature on labor in the early history of the penitentiary).

123. Ironically, though, this eventually took the form of isolation from rather than immersion in community life. Reformers wrote extensively of "the need to guard the criminal against corruption and teach him the habits of order and regularity." ROTHMAN, *supra* note 100, at 83; *see id.* at 105 (noting that a "quasi-military"style of governance prevailed in the early penitentiaries, with inmates moving literally in lock step from one activity to another).

124. One prison chaplain was so taken with "the regularity, and temperance, and sobriety of a good prison" that he felt that "society [should] change places with the prisoners . . . ." JAMES B. FINLEY, MEMORIALS OF PRISON LIFE 41 (1851).

125. As Finely wrote: "Could we all be put on prison fare, for the space of two or three generations, the world would ultimately be the better for it." *Id.*; *see also* ROTHMAN, *supra* note 100, at 83. The enthusiasm also had a fiscal aspect: Popular accounts described how it brought the full force of societal obligations to bear in an almost scientifically controlled setting, all the while saving the state a tidy sum. These accounts, coming from interested parties, are certainly suspect. *See, e.g.*, ROTHMAN, *supra* note 100, at 92–93; Garvey, *supra* note 122, at 353–56. But even though the fiscal benefit was overstated, there was belief that the fiscal benefits from the penitentiary added to its appeal—at least so long as fiscal benefit was plausible.

America never "questioned the shared premise . . . that incarceration was the only proper social response to criminal behavior."[126]

C. The Changing Meaning of Convict Labor

Early enthusiasm for the penitentiary quickly faltered, however, largely as a result of a shift in the meaning of convict labor. Prison labor was the centerpiece of the penitentiary model, the means by which responsibility was enforced and reform effected. Over time, though, convict labor in both the North and the South assumed new and highly contentious meanings.

In the North, free workers, particularly those attempting to organize into unions, came to regard inmate labor as a threat to their livelihoods. In response to widespread protests from both unions and trade groups, many states enacted statutes or amended their constitutions to restrict the use of prison labor.[127] Faced with political opposition to the original, labor-centered model of the penitentiary, northern states shifted to what has been described as the "custodial model"[128] in its place, and the purpose of the penitentiary came to be seen as isolation of the incorrigible rather than socialization through enforced responsibility.[129] The administration of justice was no longer imagined as exerting social control over offenders to hold them accountable to broader social responsibilities, but rather as containing unruly criminal crowds in large and underfunded facilities.[130] The demise of the penitentiary model and the rise of the custodial model, while widely lamented, was effectively accomplished in the North by the turn of the century.[131]

126. ROTHMAN, *supra* note 100, at 88.

127. *See* MATTHEW J. MANCINI, ONE DIES, GET ANOTHER 15–16 (1996).

128. *See* ROTHMAN, *supra* note 100, at 265–95.

129. This theory of incarceration's utility finds its modern counterpart in discussions of incapacitation. As one prominent academic put it:

> [W]e would view the correctional system as having [this] function—namely, to isolate and to punish. . . . [S]ociety at a minimum must be able to protect itself from dangerous offenders. . . . The purpose of isolating—or, more accurately, closely supervising—offenders is obvious: Whatever they may do when they are released, they cannot harm society while confined or closely supervised.

JAMES Q. WILSON, THINKING ABOUT CRIME 172–73 (1975); *see also* John J. DiIulio, Jr., *Instant Replay: Three Strikes Was the Right Call*, 18 AM. PROSPECT 12 (1994) (voicing a similar conception of the criminal justice system's proper function).

130. *See* ROTHMAN, *supra* note 100, at 265 ("The first and most common element was overcrowding and in its train came the breakdown of classification systems, the demise of work therapy, and an increase in the use of mechanical restraints . . . .").

131. Southern states were slow to follow suit for numerous reasons. Urbanization and industrialization came more slowly to southern states; the cultural climate was more amenable to

While southern states were less enamored with penitentiaries and the restorative capabilities of work,[132] they had plenty of other uses for convicts, and it is the southern experience that lends penal labor its most disturbing associations today. Following the Civil War, many southern states adopted convict leasing both as a substitution for slavery and as means of breaking nascent unions across the southland.[133] Southern penal labor was not a system for enforcing responsible behavior, but one of brutal exploitation and even extermination for private profit.[134]

Despite unfavorable decisions by the Supreme Court in 1905 and 1914,[135] convict leasing persisted at the state level into the 1920s and, at the county level, convict leasing wouldn't be fully quashed until well into the Civil Rights era. When southern states finally relinquished the ability to force inmates into private labor for profit, many simply transitioned to forcing inmates into public labor on chain gangs, state farms, and prison camps. Inmate abuses in these institutions were vicious, and the names of many of the prisons farms and camps—Parchman, Angola, Sugarland, Tucker, and Cummins—still conjure associations with brutal racial

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the old community-oriented manner of punishment; and slavery gave violence a greater role in the organization of discipline and punishment. *Id.*

132. As a result, shaming punishments remained and, particularly for slaves and even free blacks, corporal punishment was still deemed essential.

133. *See* MANCINI, *supra* note 127 (describing the practice in Alabama, Arkansas, the Carolinas, Florida, Georgia, Louisiana, Mississippi, Tennessee, and Texas).

134. As one captain of a convict leasing camp in the Florida woods recounted, convicts were assumed to be disposable: "There was no provision made for either shelter or supplies. . . . [T]here was no food at all. . . . [C]onvicts were . . . only allowed the briefest intervals from labor to scour the woods for food." J.C. POWELL, THE AMERICAN SIBERIA, OR FOURTEEN YEARS' EXPERIENCE IN A SOUTHERN CONVICT CAMP 12 (Homewood 1893) (1891); *see also* DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996). Over half of all inmates on a specific project were literally worked to death. *Id.* at 56. The brutality of the convict leasing system across the South is aptly captured in the title of David M. Oshinsky's recent account.

135. In the *Peonage Cases—Clyatt v. United States*, 197 U.S. 207 (1905); *Bailey v. Alabama*, 219 U.S. 219 (1911); and *United States v. Reynolds*, 235 U.S. 133 (1914)—the U.S. Supreme Court dealt convict leasing a major blow by invalidating laws that effectively maintained peonage by criminalizing breach of employment contracts. Such laws were widespread in the South. *See, e.g.*, Pollock v. Williams, 322 U.S. 4, 25 (1944) (invalidating a Florida statute that criminalized breach of contract); Taylor v. Georgia, 315 U.S. 25, 29 (1942) (invalidating a Georgia statute that criminalized breach of contract); *Bailey*, 219 U.S. at 245 (invalidating an Alabama statute that criminalized breach of contract). Many states circumvented the Court's intent by criminalizing fraud instead of breach of contract. *See* Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The* Peonage Cases, 82 COLUM. L. REV. 646, 666, 689 (1982). But this did not by any means bar mandatory prison labor. *See, e.g.*, Butler v. Perry, 240 U.S. 328, 333 (1916) (upholding a Florida law requiring all able-bodied male citizens to work six days per year on public roads).

violence and oppression.[136] These, rather than any conception of offender accountability, were ultimately the legacy of southern penal labor.

By the second half of the twentieth century, the meaning of penal labor and the practice of imprisonment had been radically transformed. On the one hand, both the northern and southern experience recast prison industries as unfair competition for unions and manufacturers.[137] At the same time, southern chain gangs, prison farms, and other forms of penal work lent convict labor another meaning—one synonymous with the legacy of slavery and reconstruction. Progressives of that era could not help but view prison labor through the dark glass of racial violence and exploitation.

While proponents of the earlier model of the productive prison never fully disappeared, by the turn of the century they were awash in a sea of disappointment and disgust. The emergence of reform movements across the United States, although motivated by differing concerns at the local level, eventually resulted in massive reductions in prison labor across the board. In 1885, nine out of ten inmates in southern states were engaged in some form of labor;[138] the trend since that time has been a steady decline to near extinction today.[139]

D. The Changing Meaning of Penal Hardship and Rehabilitation

The concerns over exploitation and racial subordination that spurred the dramatic curtailment of prison labor also led reformers to demand improvement in prison conditions across the country. As the civil rights

136. As Glenn Feldman has noted:

> [T]he guns, whips, cattle prods, and dogs; the "trusties"—hardened convicts who served as prison guards over the more generic "gunmen"; the harshness of labor on a cotton plantation; the isolation, often unbearable heat, brutality, violence, sex, and drugs; an array of medieval tortures applied by "trusties" without supervision; open ditches of raw sewage, worm-ridden food, vermin-infested bedding, lost records; the indiscriminate mixing of boys and men, girls and women, hardened criminals and minor offenders, vagrants, or petty thieves; the curious incentive to "trusty" convicts to win pardons by killing would-be escapees.

Glenn Feldman, Book Review, 83 J. AM. HIST. 1416, 1419 (1997) (reviewing ALEX LICHENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH (1996)); *see also* MANCINI, *supra* note 127; OSHINSKY, *supra* note 134 (describing Oshinsky's account of the Parchman farm).

137. Given the open use of prison labor to break unions, the concern was not unfounded. *See* Fletcher M. Green, *Some Aspects of the Convict Lease System in the Southern States*, *in* 31 ESSAYS IN SOUTHERN HISTORY (1949) (describing these practices).

138. GAIL S. FUNKE ET AL., ASSETS AND LIABILITIES OF CORRECTIONAL INDUSTRIES 20–21 tbls.2–7 (1982).

139. Fewer than one in sixteen inmates works today. Greg Wees, *Prison Industries*, CORRECTIONS COMPENDIUM, June 1997, at 4.

movement made headway in the courts, many civil rights activists were sent to jail and prison. Their experiences raised awareness of a problem unaddressed by the curtailment of prison labor: the endemic violence in prisons, particularly against black inmates.[140] In 1964, the Supreme Court ruled in *Cooper v. Pate*[141] that inmates have the right to bring legal action against prison officials under the Civil Rights Act of 1871.[142] It was after this decision that federal involvement in the quality of incarceration began in earnest. With a few dozen cases filed in 1964, a few hundred by 1966, and tens of thousands by 1971, the floodgates of court-mandated reform were opened.[143]

Beginning in Arkansas,[144] Mississippi, and a handful of other southern states, the prison reform movement swept northward and westward. In the name of today's "broad and idealistic concepts of dignity, civilized standards, humanity, and decency,"[145] courts have held that prisons and jails must be hygienic; that the use of physical force by agents of the state must be proportionate and necessary; and that severe forms of isolation are subject to significant constitutional scrutiny.[146]

The resulting transformation of correctional facilities in state after state has been dramatic. Although cruelty and hardship have not been

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140. *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 136 (1998) (describing the systematic beatings of inmates that were the basis of important early prison litigation).

141. 378 U.S. 546 (1964).

142. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2000)); James B. Jacobs, *The Prisoner's Rights Movement and Its Impacts*, *in* NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 33, 36–37 (James B. Jacobs ed., 1983).

143. By the late 1970s, at the request of the federal judiciary and other federal officials, most state prisons had implemented some formal mechanism to address inmate complaints outside of the courts. *See, e.g.*, Donald P. Lay, *Corrections and the Courts: A Plea for Understanding an Implementation*, RESOL. OF CORRECTIONAL PROBS. & ISSUES, Fall 1974, at 5, 10–11; REPORT OF THE COMPTROLLER GEN. OF THE U.S.: GRIEVANCE MECHANISMS IN STATE CORRECTIONAL INSTITUTIONS AND LARGE-CITY JAILS (1977).

144. *See* Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965); *see also* FEELEY & RUBIN *supra* note 140, at 55–73 (describing Judge Henley's long crusade to reform Arkansas prisons and the implications of federal involvement in state corrections).

145. Hutto v. Finney, 437 U.S. 678, 685 (1978) (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

146. A passage from the Court's 1978 decision in *Hutto v. Finney* gives some indication of the tenor of American penal reform during this period:

> The Eighth Amendment's ban on inflicting cruel and unusual punishments, made applicable to the States by the Fourteenth Amendment, "[proscribes] more than physically barbarous punishments." It prohibits penalties that are grossly disproportionate to the offense, as well as those that transgress today's "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."

Id. at 685 (citations omitted).

banished from prison,[147] and many prisons today remain under court order for Eighth Amendment, civil rights, and statutory violations,[148] it is fair to say that in large part prison reformers won at least one battle: Prisons are far more humane today than they were in the first half of the twentieth century.[149]

But reformers lost another battle: that over rehabilitation. While the mission of offender rehabilitation had been in slow decline since the demise of the original penitentiary system, it witnessed a temporary revival in the 1950s and 1960s. In this era, the same forces that united against cruel and discriminatory punishment also pushed for a number of programs to help criminal offenders become productive members of society. For this brief period, an increased number (though certainly not a majority) of offenders were offered a host of educational and job-training programs, often outside of the prison setting.

Although these reforms may have shared the penitentiary's goal of bringing criminal offenders back into the social fold as productive and virtuous citizens, the penal regime in which these programs were offered was quite different from the early penitentiary. Progressive criminology predominated, suggesting that criminality was driven by material hardship and social marginalization—problems that involvement in the criminal justice system only exacerbated.[150] Whereas reform of offenders had once

147. *See, e.g.*, Pamela Podger, *Ex-Warden Takes Fifth in Prison Abuse Probe; Lawmakers Grill Corcoran Officials*, S.F. CHRON., Aug. 19, 1998, at A19 (describing "violence, excessive force and gladiator-style fights among inmates arranged by Corcoran [prison] guards").

148. The number has dropped, though, since the passage of the Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626 (2000). *See, e.g.*, John Sullivan, *States and Cities Removing Prisons From Courts' Grip*, N.Y. TIMES, Jan. 30, 2000, at 1.

149. *See* Edgardo Rotman, *The Failure of Reform*, *in* THE OXFORD HISTORY OF THE PRISON 169, 196 (Norval Morris & David J. Rothman eds., 1995) ("The introduction of law and the courts into prisons in the early 1960s contrasts with the lawlessness, arbitrariness, and cruelty that had been routine in penitentiary management practice."). There was, of course, an element of popular constitutionalism in this litigation. *See* Neal Devins, *I Love You, Big Brother*, 87 CAL. L. REV. 1283, 1285 (1999) (reviewing FEELY & RUBIN, *supra* note 140) (arguing that the prison reform effort has been a "testament to how courts and elected officials participate in constitutional dialogues with each other"). A description of reform in Arkansas gives some sense of the dramatic transformation that has taken place:

> Inmates no longer had to bribe brutal inmate overlords to obtain basic necessities. They no longer had to fear for their lives every time they went to sleep. They no longer were capriciously deprived of food and medical services. They no longer had to worry that their genitals might be taped to electrodes or their knuckles cracked with pliers. They were no longer stripped to the waist and whipped for failure to pick a sufficient amount of cotton or okra.

FEELEY & RUBIN, *supra* note 140, at 79.

150. *See, e.g.*, MENNINGER, *supra* note 56; WOOTTON, *supra* note 56; Menninger, *supra* note 56; Wasserstrom, *supra* note 56; *see also* GARLAND, *supra* note 56.

been attempted either through meticulous control over the offender or through imposition of such misery as would deter future criminal conduct, new notions of prisoner reform emphasized positive self-image, freedom, capability, and moral choice.[151] Particularly in the Northeast, correctional institutions experimented with a host of educational, job training, and other prisoner-empowerment programs.[152] Many of these programs were combined with the growth of parole,[153] allowing offenders to receive job training or guaranteed jobs in the community as part of an effort to reintegrate the least advantaged back into society.[154]

But reformers quickly lost the battle over rehabilitation. In retrospect, it is not hard to see why these programs were short-lived.[155] Aside from the fact that they generally had little or no measurable impact on rising rates of crime and recidivism, the public simply viewed prisoner empowerment as expressing too little condemnation of criminality.[156] Complaints about the lenity of the criminal justice system abounded, and public polling at the time showed strong support for stricter police enforcement and tougher penalties.[157]

By the late 1960s, the rehabilitative ideal was in decline; today, many have declared it dead.[158] Most of the rehabilitative programming that

151. *See* Rotman, *supra* note 149, at 189–91.

152. *See id.* at 179–81 (noting reformers like Thomas Mott Osborne who sought to democratize prisons by introducing the "inmate self-government" into the penitentiary); David Garland, *The Limits of the Sovereign State*, 36 BRIT. J. CRIMINOLOGY 445, 462 (1996) (describing this form of penality as producing offenders "trained for freedom").

153. *See* JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990 (1993) (describing the growth of parole); A. Keith Bottomley, *Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s*, *in* 12 CRIME & JUST. 319, 321–26 (same); Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 484–85 (1999) (same).

154. James Jacobs provides the classic account of the changes that transformed prison life during this period by reviewing prison life at the Stateville Penitentiary in Illinois. JAMES B. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY (1977).

155. Some had the foresight to see it at the time. *See, e.g.*, Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 557–58 (1978).

156. *Cf.* Kahan, *supra* note 54, at 626 (describing a similar problem with community service).

157. *See, e.g.*, Monica D. Blumenthal et al., *Justifying Violence: Attitudes of American Men*, ICPSR No. 3504 (2d ed. 1978), available at http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/03504.xml; Roper Poll, Public Opinion Online, Nov. 1971 (showing that men favor get tough measures to rehabilitation by 12 to 1); Gallup Poll (reporting that Americans, black and white, are increasingly concerned over crime and lawlessness).

158. The death of rehabilitation is, of course, still a matter of debate. *Compare* Charles H. Logan & Gerald G. Gaes, *Meta-Analysis and the Rehabilitation of Punishment*, 10 JUST. Q. 245 (arguing for a purely custodial or "confinement" model of corrections) *with* D.A. Andrews et al.,

survives remains tied to the unpopular prisoner rights and empowerment model. Unlike mandatory programs in the early penitentiary system, participation is usually optional; indeed, in many prisons, education, drug treatment, job training, and work are privileges for which prisoners must seek approval. Like "good time,"[159] participation in rehabilitation programs is conceived of as an optional benefit conferred upon offenders rather than an obligation that offenders owe their victims, families, communities, or society at large.

By remolding sanctions that forced offenders to meet prosocial obligations into programs that focused on the therapeutic benefits accruing to offenders, reformers effectively removed many of the core concerns of accountability from mainstream penal practice. Most of the activities that were once central to punishment—public apology, compensating victims, labor for the common good, participation in basic educational programs, and other responsible behaviors—have been captured by reforms with far narrower social appeal, purified for progressive consumption, and thus rendered politically inert.

E. The Rise of Incarceration

We have come a long way from our colonial past. Prison conditions and correctional practices are much improved. But if our sanctions are gentler today, they are also less pragmatic. Far from "rubbing the noses of offenders" in the community context, the vast majority of criminals are removed from their neighborhoods, often to distant out-of-state prisons. At immense cost to their victims, their families, their communities, and the state, they sit idle. It is an arrangement that distresses those on both the left and the right,[160] and is a systematic enforcement of unaccountability and dependence that is not only expensive, but which frustrates the public's moral intuitions about what just sanctions entail.

There is also something perverse about the continued growth of prison populations that has accompanied the steady improvement of prison life. Even those who supported and participated in the reforms of the 1960s look back on their efforts with mixed feelings. Some of the staunchest defenders

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Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis, 28 CRIMINOLOGY 369 (1990) (arguing for rehabilitative service for higher risk convicts).

159. "Good time" is a reduction in the term of incarceration that a prisoner "earns" through good behavior.

160. *See infra* notes 225–240 and accompanying text (describing the widespread dissatisfaction with incarceration).

of judicial intervention today acknowledge that the "constitutionalization of the process. . . . may have contributed to an increased willingness to rely on prisons and even to the increasing oppressiveness that results from the development of supermaximum institutions."[161] And a prominent prison litigator concedes that "by promoting the comforting idea of the 'lawful prison,' the litigation movement may have smoothed the way for ever-harsher sentences and criminal policies."[162]

To be sure, there is much to grimace at in historical accounts of American justice, and reformers can justifiably remark that they have made the criminal justice system less barbarous. But I suggest that along the way we have lost something besides cruelty, something important. Although we rightly champion the humanity of two centuries of criminal justice reform—a vast improvement over the brutality of early American sanctions—we should also mourn the loss of the sense of social accountability that earlier criminal sentences endeavored to attain. Punishments that enhance offender accountability have been captured and transformed by political reform movements that had less to do with accountability per se than with the excesses of offender exploitation and empowerment. Each capture and transformation has altered the socially constructive forms of punishment to more narrowly approximate the concerns of either punitiveness or rehabilitative idealism rather than concerns about offender accountability. I now turn to these issues.

III. ACCOUNTABILITY AND POPULAR PUNITIVENESS

Criminal offenders, it is often said, owe a debt to society. But progressive reformers reversed this intuitive understanding by arguing that society owed a debt to offenders. Far from denying them freedom and holding them accountable, the rehabilitative ideal offered offenders the kind of options that define freedom and, even more distressingly, the ability to live free of their obligations to others. Conservatives did no better, privileging punitiveness to the exclusion of public-regarding and socially-constructive features that punishment might also entail.

This, of course, is not the standard reading of our current predicament. According to leading theorists, mass incarceration is a response to the

161. FEELEY & RUBIN, *supra* note 140, at 375.

162. Margo Schlanger, *Beyond the Hero Judge: Institutional Return Litigation as Litigation*, 97 MICH. L. REV. 1994, 1998 n.19 (1999); *see also* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995) (describing a similar pattern in the recent history of capital punishment).

public's insatiable demand for "harsh justice,"[163] "degradation,"[164] "condemnation,"[165] and a "robust retributivism."[166] Popular punitiveness is the theory of the moment,[167] explaining why—despite untenable budget outlays,[168] the devastation of vulnerable communities,[169] and the nearly unanimous opposition of experts[170]—our prisons continue to expand beyond all historical precedent.[171]

But the signs that Americans are pining for more meaningful sanctions abound. Looking back across the first 150 years of our nation's history, few would have complained that our criminal justice system demanded too little from criminal offenders. Over the last four decades, however, that feeling has become commonplace. The dissatisfaction is apparent in the

163. JAMES Q. WHITMAN, HARSH JUSTICE 3 (2003) (providing a comparative historical account of American punitiveness).

164. *See* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 277 (2004) (linking degradation to "narcissistic aggression [that is] particularly acute in today's America").

165. Kahan, *supra* note 54, at 630–53 (arguing that punitiveness is intrinsic to punishment and must thus be harnessed, for example, through shaming).

166. TRAVIS, *supra* note 77, at xx (describing nonpunitive efforts as "tender seedlings struggling for light in the dark forest of robust retributivism dominating our discourse on sentencing policy").

167. *See, e.g.*, DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 13–14 (2001); SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 222–24 (2d ed. 1998); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1276 (2005) ("Voices in favor of tougher sentences dominate the legislative debate at the state and federal levels."); Anthony Bottoms, *The Philosophy and Politics of Punishment and Sentencing*, *in* THE POLITICS OF SENTENCING REFORM 17, 39–41 (Chris Clarkson & Rod Morgan eds., 1995); Richard S. Frase, *Comparative Perspectives on Sentencing Policy and Research*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 259, 262–63 (Michael Tonry & Richard S. Frase eds., 2001); Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 PAC. L.J. 243 (1996).

168. *See supra* note 90 and accompanying text.

169. I develop these points in greater detail elsewhere. *See generally* BRAMAN, *supra* note 8; Donald Braman, *Families and Incarceration*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002); Donald Braman & Jenifer Wood, *From One Generation to the Next*, *in* PRISONERS ONCE REMOVED 167 (Jeremy Travis & Michelle Waul eds., 2003).

170. *See* Kahan, *supra* note 54, at 592 (describing expert opposition to mass incarceration across the ideological spectrum).

171. Bill Stuntz has developed another explanation, describing the politics of institutional design and incentives that drive the expansion of the criminal codes. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510–11 (2001). His account is complementary to that developed here: Precisely because the likelihood of shrinking the criminal code is so small, the punishment goal of the criminal justice system is the logical place to look for reform.

resurgence of interest in early American sanctions,[172] in several attempts to increase criminal liability (including the victim compensation movement), and in the profound dissatisfaction with prisoner idleness found in nearly every state and national survey conducted on the issue.[173] The public overwhelmingly feels that criminal offenders get off too lightly.[174] And when asked to evaluate various parts of the criminal justice system, the public appears to be most dissatisfied with the quality of imprisonment.

Whether this dissatisfaction stems from a desire for greater punitiveness or a desire for greater accountability matters a great deal. For if the public desires more punitiveness, then progressive reformers who favor more constructive sanctions will need to undertake the lengthy (and, in all likelihood, impossible) task of reeducating the public about the virtues of conferring rehabilitative benefits on offenders. But if my account is correct, and it is accountability that the public wants, then it may make more sense to help reformers develop socially constructive proposals that more closely meet public demand. To that end, I now turn to a defense of the public's desire for accountability against the charge of popular punitiveness.

A. The Puzzle of Popular Punitiveness

Standard accounts of the rise of incarceration and the resurgent interest in archaic forms of punishment often refer to the emergence of a "popular punitiveness" in America.[175] According to this theory, the public demands harsher and harsher penalties as an expression of its fear of crime and its disgust with criminality.[176] Theories of popular punitiveness suggest

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172. For an overview of this revival, see J.C. Oleson, Comment, *The Punitive Coma*, 90 CAL. L. REV. 829, 836–43 (2002).

173. For a balanced review of public opinion research on public attitudes, see Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1 (2000).

174. See *infra* Part III.B.2 for a detailed discussion of this data.

175. This hypothesis has been widely discussed. *See, e.g.*, GARLAND, *supra* note 167; Bottoms, *supra* note 167; Frase, *supra* note 167; Zimring, *supra* note 167. *But see* Francis T. Cullen et al., *Explaining the Get Tough Movement: Can the Public Be Blamed?*, 49 FED. PROBATION 16, 22 (1985) (arguing that the rehabilitative ideal is alive and well); Francis T. Cullen et al., *Is Rehabilitation Dead? The Myth of the Punitive Public*, 16 J. CRIM. JUST. 303 (1988) (same); Francis T. Cullen et al., *Public Support for Correctional Treatment: The Tenacity of Rehabilitative Ideology*, 17 CRIM. JUST. & BEH. 6, 7 (1990) (same); Sandra Evans Skovron et al., *Prison Crowding: Public Attitudes Toward Strategies of Population Control*, 25 J. RES. CRIME & DELINQ. 150, 154 (1988) (same).

176. *See, e.g.*, KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 3 (1997).

that the public is "obsessed . . . with dangerous individuals."[177] Insisting on a "zero-tolerance approach,"[178] the public "believes that with severe enough sanctions, crime can and should be completely eliminated."[179]

While commentators across the political spectrum generally agree on the contours of popular punitiveness, they have strikingly different responses to it. Conservative reformers see it as a natural reaction to decades of liberal mismanagement of the criminal justice system, during which progressives were able to use the courts to "expand[ ] the rights of criminals with little if any . . . concern for consequences."[180] The humanization of the criminal justice system at the hands of progressive courts, conservatives argue, has diminished both the moral message and the deterrent capacity of the criminal law.[181] On this account, the public is both righteous and pragmatic in its demand for longer prison terms.[182]

Liberal reformers, on the other hand, lament that the recent turn away from the progressive humanization of our criminal justice system toward lengthy prison sentences heralds neither moral nor pragmatic progress, but an appalling "new primacy of vengeance seeking."[183] There are usually three parts to liberal critiques of popular punitiveness:[184] A sensationalist media misleads the public by exaggerating both the risk of criminal victimization and the leniency of the criminal justice system;[185] savvy conservative politicians play up criminal sanctions in elections, often using "tough on crime" policies as a code for racial prejudice;[186] and the public, primed by

177. Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCH. PUB. POL'Y & L. 452, 455 (1998).

178. *Id.*

179. *Id.*

180. Arnold Beichman, *Crime on the Campaign Scales*, WASH. TIMES, Aug. 21, 1996, at A14.

181. *See, e.g.*, James J. Foster, Letter to the Editor, *Let's Be Tougher on Inmates*, MILWAUKEE J. SENTINEL, Feb. 28, 1999, at 5 ("It's simply wrong to say that lawmakers lack the courage to stop making the criminal code harsher. What we lack is the courage to truly punish lawbreakers. Instead, we provide a comfortable environment for inmates, including cable television, fitness equipment and other creature comforts that many law-abiding citizens don't have.").

182. Elliot Currie summarizes this perspective quite nicely: "Contrary to the claims of liberal do-gooders and 'elite' experts, prison 'works'; locking up more people for longer terms . . . cuts crime dramatically, and indeed the reason crime has fallen in the past few years is that we have finally begun to put more criminals behind bars." ELLIOT CURRIE, CRIME AND PUNISHMENT IN AMERICA 4 (1998).

183. Simon, *supra* note 177, at 455.

184. Some parse these categories more finely. *See, e.g.*, Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 423–24 (2003) (describing five elements).

185. *See, e.g.*, Bottoms, *supra* note 167.

186. *See, e.g.*, Jonathan Simon, Doing Time: Punishment, Work Discipline and Industrial Time, paper presentation at the ISA Conference, Amsterdam, 1991.

cultural and psychological phenomena to be receptive to media coverage and political overtures, gives free rein to its punitive impulses by demanding ever harsher criminal penalties.[187] The result over the last quarter century has been, on this account, a "punitive turn in contemporary penality,"[188] characterized by three-strikes and mandatory minimum sentencing laws, the increased adoption of sentencing guidelines, the abolition or reduction in the use of parole, truth-in-sentencing laws, and, of course, the subsequent dramatic increase in prison populations.[189]

While these accounts of popular punitiveness have some merit, they are also unsatisfying in important ways and, ultimately, misleading. First, they fail to explain why the public supports not only *harsher* punishments but seemingly *softer* ones as well. Poll after poll show the same perplexing pattern: The public wants the government to get much tougher on criminals, but it also wants the government to educate, train, and employ them.[190] When progressive analysts try to explain the complexity of public sentiment, most simply dismiss the public's punitiveness as irrational and immoral,[191] while praising public interest in rehabilitation as reasoned and beneficent.[192] Conservatives, predictably, do the reverse.[193]

Second, traditional popular-punitiveness accounts fail to explain why the massive expansion of the criminal justice system in recent history has

187. *See, e.g.*, Bottoms, *supra* note 167, at 47.

188. Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 831 n.5 (2000) (quoting David Garland, *The Culture of High Crime Societies: Some Preconditions of Recent "Law and Order" Policies*, 40 BRIT. J. CRIMINOLOGY 347, 349–50 (2000)).

189. *See* BRAMAN, *supra* note 8, at 32 (describing the federal laws and incentives that helped to produce these outcomes); *see also* GARLAND, *supra* note 167, at 142 (describing the indicia of popular punitiveness as including "[h]arsher sentencing and the increased use of imprisonment; 'three strikes' and mandatory minimum sentencing laws, 'truth in sentencing' and parole release restrictions; no frills prisons laws and 'austere prisons'; . . . the revival of chain gangs and corporal punishment; boot camps and supermax prisons").

190. *See infra* Part III.B for a more detailed analysis.

191. This approach lays much of the blame at the feet of what one prominent critic has described as "mob politics." James Q. Whitman, *What Is Wrong With Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1091 (1998). Whitman offers a reasoned response: If the force behind recent changes are the "irrational urges of the public," then it is the job of the enlightened academics to urge resistance to such impulses. *Id.* The lament of academics extends to the general removal of academics from the center of the criminal justice machine, in part because the public is perceived to view academic debates as largely irrelevant to punishment. *See, e.g.*, Zimring, *supra* note 167, at 254 ("The public believes that analytic and statistical implications of policy choices in criminal justice are unimportant.").

192. *See, e.g.*, Melissa M. Moon et al., *Is Child Saving Dead? Public Support for Juvenile Rehabilitation*, 46 CRIME & DELINQ. 38, 54–57 (2000).

193. *See, e.g.*, Charles Murray, *The Ruthless Truth: Prison Works*, TIMES (London), Jan. 12, 1997, at 2.

not sated the public's appetite. For the last forty years, a large proportion of the public has complained that courts fail to treat offenders harshly enough[194] and that criminals get off with what the public views as insufficient punishments.[195] This is so despite an increase in incarceration rates that is unmatched in our own history, and perhaps even in the history of the world. If the criminal justice system is steadily becoming more punitive, why is there no equivalent decline in public dissatisfaction? Conservatives view public dissatisfaction as justifying more of the same. Progressives, on the other hand, have developed a secondary set of increasingly strained theories[196] about why the contemporary public is particularly ignorant and vicious.

Finally, while conservatives derive a clear political imperative from their account of popular punitiveness, it is unclear what progressives derive from theirs. Indeed, perhaps the biggest problem with the progressive theories of popular punitiveness is not simply that they cannot explain what is happening or why, but that they are not very useful in determining what should be done. By locating the sources of popular punitiveness in broad structural shifts in social and economic life, sophisticated political manipulation, and widespread media practices, progressive theories of popular punitiveness tend toward political inertia. By assuming the public to be gullible, misinformed, and morally inept, progressive critiques of the criminal justice system essentially disavow any political constituency they might have.[197]

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194. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1999, at 130–31 tbl.2.56 (Ann L. Pastore & Kathleen Maguire eds., 2000).

195. The evidence of a general perception of the lack of sufficient punishment is not limited to statistical studies. *See, e.g.*, Jean Johnson, Letter to the Editor, *Prisoners Have It Easy*, HERALD-SUN (Durham, N.C.), Apr. 20, 1995, at A12. Johnson writes:

> As a working, taxpaying citizen, I am shocked. [We're] buying 12 32-inch TVs for prisoners in the new jail. I work every day, live in a 45-year-old house and have a 19-inch TV. It is inhuman for prisoners to be made to pick up litter. I work and help pick up litter on the weekends—give the citizens a break. I suppose we will all have to rob banks, shoot our neighbors or break into someone's home. Then the county government can support us, too.

Id.; Peter T. Kilborn, *Revival of Chain Gangs Takes a Twist*, N.Y. TIMES, Mar. 11, 1997, at A18 ("Rehabilitation does not work, say people in Centreville. And prisoners have it too easy, they add. A convict gets free room, board, medical care and television, while they have to earn both their own keep and his. They want convicts, like welfare recipients, to work.").

196. *See supra* notes 185–187 and accompanying text.

197. *See* Kahan, *supra* note 54, at 592. Kahan's specific point is distinct from that made here. He argues that sanctions that are not punitive have no political constituency. However, I argue that accountability matters as well, and I share his skepticism of the political viability of offender-empowering sanctions.

I suspect that part of the difficulty progressive analysts have had in interpreting public sentiment may have to do with the anxiety with which traditional liberal theories of justice regard popular sentiment.[198] While conservatives are more comfortable with populist moralizing, liberals tend to distrust popular concerns. Just as liberal accounts of popular punitiveness imply that the public is irrational and immoral, liberal theories of justice often describe the law as guarding individuals against the undisciplined impulses of the masses.[199] But in this case the liberal aversion to developing a more robust account of public sentiment is misplaced. While we should protect suspects, defendants, and offenders from the mob,[200] public frustration with our criminal justice system is not simply a fearful lashing out in the face of crime. A closer examination suggests that public concerns reflect a deeper anxiety about the unraveling of the social fabric itself, and the inability of our criminal justice system to do anything about it. In this instance the public is right, and reformers would do well to pay closer attention.

B. Reexamining Public Sentiment

The skeptical reader might argue that popular punitiveness is evidenced in the resurgence of interest in punitive early American sanctions like shaming and chain gangs, or might point to public opinion polls commonly cited as supporting the notion of popular punitiveness. Before accepting any theory featuring accountability as motivating demand for punishment, then, this reader will want some response to oft-quoted evidence regarding popular punitiveness.

198. *See, e.g.*, ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 6 (1956) (echoing Madison's concern that one group will "tyrannize over others" if unchecked by the constraints of liberalism); SEYMOUR MARTIN LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 119–30 (1981) (describing the threat of populist extremism); JOHN RAWLS, A THEORY OF JUSTICE 203 (rev. ed. 1999) (defending individual rights against popular sentiment "[w]hatever the depth of feeling against them").

199. *See* Whitman, *supra* note 191, at 1091 ("In defining ourselves as a liberal society, as a society *different* from Maoist or Nazi society, we must accordingly remain conscious of the dangers of demagogic politics—conscious of the impropriety of any kind of official action that plays on the irrational urges of the public.").

200. *See id.* at 1091 (arguing that it is "a condition of democratic rule of law, and of the right of a democratic society to punish, that we shy away from mob politics").

1. Reinterpreting Interest in Early American Sanctions

Perhaps the most salient indicator of public dissatisfaction with contemporary criminal sanctions is the resurgence of interest in archaic alternatives. A number of reformers have argued, for example, that modern shame sanctions and chain gangs should be more widely employed.[201] This renewed interest in alternatives and supplements to simple detention has often been interpreted as evidence of popular punitiveness.[202] As one commentator described the development, "Cruelty and pain, long treated as inappropriate ends of public policy, are steadily making inroads into the discourse and practice of punishment."[203] These are, theorists of popular punitiveness suggest, indicative of a broader "severity revolution"[204] in Americans' conception of just punishment.

But while initially plausible, this interpretation becomes less satisfactory on further inspection. If the public wants punitiveness, cruelty, and pain, then why is it that the public is repulsed by calls for a return to public executions,[205] corporal punishment,[206] and stocks[207]—suggestions that to most Americans seem unacceptably harsh?[208] Indeed, if it were really

201. *See* Kahan, *supra* note 54, at 632–37 (surveying shame sanctions imposed by judges); Whitman, *supra* note 191, at 1057 (noting that "courts are ordering shame sanctions"); Mark Curriden, *Hard Time*, A.B.A. J., July 1995, at 72, 74; Peter Morrison, *The New Chain Gang*, NAT'L L.J., Aug. 21, 1995, at A1.

202. *See, e.g.*, Cullen et al., *supra* note 173, at 27 (reporting that "nearly four in five Americans believe that the courts in their communities are not sufficiently punitive").

203. Jonathan Simon, *Sanctioning Government: Explaining America's Severity Revolution*, 56 U. MIAMI L. REV. 217, 219 (2001).

204. *Id.*

205. *Cf.* AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 30 (2001) (arguing that it is precisely because of this repulsion that we should resist "the turning of state killing into an invisible, bureaucratic act" and make executions public as part of a "new abolitionism").

206. Some argue that "[c]orporal punishment may appear to be a barbaric solution to the problems of a civilized society, but it is in fact a reasonable, rational alternative to the systemic prison overcrowding and rampant recidivism that are part of our current approach to crime and criminals." Whitney S. Weideman, Comment, *Don't Spare the Rod: A Proposed Return to Public, Corporal Punishment of Convicts*, 23 AM. J. CRIM. L. 651, 652 (1996). Others have argued that the public actually *supports* public corporal punishment. *See, e.g.*, Daniel E. Hall, *When Caning Meets the Eighth Amendment: Whipping Offenders in the United States*, 4 WIDENER J. PUB. L. 403, 407–08 (1995). However, even corporal punishment advocates admit that public opinion polls show that a majority oppose the practice. *Id.* at 408. Indeed, while there have been a number of calls for public caning and a return to corporal punishment, despite their legality, the proposals have failed to produce much in the way of results.

207. For a fanciful rejection of the stocks, see Harrison Fletcher, *We've Gotta Teach These Kids a Lesson*, ALBUQUERQUE TRIB., Jan. 18, 1996, at A3.

208. *See* Kahan, *supra* note 54, at 591 (describing corporal punishment as "barely conceivable").

punitiveness on the rise, then one would expect the public to *prefer* these over arguably *less* punitive early American sanctions.

An alternative account—one that features public desire for offender accountability—fits the facts far better. For example, shaming, as Dan Kahan and others note,[209] is far less expensive than incarceration,[210] arguably no worse a deterrent,[211] and gives expression to public disapprobation by being explicitly retributive.[212] I suggest that, for many Americans, the most attractive aspect of shaming is the implicit social order that shame sanctions advertise: the notion that the community is capable of imposing its norms on criminal offenders in a highly visible manner. Shame sanctions recall a form of community connectedness that many feel is slipping away; indeed, many studies show that it is in fact slipping away.[213] They remind us of communities that were well-ordered enough to impose decidedly social sanctions.

Similarly, chain gangs combine publicity and sociality, but they also add the dimension of enforced social productivity.[214] Unsurprisingly, as our society has drifted toward sanctions that are increasingly asocial—effectively requiring offenders to do nothing and to serve no one—opinion polls show chain gangs gaining the support of a substantial majority of the population in many states.[215] The public in these states appears eager to

209. *See generally id.*; Whitman, *supra* note 191.

210. Kahan, *supra* note 54, at 641.

211. *Id.* at 638–41.

212. *Id.* at 645–36.

213. *See, e.g.*, PUTNAM, *supra* note 75 (describing the decline in social connectedness in the United States).

214. I discuss the public opinion data on this below. *See infra* Part III.B.2.

215. *See* Rhonda Cook, *Chain Gangs Seen as Fair by Georgians*, ATLANTA J.-CONST., Feb. 14, 1996, at A1 (reporting a public opinion poll finding that "support for chain gangs crossed political, racial, generational and economic lines"); Mario Garcia, Editorial, *Letters From the People*, ST. LOUIS POST-DISPATCH, July 26, 1996, at 6B (stating that in Illinois "polls estimate public support for chain gangs to be between 70 percent and 90 percent"); Betsy Z. Russell, *Punishing Costs—More Chain Gangs, Long Sentences; But No More Prisons*, IDAHO FALLS POST REG., Nov. 16, 1997, at A1 ("Seventy-five percent [of Idahoans] support chain gangs assigned to do community tasks outside prison walls."); Kimberly Seitz, *Reviving Chain Gangs A Good Idea*, S. BEND TRIB., Mar. 10, 1996, at A21 (reporting that "more than 70 percent of the people of Alabama support Gov. Fob James' decision to reimplement chain gangs"); Bruce Merrill & Lacey Phelps, Press Release, *KAET Poll: Overwhelming Support For Chain Gangs* (May 25, 1995), *available at* http://www.kaet.asu.edu/horizon/poll/1995/maypoll2.htm (noting that 75 percent of registered voters in Arizona support the use of chain gangs and that support crossed party and ideological lines); Kelly Pearce, *Chain Gang Proposal Survives First Test in Senate* (May 3, 1996), *available at* http://www.prisonactivist.org/pipermail/prisonact-list/1996-May/000310.html (reporting that 71 percent of Coloradans favor the use of chain gangs); Florida Dep't of Corrections, *Inmate Work and Unstructured Time* (1998), *available at* http://www.dc.state.fl.us/pub/survey/work.html (reporting that nearly three-quarters (73.3 percent) of Floridians support the use of chain gangs).

reintroduce explicit social obligations into the criminal justice system, and it views chain gangs as a way of achieving just that.

Reframed in terms of accountability, shame sanctions and chain gangs can be seen as a piece of one of the most unexpected reforms in recent American penology: the return of the religious penitentiary. State after state is opening faith-based correctional facilities or programs in which inmates are required not only to work, but to "attend classes, . . . learn how to dress for a job, communicate better with their families[, and] cope with adversity,"[216] all in the context of religious penitence and devotion. This is occurring in states that are considered to be among some of the most conservative[217] *and* the most progressive.[218] It's clearly not punitiveness that moves the public to advocate for these programs. Rather, those who support the return of the religious penitentiary are looking for ways to bring criminal offenders into the social fold. They view religion not only as a good in and of itself, but also as a means to that end.[219] The reintroduction of government-approved faith-based correctional facilities, in fact, forgoes many of the punitive parts of the early American penitentiary, while expanding on its accountability-reinforcing features.[220]

An account that features public interest in greater offender accountability also helps to explain what has been by far the most popular reform in criminal sanctions in the past half century: the return of

216. "Most of Lawtey's inmates, like those in other Florida prisons, spend their mornings at menial jobs inside the prison or on work-release programs. The difference begins in the afternoon, when church volunteers teach all inmates such secular skills as how to write a résumé, open a bank account and manage a household budget." Alan Cooperman, *An Infusion of Religious Funds in Fla. Prisons: Church Outreach Seeks to Rehabilitate Inmates*, WASH. POST, Apr. 25, 2004, at A1.

217. *See, e.g.*, Carlos Campos, *Faith Behind Bars*, 4C ATLANTA J.-CONST., Aug 22, 2004, at C4 (describing faith-based prison programs in Georgia); Gary Emerling, *Inmate Aid Project Grows*, WASH. TIMES, Mar. 20, 2005, at A10 (describing faith-based prison programs in Texas); *Prison Will Be Model for Country*, TAMPA TRIB., Apr. 26, 2004, at 10 (describing faith-based prison programs in Florida).

218. *In Brief*, WASH. POST, Aug. 14, 2004, at B7 (describing faith-based prison programs in Maryland); Steve Silverman, *Center Lends Aid, Strength to Parolees*, PANTAGRAPH (Bloomington, Ill.), Mar. 10, 2003, at A4 (describing faith-based prison programs in Illinois); Ron Word, *Christ Behind Bars*, TELEGRAPH HERALD, May 22, 2004, at D1 (describing faith-based prison programs in Iowa).

219. *See, e.g.*, Lawrence Aaron, *Faith-based Solution to Combat Recidivism*, RECORD (Bergen County, N.J.), July 28, 2004, at L09.

220. *See, e.g.*, Gussie Fauntleroy, *Penitentiary's Early Years Were Full of Politics*, SANTA FE NEW MEXICAN, June 13, 1999, at F1 (describing an early penitentiary in New Mexico in which inmates were given "good clothing, proper literature, and systematic religious exercises"); Jean Gordon, *The Bible Behind Bars*, NEWS-STAR, Feb. 5, 2003, at A1 (describing the religious roots of the penitentiary in which every inmate was "'given a Bible and told to repent'" (quoting Marianne Fisher-Giorlando)).

restitution and victim compensation[221] to the criminal justice system. Restitution (where offenders directly repay victims) and victim compensation (where the state collects fines from offenders and provides assistance to victims based on need) were once integral to the sanctions imposed on criminal offenders. But both were steadily removed from the criminal code as civil and criminal cases became formally distinguished from one another and victims were required to pursue compensation in the civil system. It was not until quite recently, with the rise of the victims' rights movement, that the federal government and most states established victim compensation programs,[222] and many reintroduced restitution.[223] And while providing assistance to victims has obvious political appeal on its own, there is a deeper appeal to America's sense of justice in demanding that criminal offenders pay for that compensation—a justice that is better expressed in terms of accountability than punitiveness.

My point here is not that we should evaluate these sanctions only in terms of accountability, nor that any of these programs are—when considered in full—desirable; rather I believe that their popular appeal can help us to understand how the public thinks about sanctions in more productive and sophisticated ways than standard accounts that simply pit rehabilitation against retribution and deterrence. Viewed across the scope of American history, it is not hard to understand why, when Americans look back on early American criminal sanctions, their discomfort is often mixed with a heavy dose of longing.[224] Criminal offenders today are held unaccountable to everyone that matters—their victims, their children, their communities, and society at large—and the public is understandably upset. Indeed, it is hard to think of a form of punishment that asks less of

221. A number of people have noted the extraordinary success of the victim compensation movement. For an early description of the rationale behind the movement, see Stephen Shafer, *Victim Compensation and Responsibility*, 43 S. CAL. L. REV. 55 (1970). For a more recent recapitulation of the history of the movement, see Christopher Bright, Victim Compensation Funds (1997), http://www.restorativejustice.org/intro/tutorial/outcomes/compensation (reviewing the history of victim compensation funds). For a review of the historical origins of victim compensation, see Shafer, *supra*, at 55–57.

222. *See* Bright, *supra* note 221 (noting that "[s]tate action began with California in 1965 when it set up its first compensation program" with various other states following suit until, finally, "in 1984, Congress passed a bill to finance state compensation programs").

223. Restitution differs from compensation in that the money is paid directly to the victim by the offender. For a review of restitution law, see Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931 (1984).

224. For a less favorable account of this phenomenon, see Simon, *supra* note 177 (describing the revival as a form of postmodern nostalgia).

the offender or expresses less social anguish over the abandonment of social responsibilities than the human warehousing we regularly impose.

2. Reinterpreting Public Opinion Data

Accountability can also provide us with a more satisfying account of public opinion data. Over the last decade, dozens of national and statewide surveys have been conducted to gauge the public attitudes about crime, criminal offenders, and the criminal justice system. While these results are often read as indicating the contradictory impulses of a fickle or irrational public, a theory of accountability paints another picture—one of a thoughtful and pragmatic public that is concerned about the failure of the criminal justice system to deliver what they consider to be just outcomes.

a. Public Dissatisfaction

Take, for example, the oft-cited polling data indicating public dissatisfaction with the criminal justice system.[225] Perhaps most frequently discussed is the item in the General Social Survey (GSS) that asks respondents about their perception of the sentences that courts hand down.[226] The percentage of respondents who feel that court sentences for criminal offenders are "about right" has never, in the thirty years of the survey, exceeded 20 percent.[227] Around three-quarters of Americans feel—and have felt rather consistently across the same period—that criminal offenders are treated "not harshly enough" by courts.[228] The longitudinal GSS data are supplemented by a host of other polls conducted over the last ten years that have found, variously: that by more than two to one, Americans prefer "impos[ing] stricter sentences on criminals" over "increas[ing] the amount of police on the street" as a way "to solve the

225. *See, e.g.*, Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980–1998*, 12 FED. SENT'G REP. 12 (1999) (reporting a public "perception that too many criminals were getting off easy"); Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1392 (1997) ("Reference to opinion polls . . . would seem to indicate that a majority of the public is a great deal more concerned with punishing and incapacitating offenders for very long periods of time than it is about the process issues that preoccupy the academy.").

226. The General Social Survey (GSS) is the most extensive longitudinal survey of American public opinion. The item asks: "In general, do you think the courts in this area deal too harshly or not harshly enough with criminals?" NAT'L OPINION RESEARCH CTR., CODEBOOK VARIABLE: COURTS, (1998) (presenting the GSS), *available at* http://webapp.icpsr.umich.edu/GSS/rnd1998/merged/cdbk/courts.htm.

227. *Id.*

228. *Id.*

country's crime problem";[229] that more than four out of five Americans feel that Congress should make "tougher crime enforcement legislation" a "high priority";[230] that over three-quarters strongly agree that "we should toughen and strengthen penalties for convicted criminals";[231] and that nearly nine out of ten favor or strongly favor "tougher sentences for criminals."[232]

As with the renewed interest in early American sanctions, polling data showing public interest in tougher sanctions are generally interpreted as indicating popular punitiveness.[233] And on their face, these simple and commonly cited data appear to support this reading. But as the more experienced and cautious analysts of public opinion have noted,[234] the nuances of public sentiment are difficult to capture in single-item questions,[235] and the more one studies the responses, the less satisfying the punitiveness explanation becomes.[236]

One initial indication that punitiveness may not be the best characterization of public attitudes emerges when we look more closely at public evaluations of the various components of the criminal justice system. If the public were primarily frustrated with the laxity of the system, one would think that it would be upset with the prosecutors who fail to charge, the juries who fail to convict, or the judges who hand down lenient sentences. Not so. When asked to distinguish between parts of the criminal justice system, respondents give the highest approval ratings to judges, juries, prosecutors, and police, while giving the lowest approval

229. Survey conducted by CBS News, Oct. 27–Oct. 29, 1996, based on telephone interviews with a national adult sample of 1077 (on file with author).

230. Survey by Time & Cable News Network, conducted by Yankelovich Partners, June 30–July 1, 1998, and based on telephone interviews with a national adult sample of 1024 (on file with author).

231. Survey by NBC News & Wall Street Journal, conducted by Hart & Teeter Research Companies, Feb. 26–Mar. 1, 1998, and based on telephone interviews with a national adult sample of 2004 (on file with author).

232. Survey by U.S. News & World Report & Bozell Worldwide, conducted by KRC Communications/Research, Feb. 6–Feb. 9, 1997, and based on telephone interviews with a national adult sample of 1000 (reporting that 72 percent of adults "strongly favor" and another 17 percent "favor" "tougher sentences for criminals") (on file with author).

233. *See, e.g.*, Bottoms, *supra* note 167, at 39–41 (describing archaic sanctions as part of the rise of populist punitiveness); Garland, *supra* note 152, at 3 (describing the return of archaic sanctions as punitive and as inexplicable within standard theories of social control); Simon, *supra* note 186, at 219 (arguing that "[c]ruelty and pain, long treated as inappropriate ends of public policy, are steadily making inroads into the discourse and practice of punishment").

234. *See, e.g.*, Joseph E. Jacoby & Francis T. Cullen, *The Structure of Punishment Norms: Applying the Rossi-Berk Model*, 89 J. CRIM. L. & CRIMINOLOGY 245 (1998).

235. *See id.* at 251.

236. *Id.* at 251–254 (describing the various problems with simple interpretations of punitiveness).

ratings to prisons, jails, probation, and parole.[237] Even among those who think that the criminal justice system is doing a good or excellent job overall, prisons rank lowest with probation and parole a close second.[238]

Perhaps this might be read as ambiguous evidence still consistent with punitiveness—a desire, perhaps, for still longer sentences. But here again the data suggest another answer. The public does not appear to view more prisons or longer prison terms as the solution to the problem of crime. Instead, by a margin of nearly two to one, Americans favor fighting crime through reforms that feature spending money on "social and economic problems" over spending money on "police, prisons and judges."[239] Moreover, polls show that even those Americans who favor tougher penalties support increased funding for social programs, including programs for job creation and education.[240]

On the surface, this presents a puzzle: Are Americans hard- or soft-hearted? Conservatives and liberals alike have been quick to brandish the data that support their respective positions, arguing for longer prison terms on the one hand and for leniency on the other, but neither has much to say about the seemingly contradictory data on the other side. Certainly the public is dissatisfied, but with what, exactly?

237. Attitudes Towards Crime and Punishment in Vermont: Public Opinion About an Experiment with Restorative Justice, 1999, ICPSR 3016 (on file with author).

238. *Id.* For comparably dismal evaluations of prison, probation and parole, see the 2003 Arkansas Crime Poll, *available at* http://plsc.uark.edu/arkpoll/2003/index.htm, in which Arkansans rated state prisons as inspiring the lowest levels of confidence of all the aspects of the criminal justice system. *See also* Justice Policy Institute, Maryland Voter Survey (2003), *available at* http://www.treatnotjail.org/facts_md_poll_full.pdf (indicating that more Maryland residents would cut prison spending than any other budget item).

239. Survey by Texas A & M University & Sam Houston State University, conducted by Public Policy Research Institute, Texas A & M University, June 6–June 26, 1995, and based on telephone interviews with a national adult sample of 1005 (on file with author). *See also* BELDEN RUSSONELLO & STEWART, OPTIMISM, PESSIMISM, AND JAILHOUSE REDEMPTION: AMERICAN ATTITUDES ON CRIME, PUNISHMENT, AND OVER-INCARCERATION (2001), *available at* http://www.prisonsucks.com/scans/overincarceration_survey.pdf (reporting findings from a national survey finding that only 7 percent of Americans feel that prisons are doing a "good" or "excellent" job, 25 percent feel that prisons are doing a "fair" job, and 58 percent feel that prisons are doing a "poor" or "very poor" job of rehabilitating prisoners); Survey by Life Magazine, conducted by Gallup Organization, Mar. 30–Apr. 5, 1992, and based on telephone interviews with a national adult sample of 1222 (reporting that 64 percent favored spending money on "better education, job training and other programs to help prevent people from getting involved in crime" over "improving law enforcement with more police, prosecutors, judges and prisons") (on file with author).

240. Survey conducted by ABC News, Dec. 7–Dec. 18, 1982, and based on telephone interviews with a national adult sample of 2464 (on file with author).

b. What the Public Wants

One way to shed light on simpler measures of public discontent is to examine how our most common sanctions differ from what most Americans say that they would like criminal sanctions to look like. National polling data on the type of sanctions that Americans approve of (summarized below in Table A) show overwhelming support for sanctions that require offenders to learn a trade, to work, and to obtain a basic education—and opposition to programs conferring benefits on offenders, such as allowing spousal visits.

TABLE A
SUPPORT FOR CRIMINAL SANCTION REFORM[241]

Mandatory Literacy Programs	92%
Mandatory Job Training Programs	92%
Mandatory Correctional Labor Programs	87%
Spousal Visits	45%

From the perspective of accountability, the seemingly "hard" and "soft" demands that Americans would make of criminal offenders are not contradictory at all. Rather, most Americans view completion of a basic education, learning a trade, and working at a job to be important obligations that offenders should be required to meet. And when education, job training, and work are presented as such, most Americans heartily endorse sanctions that include them.

We can see the demand for accountability even more clearly if we refine our analysis of attitudes toward prison labor. Unsurprisingly, as indicated in the left column of Table B, those who support prison labor generally also support requiring offenders to work for pay and to compensate victims by a margin of over four to one (81 percent to 19 percent).

241. TIMOTHY J. FLANAGAN & DENNIS R. LONGMIRE, NATIONAL OPINION SURVEY OF CRIME AND JUSTICE (1995). Respondents were first asked: "Please tell me whether you think . . . the following proposals are good ideas or bad ideas." They were asked to respond to: Mandatory Literacy Programs: "Require every prisoner to be able to read and write before he or she is released from prison"; Mandatory Job Training Programs: "Require prisoners to have a skill or to learn a trade to fit them for a job before they are released from prison"; Mandatory Correctional Labor Programs version 1: "Keep prisoners busy constructing buildings, making products or performing services that the state would have to hire other people to do"; Mandatory Correctional Labor Programs version 2: "Pay prisoners for their work, but require them to return two-thirds of this amount to their victims or to the state for the cost of maintaining the prison"; Spousal Visits: "Permit spouses to spend some weekends each year with their husband or wife in special guest houses within the prison grounds."

TABLE B
SUPPORT FOR PRISON LABOR WITH AND WITHOUT COMPENSATION[242]

		Mandatory Labor Generally		
		Good Idea	Bad Idea	Neither
Mandatory Labor with a compensation requirement	Good Idea	81%	70%	71%
	Bad Idea	4%	18%	4%
	Neither	15%	12%	25%
	Total	100%	100%	100%

But strikingly, as can be seen at the center of the top row of Table B, a substantial majority of those who think that prison labor is a *bad* idea think that requiring prisoners to work for pay and to compensate their victims and the state is a *good* idea. Simply adding the requirement that prisoners be paid and that their pay be used to compensate their victims and the state appears to convert many of the holdouts on mandatory prison labor.

Surveys have measured public attitudes about alternatives to imprisonment as well. Here again, the evidence points to accountability rather than to punitiveness. As noted above, prisons are the aspect of the criminal justice system with which Americans are least satisfied.[243] And when Americans are asked about strategies for reducing prison overcrowding, their favorite option is sentencing nonviolent offenders to mandatory work programs in the community.[244] Indeed, the most direct measures of these attitudes indicate that Americans prefer this to building more prison beds by nearly three to one.[245]

c. The Politics of Accountability

But even if a substantial majority of Americans support these accountability-reinforcing sanctions, perhaps the statistics conceal a political or ideological divide that would frustrate reform. Liberals, for example, are more than twice as likely as conservatives to believe that rehabilitation should be the primary goal of the criminal justice system and

242. *Id.* For simplicity's sake, I exclude "don't know" and "refused" responses. See *supra* note 241, for text of each item.

243. *Id.*

244. *Id.* "Would you favor or oppose each of the following measures that have been suggested as ways to reduce prison overcrowding?" Eighty-nine percent of respondents thought the following was a "good idea:" "Developing local programs to keep more nonviolent and first-time offenders active and working in the community." Thirty-three percent of respondents thought the following was a "good idea:" "Increasing taxes to build more prisons."

245. *Id.*

are nearly twice as likely to oppose the death penalty; the opinions of Republicans and Democrats show a similar disparity.[246] Those who support accountability-reinforcing programs might thus be disproportionately Democratic or Republican, liberal or conservative.

Indeed, the historical transformation of American sanctions arguably derives from an ideological debate over the what American society should look like. Unable to agree on other sanctions, reformers of all stripes have stripped criminal sanctions down to their lowest common denominator: liberty deprivation. Perhaps, then, accountability-reinforcing sanctions run afoul of the same conflicts that spelled the demise of both flogging and prisoner-empowerment programs.

The data suggest otherwise, however. While the public is divided over both soft proposals for increased leniency and protection of defendants' rights and hard proposals for longer prison terms and more punitive sanctions, survey data reveal support for accountability-reinforcing sanctions that crosses ideological and party lines. As indicated in Table C, while there is some partisan and ideological variation in support for penalties that *don't* enhance accountability (spousal visits and allowing parole boards to release offenders early, for example) there is little variation in the overwhelming support for sanctions penalties that *do*: mandatory community labor, mandatory literacy and job training, and mandatory labor while incarcerated.

TABLE C

SUPPORT FOR ACCOUNTABILITY-BASED REFORMS CROSSES IDEOLOGICAL AND PARTY LINES						
	Liberal	Moderate	Conservative	Democrat	Independent	Republican
Mandatory Work in Community	92%	89%	88%	90%	87%	90%
Mandatory Education	89%	93%	93%	91%	90%	91%
Mandatory Job Training	89%	93%	94%	92%	93%	91%
Mandatory Prison Labor	88%	87%	86%	89%	85%	91%
Spousal Visits	55%	47%	41%	48%	45%	47%
Allow Parole Board to Release	33%	19%	14%	21%	21%	18%

246. Fourteen percent of conservatives versus 29 percent of liberals, and 14 percent of Republicans versus 24 percent of Democrats agreed that the "most important" purpose in sentencing adults should be "to train, educate and counsel offenders." *Id.*

There is even consensus on accountability-reinforcing sanctions in one of the most contentious areas of the criminal law: the war on drugs. Most Americans believe that we are losing the war on drugs,[247] but they don't want to stop fighting it.[248] What divides many Americans is how to engage the enemy. Generally speaking, while progressives favor expanding drug treatment on demand, conservatives view it as less effective than punishing criminal offenders.[249] But as with prison labor, support becomes bipartisan when drug treatment is made mandatory and combined with additional sanctions rather than voluntary and without additional sanctions.

Moreover, not only do the vast majority of citizens want to require drug offenders to complete some kind of drug treatment program, by a more than a five-to-one margin, citizens want judges to provide oversight of criminal justice agencies to make sure that drug addicts complete some kind of treatment program as well.[250] The public doesn't want more of the same; it wants the criminal justice system to require offenders to meet reasonable obligations promulgated by that system.

Why don't accountability-reinforcing sanctions run afoul of the same political problems as sanctions that are more purely rehabilitative or punitive? By reframing socially beneficial programs as mandatory, accountability-reinforcing sanctions transform what was previously a liberty-enhancing benefit into a liberty-reducing obligation. And by combining elements that satisfy diverse concerns—punishment for conservatives and social-welfare enhancement for liberals—it allows individuals to view these sanctions in light of their own moral commitments.[251] Dan Kahan and I have described this phenomenon as

247. For example, 65 percent of liberals and 64 percent of conservatives feel that the war on drugs has had "no effect on the amount of drug use" in their communities. *Id.*

248. FLANAGAN & LONGMIRE, *supra* note 241.

249. Conservatives, for example, are more likely—and liberals are less likely—than the general population to: oppose drug legalization; believe that punishment or punishment combined with treatment is more effective than treatment alone; and believe that military interdiction and policing are more effective than education and drug treatment. *Id.*

250. FLANAGAN & LONGMIRE, *supra* note 241. Respondents were asked: "Some people think that courts should stick to their traditional role of looking at the facts in a specific case and then applying the law. Other people think that it is now necessary for the courts to go beyond that role and try to solve the problems that bring people into court. I am going to read you a few statements about the role of the court. Do you strongly agree, somewhat agree, somewhat disagree, or strongly disagree that courts should . . . [o]rder a person to go back to court and talk to the judge about their progress in a treatment program."

251. Alternatively, accountability may have a single meaning that most Americans agree on, the kind of "overlapping consensus" on criminal sanctions that liberal democratic theory aspires to. *See, e.g.*, John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 229 (1985) ("[J]ustification is addressed to others who disagree with us, and therefore it

"*social-meaning overdetermination*."[252] On this account, competing social groups need not agree on the philosophical foundations of punishment; they need only find policies that they agree are acceptable notwithstanding their diverse worldviews.[253]

C. A Return to Accountability

Portraits of the public as excessively punitive are, in the end, misleading. In more thorough and nuanced measures of popular sentiment, we begin to see what the public really means when it demands tougher sanctions: The public believes that the criminal justice system should hold criminal offenders accountable by forcing them to meet reasonable obligations, and that simple detention alone does not provide this form of accountability. Liberty deprivation may be a reasonable means to the end of accountability, but it is not an end in and of itself. Americans are not soft on crime, but neither are they irrationally punitive. Instead, given a chance, they tell us that they want programs that enhance offender accountability.

Justice Holmes once stated, "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."[254] In the instant case of criminal sanctions, the community is right, and the law has drifted too far from the feelings and demands of the public. Sadly, neither reformers on the left nor the right offer much in the way of an alternative. Overly concerned with the rehabilitative ideal and offender rights, liberals have ignored the reasonable demands of the public for sanctions that constrain offender

must always proceed from some consensus, that is, from premises that we and others publicly recognize as true; or better, publicly recognize as acceptable to us for the purpose of establishing a working agreement on the fundamental questions of political justice.").

252. Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, __ EMORY L.J. (forthcoming __) (manuscript at 22 on file with authors).

253. *See id.* A note of caution is warranted. Accountability, while not as narrowly secular as purely punitive or rehabilitative options, could be subject to ideological capture in the future. If, for example, accountability were to be stripped of its overdetermined aspects and made into merely a code for nonmandatory programming privileges for offenders, or if the demand for accountability were merely used to heap insurmountable burdens on already stigmatized and burdened populations, it could produce proposals as inert as those now made by punishment purists. It is for precisely this reason that articulating a coherent and thorough conception of accountability is so important.

254. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 41 (Dover Publications 1991) (1881).

autonomy.[255] And, overly concerned with retribution talk and being tough on criminals, conservatives have ignored the public demand for sanctions that hold offenders accountable to others. Both see the public as either supporting their view or being confused and immoral, and both miss an important moral and pragmatic middle ground.

A fair reading of both history and the contemporary historical moment reveals not a gullible or immoral public, but a subtle, rational, and highly principled public worthy of far more respect than either progressive or conservative commentators have given it to date. Indeed, if those of us interested in responsible reform would only listen more carefully, we might learn something valuable about how to craft policies that are moral, effective, and politically viable.

But if we are to develop accountability-reinforcing sanctions, we will need examples of how they can work in the real world. In what follows I describe how states are negotiating their way out of the rut of lowest-common-denominator punishment. By paying closer attention to both social meaning and social costs, legislators, administrators, and activists have begun to develop sanctions that are both expressively rich enough to satisfy our contending moral ambitions and pragmatically effective enough to satisfy the social needs of our communities. Unsurprisingly, these approaches prominently feature offender accountability.

IV. ACCOUNTABILITY AND CONTEMPORARY REFORM

State executives, legislators, and administrators know that the American system of punishment is broken. Indeed, it is hard to find a state that has not, in the last few years, ordered its sentencing commission to investigate ways to better hold criminal offenders accountable.[256] The

255. *See* Kahan, *supra* note 54, at 596 (describing reasons why liberals neglect retribution in their proposed alternatives to incarceration). That retributiveness is part of what comprises most people's conception of punishment has been fairly well demonstrated. *See, e.g.*, Kenworthey Bilz & John M. Darley, *What's Wrong With Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215 (2004).

256. *See, e.g.*, ALA. CODE § 12-25-37 (Supp. 2004) (specifying, under Article 2 of the Alabama Sentencing Reform Act of 2003, that released offenders should be both reintegrated into society and held accountable for their offenses); ARK. CODE ANN. § 12-27-105(a) (2004) (defining the purpose of the Board of Corrections as "manag[ing] correctional resources in the state such that offenders are held accountable for their actions"); 2004 Kan. Sess. Laws 92; (creating the Kansas criminal justice recodification, rehabilitation and restoration project in order to "[s]tudy[ ] and review[ ] programs which hold offenders responsible and accountable for such offender's actions and reduce[ ] recidivism"); MASS. ANN. SPEC. LAWS ch. 66, § 6(a) (Supp. 2005) (wherein Massachusetts has just ordered its sentencing commission to investigate ways to hold criminal offenders "accountable").

solutions that they are developing, while promising,[257] are contested and often appear incoherent when viewed in light of existing theories of punishment. And all of them exist in a context in which accountability-reducing sanctions are still the norm. But the tenuous and haphazard nature of these reforms can be taken as both discouraging and inspiring. On the one hand, it suggests that a great deal of work needs to be done to generate an approach to criminal sanctions that is genuinely attentive to offender accountability. On the other hand, that these reforms have succeeded at all suggests that, even in the absence of theoretical justification, accountability-reinforcing sanctions have attained some traction.

The aim of this part is not to endorse any of these reforms, but rather to describe how a focus on accountability can provide them with the conceptual coherence and analytical framework they now lack. This framework is one that supports some aspects of these sanctions while also pointing to problems and shortcomings.

A. Changing the Form of Punishment

1. Community Corrections for Nonviolent Offenders

Progressive reformers have long argued that nonviolent offenders should serve their sentences in the community, but such programs have often been met with public controversy.[258] Today, however, states are broadening their use of community-based corrections in ways that address

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The emphasis on accountability, while resurgent, is not new. Delaware, for example, has structured its entire criminal code explicitly around offender accountability since 1987. *See* Delaware Supreme Court Administrative Directive Number Sixty-Seven, September 15, 1987.

257. "Smarter punishment" is the latest catchphrase. *See, e.g.*, SMART SENTENCING: THE EMERGENCE OF INTERMEDIATE SANCTIONS (Byrne et al. eds., 1992). The phrase is intended to promote sanctions that reduce crime at a lower cost than imprisonment. This approach to selling new sanctions to the public and public officials is, I think, only half right. To be sure, successful reform efforts should be smart about budgets and crime reduction, but they should also be smart about the social meanings and social effects of the proposed sanctions.

258. *See* Justice Policy Institute, *supra* note 238 (citing public opinion data on probation and parole). Community corrections span a broad spectrum of sanctions from simple parole to detention in a community correctional center with work release. The bulk of the controversy focuses on the often arbitrary use of parole to control prison overcrowding rather than to promote public safety and the lack of enforcement of conditions of parole. Only about half of parolees meet the conditions of their parole and less than one fifth of parole violators are sanctioned. *See* RONALD P. CORBETT, JR. ET AL., CENTER FOR CIVIC INNOVATION, CIVIC REPORT NO. 7: "BROKEN WINDOWS" PROBATION: THE NEXT STEP IN FIGHTING CRIME (Aug. 1999), *available at* http://www.manhattan-institute.org/html/cr_7.htm.

public concerns and move in the direction of greater offender accountability.

Although by no means the norm, perhaps the largest shift in community corrections is occurring in the area of nonviolent drug offenders. Several states have begun to employ or are now evaluating mandatory inpatient drug treatment as a first alternative to incarceration for drug offenders. Consider, for example, the trend in popular referenda on sanctions for drug offenders. In 1996, Arizona voters passed the Drug Medicalization, Prevention, and Control Act of 1996,[259] mandating court-supervised drug treatment and education programs instead of incarceration. Four years later, California voters enacted the Substance Abuse and Crime Prevention Act of 2000.[260] Citizens in both states eliminated judicial discretion in sanctioning and prosecutorial discretion in the determination of which defendants will participate in the programs.[261] Similar acts have begun to appear on the ballots in other states as well.[262] Through each of these programs, first time drug offenders can avoid prison and a felony conviction if they plead guilty and complete an approved treatment program.

Both programs are still relatively young, and the California program in particular was dogged with lack of service capacity in the first year. But subsequent years have increased capacity and both states are beginning massive evaluations to refine their strategies. While the long-term effects are not yet known, the early evaluations suggest the program is working as anticipated: "Tens of thousands of people who were previously denied treatment are getting it; hundreds of millions of dollars are being saved. And as a result, individuals, their families and their communities continue to get healthier."[263]

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259. ARIZ. REV. STAT. ANN. § 13-3412.01 (2001).

260. CAL. PENAL CODE §§ 1210, 3063; CAL. HEALTH & SAFETY § 1999 (Supp. 2006).

261. *See* Lisa Rosenblum, Note, *Mandating Effective Treatment for Drug Offenders*, 53 HASTINGS L.J. 1217, 1221 (2002) ("The Arizona and California Acts offer the best of both penological worlds. Like the drug treatment courts, the initiatives treat drug offenders while saving prison beds for violent offenders. But unlike the drug treatment courts, the Acts operate without the arbitrary and unfair decision-making that has plagued the rehabilitative regime in the past.").

262. *See, e.g.*, Daniel Barbarisi, *Ballot Initiatives to Cover Taxes, Health Care, and Dog Racing*, BOSTON GLOBE, July 6, 2000, at B2 (describing a ballot measure in Massachusetts proposing the creation of "a 'drug treatment trust fund' to pay for drug treatment programs, bankrolled largely by money seized in drug-related arrests").

263. Josh Richman, *Drug Treatment Law Gets High Marks*, Oakland Tribune, July 17, 2003, at 2, *available at* http://www.findarticles.com/p/articles/mi_qn4176/is_20030717/ai_n14555376/pg_2 (quoting Daniel Abrahamson).

2. Mandatory Program Participation in Correctional Settings

Similar reforms are being undertaken in correctional settings. The benefits of correctional education and drug treatment programs, while extensively documented, have long faced a social-meaning problem.[264] While criminal justice reformers understand the beneficial effects that education and drug treatment can have on an offender's sobriety, employment, and recidivism, such programs are normally available to relatively few inmates.[265] Despite their cost-effectiveness, legislatures have been reluctant to fund them. Why? One reason is that such programs are often presented as perks for inmates. As one expert, reviewing the literature for the Office of National Drug Control Policy, lamented, "[t]reatment programs are often portrayed as easy, minimally intrusive, and a privilege."[266] Framed in this way, the social meanings conveyed by educational and drug treatment programs are a political disaster.

But reformers in a growing number of states have found that by making correctional education and drug-treatment programs mandatory, they are able to effectively flip the social meaning of implementation from privilege to obligation, making the political case for these welfare-enhancing programs far more palatable.[267] By presenting such programs as "restrict[ing] freedom by limiting the activities of the participants, limiting peer association, changing residence, and requiring participation in a variety of activities such as self-help groups,"[268] advocates have significantly enhanced the political viability of these programs and opened the door to increased state and federal funding.[269] As a result, "mandating offender participation

264. For example, despite the popular belief that treatment must be voluntary to be effective, several studies now show that mandatory treatment is at least as effective as voluntary treatment. *See* M. Douglas Anglin et al., *The Effectiveness of Coerced Treatment for Drug-Abusing Offenders*, 62 FED. PROBATION 3 (1998).

265. *See* FAYE S. TAXMAN, REDUCING RECIDIVISM THROUGH A SEAMLESS SYSTEM OF CARE: COMPONENTS OF EFFECTIVE TREATMENT, SUPERVISION, AND TRANSITION SERVICES IN THE COMMUNITY (1998), *available at* http://www.bgr.umd.edu/pdf/coerced_tx_12%20steps.pdf.

266. *Id.* at 7.

267. *See* Norval Morris, Comments to Franklin E. Zimring, *Drug Treatment as a Criminal Sanction*, 64 U. COLO. L. REV. 831, 834–35 (1993) ("[M]any prison administrators support the boot camp movement, not because they think that the short, sharp shock of military-style discipline will reform the criminal, but because that idea appeals politically, and to the public, and will allow a shortening of the prison term and a movement to a follow-up period of community-based treatment for drug abusers so sentenced.").

268. TAXMAN, *supra* note 265, at 7.

269. *See* Rebecca Kolberg, *Washington News*, UNITED PRESS INTERNATIONAL, Mar. 15, 1990, *available at* http://www.lexis.com (search "News, All (English, Full Text)" for "Rebecca Kolberg" and with date restriction from "01/03/1990" to "01/04/1990") (noting that the "Bush administration has increased federal funding for drug treatment 70 percent since fiscal 1989 and

in education programs" and "[u]sing legal coercion to force drug-addicted offenders into treatment is enjoying more favor than ever."[270]

This shift is well timed, as the practical benefits of correctional drug treatment and education have never been clearer. For example, a report used recently conducted for the U.S. Department of Justice on the efficacy of programs that test all nonviolent offenders and divert all of those who test positive into mandatory drug treatment rather than prison.[271] This report found that these programs not only had a substantial impact on drug dependency and recidivism,[272] but also, unsurprisingly, significantly reduced relationship problems in the offender's family.[273] The same evaluation indicates that in many cases, expansion of mandatory education and drug-treatment programs also significantly reduce the likelihood of employment problems—the reverse of the effect of days spent in jail.[274] Mandatory participation, by highlighting offender accountability, makes these programs morally and politically sensible as well.[275]

Still, the studies have been largely focused on offenders themselves, and the theory of accountability suggests that the benefits are likely to be far broader. Are prosocial norms regarding family life, work, or education more pervasive and influential in communities in which high quality drug treatment is available compared with communities where it is not? Do people perceive sanctions that include mandatory drug treatment and education to be more just, and does that perception increase compliance and cooperation with the law? Large-scale studies with these specific effects

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this year allocated $100 million to help states reduce waiting lists of people seeking treatment"). In addition to federal funding, citizens in some states have voted for mandatory drug treatment as an alternative to incarceration. *See supra* note 261 and accompanying text.

270. JENNIFER TRONE & DOUGLAS YOUNG, BRIDGING DRUG TREATMENT AND CRIMINAL JUSTICE (1996).

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272. *See* ADELE HARRELL ET AL., URBAN INSTITUTE JUSTICE POLICY CENTER, EVALUATION OF BREAKING THE CYCLE (2003), *available at* http:/www.urban.org/uploadedPDF/410659_BreakingtheCycle.pdf; *see also* Alan Turley et al., *Jail Drug and Alcohol Treatment Program Reduces Recidivism in Nonviolent Offenders: A Longitudinal Study of Monroe County, New York's, Jail Treatment Drug and Alcohol Program*, 48 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 721 (2004) (assessing recidivism in drug treatment programs).

273. HARRELL ET AL., *supra* note 272, at II-23 to II-32.

274. *Id.* at II-2 to II-14.

275. It is also worth noting that, despite the widespread misperception that drug treatment only works for those who "have hit bottom" and "really want to change," in correctional settings mandatory drug treatment is at least as effective as optional drug treatment, if not more so. *See* NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., BEHIND BARS: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION (1998).

in mind have yet to be undertaken, but what we do know provides good reason to think that the answer to these questions will be "yes."

3. Intensive Supervision Programs

States have also sought to substitute expressive quality for quantity through so-called "intensive sanctions," which generally require offenders to satisfy some combination of educational, job training, employment, community service, or restitution requirements, often in a quasi-military atmosphere. They are also, as a rule, significantly less lengthy than sanctions that include only empty time in a jail or prison. Again, from an accountability-reinforcing perspective, these indicate that the state can achieve the same or better correctional results with a more meaningful and less-costly sanction.

The concept of intensive sanctions is not new. The early penitentiary was structured around the theory that, by exercising more complete social control over an offender, the state could require him to behave in socially responsible ways. The idea behind modern programs is similar: A shorter and more intensive regime of discipline and training, it is thought, provides the same or greater reductions in recidivism at a lower cost than incarceration. Evaluation of these programs is ongoing and not yet decisive.[276] Nonetheless, there are a number of preliminary findings that are promising.

New York, Illinois, and Louisiana have the most extensive and, by most accounts, the most effective programs. These states integrate intensive drug-treatment, educational, and job-training components into a detailed and strictly monitored four- to six-month schedule. The program in New York, for example, "stresses a highly structured and regimented routine, considerable physical work and exercise, and intensive substance abuse treatment."[277] Like the early American penitentiary system, its goals include not only rigorous physical training and discipline, but also "build[ing] character, [and] instill[ing] a sense of maturity and responsibility."[278] As administrators reported:

276. As one reviewer of intensive sanctions put it, the research suggests that outcomes "are neither as good as the advocates assert nor as bad as the critics hypothesize." Tomer Einat, *Shock-Incarceration Programs in Israeli Sanctioning Policy: Toward a New Model of Punishment*, 36 ISRAEL L. REV. 147m 170 (2002).

277. Glenn S. Goord & Brion Travis, The Fifteenth Annual Shock Incarceration Report 1 (2003).

278. *Id.*

> For every 500 hours of physical training plus drill and ceremony that has led to the media calling it a "boot camp," Shock Incarceration in New York also includes 546 hours of the therapeutic approach to treating addiction. . . . It also includes at least 260 mandatory hours of academic education and 650 hours of hard labor, where inmates work on facility projects, provide community service work, and work on projects in conjunction with the Department of Environmental Conservation.[279]

Unlike the early penitentiary, however, these programs are not limited to incarceration; instead, they explicitly integrate formal and informal modes of social control.[280] They attempt to increase offender accountability by monitoring compliance with drug treatment and employment requirements and by strengthening the offender's relationships with family and community members who can exert pressure on parolees to behave responsibly.[281] Integrating these aspects of social control under intensive parole supervision—precisely the kind of parole the public has indicated it wants[282]—turns out to have positive effects on offender adjustment.[283] In fact, the most extensive evaluation completed to date reports that, "[i]n every State where information was available on supervision intensity, positive adjustment increased when supervision intensity increased."[284]

Again, by maximizing the practical and symbolic return on their criminal justice investment, public officials are able to provide the same or a higher level of public protection for each dollar spent when compared with standard incarceration. The New York Department of Corrections, for example, estimates that it has saved about a billion dollars over the last fifteen years.[285] Illinois estimates that it saves a more modest five million dollars annually by diverting offenders who would otherwise go to prison into its intensive incarceration and parole programs.[286]

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279. Thomas Coughlin, U.S. Senate Committee on the Judiciary, July 25, 1989:1.

280. The model is built around "control theory," a well established criminological model. *See* RONALD A. FARRELL & VICTORIA LYNN SWIGERT, SOCIAL DEVIANCE (1975).

281. Goord & Travis, *supra* note 277, at 4.

282. *See supra* note 237 and accompanying text.

283. Robert Brame & Doris Layton MacKenzie, *Shock Incarceration and Positive Adjustment During Community Supervision: A Multisite Evaluation*, *in* CORRECTIONAL BOOT CAMPS: A TOUGH INTERMEDIATE SANCTION 275 (Doris L. MacKenzie & Eugene E. Hebert eds., 1996).

284. *Id.* This counters concerns raised by previous researchers. *See, e.g.*, Joan Petersilia & S. Turner, *Evaluating Intensive Supervision Probation/Parole: Results of a Nationwide Experiment*, Research in Brief, Washington, D.C.: U.S. Department of Justice, National Institute of Justice (1993).

285. Goord & Travis, *supra* note 277, at 15.

286. ROGER E. WALKER JR., ILL. DEP'T OF CORRECTIONS, IMPACT INCARCERATION PROGRAM 23 (2003) ("The net cost savings for FY03 were an estimated $4,965,163.").

But while mandatory education and drug treatment have few opponents, many progressive reformers and activists have actively opposed intensive supervision programs, describing them as "ineffective" and "theoretically flawed."[287] They argue that, because it is the rehabilitative aspects of these programs rather than their "get tough" or military features that reduce recidivism,[288] states should just offer offenders rehabilitation programs and dispense with the stringent requirements and tough presentation.

Intensive accountability-reinforcing programs may not require a military veneer to have a rehabilitative effect.[289] But these rehabilitation purists who are presumptively skeptical of any sanction that appears tough appear to miss much of what administrators are saying: By forcing offenders to undergo intensive rehabilitation in a shorter time span, correctional administrators are able to meet the moral demand for offender accountability while reducing overall prison populations. States, by making participation in rehabilitative programs mandatory under intensive supervision, have begun to provide punishment that is both socially meaningful and materially effective. Measured in terms of costs, benefits, and public satisfaction, this is progress.[290]

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287. For example, Doris MacKenzie and Francis Cullen, two very capable proponents of rehabilitation, admit to being theoretically predisposed against intensive supervision, proclaiming that "get tough" programs are "theoretically flawed" and therefore necessarily ineffective. *See* Francis T. Cullen, *The Twelve People Who Saved Rehabilitation: How the Science of Criminology Made a Difference*, 43 CRIMINOLOGY 1, 21 (describing personal communication between the scholars in which these sentiments were expressed).

288. *See, e.g.*, Francis T. Cullen et al., *Control in the Community: The Limits of Reform?*, *in* CHOOSING CORRECTION INTERVENTIONS THAT WORK 76 (Alan T. Harland ed., 1996) (finding that the military aspects of the boot camp had "negligible" effects on recidivism); Joan Petersilia & Susan Turner, *Intensive Probation and Parole*, *in* CRIME AND JUSTICE: A REVIEW OF RESEARCH (Michael Tonry ed., 1993) (finding that intensive incarceration and probation programs had no effects on recidivism rates compared with simple parole).

289. This is apparently what the Federal Bureau of Prisons (BOP) has decided in their recent evaluation of their "Intensive Confinement Center Program" (ICC). *See* Memorandum from Harley G. Lappin to all Federal Judges, Re: Intensive Confinement Ctr. Program (Jan. 14, 2005). Prevented by law from offering a reduction in prison time served, and unable to provide more intensive postrelease supervision, the BOP did not realize the same return on investment as some states. The BOP remains committed, however, to mandatory programming:

> Rigorous research conducted over the past 20 years has demonstrated convincingly that inmates who participate in the Bureau's major inmate programs are substantially less likely to recidivate as compared to similar inmates who do not participate. These programs include Residential Substance Abuse Treatment, Vocational In the memorandum I previously sent to all judges, I described results of several recidivism studies, indicating that boot camps or ICC programs in general do not reduce recidivism.

Id.

290. Indeed, stripped of their martial trappings, intensive supervision programs are conceptually quite similar to the highly effective programs that most pro-rehabilitationists

Rehabilitative purists also miss the potential indirect effects of accountability-reinforcing sanctions on the perceptions and behavior of other members of their communities. As members of their communities come to see them as being required to behave responsibly, the theory of accountability suggests that cooperation with the law should increase and rates of crime should decrease. These effects are likely to be greater where intensive sanctions can highlight the responsible behavior that offenders are required to undertake.

Ultimately, whether in a correctional or community setting, the development of effective intensive interventions suggests that reformers are technically capable of designing programs that will benefit the most disadvantaged in our society. Accountability, as reformers in some states are beginning to realize, provides a moral language that allows them to do so.

4. Correctional Labor

Perhaps the most straightforward movement toward offender accountability—the resurgence of interest in correctional labor—has also been the most problematic.[291] It is not hard to see where the controversy comes from. Critics of correctional labor programs argue that they operate much as they did in the South during reconstruction, simultaneously exploiting black Americans while undermining organized free labor.[292]

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strongly support: "multidimensional" and "multisystemic" programs for juveniles. The literature on these kinds of programs is vast. Multsystemic work generally clusters around the work of Scott Henggeler. *See* Scott W. Henggeler et al., *Family Preservation Using Multisystemic Therapy: An Effective Alternative to Incarcerating Serious Juvenile Offenders*, 60 J. CONSULTING & CLINICAL PSYCH. 953 (1992). For recent meta-analyses of program evaluations, see Nicola M. Curtis et al., *Multisystemic Treatment: A Meta-Analysis of Outcome Studies*, 18 J. FAM. PSYCHOL. 411 (2004); David P. Farrington & Brandon C. Welsh, *Family-based Prevention of Offending: A Meta-analysis*, 36 AUSTL. & N.Z. J. OF CRIMINOLOGY 127 (2003); S.R. Woolfenden et al., *Family and Parenting Interventions for Conduct Disorder and Delinquency: A Meta-Analysis of Randomized Controlled Trials*, 86 ARCHIVES OF DISEASE IN CHILDHOOD 251 (2002). Both the "tough" and "caring" intensive programs leverage formal control to build stronger social relationships, which then lead to better informal control by family and friends—all while generating broad political support.

291. *See, e.g.*, Garvey, *supra* note 122.

292. One recent editorial summarized all of the problems that nearly extinguished correctional labor early in the twentieth century:

> Prison corporations exploit prison labor in "factories behind fences." Virtually free prison slave labor has led to the shutdown of Northwest sawmills. Slavery is permitted today because the slaves do not belong to the plantation owner, but to the state. They are just "rented" to capitalist corporations. This is why America is buddy buddy with the ruthless, brutal Communist butchers of China: We've got the same system.

Dan McKinnon, Letter to the Editor, *Corporate Slavery*, IDAHO STATESMAN, Feb. 28, 2004, at 8.

While these concerns are legitimate, properly structured correctional labor programs should be able to overcome them. Indeed, a number of possible adjustments to federal and state correctional labor programs suggest that partial solutions are already in the works. Below, I first describe some promising programs and then discuss ways to address the legitimate concerns they provoke.

a. Nonprofit Labor

Many states have either dramatically expanded inmate nonprofit labor programs or are making plans to do so in the near future. In Vermont, for example, many prisoners are diverted to work camps where inmates "work off" up to half of their sentence. The camps are far cheaper to operate than traditional prisons, and inmates perform truly useful labor, such as "cutting, delivering and stacking firewood for the needy; forestry management; construction and rehabilitation of low-income housing, including maintenance; services for towns; gardens for the poor; providing assistance with daily living for the elderly; providing clerical and data entry assistance to state agencies serving the needy."[293] While these programs are not suitable for high-risk offenders, they are suitable for a broad middle-tier of offenders who will be released in the near term.

A number of other states operate sophisticated programs that target the large-scale nonprofit sector, like the programs in state prisons in Michigan, Illinois, Texas, and Wisconsin where inmates build housing in modules for Habitat for Humanity.[294] As part of correctional training in the building trades, these programs provide participating inmates with improved prospects for finding a job upon release. The prison-made modules are then transported to housing sites and assembled into finished homes by Habitat volunteers.

Many municipalities operate less-sophisticated programs for short-term offenders housed in local jails. Local sheriffs send inmates to clean streets,

293. EDWARD R. ZUCCARO ET AL., REPORT AND RECOMMENDATIONS OF THE [STATE OF VERMONT] GOVERNOR'S COMMISSION ON CORRECTIONS OVERCROWDING (2004).

294. *See, e.g.*, Steve Pardo, *National Guard, Habitat Team Up: Units Transport Walls Used to Build Homes for Poor*, DETROIT NEWS, Nov. 10, 2003, at O1C ("Under federal rules, Habitat for Humanity of Michigan has to put yearly notices in local papers in the Howell, Jackson, Lansing, Grand Rapids and Midland areas stating their intentions to use the National Guard to transport the prefabricated walls, made by state prisoners, to about 400 sites from Jan. 1, 2005, through 2006."). *See also* Peter Hoekstra & James P. Hoffa, *Federal Prison Agency Preys on Workers*, DETROIT NEWS, June 20, 2003, at 15A (praising the Habitat for Humanity program as an alternative to prison labor programs that hurt unionized labor).

clear drains, and trim hedges. Inmates also help churches and other nonprofits, prepare for, manage, and clean up after major events; paint or repair facilities; and even assist with technical administrative work. Inmates, who often grew up in the neighborhoods they are serving, gain experience and community contacts they can then use to obtain employment when released.[295]

Nonprofit work programs are, of course, usually profitable to someone, and the acceptability of such programs is likely to depend on precisely who benefits and how. There is a world of difference, for example, between a sanction that requires an inmate to labor for political elites (say, trimming hedges at the governor's house) and a sanction requiring an inmate to help build houses or cut firewood for the poor in his own community. A theory of accountability, however, can help distinguish between the two by asking not only whether the offender is laboring, but also how that labor furthers accountability in concrete ways and how the social meaning of that labor is likely to affect behavior in the community.

b. For-profit Labor

For-profit correctional labor is relatively uncommon in the United States, but it is making some inroads in both small- and large-scale settings. At the low end of the correctional labor market are programs like Oakland's RECOVER program.[296] Because destitute offenders are generally unable to compensate their victims, sanctions against them are generally less efficient than sanctions against employed offenders. Under the RECOVER program, unemployed offenders have the option of working a menial job for an employer who contracts with the state. The contractor donates ten dollars for each hour the offender works,[297] all of which is passed on to the victim in restitution. In essence, the state serves as a broker, connecting employers with indigent laborers who need to meet a legal obligation. The offender gets access to an entry-level job with a shot at further employment if he performs well. The employer pays a decent wage, but only hires the offender for the hours necessary, thereby avoiding overhead. And, of course, the victim is compensated—indeed, in one year under the Oakland

295. *See infra* Part I.C.2, discussing the effects of social norms.

296. *See* Stephen W. Huber, *RECOVER Works for Victims*, DAILY OAKLAND PRESS, Mar. 4, 2004, *available at* http://www.theoaklandpress.com/stories/030404/loc_20040304027.shtml (describing the RECOVER program). RECOVER stands for Restitution Equals Compensation of Victims' Economic Rights. *Id*.

297. This arrangement avoids the complication of taxing the wages.

program, judges report that orders of restitution, once an "empty gesture,"[298] now retrieve "nearly 100 percent of what was owed."[299]

At the upper end of the correction labor market are programs like the Federal Prison Industries Enhancement (PIE) program.[300] Under PIE, private firms are allowed to employ prison labor so long as they are paid a prevailing wage and do not displace free labor. Employers must pay the full panoply of taxes and insurance costs, and wages are garnished to compensate victims, to support dependants, to pay for the inmates' room and board, and to meet other obligations. PIE provides state and local taxpayers, victims, and dependants with tens of millions of dollars each year. Recent and pending reforms are aimed at both expanding the use of PIE labor, particularly where it would compete with foreign labor, while restricting competition with other domestic labor sources.

c. Concerns about Correctional Labor

Many correctional labor programs are far less attractive than those outlined above. California, for example, found itself the target of a lawsuit for contracting with companies who were illegally using low-wage (and disproportionately minority) prison labor to compete with domestic companies employing free noncorrectional labor. Such practices give rise to familiar concerns from the early days of the penitentiary: racial subordination and competition with free labor.

(1) Racial Subordination

Given America's historical use of slavery, convict leasing, and other abusive and racially exploitative tragedies, serious and legitimate concerns about racial subordination attach to any form of involuntary labor. In light of the potential for abuse, any implementation of mandatory labor programs as part of punishment should be subjected to a careful review of any possible subordinating effects.

But accountability and antisubordination principles are not incompatible. By paying decent wages, for example, both small- and large-

298. Amy Lee, *Oakland Crime Victims Get Their Due: New Program Sends Indigent Criminals to Work, But Paychecks Used for Restitution*, DETROIT NEWS, Mar. 4, 2004, at 1A (quoting a victims advocate whose daughter was killed by a drunk driver as saying, "'Pay restitution' is a nice thing to say, but it's an empty gesture because people simply don't do it.").

299. *Id.* (quoting Judge Bob Evans of Florida's 9th Circuit Court).

300. *See* 18 U.S.C. § 1761(c) (2000).

scale programs help victims and families of prisoners in low income neighborhoods—precisely those neighborhoods currently harmed by both crime and overincarceration. Increasing the portion of income allocated to family support would not only help to alleviate poverty in many of our nation's poorest neighborhoods, but it would also help to build the familial bonds that studies show to be important in reducing offender recidivism.[301] And, because the removal of large portions of able-bodied young men from low-income neighborhoods further lowers tax revenues, offenders might be required to contribute some portion of their pay to the city where they originally resided. All of this would help to direct funds into impoverished neighborhoods from which productive labor has been removed, which would help to create a more equitable distribution of wealth.[302]

(2) Competition with Free Labor

Another serious and legitimate concern is that prison labor may unfairly compete with nonprison labor, resulting in diminished wages for and increased unemployment among nonoffenders.

There is no single answer to this concern, but there are a host of partial answers.[303] First, a requirement that correctional labor programs pay free-market wages may alleviate this concern.[304] Second, many of the jobs that correctional labor competes for are not American jobs, but jobs that have already been outsourced overseas. Indeed, the federal prison industries program—which is by far the largest correctional labor program in the nation—operates under the constraint that it cannot compete with domestic labor.[305]

But this only addresses part of the concern, for there would certainly be some job reallocation within the United States as a result of large-scale

301. *See* TRAVIS, *supra* note 77, at 119–50 (reviewing the literature on the effects of incarceration on families and the effects of family ties on recidivism).

302. Those worried that public support for prison labor is—at root—racist, should be further reassured by the fact that a substantial majority of those who support offender work programs in general also support requirements that would direct benefits to disadvantaged minority populations (for example, by earmarking a portion of earnings for offenders' victims, families, or communities). *See supra* note 256 and accompanying text.

303. My argument is admittedly speculative. This issue deserves extensive empirical study.

304. Many states that mandate prison labor also have prevailing wage requirements, as do federal correctional industries. *See, e.g.*, ALA. CODE § 14-8-4 (2005); CAL. PENAL CODE § 1208 (West 2006); CONN. GEN. STAT. § 18-90b (2004); 50 Fed. Reg. 12,661-64 (1985).

305. Indeed, PIE certification requires that programs be voluntary, avoid unfair competition with private sector business and labor, and provide hourly wage rates not less than those prevailing for similar work in the locality. *See* Prison Industry Enhancement Certification Program Guideline, 64 Fed. Reg. 17,000 (Apr. 7, 1999).

expansion of correctional labor programs. However, it is not clear that this would hurt free labor. The question is whether the redistribution is necessarily a zero-sum proposition or whether correctional labor can effectively "grow the labor pie." For example, correctional labor arguably could expand free labor employment by creating greater market efficiencies in areas where incarceration is common.

To understand how this might occur, first think about how increased crime *diminishes* the number of jobs in a neighborhood and how increased unemployment *increases* crime rates, creating a vicious cycle that lands far too many inner-city residents out of work and in prison. Rising crime rates drive some employers out of business altogether, creating a net loss in jobs. But even if businesses relocate, their access to local markets and free labor's access to employment are reduced because the employer and the unemployed workers will be less available to each other. This further depresses formal market employment and encourages informal and often illegal market activity.[306] The inefficiencies created by this cycle ultimately drive down formal employment levels not only at the local level, but at the macro level as well. This is, for economists and labor activists alike, a miserable story of a shrinking pie.[307]

While there is not much evidence that correctional labor directly increases the number of jobs in high-crime, low-income neighborhoods, a properly structured program might do so indirectly through a host of second-order effects. Under a correctional labor regime that focuses on accountability, the profits accrue mostly to the victims, families, and communities of offenders; this increases overall household incomes and local wealth, helping to reduce poverty, keep families intact, and cut crime. The increased purchasing power of residents may also encourage business expansions and new businesses, all of which, in turn, help to create new jobs. Increased income and employment, consequently, can help to reduce crime rates, which increases business opportunities and employment. These effects may be bolstered by the normative effects of accountability on community and family life described above.[308] Would the gains be greater than the costs related to job loss in areas out-competed by correctional labor? A great deal more research is needed to settle these issues decisively,

306. *See* Richard Freeman, *America's Punishment Industry*, PROSPECT (U.K.) Feb. 5, 1996.

307. Bruce Western has done some of the best work in this area. *See* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA ("[E]x-prisoners earn lower wages and suffer more unemployment than similar men who have not been incarcerated. Ex-prisoners are also less likely to get married or cohabit with the mothers of their children.") (manuscript on file with author).

308. *See supra* Part I.C.2.

but there are good reasons to think that they would,[309] and that holding criminal offenders accountable to their victims, families, and communities need not pit free labor against correctional labor.

I do not mean to minimize concerns about free labor, nor am I attempting a comprehensive account of how correctional labor ought to be evaluated. The role of mandatory labor programs in and out of correctional institutions raises serious questions about the appropriate context, form, and scope of state control over offender autonomy, and about the effects of any displacement of free labor that may occur. But as the federal government and states look to increase participation in correctional labor programs—and to do so with significant public support—an analytical framework structured around offender accountability suggests ways to make the most of their experiments and empirical evaluations.

5. More Productive Sanctions

Focusing on accountability when structuring sanctions can help us to more justly parse the burdens and benefits that the law creates. Americans rightly want to hold criminal offenders accountable in ways that simple detention cannot. They overwhelmingly support mandatory paid labor, the fruits of which accrue to third parties harmed by crime and incarceration. The technical problems associated with correctional employment appear to be manageable.[310] The real question is whether we can construct programs that generate a just distribution of the fruits of that labor—a question that an approach structured around offender accountability can help us answer.

B. Accountability and Restorative Justice: An Alternative Approach to Alternative Sanctions

One of the most interesting accountability-related developments of the last two decades—the restorative justice movement—is ostensibly not

309. This is because the marginal effect of a dollar in the neighborhoods where offenders come from is likely to be higher than the marginal effect of a dollar elsewhere. One reason for this is that the marginal crime rate associated with reduced income is nonlinear, so that the most dramatic reductions occur at the low end of the spectrum—the end disproportionately populated by the victims, families, and neighbors of offenders.

310. *See, e.g.*, Thomas W. Petersik, Tapan K. Nayak & M. Katie Foreman, Identifying Beneficiaries of PIE Inmate Incomes Who Benefits from Wage Earnings of Inmates Working in the Prison Industry Enhancement (PIE) Program? Report to The George Washington University Center for Economic Research (July 1, 2003).

about sanctions at all.[311] Nevertheless, restorative justice can be seen as a search for a far-reaching and thorough form of accountability, not just of the offender to nonoffenders, but also of nonoffenders to the offender. Understanding the similarities and distinctions between the aims and means of restorative justice and accountability-enhancing sanctions reveal both compatibilities as well as the relative strengths and shortcomings of each.

While diverse in attitudes and approach, a common theme in the restorative justice literature can be found in its dissatisfaction with the state's ability to "steal" conflicts from private citizens, robbing individuals of the ability to resolve conflicts that have complex sources without employing the blunt and generally ineffective tools of formal criminal proceedings.[312] As a response to this, advocates of restorative justice favor quasi-civil conferences in which the victim and any others interested in the victim's welfare meet with the offender and any others interested in the offender's welfare.[313] John Braithwaite has suggested that restorative justice is "[a] procedural requirement that the parties talk until they feel that harmony has been restored on the basis of a discussion of all the injustices they see as relevant to the case."[314] The goal of each conference is to restore property, a sense of security, and dignity to the victim, while also encouraging the offender to participate in that restoration by applying social pressure and providing social support specific to the situation at hand.[315]

Because one of the most obvious ways for an offender to repair damage that he has imposed on another is to apologize and provide some form of compensation, the likelihood that restorative justice proceedings will result in a requirement that the offender meet some prosocial obligation is high.[316] There are, however, distinctions between restorative justice and an

311. Gerry Johnstone, *Introduction, Restorative Approaches to Criminal Justice*, *in* A RESTORATIVE JUSTICE READER 5–6 *passim* (Gerry Johnstone ed., 2003) (describing restorative justice as "civilizing" the criminal law).

312. *See generally* Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1977).

313. *See id.*; Johnstone, *supra* note 311, at 8–14 (describing restorative justice as "civilizing" the criminal law).

314. John Braithwaite, *Restorative Justice and a Better Future*, *in* A RESTORATIVE JUSTICE READER 83, 87 (Gerry Johnstone ed., 2003).

315. *Id.*

316. While, in theory, the victim and offender can decide to do anything that they choose, mediators are often encouraged to guide them toward a resolution that reflects "obligations created by the offense." HOWARD ZEHR, RETRIBUTIVE JUSTICE, RESTORATIVE JUSTICE 13 (1985).

approach focused on the accountability-related concerns described in this Article.

Whereas accountability-reinforcing sanctions can be described independently of the criminal justice process, restorative justice is generally described as requiring a process in which people affected significantly by the criminal offense meet "to discuss the harm caused by the offence and to decide, collectively, how the harm should be repaired."[317] While accountability concerns focus agnostically on offenders meeting the obligation of responsible behavior, restorative justice often emphasizes "caring," "love," "compassion," "redemption," "forgiveness," and "reconciliation," while rejecting the labels of "crime," "offender," "victim," and "punishment."[318]

Generally speaking, then, the form of accountability implicit in the sanctions that I have described allows for a more generic approach focused on appropriate outcomes, an approach compatible with restorative justice and also with indeterminate and determinate sentencing in a more traditional criminal justice process. It does not require major procedural reform, that victims confront the victimizer, or the consent of the offender—aspects of restorative justice that, even though they may be desirable in some circumstances, limit the circumstances to which restorative justice is likely to be applied. But perhaps just as importantly, a focus on accountability does not require that the public embrace the more specific and sectarian goals and values of restorative justice. Reformers may want to live in a world where offenders are loved and their dignity restored, but to demand that world as part of reform significantly limits its appeal and implementation.

Ultimately, although an emphasis on accountability forgoes some of the potential benefits of restorative justice, it also avoids some of restorative justice's most serious limitations—and it does so while still insisting on a socially constructive approach to sanctions.

317. Johnstone, *supra* note 314, at 3; *see also generally*, Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977) (describing the return of this process to the individuals involved); ZEHR, *supra* note 316 (describing the importance of focusing on harms related to the offense).

318. Johnstone, *supra* note 314, at 5–6, *passim*.

CONCLUSION

Although accountability features prominently in nearly every criminal code in our nation,[319] runs through the earliest history of our criminal law, and is overwhelmingly favored by the public, it has been largely missing from the mainstream debate. The accountability of criminal offenders features prominently in every election cycle, but policymakers have delivered precisely the opposite—a blight of accountability-reducing sanctions centered on incarceration, probation, and parole. We warehouse criminal offenders or let them walk free because we cannot imagine doing anything else. At tremendous cost to the welfare of those in high-crime neighborhoods, and to the public's trust in—and the legitimacy of—our criminal justice system, we are failing.

Our system of criminal sanctions is broken and the dominant accounts of punishment—whether framed in terms of retribution, deterrence, expressive condemnation, or rehabilitation—have little to say about how to fix it. We need a new approach, a new way of looking at what it is that punishment can and should do. I argue that a framework structured around broader offender accountability can provide just that. By attending to our best understandings of human behavior and social organization, we can fashion punishments that protect the important social goods on which healthy families and communities depend.

An approach to punishment that features accountability has several advantages over mainstream discussions that pit a convulsive popular punitiveness against defenders of criminals' rights. Ordinary citizens, the evidence suggests, have a highly sophisticated moral sensibility and, given the choice, support measures that convey not only disdain for criminality, but a desire for social justice and concern for our collective social welfare. Public dissatisfaction should not be read as mere bloodlust, but as a desire for a far more meaningful and pragmatic form of justice.

A focus on accountability also provides practical guidance for future reform—reform that is desperately needed. Holding criminal offenders accountable has never been easy and likely never will be. But the stakes, both moral and material, are too high not to try. Popular dissatisfaction with—and the massive social costs of—imprisonment are forcing legislators to reexamine their overreliance on incapacitation alone, and many are devoting time and energy to reversing the trend toward mass incarceration. In the process, some are beginning to rediscover the public's interest in

319. *See supra* note 256 and accompanying text.

accountability and are developing innovative programs to meet public demand. This Article, I hope, will contribute to the conversations that these reformers are having with each other and with the public at large.