

PROMISE OR PERIL?: THE POLITICAL PATH OF PRISON ABOLITION IN AMERICA

*Rachel E. Barkow**

America is now home to a burgeoning prison abolitionist movement. The word abolition focuses on a negative goal, but prison abolitionists have a positive agenda that is just as important. They believe the key to abolishing prisons is to address the social, economic, and political conditions that cause crime, thus obviating the need for prisons. They acknowledge that the societal changes they seek are, to put it mildly, big ones, including the demolition of capitalism, racism, patriarchy, and militarism, plus a shift to a governance model where people take a shared responsibility for one another. These are not realistic goals that will be achieved any time soon, if ever, given the American political landscape. Is the pursuit of such ends nevertheless a positive development for criminal justice reform, or does it pose real risks to an agenda of massive decarceration and improvements in how criminal law operates in America?

For those who embrace abolition as an expressive reaction to what they view as the intolerable state of American punishment practices, the answer to that question may not matter. But others adopt an abolitionist stance precisely because they believe it is the most effective political strategy for bringing about change to American criminal justice

* Charles Seligson Professor of Law, Faculty Director, Zimroth Center on the Administration of Criminal Law, NYU School of Law. For helpful comments on earlier drafts and guidance on research avenues to pursue, I owe great thanks to Shima Baradaran Baughman, Sharon Dolovich, Brenner Fissell, Barry Friedman, Trevor Gardner, David Garland, John Goldberg, Sarah Gronningsater, Daniel Harawa, Helen Hershkoff, Stephen Holmes, Emma Kaufman, Máximo Langer, Daryl Levinson, Grace Li, Tracey Meares, Jamelia Morgan, Mark Osler, Rick Pildes, John Rappaport, Noah Rosenblum, Andrea Roth, Steve Schulhofer, Peter Shane, David Sklansky, Chris Slobogin, Carol Steiker, Jason Taper, and participants at the Criminal Justice Roundtable at Stanford Law School, the Markelloquium, and the NYU Faculty Workshop. I am particularly grateful to Paul Butler for his probing comments on the first version of the Article that led me to rethink the orientation of the piece. Gaelin Bernstein, Christopher Kim, Cleo Nevakivi-Callanan, and Madison Lahey provided excellent research assistance and editorial suggestions.

practices. It is this latter goal of abolition that is the subject of this Article.

Specifically, this Article explores whether prison abolition as a movement will, on net, lead to more productive changes to criminal justice punishment practices or instead produce a backlash that hinders reform efforts. The most optimistic take is that the movement could improve the conversation around crime policy to include bolder initiatives that dislodge the central role of prisons and punishment and shift attention to root causes of harm. On this view, the abolitionist perspective can shift the Overton window to embrace much broader downsizing of prisons and investment in communities than would take place without the abolitionist challenge. Moreover, the call for abolition is just the kind of simple, powerful rhetorical move that draws people to embrace it and helps mobilize grassroots efforts for change.

There is, however, a future political path for abolition that is less rosy. Instead of helping the cause of decarceration and improving the lives of those under the control and supervision of the state's punitive apparatus, there is the possibility that calls for abolition could lead to more harms than they prevent. This risk exists for two main reasons. First, because the rhetoric of abolition is absolutist—the language being used is deliberate and calls for an end to prisons—there is the risk that approach will frighten segments of the public who would otherwise support decarceration, even radical decarceration, but are not prepared to rule it out entirely. Politicians may take steps to avoid being associated with an abolitionist framing that is politically unpopular and resist reforms they would otherwise support. We have seen just such a dynamic with abolitionist calls to Defund the Police. Language and messaging matter in politics, and the abolition message may prove to be politically costly as mainstream public discussion becomes more aware of it. The danger is greater still if the idea of prison downsizing gets associated with broader abolitionist goals of ending capitalism and replacing it with communism or some other kind of communal governance structure that scares off too many would-be supporters of criminal justice reforms.

The second reason an abolitionist framing may ultimately produce more harm than good is that some who seek abolition often use that goal as the yardstick for deciding what policy changes to support. They reject what they call “reformist reforms” that do not contribute to dismantling the existing legal order. For example, many abolitionists reject calls to invest in improvements to prisons or put in place

greater staffing, even if doing so would improve the lives of currently incarcerated people, on the view that this additional funding ultimately expands the role of prisons in society and leads to incarceration being more entrenched overall. Abolitionists have also rejected laws that would release certain groups of incarcerated people—such as those serving offenses that do not involve violence—because of a concern that those laws exclude others. The abolitionist framing therefore runs the risk of sacrificing too many reforms that would benefit people currently suffering from incarceration for a utopia that will ultimately not materialize.

In weighing the pros and cons of abolition as a political organizing strategy, then, a great deal turns on the likelihood of prisons being abolished. And on that score, the relatively recent history of another recent abolition movement—the movement to close state mental hospitals and provide community care to people with mental health needs, known as *deinstitutionalization*—strongly suggests that the more pessimistic take on the fate of prison abolition will ultimately prove correct. *Deinstitutionalization* is a cautionary tale with important lessons for today’s abolitionists and their political calculus.

It is an urgent question what strategy will best address the fact that prisons and jails in the United States are inhumane and dreadful. For those of us committed to drastic changes to patterns of policing, prosecution, and punishment that perpetuate structural inequality and fail to reduce harm, what is the best path forward to achieve those goals? Is the rhetoric and social organizing power of abolition beneficial because it will spark a successful political movement toward decarceration, or does it bring more political risks than benefits and will therefore ultimately harm the goal of weaning America off its reliance on prisons, jails, and other forms of detention?

This Article answers these questions by first describing the abolitionist movement in Part I. Part II considers the policy implications of an abolitionist framework. Part III then turns to the political calculation and analyzes the political pros and cons of an abolitionist stance. Drawing lessons from the *Defund the Police* movement and *deinstitutionalization*, it highlights where and why public resistance may emerge.

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INTRODUCTION

America holds the dubious distinction as the world's largest incarcerator,¹ a product of decades of tough-on-crime rhetoric and policies. America is now also home to a burgeoning abolitionist movement that seeks to do away with prisons altogether.² The two are not unrelated, as the call for prison abolition is a response to the punitive approach that has dominated American politics and is oppositional to it in almost every respect. Whereas advocates for

1. Dan Berger, *How Prisons Serve Capitalism*, PUB. BOOKS (Aug. 17, 2018), <https://www.publicbooks.org/how-prisons-serve-capitalism/>.

2. For a sample collection of sources and scholarship on this abolition movement in America, see Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2015 n.11 (2022); Anna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1784 n.6 (2020); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 5 n.17, 11 nn.45–51 (2019). For abolition efforts and scholarship outside the United States, see Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 47–50 (2020). Scholars and activists in America have been pursuing prison abolitionist goals since the 1960s, with a concerted effort in that direction kicking off in the late 1990s around the founding of Critical Resistance by Ruth Wilson Gilmore, Angela Davis, and other activists in California. Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html>; see also Roberts, *supra*, at 5 & n.19 (tracing the birth of the modern abolition movement to a conference held at the University of California, Berkeley in 1998). The killing of George Floyd and the racial justice protests that followed were another turning point in the abolitionist movement. Akbar, *supra*, at 1783. The broader abolitionist movement is not merely directed at prisons, but also includes other means of detention (such as jails and detention centers) as well as the end of policing and state surveillance. MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 191 (2021). In this Article, I focus on the politics around the abolition of prisons and forms of incarceration, which has been the core of this movement for decades.

harsh punishments highlight the grizzliest cases that make headlines and blame crime on bad actors choosing to harm others, those in the abolitionist camp focus on the structural forces that push people to engage in antisocial conduct.³ Abolitionists emphasize that the harmful choices we label as crimes⁴ are the product of societal biases and inequities, whether based on race, gender, socioeconomic status, or other factors.⁵ These two polar-opposite visions of the underlying cause of antisocial behavior produce starkly different policy responses. Those who see harmful behavior as the product of individual choice focus their efforts on controlling individuals, typically by incapacitating them and making them give up their liberty as their just deserts for the harms they have chosen to inflict on others.⁶ Abolitionists, in contrast, believe the better strategy for addressing violence and antisocial conduct is to fix the structural forces that lead individuals to harm each other in the first place—forces that include state instruments of violence and oppression, such as prisons.⁷ To abolitionists, prison is a dirty band-aid that covers up a wound and ultimately makes it worse, while the initial source of the infection itself goes untreated. The end goal for many, if not most, abolitionists is the elimination of any form of detention or state surveillance of wrongdoers, which they argue can be achieved with sufficient societal changes.⁸ They acknowledge these societal changes are big ones, including the demolition of capitalism, racism, patriarchy, and militarism, in addition to a shift to a governance

3. Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST. 212, 215 (2000) (“[A]n abolitionist approach requires an analysis of ‘crime’ that links it with social structures, as opposed to individual pathology, as well as ‘anticrime’ strategies that focus on the provision of social resources.”).

4. For ease of exposition, I will sometimes refer to the harmful, antisocial behavior that society seeks to prevent as criminal behavior or crime, even though this is a contested category that is properly criticized for both recognizing too many behaviors and not enough within its orbit. See, e.g., Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform,”* 128 YALE L.J.F. 848, 854 (2019) (“Choices about what is a crime and what is not are made by politicians and within the economic, social, and racial systems in which politicians exist.”). There are, of course, some core *mala in se* harms that are universally recognized across societies as crimes even if there is debate beyond that core about what should be included.

5. See *Manifesto for Abolition*, ABOLITION J., <https://abolitionjournal.org/frontpage> (last visited Jan. 29, 2023).

6. See Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKLEY J. CRIM. L. 259, 264–65 (2011).

7. See *Manifesto for Abolition*, *supra* note 5.

8. I am speaking in general terms about the abolitionist agenda, though it is important to note there are differences of opinion among self-identified abolitionists. See, e.g., *infra* Subpart I.B.1; Frampton, *supra* note 2, at 2018.

model where people take a shared responsibility for one another.⁹ For any harms that still occur, they propose addressing them through restorative and transformative justice models instead of with detention or other state mechanisms that use force to control bodily movements.¹⁰

Neither the tough-on-crime nor abolitionist approach, on its own, captures the full range of causes of crime. Abolitionists focus on economic deprivation and structural biases but tend to ignore individual motivations for crime that exist regardless of social structure, such as greed, envy, and anger.¹¹ The tough-on-crime crowd tends to ignore the structural forces that foster criminal behaviors.¹² An ideal policy response to crime would recognize both structural forces and individual motivations for interpersonal harm and craft responses that address the complexity of the problem. But if one had to choose between these two diametrically opposed visions of what leads to crime, the abolitionist framing of what causes crime paints a more accurate picture of the predominant forces that lead to harmful behavior in society than a view that focuses on individual choices without any attention to broader structural dynamics. There is an undeniably powerful relationship between poverty and crime throughout the world, across cultures and societies. Thus, an abolitionist approach that seeks to get at these root causes would do a much better job reducing crime and improving public safety than a model that focuses only on individual choice. The tough-on-crime approach creates a revolving door to more crime precisely because broader underlying issues go unresolved, and prisons often make people worse off. As David Garland describes it, “penal exclusion has been layered on top of economic and racial exclusion, ensuring that social divisions are deepened[] and that a criminalized underclass is brought into existence and systematically perpetuated.”¹³

Thus, even if an abolitionist perspective is incomplete in terms of what it sees as driving crime, it could serve as a valuable corrective to the tough-on-crime framing that has dominated American politics for decades. Even if the abolitionist goal of ending all incarceration cannot realistically be achieved, the abolitionist perspective could help change overall perceptions of criminal justice policy and the scale of reform that is needed. This could move the Overton window and

9. See, e.g., *Manifesto for Abolition*, *supra* note 5; Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1546 (2022).

10. Rafi Reznik, *Retributive Abolitionism*, 24 BERKELEY J. CRIM. L., Fall 2019, at 123, 146–47.

11. See KABA, *supra* note 2, at 65.

12. See Dolovich, *supra* note 6, at 265.

13. David Garland, *Introduction: The Meaning of Mass Imprisonment*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1, 2 (David Garland ed., 2001).

potentially pave the way for broader downsizing of prisons and investment in communities than would take place without the abolitionist challenge. The mere existence of an abolition argument in the policy space might help lead people to engage in a much-needed rethinking of a failed model of prisons that has been unchanged for hundreds of years. With abolitionists in the mix, other reforms seem moderate by comparison.

Moreover, the call for abolition is just the kind of simple, powerful, rhetorical move that draws people to embrace it. By deliberately invoking a parallel to the abolition of slavery, American prison abolitionists seek to carry the same mantle of justice for their cause and to attract people to organize under its banner.¹⁴ Abolition is already a successful organizing strategy, bringing together activists and community members who might otherwise sit on the sidelines, precisely because it frames its narrative in terms that resonate with the lived experience of many.¹⁵ Mobilizing at the grassroots level is an effective strategy because these people know what is wrong with the status quo and can generate creative ideas for positive change based on the needs of their communities.¹⁶

Thus, even though abolition paints an incomplete picture of the causes of crime and offers a utopian policy response that is unlikely to be fully realized, it could nevertheless bring about positive political changes by being part of the societal conversation about crime and the harm caused by prisons. Indeed, we have already witnessed successful policy changes that came about in part because of organizing by abolitionists along with other reformers.¹⁷ These may be the seeds that ultimately grow into broader changes in public perception that support the abolitionist vision. Even if the public does not shift its views completely, or it takes decades or longer for that change to come, in the meantime, abolitionist arguments could help bring about beneficial changes that do not entrench or expand the carceral state. Moreover, the radical frame of abolition may succeed

14. Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 MINN. J.L. & INEQ. 211, 224 (2012) (noting that invoking the term abolition in the context of the death penalty brings connotations “that the decision to end the practice is morally compelled to the same extent as the duty to end slavery”).

15. In this way, abolitionists capture the “experience-informed critiques” of the carceral state in communities most affected by it that is too often absent from government policies. For a discussion of this dynamic, see Vesla Weaver et al., *Too Much Knowledge, Too Little Power: An Assessment of Political Knowledge in Highly Policed Communities*, 81 J. POLITICS 1153, 1164 (2019).

16. KABA, *supra* note 2, at 2 (“[A]bolition is a political vision, a structural analysis of oppression, and a practical organizing strategy.”); *id.* at 110.

17. Langer, *supra* note 2, at 56 (“U.S. prison abolitionists have earned various victories, including slowing down or stopping the construction of new prisons and reimagining conceptions of public and community safety . . .”).

over a longer time horizon in disrupting the entrenched idea that prisons bring about public safety.¹⁸

This, then, is the promising take on the rise of abolitionist rhetoric and organizing in American politics. It mobilizes people to fight injustices in the administration of punishment and opens the policy space for greater reforms. Perhaps it ultimately achieves its end goal of eliminating all prisons and other means of state detention, though it is hard to see how that vision materializes first in America, of all countries, when the abolitionist agenda has not made headway even in Nordic countries that start from a much more humane approach to prisons and punishment.¹⁹ But even if abolition does not achieve its stated outcomes in the United States, maybe it brings benefits along the way by educating the public and policymakers about the structural forces that lead to crime and the criminogenic effects and brutality of prison in America. Under this take, the rise of abolition as a movement is a net positive in the policy and political space, whether or not it achieves its ultimate goal of ending incarceration.

Increased calls for abolition could, however, prompt a different political and policy response that is less rosy if the goal is to minimize incarceration and the harms it causes. Instead of helping the cause of decarceration and improving the lives of those under the control and supervision of the state's punitive apparatus, there is the possibility that abolitionist arguments could, perversely, make things worse. This risk exists for two main reasons. First, the rhetoric of abolition may worry segments of the public who would otherwise support decarceration, perhaps even radical decarceration, but who are not prepared to rule out the possibility of incarceration entirely, at least not until there are satisfactory, concrete alternatives presented to them. These people may have particular cases in mind that they believe call for sufficiently severe punishments in response, and abolitionists have yet to offer alternatives to prison that will satisfy what most members of the public view as the just deserts for the most serious offenses. Many members of the public may not want

18. Michelle S. Phelps et al., *From Police Reform to Police Abolition? How Minneapolis Activists Fought to Make Black Lives Matter*, 26 MOBILIZATION: AN INT'L Q. 421, 424 (2021) (noting how radical frames “can succeed in changing the dominant discourse in the long-term . . .”); Julia Sudbury, *Reform or Abolition? Using Popular Mobilisations to Dismantle the ‘Prison-Industrial Complex’*, CRIM. JUST. MATTERS, Dec. 2015, at 17, 18 (noting that prison abolitionists “aim to transform popular consciousness, so that people can believe that a world without prisons is possible”).

19. Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 699 (2017) (reviewing MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015)) (“Of course, the Scandinavian abolitionist project has failed, but the prison movements succeeded at radically humanizing their countries’ prisons . . .”).

to associate with a movement that does not seem to sufficiently condemn those cases with adequate punishment. They may also be concerned that abolitionists do not have adequate deterrents or means of incapacitating people who will engage in harmful conduct. That fear, in turn, could fuel a backlash, not only to abolition but to criminal justice reform more generally, because politicians will take steps to avoid being associated with an abolitionist framing that is politically unpopular and thus bend over backward to show that they support tougher responses to crime. We have seen just such a dynamic with abolitionist calls around policing. There was great momentum after the protests in the wake of George Floyd's murder to fundamentally alter policing, and calls to Defund the Police built on that energy.²⁰ But that wave crested and crashed, with a blowback that has led to police departments seeing increased funding and state-level efforts to block local law enforcement budgets from ever being reduced below certain levels.²¹ President Biden singled out the Defund the Police movement as misguided in his first State of the Union address, saying we need to increase police funding.²² It is not hard to imagine a similar dynamic operating with respect to prisons if the idea of abolishing them enters more mainstream political thought. Politicians may respond to abolitionist calls by perversely clinging to and celebrating prisons in the same way we are seeing them recommit to policing in response to calls for defunding the police. Language and messaging matter in politics, and the abolition message may prove to be politically costly even if it is a valuable organizing strategy at the community and individual level. Politicians facing a broader electorate may be reluctant to associate with any criminal justice reform because of a worry that they will be linked with an abolitionist label that is toxic to their political future. Most voters want policy responses to crime that address the traditional retributive and utilitarian goals of punishment, and abolition does not have a satisfactory response to those concerns.

Unless and until abolitionists can provide adequate substitutes for prison that adequately serve those same retributive and utilitarian ends—goals that are more than transient political ideals but instead are fundamental societal demands—their vision of no incarceration will be rejected in the broader political sphere. Voters will worry that a change from the status quo will compromise public

20. See Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

21. See Zusha Elinson et al., *Cities Reverse Defunding the Police Amid Rising Crime*, WALL ST. J. (May 26, 2021, 5:58 PM), <https://www.wsj.com/articles/cities-reverse-defunding-the-police-amid-rising-crime-11622066307>.

22. Joseph R. Biden Jr., President, State of the Union Address (Mar. 1, 2022).

safety and a commitment to justice. The political ads write themselves: All a political opponent needs to do is find the most gruesome crime and argue that the abolitionist vision would allow the person who committed it to remain free. And for those who seek reform short of full abolition, political opponents will claim it is a slippery slope and those reformers are abolitionists in disguise. To be sure, reformers can try to distinguish themselves and their arguments from more extreme calls for abolition, but the associational risks cannot be ignored and may chill people who would otherwise support meaningful criminal justice reforms from doing so. At least in its current iteration, with few concrete alternatives to prison presented for the most serious harms or recidivists, it is hard to see abolition succeeding politically.

The second reason an abolitionist framing may ultimately produce more harm than good, as measured by its effect on incarceration, is that some abolitionists call for opposition to reforms that could bring benefits to those currently harmed by incarceration. Many abolitionists reject what they call “reformist reforms” that do not contribute to dismantling the existing legal order.²³ For example, some abolitionists reject calls to invest in improvements to prisons or to put in place greater staffing, even if doing so would improve the lives of currently incarcerated people, on the view that this additional funding ultimately expands the role of prisons in society and leads to incarceration being more entrenched overall.²⁴ Other abolitionists have rejected proposals that would release certain groups of incarcerated people—such as those serving offenses that do not involve violence—because of a concern that excluding others “entrenches the idea that anybody ‘deserves’ or ‘needs’ to be locked up.”²⁵ The question of whether to support a political compromise is always difficult because one has to balance the gains the reform brings with the risk that it will kill the prospects for bigger changes

23. See, e.g., CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS TO END IMPRISONMENT 1 (2021), https://criticalresistance.org/wp-content/uploads/2021/08/CR_abolitioniststeps_antiexpansion_2021_eng.pdf.

24. See *id.* However, this is not true of all abolitionists. Some argue that you must improve the conditions of those currently incarcerated, even if that is not consistent with the longer-term agenda of cutting prison budgets and eliminating them altogether. See Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1652 (2019).

25. See CRITICAL RESISTANCE, *supra* note 23, at 1; see also Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 314 (2018) (observing that those who adopt an “over” frame that focuses on reducing the number of people in prison as opposed to abolishing prison “risk playing into a dynamic by which ‘criminal justice reform’s first step—relief for nonviolent drug offenders—could easily become its last” (quoting JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 230 (2017))).

that could otherwise be possible without the compromise.²⁶ In that sense, abolitionists are engaging in the same strategic calculations that all political actors do. The end sought by abolitionists, however, is unlikely to materialize because they seek the total elimination of prisons and state detention,²⁷ which they concede would require enormous societal changes to obviate the harms that prisons are created to address.²⁸ Abolitionists are playing for a utopian endgame that is unlikely ever to occur and certainly not for generations. The abolitionist framing therefore runs the risk of sacrificing too many reforms in the here and now that would benefit people currently suffering from incarceration.²⁹ To be sure, this is not to say that abolitionists reject all reforms or that all abolitionists oppose so-called reformist reforms. But abolitionist opposition to proposals that benefit currently incarcerated people has already occurred and will undoubtedly continue. To the extent that opposition has an effect on the political fate of these proposals, people who would have benefited from release or improved prison conditions will pay the price for abolitionist idealism.

For some, prison abolition is a moral imperative, regardless of the policy or political consequences. They will therefore continue to call for the end of incarceration regardless of the policy or political consequences. They are not the target audience for this Article because it is not my aim to question views grounded in individual moral judgments.

This Article is targeted instead at those who care about the policy and political consequences of calling for an abolitionist agenda. If someone is interested in radical decarceration and minimizing suffering, they should care whether calls for abolition will ultimately further or frustrate those goals.³⁰ Indeed, many abolitionists adopt

26. For a discussion of these trade-offs in the context of capital punishment, see Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 418 (2002) (“[T]he choice to reform also carries the distinct possibility that it will normalize the underlying practice and avert the very critical gaze that gave rise to the reforming impulse, thus delaying, or even permanently preventing, full-scale abolition of capital punishment.”).

27. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156, 1164 (2015).

28. Frampton, *supra* note 2, at 2023–24.

29. Steiker & Steiker, *supra* note 26, at 431 (urging the rejection of some reforms to the death penalty but doing so on the explicit premise that “abolition is possible in the foreseeable future”).

30. See Langer, *supra* note 2, at 45 (noting “the urgent need to radically decarcerate the United States and to work towards humane, nondiscriminatory, and just policing, criminal processes, punishment, and societies in the United States and around the world” and exploring “the best ways to advance this agenda”).

the rhetoric of the movement precisely because they believe it will yield positive political benefits along those lines.³¹

The aim of this Article is thus to assess the likely political and policy consequences of an abolitionist framing. Is the rhetoric and social organizing power of an abolitionist goal beneficial because it will ultimately dislodge the narrative of prisons being effective at reducing harm and spark a successful political movement toward decarceration? Or does it bring more risks than benefits and therefore ultimately harm the end game of weaning America off its reliance on prisons, jails, and other forms of detention?

Part I begins by explaining how the abolition movement arose in response to a get-tough approach to crime and describes the different policy prescriptions that emerge from these competing understandings of the causes of criminality. A main goal of Part I is to synthesize the now large body of abolitionist scholarship and writing by activists to set out what its proponents advocate, while also acknowledging the variation of views among those who place themselves under the abolition mantle.

Part II then considers the policy and implementation shortcomings of the abolitionist framework. There are inherent flaws to abolition as a response to interpersonal harm that make it politically vulnerable not just in the short-term but over the long haul as well because the issues are endemic to the human condition and have presented themselves across time and societies.

Part III then turns to the question of what those policy shortcomings likely mean for the future of abolition as a political movement. In answering that latter question, Part III draws lessons from America's most recent abolition movement—the movement to close state mental hospitals and provide community care to people with mental health needs, known as deinstitutionalization. The deinstitutionalization movement had much in common with today's prison abolition movement: It sought to close outdated institutions that were causing more harm than good and replace them with community care and social supports.³² The deinstitutionalization movement shows why the positive agenda of prison abolitionists—to provide people with basic needs—faces the longest of odds. It was one thing to amass a coalition to further the negative agenda of closing state mental hospitals because that attracted fiscal conservatives interested in smaller government and reduced spending.³³ The positive agenda, however, proved entirely too difficult to accomplish

31. See *infra* notes 173–80 and accompanying text.

32. Máximo Langer drew the analogy between penal abolition and deinstitutionalization in his response to Dorothy Roberts' Foreword. Langer, *supra* note 2, at 66–67.

33. E. FULLER TORREY ET AL., TREATMENT ADVOC. CTR. & NAT'L SHERIFFS' ASS'N, MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 2, 13 (2010).

because the coalition broke down. The end result was a public policy disaster. While thousands of state facilities closed, those that remained continued to exist in deplorable conditions.³⁴ Because the goal was to remove people from state hospitals,³⁵ advocates and policymakers did not invest time or resources into thinking about how to improve conditions within state hospitals for the people who could not be released. The majority of people released from state hospitals found no support in the community, leaving them unhoused and leading many of them to become entangled with criminal legal systems.³⁶ Instead of solving the problem of state asylums, the movement just transferred these problems and, in some ways, made them worse. It is a cautionary tale with important lessons for people who seek large-scale decarceration.

I. THE ROOTS OF CRIMINALITY AND THE RESPONSES

If you spend any time in America's jails and prisons, some of the structural forces that propel people into entanglement with criminal legal systems are immediately apparent: the disproportionately large number of people of color among the populations, the visible manifestations of physical and mental illness, and horrible conditions of confinement that make it difficult for people to readjust to living in their communities once they are released.³⁷ If you spend time talking to people who are incarcerated, you learn that most of them come from impoverished backgrounds and family dysfunction, suffer from poor health, have had spotty work records, and have received minimal education.³⁸

These broad structural themes rarely make an appearance in the tough-on-crime narrative that has dominated American politics for decades. The people who push for ever-harsher penalties are typically blind to, or unwilling to recognize, the powerful structural forces that

34. Cf. Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 887–89 (2009) (noting the deplorable conditions in correctional facilities).

35. Risdon N. Slate, *Deinstitutionalization, Criminalization of Mental Illness, and the Principle of Therapeutic Jurisprudence*, 26 S. CAL. INTERDISC. L.J. 341, 342 (2017).

36. See *id.* at 347; see also *id.* at 342 (The “not in my backyard” . . . mentality prevailed” when the federal government attempted to establish Community Mental Health Centers. “[C]itizens enacted legal barriers and municipal ordinances to halt the establishment of the [Health Centers] in their neighborhoods.”).

37. See Dylan Rodriguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1585–86 (2019); Pamela M. Diamond et al., *The Prevalence of Mental Illness in Prison*, 29 ADMIN. & POL’Y IN MENTAL HEALTH 21, 36 (2001); Dolovich, *supra* note 34, at 887–89.

38. See BRUCE WESTERN, *HOMEWARD: LIFE IN THE YEAR AFTER PRISON* 63–64, 83 (2018).

lead to most criminal wrongdoing and see only individuals making choices to do harm to others for their own selfish ends.³⁹ This frame fuels mass incarceration because the public wants to prevent these individuals from hurting others and seeks a suitably harsh response as a measure of retributive justice.⁴⁰

The prison abolitionist movement has emerged in direct opposition to the punitiveness that has dominated American crime policy. Abolitionists place the focus on the structural forces that lead to criminal offending, and they argue that prison itself is one of them.⁴¹ Their solution to the crime problem, in contrast to the get-tough crowd, is to tackle the underlying structural forces that lead people to commit crimes in the first place.⁴² They argue that addressing those societal failings will ultimately make the need for prisons obsolete.⁴³ To the extent some residual harms remain, they propose alternative mechanisms for addressing them other than prisons because they see the downsides of prisons as outweighing any benefits.

This Part explores these competing frameworks for understanding criminality and the policy proposals that arise from them.

A. *The Dominant Narrative of the Bad Actor and the Tough-on-Crime Response*

Beginning in the 1970s and continuing unabated until relatively recently, America's approach to criminal punishment has largely been the more, the better.⁴⁴ This philosophy is what vaulted the

39. Dolovich, *supra* note 6, at 264–65 (noting how America's harsh approach comes from "a radically individualist" view "that locates the causes of crime exclusively in the free and conscious choice of the offenders" and society is "absolved of any responsibility for either the crime itself (since it is the product of individual choice) or the punishment (because it is demanded by the individual's own criminal conduct)."). This is the fundamental attribution error—the "tendency to explain observed behavior by reference to internal dispositional factors while ignoring or minimizing the impact of situational variables[.]" Philip G. Zimbardo, *A Situationist Perspective on the Psychology of Evil: Understanding How Good People Are Transformed into Perpetrators*, in *THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL* 21, 24 (Arthur G. Miller, ed., 2004).

40. To be sure, populist politics often lead to excessively punitive responses that are inconsistent with moral desert, and therefore, retributive justice demands that punishment be proportional.

41. Kushner, *supra* note 2.

42. Roberts, *supra* note 2, at 6–9.

43. *Id.* at 43.

44. The past decade or so has seen a shift, with an increasing number of voters and politicians recognizing that mass incarceration and overcriminalization have gone too far. Thus, we have started to see arrest rates decline and some sentencing reductions. Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1126

United States into the top spot as the world's leading incarcerator, accounting for almost a quarter of the globe's incarcerated population.⁴⁵ The brunt of this punishment falls on poor people and disproportionately affects people of color, especially Black people.⁴⁶ Before the 1970s, America resembled other western democracies in its approach to crime and punishment.⁴⁷ But in response to rising homicide rates, social unrest, and the resulting public unease, politicians turned to increased policing and incarceration as the answer, instead of an approach that addressed the root causes of crime.⁴⁸ The policymakers taking this approach have not been blind to structural forces; they just have chosen not to address them directly. Instead, they have raised the penalties for crime because of the acknowledgment that individuals living under tough social circumstances will face such a strong pull toward crime. The higher penalties are meant to deter people from giving in to that temptation and to incapacitate those who could not resist the pull.

The political playbook that supports the strategy of higher penalties instead of attacking root causes relies on narratives of individual evildoers choosing their lives of crime.⁴⁹ Starting in the 1970s, jurisdictions blamed the increase in homicides, drug use, gangs, and just about everything else on "bad people."⁵⁰ There is rarely any deeper analysis of structural deprivation that drives people to drug use or crime. Almost all coverage of crimes in the media and in fictional accounts ignores the fact that most people who are arrested and convicted for crimes are themselves crime survivors

(2021). Some legislative reforms rolling back some of the harshest laws have passed, and prosecutors running on a decarceral agenda have won elections. RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 12–13, 155–59 (2019).

45. Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POLY INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html>.

46. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POLY INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> (slideshow six showing the demographics of the prison population, including the fact that Black people make up 13 percent of the population but 38 percent of the incarcerated population).

47. FRANKLIN E. ZIMRING, *THE INSIDIOUS MOMENTUM OF AMERICAN MASS INCARCERATION* 5 (2020).

48. See RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 116 (2007).

49. See Rachel E. Barkow, *Making Connections with The Wire: Telling the Stories Behind the Statistics*, 2018 U. CHI. LEGAL F. 25, 29–31; Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 829–30, 845–50 (2000). For the use of this framing throughout American history, see KAREN HALTTUNEN, *MURDER MOST FOUL: THE KILLER AND THE AMERICAN GOTHIC IMAGINATION* 6 (1998).

50. GILMORE, *supra* note 48, at 109.

and that they face enormous disadvantages due to poverty, lack of education and employment opportunities, and various forms of societal bias.⁵¹ Instead, the discussion around crime focuses on the most gruesome crimes, portrays those crimes as the product of evil people, and then policies follow from the assumption that this applies to all criminal offending.⁵² The 1994 Crime Bill,⁵³ for example, had “heinous high-profile crimes as its template” and produced legislation filled with “measures to eradicate or incapacitate bad men.”⁵⁴ This frame is seen time and again, across a range of crime types and in jurisdictions throughout America, as the impetus for legislation and penalties.

The bad actor lens also explains why the sky-high recidivism rate of people who have been imprisoned is seen as their individual failure,⁵⁵ not structural forces that remain uncorrected or the criminogenic effects of prison itself. “People convicted of repeated minor crimes are not seen as social products born of poverty and neglect, of hyper-criminalization and policing. For such people there is no help, no rehabilitation, only incapacitation.”⁵⁶ The fact that someone’s time in prison seems to make things worse is ignored because everything is seen as a matter of personal responsibility and individual choice, so no one looks to the role prisons and jails play in making things worse.⁵⁷

The only remedy under this vision is changing the individual. But all too often, under the dominant narrative, these individuals are viewed as irredeemable, even though most criminal offending occurs during adolescence and young adulthood and most people age out of antisocial behavior.⁵⁸ In the popular narrative, however, we have “career criminals,” “super predators,” and “thugs.” The social investments go to law enforcement, to catch these bad individuals, and to prisons, to incapacitate them. Investments in social programs for poor people plummeted as police, prison, and prosecution budgets

51. For a discussion of this general pattern and the way in which the show *The Wire* was a notable exception, see Barkow, *supra* note 49, at 26–27.

52. BARKOW, *supra* note 44, at 106–10.

53. Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 136.

54. JOSHUA DUBLER & VINCENT W. LLOYD, *BREAK EVERY YOKE: RELIGION, JUSTICE, AND THE ABOLITION OF PRISONS* 91 (2020).

55. See MARIEL ALPER ET AL., U.S. DEP’T OF JUST., 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014) 1 (2018), <https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf> (finding that 83 percent of the people released from the sample of thirty state prisons in 2005 were arrested at least once within the nine-year period after their release).

56. DUBLER & LLOYD, *supra* note 54, at 91.

57. BARKOW, *supra* note 44, at 72.

58. See Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCH. REV. 674, 674 (1993).

skyrocketed.⁵⁹ When crime rises in spite of the huge investments in the punitive approach, and prisons release individuals who recidivate at high rates,⁶⁰ the response has not been to second-guess the get-tough approach and its limits. Instead of looking to fix the structural root causes of criminal offending and considering that there may be a point of diminishing returns with harsh responses or that prisons themselves cause crime, policymakers double down on punitive approaches to deter and incapacitate.⁶¹

The punitive response is also viewed by the public as justified as a retributive matter. “Do the crime, do the time” is the response to almost any criminal offense, though the reality of American politics means there is often little concern for why the crime was committed or a second thought as to whether “time” in prison is the appropriate response (or, if it is, if the length is proportionate as a matter of true retributive justice based on the perpetrator’s moral culpability).⁶² In fact, punishments are frequently not retributively just because they are grossly excessive to the offense and offender, but that goes uncorrected because punishments are set for the narratives that dominate the news and public imagination as opposed to the facts of actual cases.

This bad actor narrative has characterized American criminal justice policy for decades and led to mass incarceration. In the past decade or so, there has been some loosening, as the strength of the racial justice movement, fiscal pressures, the personal impact of mass incarceration and criminalization on millions of people, and a burgeoning awareness of the ineffectiveness of this approach for public safety have sparked some changes. But those changes have been modest so far, with the biggest shifts coming from institutions that are more insulated from the direct politics of crime.⁶³ More

59. See BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 40–44 (2011); LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* 1–3 (2009).

60. See ALPER ET AL., *supra* note 55, at 1.

61. Punishment deters, see Robert Apel & Daniel S. Nagin, *General Deterrence*, in *THE OXFORD HANDBOOK OF CRIME AND CRIMINAL JUSTICE* 179, 179 (Michael Tonry ed., 2011), and incapacitation reduces harms as well, see Shawn D. Bushway, *Incapacitation*, in [4 PUNISHMENT, INCARCERATION, AND RELEASE] *REFORMING CRIMINAL JUSTICE* 37, 37 (Erik Luna ed., 2017). But those benefits have to be weighed against the downsides of longer sentences and the difficulty they impose when people seek to reenter society. BARKOW, *supra* note 44, at 42–49.

62. For a discussion of the ways in which both the definitions of crimes are overbroad and the “time” attached to them fails to provide proportionate punishment, see BARKOW, *supra* note 44, at 17–37.

63. One example is the “Drugs Minus Two Amendment” passed by the US Sentencing Commission in 2014, which reduced the federal Sentencing Guidelines for drug offenses. U.S. SENT’G GUIDELINES MANUAL app. C, amends. 782, 788 (U.S. SENT’G COMM’N Supp. 2014). The amendment was given

modest changes have emerged directly from the political process, but they have focused mainly on lower-level offenses or offenses not characterized as violent.⁶⁴ Moreover, even as some reforms lessening sanctions have passed, the push for more severe punishments has persisted, with other crimes seeing increases in penalties, particularly in the wake of a particularly heinous crime.⁶⁵

B. *The Structural Forces Frame and Abolition*

While the get-tough crowd frames the problem of crime almost exclusively at the individual level, abolitionists (as well as many others who seek to break away from the bad actor narrative) point to critical structural forces that drive crime, such as poverty, racism, and distrust of the state because of excessive policing and punishment.⁶⁶ The abolitionist narrative focuses on the fact that we have “entire communities in shambles” because of racial inequalities and global capitalism.⁶⁷ As Angela Davis notes: “Huge numbers of people lose jobs and prospects for future jobs. Because the economic base of these communities is destroyed, education and other surviving social services are profoundly affected. This process turns the men, women, and children who live in these damaged communities into perfect candidates for prison.”⁶⁸

Dan Berger similarly explains that “[p]olice and prisons have expanded in both quantity and meanness over the last half century to

retroactive effect, and since then, more than 31,000 retroactivity motions have been granted, leading to an estimated average sentence reduction of 17 percent, or roughly 25 months. U.S. SENT’G COMM’N, RETROACTIVITY & RECIDIVISM: THE DRUGS MINUS TWO AMENDMENT 1 (2020). State sentencing commissions have also had success reducing sentences. See, e.g., MINN. SENT’G GUIDELINES COMM’N, REPORT TO THE LEGISLATURE 3 (2016) (reducing the severity levels for first-degree and second-degree drug possession crimes in Minnesota). For a general discussion of state commission structures that have proven most successful, see Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005). Another example is the reduction of California’s prison population from *Brown v. Plata*, 563 U.S. 493, 502 (2011). See Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 184–91 (2013) (providing an overview of California’s post-*Plata* reforms—collectively termed “realignment”—and their decarceral effects); MAGNUS LOFSTROM & BRANDON MARTIN, PUB. POL’Y INST. OF CAL., PUBLIC SAFETY REALIGNMENT: IMPACTS SO FAR 5 fig. 4 (2015), https://www.ppic.org/wp-content/uploads/content/pubs/report/R_915MLR.pdf (showing a decline in the overall incarcerated population in California after realignment).

64. BARKOW, *supra* note 44, 12–13.

65. *Id.*

66. See KABA, *supra* note 2, at 24 (“[A] system that never addresses the *why* behind a harm never actually contains the harm itself.”); BARKOW, *supra* note 44, at 89–90.

67. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 16 (2003).

68. *Id.*

enable the brutal management of (potentially) rebellious workers made obsolete by the increasing globalization of American capitalism.”⁶⁹ Ruth Wilson Gilmore further observes,

For Black people looking out from the jail-like complex of [a public housing complex], the landscape of legitimate work was bleak: an expanse of big, empty factories, minimum-wage service jobs in retail or home health care[;] unreliable, slow, and expensive public transportation[;] and bad schools leading nowhere in terms of education and skills[.]⁷⁰

Mariame Kaba notes that “the prison system did not see its most massive population surge until the 1980s, when deindustrialization created the need for dungeon economies to replace lost jobs, and a backlash against the Civil Rights Movement and other social gains by Black people propelled heightened efforts at social control.”⁷¹ Prison, in the words of Dorothy Roberts, is “the state’s response to social crises produced by racial capitalism, such as unemployment and unhealthy segregated housing, and to the rebellions waged by marginalized people who suffer most from these conditions.”⁷² Those “social crises” manifest themselves in crimes, some of which, abolitionists note, have been defined with the goal of criminalizing these communities.⁷³ “Communities whose needs are met are not rife with crimes of desperation, whereas struggling communities are[.]”⁷⁴ Abolitionists note the historical roots of this dynamic, explaining how, after the emancipation of enslaved people following the Civil War, many free Black people had to steal to survive.⁷⁵ Today, economic hardship likewise creates conditions that lead to greater criminal activity.

A look at the people in prison confirms the abolitionist claims about the relationship between crime and societal neglect. Incarcerated people come predominantly from urban neighborhoods of concentrated poverty, homelessness, unemployment, widespread

69. Berger, *supra* note 1.

70. GILMORE, *supra* note 48, at 200. For an argument that there should be a federal right to education as part of the effort to create a “life-affirming institution[]” that will help “to destroy the carceral infrastructure,” see Helen Hershkoff & Nathan Yaffe, *Unequal Liberty and a Right to Education*, 43 N.C. Cent. L. Rev. 1, 3 (2020).

71. KABA, *supra* note 2, at 28.

72. Roberts, *supra* note 2, at 16.

73. Abolitionists focus, for example, on the Black Codes, passed in the wake of emancipation, that criminalized things like vagrancy, loitering, and breach of contract to cast a wide net for incarcerating Black people. *Id.* at 30–31, 34. More recent examples of such racially targeted criminalization includes the harsh response to the use and distribution of crack cocaine. *See id.* at 16.

74. KABA, *supra* note 2, at 29.

75. DAVIS, *supra* note 67, at 33.

addiction, and racial segregation.⁷⁶ The neglect of these neighborhoods from the 1940s to the 1960s sparked protests and violence in these communities during the period from 1963 to 1968,⁷⁷ which in turn sparked the incarceration and tough-on-crime approach that dominated subsequent decades. As Patrick Sharkey and Alisabeth Marsteller put it, “[i]nstead of a policy regime based on justice and investment” in these communities, “the nation chose a regime based on abandonment and punishment.”⁷⁸ The people subject to this punishment are disproportionately people of color.⁷⁹ They typically lack even a high school degree, and many are functionally illiterate.⁸⁰ Most of the people who commit crimes are themselves people who have survived criminal conduct.⁸¹ Kaba notes that roughly 70 percent of the people incarcerated in California were formerly in foster care.⁸² As Ruth Wilson Gilmore summarizes it, “as a class,” the people in prison “are deindustrialized cities’ working or workless poor.”⁸³

Because abolitionists see the relationship between structural forces and crime, they have both a positive and negative agenda. The label they use focuses only on what they seek to end, but their positive agenda is just as important. “Abolition means not just the closing of prisons but the presence, instead, of vital systems of support that many communities lack.”⁸⁴ Indeed, the positive and negative goals are interdependent. The key to abolishing prisons is to address the “social, economic, and political conditions” that create crimes in the first place.⁸⁵ The next two Subparts describe both the negative and

76. See GILMORE, *supra* note 48, at 7 (noting that most people in California’s prisons “come from the state’s urban cores”); Patrick Sharkey & Alisabeth Marsteller, *Neighborhood Inequality and Violence in Chicago, 1965–2020*, 89 U. CHI. L. REV. 349, 349, 353 (2022) (describing the structural neglect in urban neighborhoods and the relationship to crime).

77. See Sharkey & Marsteller, *supra* note 76, at 353.

78. *Id.* at 356. For a look at this dynamic as it applied to California, see GILMORE, *supra* note 48, at 30–86.

79. Rodriguez, *supra* note 37, at 1585 (listing the demographics of those imprisoned).

80. See GILMORE, *supra* note 48, at 111 (noting that in California, fewer than 45 percent of the people in prison graduated from high school and that 25 percent are functionally illiterate).

81. DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 89 (2019) (observing that most people who commit crimes are themselves survivors of crimes).

82. KABA, *supra* note 2, at 28.

83. GILMORE, *supra* note 48, at 7.

84. Kushner, *supra* note 2; see also Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1615 (2019) (“Justice for abolitionists is an integrated endeavor to prevent harm, intervene in harm, obtain reparations, and transform the conditions in which we live.”).

85. Roberts, *supra* note 2, at 43.

positive halves of the abolitionist agenda to set the stage for considering the political viability of each.

1. *The Negative Agenda: The Abolition of What?*

It may seem like everything you need to know about the negative agenda of prison abolition is in the label itself; self-described prison abolitionists want to abolish prisons. But it turns out this language means different things to different people who identify as prison abolitionists.⁸⁶ First, consider the term “abolition” or what we might think of as the *scope* of the project. The use of the term is a deliberate invocation of the movement to abolish slavery because activists want to draw parallels between slavery and the prison as instruments of racial oppression, social control, and human rights abuses.⁸⁷ The plain meaning of the word abolition means the complete end of something.⁸⁸ One would therefore assume that prison abolitionists want the official end of prisons just as abolitionists wanted the complete demise of slavery. And that is certainly true for many of the people who identify with that label.

Others who label themselves as abolitionists, however, do not mean total abolition. While they use the term for the connotations associated with the movement against slavery, they concede there may be a role for some form of incarceration for protection against “the dangerous few.”⁸⁹ Ruth Wilson Gilmore says “[t]he ‘terrible few’

86. *Id.* at 6 (“It is hard to pin down what prison abolition means.”); James Forman, Jr., Comments Offered at Criminal Justice Roundtable, Columbia University (May 2021), in SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 57, 57–58 (11th ed. 2022) (questioning where the dividing line is between abolitionists and reformers and asking whether it is about a commitment to reduce prison by a certain amount or by a certain deadline or the function of the criminal system).

87. CRITICAL RESISTANCE, WHAT IS ABOLITION? 1 (2012), <http://criticalresistance.org/wp-content/uploads/2012/06/What-is-Abolition.pdf> (“We take the name ‘abolitionist’ purposefully from those who called for the abolition of slavery in the 1800s.”).

88. See *Abolition*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1995).

89. McLeod, *supra* note 27, at 1168 (observing that some abolitionists accept that “the dangerous few” may remain even after the social changes abolitionists urge and they may require restraint); Mirko Bagaric et al., *Prison Abolition: From Naïve Idealism to Technological Pragmatism*, 111 J. CRIM. L. & CRIMINOLOGY 351, 355 (2021) (urging “a reduction of at least 90% in prison population,” which they call the “substantive, as opposed to total, abolition of prisons”); Brentin Mock, *Life After ‘the New Jim Crow’*, BLOOMBERG (Sept. 30, 2016, 6:19 PM), <https://www.bloomberg.com/news/articles/2016-09-30/mass-incarceration-can-t-be-fixed-by-legislation-alone> (quoting Michelle Alexander as referring to herself as “a prison abolitionist, in the sense that I think we will eventually end the prisons as we know them” and then adding “[t]hat doesn’t mean that I don’t think we don’t need to remove people from the community who

are a statistically insignificant and socially unpredictable handful of the planet's humans whose psychopathic actions are the stuff of folktales, tabloids (including the evening news and reality television), and emergency legislation."⁹⁰ The abolitionists who are open to the idea of detention for some small segment are not precise about how many people or under what circumstances that segment should be detained. Instead, the abolitionists who make some allowance for limited detention usually indicate this willingness only by using qualifying language that suggests they recognize there may be this small residual group of people who need to be restrained in some way, but without much elaboration. Davis, for example, urges us to "explor[e] new terrains of justice, where the prison no longer serves as our *major* anchor."⁹¹ She envisions the creation of new institutions to address issues like healthcare needs and education that will "start to crowd out the prison so that it would inhabit *increasingly smaller* areas of our social and psychic landscape."⁹² In this telling, prison does not disappear, but it takes on a far less prominent role.

If some abolitionists do not endorse the complete end of prisons, why do they use the term at all? Why not instead use a label that more closely captures the idea of criminal law minimalism, as Máximo Langer has suggested?⁹³ Or, emphasize the positive aspects of the agenda and the investments in communities?⁹⁴ For some, the choice to use the term abolition appears to be a deliberate strategy, not only to evoke the comparison to the abolition of slavery but also to make sure that the scope of the problem with prisons is in full view and that there is no settling for modest reform strategies as sufficient.⁹⁵ Having abolition as the end goal, even if not attainable, serves as an orienting device for them. But for the group of self-identified abolitionists who are not, in fact, absolutists, it does not appear that they would be upset if there were a small residual group of people who required detention if all the other goals of the movement were satisfied. The key for them, though, is to avoid getting into a debate about the right size of a prison system because

pose a serious threat or who cause serious harm for some period of time"). It may be more accurate to label these individuals criminal law minimalists as opposed to abolitionists. Langer, *supra* note 2, at 58. For a discussion of the different abolitionist responses to the question of the dangerous few, see Frampton, *supra* note 2, at 2019–31.

90. GILMORE, *supra* note 48, at 15.

91. DAVIS, *supra* note 67, at 21 (emphasis added).

92. *Id.* at 108 (emphasis added).

93. Langer, *supra* note 2, at 58.

94. For example, Phillip Atiba Goff notes that candidates using "the message of 'strong communities keeping everyone safe' open[s] the minds of Republican voters, Democratic voters and many in between." Phillip Atiba Goff, *The Root Cause of Violent Crime Is Not What We Think It Is*, N.Y. TIMES (Dec. 12, 2022), <https://www.nytimes.com/2022/12/12/opinion/crime-policies-cities.html>.

95. See DAVIS, *supra* note 67, at 20.

the abolitionists want the default to be none and for any liberty deprivation to be supported by extraordinary reasons.

The term “abolition” is not the only one that is subject to ambiguity. There is also the question of *what* abolitionists want to abolish, or what we might think of as the *site* of the abolitionist critique. Some talk about the target as “carceral state violence,” which typically includes prisons, jails, detention centers, and, in the modern abolition movement, now also includes police and forms of surveillance.⁹⁶ Here, too, though, others use qualifying language that suggests some wiggle room. The Movement for Black Lives, for example, calls for “an end to all jails, prisons, immigration detention, youth detention [a]nd civil commitment facilities *as we know them*,”⁹⁷ which leads to an inference they could exist in some other form and a focus could be on improving conditions in existing carceral spaces. The Movement for Black Lives activists also list the kinds of attributes of prison they find most disturbing: the use of solitary confinement, shackling during pregnancy, the failure to provide adequate health care, and insufficient measures to address the needs of the LGBTQIA+ community.⁹⁸ On this reading, their call to abolish “prisons as we know them” seems more like a call for reform than a complete dismantling.⁹⁹ However, other abolitionists take a more radical view. They want to see the end of all facilities with forced confinement¹⁰⁰ and to stop the “minute control of prisoners’ bodies and most intimate experiences, profound depersonalization, and institutional dynamics that tend strongly toward violence.”¹⁰¹ That is a broader take that suggests no existing facility would pass muster. But are they opposed to any form of detention in any kind of structure? That is a harder question to answer. Angela Davis’s book, *Are Prisons Obsolete?*, a leading influence in the abolition movement, does not specify.¹⁰² She is opposed to “sequestering people in dreadful places designed to separate them from their communities and families.”¹⁰³ How much work is “dreadful” doing in that sentence? Could we still have forms of incapacitation if they were more humane? Or is any facility that restricts someone’s freedom of movement

96. Rodriguez, *supra* note 37, at 1576; KABA, *supra* note 2, at 133.

97. *End the War on Black People*, MOVEMENT FOR BLACK LIVES (Aug. 31, 2019, 1:21 PM) (emphasis added), <https://m4bl.org/end-the-war-on-black-people/> [<https://perma.cc/PPA4-VY43>].

98. *Id.*

99. *Id.*

100. See, e.g., Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1025 (2021) (“Perhaps the central tenet of a prison abolitionist ethic is the ‘rejection of the moral legitimacy of confining people in cages.’” (quoting McLeod, *supra* note 27, at 1164)).

101. McLeod, *supra* note 27, at 1184; see also *id.* at 1162 (noting abolitionists are “committed to ending the practice of confining people in cages”).

102. DAVIS, *supra* note 67.

103. *Id.* at 10.

“dreadful” by definition? Allegra McLeod, another leading abolitionist scholar, states that abolition means “eliminating the control of human beings through imminently threatened police use of violent force.”¹⁰⁴ But McLeod and other abolitionists acknowledge “that there may be, in the end, some people who are so dangerous to others that they cannot live safely among us,” thereby leaving space for some control through the use of force.¹⁰⁵ For her part, McLeod sidesteps what this means in practice by saying a “complete and final resolution” of what to do with them should not “interfere with serious engagement with abolitionist analysis, given that there are many millions of the one in thirty five American adults presently living under criminal supervision who fall outside any such small category that may exist.”¹⁰⁶

Other abolitionists stake out an even more extreme claim that any kind of institutionalization is wrong, even forms not traditionally regarded as “carceral.” For some in the abolitionist community, these include hospitals, psychiatric facilities, and the broader mental health system at large. One activist argues that:

The mental “health” system is fundamentally carceral, meaning that it is one of the many kindred systems that function to contain and surveil people, take away their locus of control, isolate them from their communities, and limit their freedom. . . . Abolition means that all the cages come down, including those that function under the guise of psychiatric “care.”¹⁰⁷

It is difficult to ascertain just how widely held this view is within the larger movement. Some abolitionists might be deliberately vague in addressing what kind of incapacitation framework may need to remain to avoid creating another instrument of social control that expands in the same way prison has. Explicitly accepting a different structure than the prison to isolate people from communities would perform the same “ideological work that the prison performs—it relieves us of the responsibility of seriously engaging with the problems of our society, especially . . . racism and, increasingly, global

104. McLeod, *supra* note 27, at 1162.

105. *Id.* at 1168.

106. *Id.*

107. Stella Akua Mensah, *Abolition Must Include Psychiatry*, DISABILITY VISIBILITY PROJECT (July 22, 2020), <https://disabilityvisibilityproject.com/2020/07/22/abolition-must-include-psychiatry/>; see also *Reforms to Avoid*, THE ABOLITION & DISABILITY JUST. COLLECTIVE, <https://abolitionanddisabilityjustice.com/reforms-to-oppose/> (last visited Feb. 2, 2023) (making a similar claim and noting opposition to reforms that would “replace imprisonment with other forms of incarceration, such as in a group home, nursing home, drug treatment facility, or hospital”).

capitalism.”¹⁰⁸ That helps explain why abolitionists may not want to engage in a discussion of what forms of restricted housing or settings would still be necessary for those who cannot safely exist among other people or for whom no measures short of incapacitation stop them from recidivating. To accept such a space creates the risk that the prison would be replaced by this new form, which would end up serving the same social control function and likely exhibit the same racial biases.¹⁰⁹

The specific negative agenda thus remains murky despite what appears to be the plain text of the movement’s moniker. But the overarching theme is that prisons are not worth keeping because they fail to keep us safe from crime and instead act as instruments of social control to repress people facing structural biases and hardship.¹¹⁰

2. *The Positive Agenda: Creating a Crime-Free Society*

The abolitionist label is murky in a second key respect. While its plain text focuses on a negative, its ultimate goal is a positive one: “to build a society that has no need for prisons.”¹¹¹ To embrace an abolitionist ethic is, according to its adherents, to share “a vision of a restructured society in a world where we have everything we need: food, shelter, education, health, art, beauty, clean water, and more things that are foundational to our personal and community safety.”¹¹² The abolitionist policy playbook is therefore devoted to addressing what abolitionists see as the societal ills that lead people to harm one another. Some of these measures would require financial investments in education, housing, health care, and the like. Abolitionists point out that the decline in manufacturing jobs created a large number of unemployed and underemployed people who turned to criminal activity.¹¹³ Instead of reshaping America’s political economy, America used prison as a means of social control of this population.¹¹⁴ Abolitionists want to shift this approach and make massive investments in the social welfare of people displaced by capitalism.

The abolitionists are hardly alone in proposing this kind of investment as the best way to prevent crime. Even early reformers such as Jeremy Bentham focused on crime prevention, though they

108. DAVIS, *supra* note 67, at 16.

109. See McLeod, *supra* note 27, at 1184.

110. See Roberts, *supra* note 2, at 44.

111. *Id.* at 6.

112. KABA, *supra* note 2, at 19.

113. See *id.* at 28.

114. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 12–13 (2001).

used the threat of punishment as the primary tactic.¹¹⁵ Most people focused on criminal justice reform today agree preventing crime in the first place is a key public safety strategy and therefore argue for social investments. What sets the abolitionists apart is that they need these structural investments not merely to reduce crime but to end it (or at least get close to ending it) so that prisons become obsolete. Abolitionists concede that the complete elimination of crime requires more than just a monumental financial investment in schools, housing, and job training—a heavy lift in its own right.¹¹⁶

The abolitionist paradigm requires a complete dismantling of core aspects of American society as it currently exists. Abolitionists believe “we can imagine and build a more humane and democratic society that no longer relies on caging people to meet human needs and solve . . . problems.”¹¹⁷ Thus, abolitionists also call for the end of borders,¹¹⁸ racism, patriarchy, militarism, ableism, imperialism, colonialism,¹¹⁹ capitalism, and “the wage system.”¹²⁰

The shift in the economy is critical in the abolitionist frame because much of policing is about protecting wealth and property.¹²¹ That is why the call is not just for a basic social safety net, but also the elimination of capitalism and the fostering of a communal sense of responsibility for each other’s well-being and needs. According to abolitionists, a society of unequal wealth will mean some people will have more than others, which creates circumstances for envy and

115. JEREMY BENTHAM, *Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM 365, 396 (John Bowring ed., 1843) (“General prevention ought to be the chief end of punishment, as it is its real justification.”).

116. See Stahly-Butts & Akbar, *supra* note 9, at 1557–58.

117. Roberts, *supra* note 2, at 7–8.

118. Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1691 (2019).

119. Roberts, *supra* note 2, at 7.

120. *Manifesto for Abolition*, *supra* note 5.

121. Some abolitionists contend that Marx’s theories accurately describe the inextricable link between prison and capitalism, such that one cannot be abolished without the other. See, e.g., GILMORE, *supra* note 48, at 70–72 (connecting Marx’s account of capital’s need to reduce surplus population and the rise of the imprisonment rates in California). See generally, JACKIE WANG, CARCERAL CAPITALISM 99–150 (2018) (charting the rise of the debt economy through racial capitalism). However, historical examples of societies’ embrace of Marxist tenets are rife with carceral violence and exploitation. See, e.g., Mao-hong Lin, *Carceral Strategy and the Social Structure in Maoist China*, 38 UCLA PAC. BASIN L.J. 33, 42–43 (2021) (describing the shift from labor reform and reeducation camps to de facto prisons during the early communist years of Mao’s China). Attempts to put Marxism into practice have accelerated mass violence. See, e.g., BENJAMIN A. VALENTINO, FINAL SOLUTIONS: MASS KILLING AND GENOCIDE IN THE 20TH CENTURY, 91–97 (2004) (tracing mass killings under communist regimes in the Soviet Union, China, and Cambodia to rapid social transformation and dictatorial leaders’ perception of opposition).

incentives to steal.¹²² Moreover, capitalism, in their view, “is antithetical to guaranteeing everyone the income, housing, healthcare, and education required for a society without the stark inequalities in well-being that fuel the prison-industrial complex.”¹²³ Thus, the abolitionist view calls for communism or socialism as the governing model so that sufficient basic needs can be met through government provision.¹²⁴ They advocate land redistribution and financial restitution for past injustices.¹²⁵

Although they do not like to belabor it or get into detail about why people might still harm others when society is reconstructed along the dramatic lines they argue—a point we will return to in Part II—abolitionists acknowledge there might still be some interpersonal harm that remains even under the radical shifts in society they seek.¹²⁶ For any residual problems that continue, they propose models of restorative and transformative justice to address them.¹²⁷ The idea is to create community mechanisms to address wrongdoing where it still occurs, get at the specific root causes, and “create a culture that enables people to actually take accountability for violence and harm.”¹²⁸ They point to the reparations model with “five elements—repair, restoration, acknowledgment, cessation, and nonrepetition.”¹²⁹ The devil will be in the details on how this plays out with different cases because that will depend on the

122. See Stahly-Butts & Akbar, *supra* note 9, at 1551 n.24.

123. Roberts, *supra* note 2, at 47. It is worth noting that other countries maintain capitalist systems while providing social services. See, e.g., Nitin Sapra, *The Origins and Role of the Penitentiary in Brazil, Scandinavia, and the United States*, 41 HASTINGS INT’L & COMPAR. L. REV. 343, 351–55 (2018) (describing the development of social services and progressive criminal policy in Scandinavian countries that maintain capitalist systems); John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess: Part I: The Nature and Roots of Scandinavian Exceptionalism*, 48 BRIT. J. CRIMINOLOGY 119, 124–29 (2008) (tracing the development of Scandinavian economies under egalitarian circumstances to the provision of welfare services and more humane prison conditions).

124. See, e.g., Roberts, *supra* note 2, at 46; see also McLeod, *supra* note 84, at 1619 (noting that “[t]he question of how precisely to achieve more equitable distribution” is “only partially described in existing abolitionist accounts . . . because our present imaginative and institutional resources are constrained by the parameters of our highly unequal world”).

125. Cullors, *supra* note 118, at 1686.

126. See KABA, *supra* note 2, at 3.

127. *Id.* at 148–49. McLeod explains the difference between the two models: “Transformative justice differs from certain other experiments in restorative justice—which are often focused primarily, if not exclusively, on individualized responsibility—in that transformative justice processes aspire to work toward broader social, political, and economic change.” McLeod, *supra* note 84, at 1630–31.

128. KABA, *supra* note 2, at 59.

129. *Id.* at 66.

circumstances and the community's chosen response. But the idea is that the community can resolve factual disputes, collectively decide how best to restore the individuals harmed, and hold the person who committed the harm accountable. This, too, is part of the positive agenda they envision.

With the abolitionist vision now set out, at least in basic terms, the next Part analyzes the policy implications of an abolitionist worldview and what it would mean for public safety and welfare.

II. EVALUATING ABOLITION AS POLICY

Prison abolition responds directly to the worst aspects of the get-tough politics that have dominated the American landscape. It focuses on societal drivers of crime that are critical, but too often ignored, by American policy.¹³⁰ It highlights the criminogenic effects of prison itself and the way in which incarceration is used as a mechanism of state control to further oppress already marginalized groups and produce punishments that are retributively unjust.¹³¹ And it uses the powerful label of abolition as a radical framing and mobilizing device to fundamentally change how people view prisons. These are valuable correctives to a landscape that has produced an excess of criminalization and punishment.

But for all these benefits, the abolitionist agenda, if achieved, has serious policy downsides, and would seem to fall short of achieving what are traditionally seen as the goals of punishment. Let's start with the utilitarian goal of using punishment to reduce harm and improve public safety. The abolitionist emphasis on structural reform is certainly a better model than the get-tough frame that ignores structural forces.¹³² However, plenty of other criminal justice reform

130. Neglecting those structural drivers of crimes means America keeps pouring money into a law enforcement paradigm that yields incredibly poor outcomes, with huge numbers of cases going unsolved and perpetrators facing no accountability for the harms they cause. Shima Baradaran Baughman, *How Effective Are Police? The Problem of Clearance Rates and Accountability*, 72 ALA. L. REV. 47, 96–97 (2020) (noting that most crimes go unreported and those that do often go unsolved, leading 93 percent of robberies, 97 percent of burglaries, and 40 percent of homicides to result in no criminal consequences for the perpetrators).

131. See, e.g., Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFFS. 217, 231–38 (1973).

132. See PATRICK SHARKEY, *UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE* 48–50 (2018); Sharkey & Marsteller, *supra* note 76, at 377 (“Levels and trends in violence cannot be explained or understood by focusing on individual people. Rather, they are driven in large part by the features of communities.”); Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155, 183 (2004) (showing how schooling reduces crime rates); María B. Vélez et al., *Neighborhood Housing Investments and Violent Crime in Seattle, 1981–2007*, 50 CRIMINOLOGY 1025, 1047–49 (2012)

models also emphasize structural investment. What does it mean for utilitarian goals to pursue those investments while also completely removing incarceration from the toolkit of possible responses, because that is the signature difference between abolition and other reform efforts that also advocate for the creation of a social safety net?

There are some individuals who, if they know they can act on their self-interest without sufficiently severe consequences, will do so. Abolitionists are so focused on structural deprivation causing crime that they tend to ignore the variety of factors that drive people to harm others, which will exist no matter how society is structured.¹³³ Greed, lust, boredom, envy, ambition, fear, honor, cruelty, anger-control issues, religion, political ideology, and a host of other individual predilections and dispositions will exist at some level no matter how society is constructed.¹³⁴ Hobbes noted that conflict will arise whenever “any two men desire the same thing, which nevertheless they cannot both enjoy,” often leading them to “endeavor to destroy, or subdue one another.”¹³⁵ Freud likewise noted that “[i]t

(demonstrating the relationship between investments in housing and crime reduction); Michelle Kondo et al., *Effects of Greening and Community Reuse of Vacant Lots on Crime*, 53 URB. STUD. 3279, 3291–93 (2016) (finding investing in infrastructure can reduce crime); Samuel R. Bondurant et al., *Substance Abuse Treatment Centers and Local Crime* 1–40 (Nat’l Bureau of Econ. Rsch., Working Paper No. 22610, 2016) (showing that the provision of health care can reduce crime). See generally COUNCIL OF ECON. ADVISERS, *ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM* (2016) (summarizing academic literature on the benefits to public safety of social investment over mass incarceration).

133. See EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD AND SELECTED TEXTS ON SOCIOLOGY AND ITS METHOD* 60–66 (Steven Lukes ed., W.D. Halls trans., 2013); see also Bagaric et al., *supra* note 89, at 355 (“[T]he total elimination of the causes that lead to the need for prisons are unachievable[.]”).

134. JOHN KEKES, *THE ROOTS OF EVIL* 118–19 (2005). In this regard, it is noteworthy that even redistributing wealth will not alleviate the kind of jealousy or desire that leads people to harm others because:

envy is much more complex and has much deeper sources than wanting some material object that someone else has. The sources of envy are the recognized excellences and deficiencies of human beings, the tendency to compare oneself and one’s life with other people and their lives, pride in coming out well in these comparisons, and resentment if one does not. These sources of envy lie deep in human nature.

Id. at 80. “People attack others who have wounded their pride or besmirched their honor.” Roy F. Baumeister & Kathleen D. Vohs, *Four Roots of Evil*, in *THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL*, *supra* note 39, at 85, 91–92; see also Jennifer Crocker et al., *The Pursuit of Self-Esteem: Implication for Good and Evil*, in *THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL*, *supra* note 39, at 271–72 (noting that pursuit of self-esteem can cause people to engage in harmful and destructive behaviors).

135. Thomas Hobbes, *The Natural Condition of Mankind: Every Man Is Enemy to Every Man*, in *THE MANY FACES OF EVIL: HISTORICAL PERSPECTIVES* 145,

is a general principle . . . that conflicts of interest between men are settled by the use of violence.”¹³⁶ Conflicts of interest between people will exist even if basic needs are met. Rich people and poor people alike commit crimes. Crimes like bribery, fraud, blackmail, and corruption are crimes of greed and a lust for power, and they will not be eradicated through structural change because they exist under every societal design.

We have seen individuals harm each other in every societal arrangement on Earth and throughout history. As Thomas Ward Frampton notes, despite the fact that “politicians (of all stripes and ideologies) have long promised that criminality would vanish under alternative social or economic arrangements To date, proof of concept is lacking.”¹³⁷ Abolitionists want to abolish capitalism and replace it with socialism or communism,¹³⁸ but that will not eradicate interpersonal harm. About twenty million people were killed in the communist Soviet Union under Stalin and in China under Mao with “the hope of creating a communist or socialist utopia, in which all would be equal, people would care for each other and share all possessions in common, and no one would exploit innocent victims.”¹³⁹ Organized crime similarly exists in societies of all kinds because individuals will take advantage of others if they know they can get away with it.

That is why societies need to come up with sufficiently hard treatment for wrongdoing as a deterrent. People unite in societies in part to act collectively to curb violence and bring order, and societies achieve this through state-sanctioned “violence, ready to be directed against any individual who resists it[.]”¹⁴⁰ The state, in other words, has a necessary role to play in curbing harms among the people who live within it and that response requires the use of force in some cases. That is particularly true in a society as heavily armed as America.¹⁴¹

148 (Amélie Oksenberg Rorty ed., 2001). *See also* Baumeister & Vohs, *supra* note 134, at 91 (noting that “conflict is probably inevitable in human social life” and that “[t]here are many ways to resolve conflict, and violence is certainly one of them”).

136. Letter from Sigmund Freud to Albert Einstein (Sept. 1932), in *THE MANY FACES OF EVIL*, *supra* note 135, at 255, 256.

137. Frampton, *supra* note 2, at 2026.

138. *See* McLeod, *supra* note 84, at 1619.

139. Baumeister & Vohs, *supra* note 134, at 93 (“[I]t seems indisputable that most of the party cadres who carried out the arrests and executions did sincerely believe that they were doing the right thing, for the sake of their beloved country and the creation of the socialist paradise.”).

140. Letter from Sigmund Freud to Albert Einstein, *supra* note 136, at 257.

141. Thomas Black, *Americans Have More Guns Than Anywhere Else in the World and They Keep Buying More*, BLOOMBERG (May 25, 2022, 2:03 PM), <https://www.bloomberg.com/news/articles/2022-05-25/how-many-guns-in-the-us-buying-spreed-bolsters-lead-as-most-armed-country>.

In the absence of such a state response, there will not be a sufficient disincentive for individuals to restrain themselves.

To be sure, that response does not have to be prison in its current form. Not all societies that use forms of incarceration use the particularly harsh and violent form of warehousing that exists in the United States, nor do they use it as excessively. Norway and other countries are committed to humane conditions of confinement to promote successful reentry.¹⁴² In addition, societies have used other approaches besides prison throughout history, including banishment, capital and corporal punishments, forced labor, and financial penalties.¹⁴³ The abolitionists are correct that the American version of a prison does not need to provide the only response. But most abolitionists reject any form of confinement, including the type used in countries like Norway,¹⁴⁴ therefore, they need to specify what disincentives they will use that will fill the deterrent and incapacitation functions currently served by incarceration. “An abolitionist retort that we should instead focus on transforming the conditions that facilitate harm occurring is rebutted by the entire history of humankind, which has never seen a period where harm is not a mainstay of human activity.”¹⁴⁵ To be sure, transforming those conditions will dramatically reduce harms. But they will not be eradicated, and a functioning society should seek to deter them where possible. In America, moreover, those harms are likely going to disproportionately fall on racial and gender lines. It is therefore fair to ask, as Trevor Gardner has, whether “the abolitionist position, when fully unraveled, accounts for the African American security interest.”¹⁴⁶

Not all abolitionists sidestep this question.¹⁴⁷ Those who discuss the “dangerous few” recognize the problem—though the category of

142. Jessica Benko, *The Radical Humaneness of Norway's Halden Prison*, N.Y. TIMES (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html>.

143. DAVIS, *supra* note 67, at 42. For those with mental illnesses, societies have used a public health model, though the use of large asylums has its own history of oppression, abuse, and denigration of minority communities that mirrors the history of the prison. See *infra* notes 315–38 and accompanying text.

144. See McLeod, *supra* note 27, at 1159.

145. Bagaric et al., *supra* note 89, at 396. Supporters of communism, such as those in Russia in the 1930s, have alleged it can “cause human aggressiveness to disappear by guaranteeing the satisfaction of all material needs and by establishing equality in other respects among all the members of the community.” Letter from Sigmund Freud to Albert Einstein, *supra* note 136, at 261. As Freud noted, however, that hope “is an illusion.” *Id.*

146. Trevor George Gardner, *Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. (forthcoming 2023) (manuscript at 38 n.178) (on file with author).

147. “A world without harm isn’t possible and isn’t what an abolitionist vision purports to achieve.” KABA, *supra* note 2, at 3.

“danger” typically references violent threats and ignores things like financial harms, organized crime, and offenses against the state that pose somewhat different issues than what the use of the word “danger” typically connotes.¹⁴⁸ They typically argue that it is better to handle any residual harms that occur through community accountability on the view that this approach will still be better overall than using prisons. Kaba notes, for example, that:

If violence originated because of unexamined misogyny or sexism learned in the family or broader culture, a community process that invites the person responsible to examine that would be more likely to lead to a positive outcome than incarceration in a cell, where the person is likely to experience more violence.”¹⁴⁹

She notes that other consequences can include restitution or providing labor to the people harmed, a public apology, or restricted access to groups or spaces.¹⁵⁰ There are strong reasons to doubt that these alternatives will be sufficiently stringent to deter would-be wrongdoers in many contexts. Some individuals faced with the consequences of their actions and forced to examine them might well decide they do not need to make changes. Some people are selfish narcissists who simply do not care about the effects their actions have on others. Financial penalties cannot be a proper substitute in many cases, both because many people do not have money to pay restitution, so the threat of financial loss is meaningless, and because others might be so wealthy that the financial hit does not change their behaviors. Forced labor might not be feasible for either the perpetrator or the survivor. A public apology is likely to be meaningless for many. Restricted access to people or spaces will require enforcement if a person is determined to flout the restriction—yet without police or sufficiently serious consequences for doing so, what keeps those barriers intact? Someone who harbors racist or sexist views or is otherwise driven by religious or ideological commitments to harm others, who knows there will be no punishment for acting on those impulses other than a community process of self-examination, is likely to harm others again. And when they do, the abolitionist framework currently has no response. Restorative justice, their preferred alternative, “is inappropriate for offenders who do not accept responsibility or who persist in wrongdoing and cannot be deterred through restorative processes.”¹⁵¹ These are serious shortcomings that explain why societies around the world condone some state use of force and liberty restrictions to address

148. See Frampton, *supra* note 2, at 2032–37 (discussing this category).

149. KABA, *supra* note 2, at 60.

150. *Id.* at 137.

151. Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 *BUFF. L. REV.* 635, 677 (2021).

harm. It may not be necessary in all cases or even most, and it is certainly grotesquely overused in America, but the idea of incarceration's total abolition as a possible option has not been put into practice in any modern society.

As noted above, abolitionists are reluctant to cede this ground, however, because of the fear that any form of incapacitation will end up expanding in the same way prison has, ultimately taking in far more people in its orbit than truly need to be there, with racially disparate results, and will therefore end up continuing to be used as an instrument of social oppression.¹⁵² So abolitionists prefer not to have it as part of their proposal at all. The view seems to be that this conversation about recidivists and people who engage in harm even after social structures are fixed “can be deferred for some time as decarceration could by political necessity only proceed gradually.”¹⁵³ In other words, prisons will continue to take care of these people as long as they continue to exist, so there is no need to worry about it now. But, of course, any reliance on prison to address this problem, even in the short term, is an admission of sorts that an abolition frame is ill-fitting for some types of cases and raises serious utilitarian concerns.¹⁵⁴

There is also a retributive justice concern with the abolitionist approach.¹⁵⁵ Although abolitionists emphasize restorative and transformative justice models to hold individuals accountable, it is not clear these models are up to the task of providing the blame and desert that public notions of justice demand of the morally culpable

152. Rodriguez, *supra* note 37, at 1593 (“[C]arceral domestic war cannot be ‘reformed’; it can only be eliminated (abolished); to do otherwise is to sustain it under revised executive/policy directives, policing tactics, jurisprudential approaches, and cultural discourses.”); Frampton, *supra* note 2, at 2044 (noting that accepting prison for the dangerous few will necessarily mean “cag[ing] many people who do *not* need to be caged, and those individuals will overwhelmingly be poor and nonwhite”).

153. McLeod, *supra* note 27, at 1171.

154. Randall Kennedy notes that abolitionists prefer the absolutist language in part as “a matter of wanting to avoid conceding openly that at least to some extent prisons do serve a useful social function.” RANDALL KENNEDY, *SAY IT LOUD!: ON RACE, LAW, HISTORY, AND CULTURE* 445 (2021). Máximo Langer sees this strategy as effectively “backtracking to criminal law minimalism” even if the abolitionists do not openly admit as much. Langer, *supra* note 2, at 58–59 (emphasis omitted).

155. A theory of retributive justice requires punishment to be justified by desert and moral culpability. Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 22 (2012). Under the “confrontational conception of retributivism” set out by Dan Markel, the state’s use of punishment serves the commitments of a liberal democracy because it provides moral accountability for the harms caused. *Id.* at 5–6 (emphasis omitted).

in all circumstances.¹⁵⁶ If it looks like people are committing grave harms with impunity, society will demand a shift in policy or resort to vigilantism. While it is true restorative justice can sometimes do a better job addressing the needs of survivors and many prefer that model,¹⁵⁷ it is not a model that every survivor wants.¹⁵⁸ Some survivors do not want to face the person who harmed them. And if the harm was motivated by greed, lust, or cruelty, a root-cause analysis may not be satisfying in any event. The people who act on those impulses often believe they are entitled to do so, and there is no magic bullet to get them to shift their thinking or to uncover some societal factor that needs to be changed to stop it from happening again. No modern society uses restorative justice on a wide scale as a replacement for incarceration in the most serious cases.¹⁵⁹ And where restorative justice is used, it is done with voluntary participation.¹⁶⁰ If a survivor does not want this and deems it inadequate, or if a perpetrator refuses to make a good-faith effort to participate, then what?¹⁶¹

In many cases, moreover, the extent of the harm is so great that the public and survivors of the crime want punishment to convey the social meaning of condemnation that the perpetrator's culpability and the nature of the act require.¹⁶² This is true across communities, including African American communities, which "have in any number of circumstances been found to take a 'just deserts' rather than an

156. Reznik, *supra* note 10, at 149, 159 (noting that "[t]ransformative justice is strictly forward-looking, voluntary, and utilitarian" and its rejection of blame effectively equates "human agency . . . to little more than dollhood").

157. See generally SERED, *supra* note 81.

158. See Jo-Anne Wemmers, *Judging Victims: Restorative Choices for Victims of Sexual Violence*, in DEP'T OF JUST. CAN., VICTIMS OF CRIME RSCH. DIG. NO. 10, at 12, 13 (Susan McDonald ed., 2017), <https://www.justice.gc.ca/eng/rp-pr/cj-cjp/victim/rd10-rr10/rd10-rr10.pdf> (noting low levels of victim interest in participating in restorative justice in the United States and Canada); Jung Jin Choi et al., *Review of Research on Victims' Experiences in Restorative Justice: Implications for Youth Justice*, 34 CHILD. & YOUTH SERVS. REV. 35, 35–36 (2012) (listing several studies of victims feeling anxiety and fear about participating in restorative justice processes).

159. Lanni, *supra* note 151, at 637–38, 666 (noting that only New Zealand uses it on a broad level, but even there it is not a replacement for traditional sentencing and instead is something that judges take into account in deciding whether to reduce a sentence).

160. Reznik, *supra* note 10, at 149.

161. Langer, *supra* note 2, at 70 (asking additionally "[w]hat would happen if, after going through these transformative justice processes, the different participants were not transformed or were not satisfied with the results?"); see also Lanni, *supra* note 151, at 663–68 (noting benefits and trade-offs with approaches that seek to use surrogates for victims and survivors of crimes).

162. Doug Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27, 36 (2020); Reznik, *supra* note 10, at 162–63.

instrumentalist disposition toward punishment[.]”¹⁶³ If prison is not an option, what will take its place? Financial penalties will not work for individuals without an ability to pay and might fall short in any event to match the severity of the harm caused. Rafi Reznik proposes imposing collateral consequences to serve this purpose of punishment,¹⁶⁴ such as restrictions on voting, jury service, or firearm use.¹⁶⁵ While these restrictions might be appropriate symbols of blame and punishment for some offenses, it is hard to see how they provide adequate retributive justice for more serious offenses.¹⁶⁶

There is another flaw in the abolitionist reliance on restorative justice models to satisfy the need for just deserts to be meted out when someone causes harm. Abolitionists place reliance on the “community” to bring accountability. What counts as a community is left undefined, but that is an extremely important question to answer.¹⁶⁷ If the victim and perpetrator are from different

163. Trevor George Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 130 YALE L.J.F. 798, 812 (2021).

164. Reznik also recognizes a role for prison. Reznik, *supra* note 10, at 186.

165. *Id.* at 191–93.

166. Elisabeth Houston, “*The Difference Between Prison and America Unsettles Me*”: A Conversation with Reginald Dwayne Betts, L.A. REV. BOOKS (July 2, 2020), <https://lareviewofbooks.org/article/the-difference-between-prison-and-america-unsettles-me-a-conversation-with-reginald-dwayne-betts/> (“We need to figure out how to have the abolition conversation in a way that is not downplaying the actual harm of selling crack in 1988, of stealing a car, of raping a woman, of murdering anyone.”). And these consequences may raise concerns of their own if they fall, as they do now, disproportionately on communities of color.

167. For a classic critique of naïve invocations of “community” in reform discourse, see generally STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION* (1985). See also Elizabeth G. Jánoszy, *Defining “Local” in a Localized Criminal Justice System*, 94 N.Y.U. L. REV. 1318, 1332–37 (2019) (detailing the importance of defining the “local community” for purposes of localizing the criminal justice system); Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F., at 215, 216–17, 240–41 (criticizing the simplistic view of “community” in describing purported support for vague anti-loitering laws and noting that “[w]hich community counts” can dictate the preferences considered. Restoring local control may not reduce crime.); David Alan Sklansky, *Police Reform in Divided Times*, 2 AM. J.L. & EQUAL. 3, 22 (2022) (noting “communities do not have clear, natural boundaries” and are not homogenous); Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 374–75 (2001) (“object[ing] to grounding local autonomy in the rhetoric of community” and noting that the “boundary problem” of who is and is not inside a community is “the problem of pluralism”); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 789 (2021) (“Communities . . . are not monolithic, a reality that has become especially salient as communities of color have disagreed internally over the summer of 2020 about calls to defund the police.” (footnote omitted)).

communities, which one counts? And what, exactly, constitutes a community? Is this a block, a neighborhood, or something else? What should be done if there is a split among the people who are ultimately deemed to constitute the community? We know such differences are common, and they exist even within a racially homogenous group, as there is, for example, “a long line of scholarship showing patterns of African American intragroup-status distinction and bias analogous to that experienced by African Americans in relation to broader society.”¹⁶⁸ What if the community, or a substantial segment of it, believes accountability requires prison? We have typically answered these questions by turning to the relevant sovereign—with punishment typically a matter of state law and enforcement discretion given to a local actor, such as a district attorney. But if this shifts to a “community,” that requires a definition, and it also requires consideration of what kind of enforcement authority the community has. Does it ever get to use force? And if it does not, what happens if the perpetrator of harm does not respect the community’s judgment? How does any of this work when guns are involved? These are serious practical questions that must be answered in order to know whether a regime that replaces the state will bring about sufficient accountability and consequences for harms that are caused.

Another set of practical concerns in defining community arises in the context of crimes that are not directed at particular people but instead aim for a mass of people or the state itself, such as treason, sedition, terrorism, counterfeiting, or mass atrocities. The relevant community in those instances would be the entire nation or most of it, so it is hard to imagine who the participants should be in a restorative justice or transformative justice model. Moreover, if the motive of the crime was religious or ideological and the perpetrator remains committed to that religion or ideology, then what? The root-cause analysis would reveal an individual commitment to religion or a cause they believe in, and that individual may refuse to do anything to repair the harm. A retributively just response may demand a form of state-imposed liberty restriction as punishment for society to express its values and its commitment to upholding them.¹⁶⁹

Abolitionists do not focus on retributive justice or spend time on the pragmatic details about different types of offenses or communities because their goal is to build a movement and dislodge preconceived notions about prisons and punishment, and movements are built around inspiring messages, not wonky blueprints that address situations outside of a central narrative. Abolitionists focus on a solution for a particular subset of people who engage in wrongdoing

168. Gardner, *supra* note 163, at 809.

169. Langer, *supra* note 2, at 63 (“Outside of the United States, in the context of mass atrocities, those affected by them, human rights groups, and many other people have also demanded punishment, typically in the form of involuntary confinement, against those who participated in them.”).

because of structural disadvantages, but there is an enormous range that simply gets ignored under their framing. Just as prison is poorly suited to address the structural inequities driving the kinds of crimes that propel the abolitionist narrative and that are ignored by the tough-on-crime camp, the abolitionist reliance on restorative justice, transformative justice, and root-cause analysis falls short at addressing a wide range of causes of interpersonal harm in society. The problem is that the failure to address this complexity means abolitionists have no solutions to them, just as the tough-on-crime crowd has people who do not fit theirs. In one case, the solution is too punitive. In the other, it is not punitive enough. The result is that neither of these models matches punishment to culpability for classes of people and offenses.

This is not to suggest that both abolitionists and those who have pushed for severe sentences and criminalization are on equal footing and that this is a “both sides” problem. The get-tough framing is orders of magnitude more problematic because of its failure to seriously consider structural forces that contribute to crime, the destruction the excessively punitive response has had on communities, and the exacerbation of already extreme racial disparities. Abolitionists have framed their response precisely to address these ills, and they have deliberately framed their movement to maximize mobilization. A simple narrative is precisely what movements need.

But actual policies and governance require more than slogans, and the goal here is to highlight that translating the movement to facts on the ground and a real policy and political platform will be far more difficult than the message suggests. A more nuanced response that captures the full range of offending types and circumstances would better achieve the utilitarian goals of harm reduction and improved public safety as well as produce more retributively just outcomes across all case types. To the extent abolitionists have rejected this nuance, it is typically for the political reasons that are discussed in greater detail in Part III. As that Part explains, while abolitionists may see a rhetorical advantage to skirting the details, these policy shortcomings ultimately place abolition on weak political footing because the utilitarian and retributive justice shortcomings of abolitionist arguments make them unlikely to succeed in the political arena, given the prevalence of those concerns across societies.

III. THE POLITICS OF THE ABOLITIONIST FRAMING

Some people support prison abolition because they believe nothing short of the end of incarceration is morally acceptable. They believe that they are seeking a worthy goal and that it is important

to state that goal explicitly to highlight the moral stakes.¹⁷⁰ They have seen reformist messaging fail to make a sufficient dent in America's reliance on mass incarceration, and witnessing injustice over and over again and the trauma it produces has convinced them that nothing short of a radical undoing of prisons is sufficient.¹⁷¹ These individuals do not care about the political trade-offs of using an abolitionist message because they want to destroy the current order at any cost.¹⁷² It is not the aim of this Article to take issue with anyone who adopts abolition as a moral stance.

Instead, this Article is directed at those who do want to consider the political and practical ramifications of framing an agenda in abolitionist terms. Some abolitionists argue that they are not only pursuing the moral high ground, but that they are also pursuing a strategy that is more likely to be successful as a political matter than one that is less ambitious and couched in the less ambitious language of reform.¹⁷³ For them, it is the political salience and effects of

170. "Beyond strategic assessments of what is most likely to bring justice, ultimately we must choose to support collective responses that align with our values." KABA, *supra* note 2, at 65; *see also* Rodriguez, *supra* note 37, at 1578 (rejecting "simplistic notions of 'what is practical,' 'what is realistic,' 'what the people will understand/accept/do,' or even 'what must be reformed first/now/soon'").

171. *Cf.* Phelps et al., *supra* note 18, at 436 ("The repeated cultural trauma of police killings of Black Americans and the routine failure of the justice system to respond radicalized many activists to demand a bolder change: the end of policing." (citation omitted)).

172. This is a not-uncommon progressive rhetorical strategy. *See* ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* 162 (1991) (noting that in response to claims that progressive demands will produce perverse results, it is a common tactic to argue "that the old order must be smashed and a new one rebuilt from scratch *regardless* of any counterproductive consequences that might ensue").

173. The reformist language can nevertheless be quite ambitious. *See* Langer, *supra* note 2, at 55 ("[T]here is conceptual and normative space for positions and theories that require a radical humanization and substantial reduction of the footprint of the penal system in the United States, but not its abolition."). Still, reformers are largely engaged in what Benjamin Levin calls "over" critiques of criminal punishment that focus on reducing the footprint of criminal law enforcement and punishment in American society but without leveling deeper social critiques of American society. Levin, *supra* note 25, at 310. Abolition, in contrast, is a "mass" critique in Levin's framing because it is a "sweeping systemic critique" of not just "all aspects of the criminal system" but also "the political economy in which it is embedded." *Id.* Paul Butler has another helpful framing, noting the split between liberals and radicals in the criminal reform movements. Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 *GEO. L.J.* 1419, 1477 (2016). Máximo Langer notes that these camps could work together, as they have in other countries, but worries about that prospect "[i]n our present world . . . , in which ideological and political intolerance seem to be on the rise and in which it might be tempting to

abolition that make it attractive. Abolitionists often argue that the greater political risk is in taking the more modest approach.¹⁷⁴ For example, Paul Butler argues that “attempts to reform the system might actually hinder the more substantial transformation American criminal justice needs” by creating a perception that things are better without making the kind of fundamental changes that are actually necessary.¹⁷⁵ There is a fear among some abolitionists that any attempt to draw distinctions among those who can be incarcerated from those who cannot will end up leaving behind huge categories of people from relief, such as those who commit crimes involving violence.¹⁷⁶ On this view, abolition as a framing device is a political asset, and calling for anything less is a liability because the nuance will swallow the entire agenda. The central goal is to disrupt entrenched societal views about crime and punishment and prisons, and that requires a bold vision and agenda.¹⁷⁷ Although people of all races support prison abolition, it is in many communities led by Black activists, and many “Black-led movements have historically favored more ‘disruptive’ tactics to demand recognition and challenge the status quo.”¹⁷⁸ For many, abolition’s boldness is what they believe is necessary to change the dominant narrative, and they believe more modest framings will fail.¹⁷⁹ These abolitionists therefore explicitly split with criminal justice reform activists who seek to craft agendas that resonate with the existing political discourse.¹⁸⁰

It is this political calculus about abolition that is the focus here. Are abolitionists who take this view correct that their movement and its framing are likely to help achieve decarceration and improve the

be suspicious, dismissive, and even accusatory and aggressive toward those whose ideas do not exactly mirror one’s own[.]” Langer, *supra* note 2, at 56.

174. See KABA, *supra* note 2, at 13 (“[R]eform is actually impossible within the current context[.]”).

175. Butler, *supra* note 173, at 1425.

176. Levin, *supra* note 25, at 312–14 (noting these line-drawing issues and observing that this approach could be particularly detrimental to those convicted of violent offenses). On the often ill-defined and complex nature of violence and how we define it, see DAVID ALAN SKLANSKY, *A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE* 5–12 (2021).

177. Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 168 (2021).

178. Phelps et al., *supra* note 18, at 425. Many abolitionists explicitly “draw[] on Black feminist and radical traditions[.]” *Id.* at 431.

179. See *id.* at 437. One policing abolition group in Minnesota, MPD150, referred to itself as a “narrative-change organization.” *Id.* at 431.

180. *Id.* at 436 (noting “the disagreements within the movement and across activists are substantial” when it comes to “framing strategies and goals” while also cautioning that “the divide between ‘reform’ and ‘abolition’ may obscure as much as it reveals” because they “overlap in as many ways as they diverge”); see also *id.* at 423 (describing the split between activist camps in the policing context between those who favor reform and those who support defunding).

lives of currently incarcerated people, reduce the footprint of law enforcement, and foster greater investments in communities? Or does the absolutist position of abolition risk unintended consequences and a backlash that could perversely create more incarceration and harm to already disadvantaged groups instead of less?¹⁸¹ Instead of framing the goal as the end of prisons, would it be better to shift to an agenda that sees prisons as a necessary last resort and seeks to improve what is left of them as much as possible, what Máximo Langer refers to as criminal law minimalism?¹⁸²

Subpart A first considers the optimistic perspective on how abolition could play out as a political matter before painting the more pessimistic picture in Subpart B. Subpart C turns to a recent historical example of a similar movement, the deinstitutionalization of state mental hospitals, to show why the more negative view seems more likely.

A. *The Optimistic View of the Politics of Abolition*

On one take, the absolutist position of abolitionists works to their political advantage. As noted above, abolitionists intentionally invoke the language of abolition to build from and be inspired by the movement to end slavery.¹⁸³ Like the prison, slavery was an embedded institution that seemed to have an unbreakable hold on American society. When slavery abolitionists first began their quest to abolish it, their goal seemed utopian. They were viewed as radicals and their cause politically unpopular.¹⁸⁴ It was impossible until it was not. Prison abolitionists seek to harness that same spirit in their quest to achieve a world without harm and therefore one without the need for prisons. This language choice and the comparison to slavery also highlights that the same driving force of racial oppression exists in both contexts.

Moreover, some abolitionists adopt their stance not just because they think it will inevitably succeed, but also because they think it will produce better outcomes along the way to an abolitionist future, whether it arrives or not.¹⁸⁵ The abolitionist ethic is designed to

181. Certainly, other well-intended movements have done just that. *See infra* notes 322–38 and accompanying text (discussing deinstitutionalization); Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1195–96 (2009) (noting how efforts to create separate protections for capital sentences may have allowed for greater abuses in the noncapital context).

182. *See* Langer, *supra* note 2, at 45–46.

183. *See* CRITICAL RESISTANCE, *supra* note 87, at 1.

184. *See* Corey M. Brooks, *Reconsidering Politics in the Study of American Abolitionists*, 8 J. CIV. WAR ERA 291, 296 (2018).

185. As Kaba notes, abolitionists typically support some reforms short of abolition itself and advocate for them, as long as they do not make it harder to eventually abolish police and prisons. KABA, *supra* note 2, at 96.

orient people to a particular view of prisons that sees them not as “broken” and in need of repair, but as working as intended and fundamentally illegitimate.¹⁸⁶ Attempts at more modest reforms, under this view, could have the unintended consequence of legitimizing prisons, which can make it that much harder to decrease their use.¹⁸⁷ Seeking the end of all prisons sends the unmistakable message that prisons as institutions are irredeemable, thus placing all their negative qualities of violence, degradation, racism, isolation, and torture in sharp relief without acknowledging a single virtue.¹⁸⁸ In the words of James Forman, Jr., thinking like an abolitionist means “you imagine a world without prisons, and then you work to try to build that world.”¹⁸⁹ It is an orientation that reframes goals along the way and also serves as a yardstick that puts more modest reforms in perspective. In assessing incremental reforms, the idea is to back efforts that focus on building up communities and offering the kind of support necessary to do away with prisons, as opposed to giving prisons and other carceral methods greater power, legitimacy, and resources.¹⁹⁰

Abolitionists also note that attempts at reform short of abolition have failed to make prisons any better.¹⁹¹ Instead, as Kaba notes, “[w]ith every successive call for ‘reform,’ the prison has remained stubbornly brutal, violent and inhumane.”¹⁹² And putting prison out of bounds for everyone means no type of crime or harm is left unaddressed, creating a movement that can incorporate everyone

186. *Id.* at 93; Karakatsanis, *supra* note 4, at 851.

187. *Cf.* Carol S. Steiker & Jordan M. Steiker, *Judicial Developments in Capital Punishment Law*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 92–94 (James R. Acker et al., eds., 3d ed. 2014) (noting how reforms to death penalty procedures may have had the unintended consequence of furthering capital punishment); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 *HARV. L. REV.* 355, 433–38 (1995) (same).

188. On the functional advantages of prisons in modern societies, see generally DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* (1990).

189. Kushner, *supra* note 2.

190. “I feel like a movement to end mass incarceration and replace it with a system that actually restores and protects communities will never succeed without abolitionists. Because people will make compromises and sacrifices, and they’ll lose the vision.” *Id.* (quoting James Forman, Jr.).

191. While this may be true in America, at least so far, non-abolitionist reforms have greatly improved conditions in Norwegian prisons. See generally Emily Labutta, comment, *The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice*, 31 *EMORY INT’L L. REV.* 329 (2017).

192. Mariame Kaba, *Prison Reform’s in Vogue and Other Strange Things . . .*, *TRUTHOUT* (Mar. 21, 2014), <https://truthout.org/articles/prison-reforms-in-vogue-and-other-strange-things/>.

who is justice-involved without pitting different interests against each other, such as when nonviolent offenses are put at the forefront at the expense of those involving physical harms.¹⁹³ The idea is to create a larger movement and show that prison makes things worse for everyone, regardless of their underlying crime.

Abolition as a framing device also helps with community mobilization so that people can organize and mobilize for the kind of alternatives to incarceration they wish to see made available.¹⁹⁴ Past efforts to get structural investments in communities as a crime-fighting strategy have been overshadowed by calls for more policing and punishment instead.¹⁹⁵ Abolitionists offer a solution to this seemingly mutually exclusive approach by taking policing and prisons off the table as an option.

Another positive spin on abolition is that it moves the goalposts of the entire political debate over criminal law reform. As Allegra McLeod describes it, calling for abolition “renders moderate reform a more palatable option, potentially advancing a more moderate reformist program by articulating a critical and radically transformative project in the same legal and policy space.”¹⁹⁶ In other words, abolition might move the Overton window so that much larger scale change is feasible and prison gets so stigmatized that there is at least more reluctance to using it.¹⁹⁷

Abolitionists can point to evidence of their organizational successes as proof that they are having a positive impact on the ground. In the summer of 2020, they helped to achieve reductions in police budgets in Seattle, Portland, and Los Angeles.¹⁹⁸ They have been part of successful efforts to convince city and state governments to use public funds slated for policing to instead go to resources for local communities.¹⁹⁹ They have also succeeded in stopping the construction of new jails and prisons.²⁰⁰ They have helped launch

193. “Manufacturing divisions between imprisoned people, as more or less ‘dangerous,’ limits our ability to create real supports and resources that sustain all people.” CRITICAL RESISTANCE, *supra* note 23, at 1.

194. McLeod, *supra* note 27, at 1217; KABA, *supra* note 2, at 20 (providing examples of organization and successful campaigns by abolitionists).

195. See, e.g., Rachel E. Barkow, *Three Lessons for Criminal Law Reformers from Locking Up Our Own*, 107 CAL. L. REV. 1967, 1981 (2019) (noting that “[t]he band-aid of criminal punishment may therefore stop the broader momentum to get bigger structural changes in place” and pointing out that “[i]f prison became less of an option . . . voters and government officials would have to give more consideration to other strategies to deal with violence and disorder”).

196. McLeod, *supra* note 27, at 1210.

197. See *id.*

198. Akbar, *supra* note 2, at 1815 n.144.

199. McLeod, *supra* note 84, at 1635–36.

200. Akbar, *supra* note 2, at 1814 & n.145 (citing the cancelation of a contract to build a large downtown jail in Los Angeles); Kushner, *supra* note 2 (noting

violence interruption programs in various communities.²⁰¹ They have been part of efforts to remove prosecutors and replace them with people committed to more decarceral agendas.²⁰² Abolitionist organizers were leaders in the movement to get reparations for survivors of police torture and abuse in Chicago.²⁰³ During the COVID-19 pandemic, abolitionist organizing has helped to pressure authorities into releasing incarcerated people to mitigate the risk and spread of the virus.²⁰⁴ Although others were part of the victorious coalitions in these examples, including reformers who do not identify as abolitionists, abolitionists deserve a share of the credit for these advances.²⁰⁵ They have been leaders at the grassroots level pushing for reforms, and their framing of the issues has educated many people on the downsides of prisons, the need to get to root causes, and the structural racism and social control function of punishment. As these programs amass records of success, they could pave the way for further advances along these lines.

Even if abolition itself cannot be achieved because some role for a prison or its substitute will always be necessary, the positive spin sees the pursuit of abolition as a goal that is politically valuable because it reframes the conversation toward the kind of bold changes that are necessary.

B. *The Pessimistic View of the Politics of Abolition*

There is a darker view of how the politics of prison abolition may ultimately unfold. Some signs of this outcome have already emerged in the context of the parallel abolitionist movement to Defund the Police. Calls to Defund the Police grew out of grassroots efforts to address the prevalence of police violence, particularly against people of color.²⁰⁶ Advocates have pointed out that training and other reforms have failed to curtail police abuses and have therefore argued that the only way to bring about real change is to shrink the footprint

Ruth Wilson Gilmore's successful efforts to stop a proposed prison in Tulare County, California, and to delay the building of a prison in Delano, California).

201. KABA, *supra* note 2, at 168–69 (giving some examples); McLeod, *supra* note 84, at 1628–30 (same).

202. KABA, *supra* note 2, at 20 (noting how abolitionists organized to launch the #ByeAnita campaign to oust former state's attorney Anita Alvarez as the chief prosecutor in Cook County); *id.* at 121–23; Stahly-Butts & Akbar, *supra* note 9, at 1569–70 (describing activists' efforts in prosecution elections).

203. KABA, *supra* note 2, at 20–21, 107; McLeod, *supra* note 84, at 1624–28.

204. See Emily Nonko, *How Prison Abolitionists Are Meeting the Moment*, APPEAL (July 14, 2020), <https://theappeal.org/how-prison-abolitionists-are-meeting-the-moment/> (describing efforts across the country for large-scale decarceration in the wake of the COVID-19 pandemic).

205. Langer, *supra* note 2, at 56–57.

206. *About—Defund the Police*, BLACK LIVES MATTER CAN., <https://defundthepolice.org/about/> (last visited Feb. 6, 2023).

of policing.²⁰⁷ As with prison abolition, for some, defund means defund to zero;²⁰⁸ thus the goal is the abolition of policing itself. For others, defund means a reduction in police budgets and operations, but it does not mean the complete elimination of policing.²⁰⁹ Both camps fall under the umbrella of a label (“defund”) that exclusively emphasizes the negative and ignores the fact they have a positive agenda as well. The idea is to replace functions that currently reside with the police with better substitutes. For example, defund advocates want to use other actors or technology to respond to traffic violations, to use social workers in schools and other settings of disagreement, and to have trained violence interrupters respond to calls for help in some situations.²¹⁰ When the public is asked whether they support those kinds of shifts in resources and responsibilities, slightly more are in favor than are opposed.²¹¹ Moreover, the initial response to these calls to Defund the Police in the wake of George Floyd’s killing and the massive racial justice protests that followed was precisely the kind of shift in the Overton window that supporters of abolition argue they can bring about.²¹² More than a dozen cities reduced their police budgets,²¹³ with total cuts nationwide of \$840 million and \$160 million diverted to fund social programs.²¹⁴ New York changed its laws on access to police discipline records, and jurisdictions around the country passed other reforms, including the creation of alternative response teams to respond to people in crisis and greater oversight mechanisms over policing.²¹⁵ Minnesota even

207. KABA, *supra* note 2, at 14–17.

208. *Id.*

209. See Aaron Ross Coleman, *Police Reform, Defunding, and Abolition, Explained*, VOX (July 16, 2020, 8:00 AM), <https://www.vox.com/21312191/police-reform-defunding-abolition-black-lives-matter-protests>.

210. See ALEX S. VITALE, *THE END OF POLICING* 70, 89, 221–28 (2017).

211. Eli Yokley, *Movement to ‘Defund The Police’ Isn’t Popular, but Voters Are More Open to Its Goal*, MORNING CONSULT (June 17, 2020, 6:00 AM), <https://morningconsult.com/2020/06/17/defund-the-police-community-programs-polling/>.

212. See Akbar, *supra* note 2, at 1783 (noting that the 2020 protests were “among the largest social movement mobilizations in U.S. history” that “catapulted prison and police abolition into the mainstream”).

213. Jemima McEvoy, *At Least 13 Cities Are Defunding Their Police Departments*, FORBES (Apr. 14, 2022, 2:05 PM), <https://www.forbes.com/sites/jemimamcevoy/2020/08/13/at-least-13-cities-are-defunding-their-police-departments/?sh=41a874b229e3>.

214. Elinson et al., *supra* note 21.

215. *In a Historic Victory, Governor Cuomo Signs Repeal of 50-A into Law*, INNOCENCE PROJECT (June 12, 2020, 3:12 PM), <https://innocenceproject.org/in-a-historic-victory-the-new-york-legislature-repeals-50-a-requiring-full-disclosure-of-police-disciplinary-records/>; Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd’s Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder>.

had a ballot measure to consider replacing their police department with a new “public-health oriented’ Department of Public Safety.”²¹⁶

A much larger backlash followed the initial gains that occurred in the immediate aftermath of George Floyd’s death. The public responded negatively to the slogan “Defund the Police.”²¹⁷ Barack Obama observed that the slogan meant the loss of “a big audience the minute you say it, which makes it a lot less likely that you’re actually going to get the changes you want done[.]”²¹⁸ Supporters of the movement responded to Obama’s critique by stating it was “not a slogan, but a policy demand,” and that they believed it was an effective way to shape their own narrative to build coalitions for “change at the ballot box.”²¹⁹ While coalitions may have been built, the results at the ballot box have been a rebuke of the slogan. After initial inroads, the political and policy results have been decidedly negative and powerful. Minnesota voters expressly rejected the effort to replace its police department,²²⁰ and those rejecting the proposal included a majority of the people living in the portions of the city with a large Black population.²²¹ The notion of defunding the police was too radical for the “emergent yet fragile cross-racial” support for police reform.²²² While supporters of the proposal have claimed the rejection was grounded more in the way the proposal was drafted than overall support for the substance of the policy shift because opponents

216. Martin Kaste, *Minneapolis Voters Reject a Measure to Replace the City’s Police Department*, NPR (Nov. 3, 2021, 12:25 AM), <https://www.npr.org/2021/11/02/1051617581/minneapolis-police-vote>.

217. Yokley, *supra* note 211 (noting that 58 percent of the people in the poll oppose defunding the police, even though 43 percent of the people in the same poll supported the redirection of funding to other actors).

218. Kenya Evelyn, *Barack Obama Criticizes ‘Defund the Police’ Slogan but Faces Backlash*, GUARDIAN (Dec. 2, 2020, 12:32 AM), <https://www.theguardian.com/us-news/2020/dec/02/barack-obama-criticizes-defund-the-police-slogan-backlash>.

219. *Id.* (quoting Ilhan Omar, a House representative from Minnesota, and Charles Booker, a Kentucky state representative).

220. Kaste, *supra* note 216.

221. Hassan Kanu, *Minneapolis’ Rejection of a New Kind of Policing Is About Politics, Not Policy*, REUTERS (Nov. 5, 2021, 3:32 PM), <https://www.reuters.com/legal/government/minneapolis-rejection-new-kind-policing-is-about-politics-not-policy-2021-11-05/>. Opposition to the initiative included Black civic and religious community leaders. Phelps et al., *supra* note 18, at 434. The ballot’s strongest support came from areas with a greater proportion of younger voters and a racially diverse area near George Floyd Square. *Id.* at 435.

222. Michelle S. Phelps et al., “We’re Still Dying Quicker than We Can Effect Change”: #BlackLivesMatter and the Limits of 21st-Century Policing Reform, 127 AM. J. SOCIO. 867, 896 (2021) (noting that the lasting impact on white American’s policy preferences resulting from cases of police violence is unclear).

were able to paint the measure as dangerous,²²³ that is precisely the risk in using language of abolition. A study by sociologists at the University of Minnesota led by Michelle S. Phelps found that people of color continue to support policing at some level because of “their dual concern with community and police violence.”²²⁴ A concern with police protection was “especially common among Black women” in the study, as they expressed a worry about what the absence of police would mean for their safety because they “would sometimes turn to the police for help managing interpersonal, gender-based, and community violence.”²²⁵ These views help explain why the more radical defund frame provoked a backlash. The positive agenda of placing more resources with other governmental agencies and actors was overshadowed by the negative agenda of no more policing, and the negative one seemed too extreme for a sufficiently large segment of the public to support it. In polling, only 18 percent of respondents support calls to Defund the Police, with support rising only slightly among Black respondents, with 28 percent in favor of the movement.²²⁶ In a 2020 Gallup poll, only 19 percent of Black respondents wanted the police to spend less time in their neighborhood, with 61 percent wanting the police presence to remain the same and another 20 percent wanting more time.²²⁷

It is all too easy for opponents to cast the agenda as a threat to safety by emphasizing what is being taken away because that is the very emphasis of the label itself—in this case, policing.²²⁸ That is why, in elections around the country, Republicans used calls to Defund the Police to paint Democrats as soft on crime and defeat them in elections.²²⁹ In the same election in which the Minnesota

223. See Kanu, *supra* note 221 (“The question we were asked to contend with was itself flawed, as was the process.”).

224. Phelps et al., *supra* note 222, at 892.

225. *Id.* at 893.

226. Gabriela Miranda, *Biden’s ‘Fund the Police’ Comment Draws Backlash from Some BLM Activists, Support from Others*, USA TODAY (Mar. 2, 2022, 8:15 AM), <https://www.usatoday.com/story/news/nation/2022/03/02/biden-fund-police-sotu-reaction/9339814002/>.

227. Lydia Saad, *Black Americans Want Police to Retain Local Presence*, GALLUP (Aug. 5, 2020), <https://news.gallup.com/poll/316571/black-americans-police-retain-local-presence.aspx>.

228. “[N]uances are often lost on people when they hear the word ‘defund’ alone. ‘It tends to mischaracterize the substance of what these policies actually do It doesn’t name all the ways in which real investment has to be made.’” Josiah Bates, *What We Did Was Nothing to Sneeze at.’ Activists in Minneapolis Look Ahead After ‘Defund’ Vote Fails*, TIME (Nov. 4, 2021, 5:54 PM), <https://time.com/6113557/minneapolis-police-reform-measure-activists/> (quoting the director of communications for Yes 4 Minneapolis).

229. See Paul Kane, *House Democrats’ 2020 Election Autopsy: Bad Polling Hurt and GOP Attacks Worked*, WASH. POST (May 18, 2021, 8:00 PM), <https://www.washingtonpost.com/powerpost/democrats-2020-autopsy->

ballot initiative to replace its police department was defeated, several city council members who supported it lost their seats, and the mayor who campaigned against it won reelection.²³⁰ One reporter noted that the slogan has become “so politically toxic that it is now more often used by Republicans as an epithet than earnestly by Democrats.”²³¹ A recent poll found that support for defunding the police was the top issue that made voters less likely to support a candidate, with a whopping 73 percent saying they would be less likely to support someone who took that position.²³² By way of comparison, 54 percent of respondents said they would be less likely to support a candidate who claims Donald Trump won the election for president in 2020.²³³ Democrats are now going out of their way to distance themselves from the slogan and show their commitment to funding the police.²³⁴ Several jurisdictions deliberately increased police budgets to show solidarity with the police. The mayor of Baltimore previously called for \$22 million in cuts to the police budget in 2020 but proposed increasing the budget by \$27 million in 2021.²³⁵ In twelve of the top twenty police departments where budgets have been introduced, nine of the twelve have seen proposals for increases.²³⁶ Some states have gone as far as passing laws limiting the ability of cities and local communities to cut their police budgets, giving police greater protection than they had before the Defund the Police movement.²³⁷

midterms/2021/05/18/6114af82-b80d-11eb-a5fe-bb49dc89a248_story.html (analyzing 600 polls with data from elections).

230. Phelps et al., *supra* note 18, at 435.

231. Shane Goldmacher, *Progressive Backlash in California Fuels Democratic Debate over Crime*, N.Y. TIMES (June 8, 2022), <https://www.nytimes.com/2022/06/08/us/politics/california-voters-democrats-crime.html>.

232. Chuck Todd et al., *The Most Popular—and Unpopular—2022 Candidate Qualities*, NBC NEWS (Mar. 30, 2022, 8:58 AM), <https://www.nbcnews.com/politics/meet-the-press/popular-unpopular-2022-candidate-qualities-rcna22151>.

233. *Id.*

234. Stephanie Murray, *Suburban Dems Flee from ‘Defund the Police,’* POLITICO (Oct. 14, 2021, 4:30 AM), <https://www.politico.com/news/2021/10/14/democrats-suburbs-lets-fund-the-police-515966>.

235. Elinson et al., *supra* note 21.

236. *Id.*

237. For example, Georgia passed a state law that would prevent cities from cutting their police budgets by more than 5 percent in response to the mere willingness of officials in Atlanta and Athens to consider cuts, even though they ultimately did not actually go through with them. Jeff Amy, *Kemp Signs Bill Aimed at Banning ‘Defund the Police’ Efforts*, AP NEWS (May 7, 2021), <https://apnews.com/article/george-floyd-racial-injustice-police-police-reform-government-and-politics-a11edff75f6ef955fa074dc4e1d3a6fa>. At least ten other states have passed legislation or are considering legislation to limit the ability of local communities to cut police budgets. John Pfaff, *The Greatest Threat to*

President Biden tackled the issue head-on in his first State of the Union address, noting that: “We should all agree: The answer is not to defund the police. It’s to fund the police. Fund them. Fund them. Fund them with resources and training.”²³⁸

So instead of moving the Overton window for more police reform, calls to Defund the Police seem to have led to an even greater investment in police departments as politicians scrambled to disassociate themselves from the movement’s calls. To be sure, part of this blowback might be tied to increases in crime, and particularly homicides, around the country in the wake of the pandemic.²³⁹ One also cannot ignore the racial politics, as conservatives have tried to use the Defund the Police notion to motivate white racial anxiety.²⁴⁰ But it is that much easier to stoke those anxieties when the terminology of the movement so easily triggers fears of public safety. It is still too early to determine how reactions to the Defund movement will ultimately play out in policy terms because policing reforms continue, and local policies have shifted as a result. The electoral consequences for candidates, however, seems clear. Defunding the police is unlikely to be an issue that most Democrats will want to tee up again anytime soon unless it is to show their opposition to it and their support for police.²⁴¹

The question is whether calls for prison abolition will face the same reaction once they enter the broader public consciousness and gain more political traction as the Defund the Police movement did.²⁴² It is one thing for prison abolition to operate as a movement and organizing device without much notice by the broader public. In that context, its benefits seem clearly to outweigh the costs because it serves as a community-orienting device to create alternatives to incarceration and educate people on the dangers of prisons, and it is

Defunding the Police? State Pre-Emption, APPEAL (April 29, 2021), <https://theappeal.org/defund-the-police-pre-emption/>.

238. Biden, *supra* note 22.

239. Rachel Treisman, *Many Midterm Races Focus on Rising Crime. Here’s What the Data Does and Doesn’t Show*, NPR (Oct. 28, 2022, 6:14 AM), <https://www.npr.org/2022/10/27/1131825858/us-crime-data-midterm-elections>. Though we have seen time and again that political opponents can manufacture a crime panic even where crime is not actually rising to produce the same effect.

240. Cf. Sarah Ferris, *High Anxiety on the Air: Midterms End with 2-Front Clash over Rising Crime*, POLITICO (Oct. 25, 2022, 4:30 AM), <https://www.politico.com/news/2022/10/25/midterm-crime-messaging-00063208>; Miranda, *supra* note 226.

241. A group of Democrats in the House of Representatives recently urged House leaders to hold a vote on legislation that would increase funding for police departments around the country. Scott Wong, *We Should Not Defund: Democrats Press Pelosi for Vote on Police Funding*, NBC NEWS (May 6, 2022, 5:30 PM), <https://www.nbcnews.com/politics/congress/-not-defund-democrats-press-pelosi-vote-police-funding-rcna27587>.

242. See Yokley, *supra* note 211.

not much of a political presence. What happens, though, as prison abolition enters more mainstream debates and conversations? Michelle Alexander posited in a recent interview that, despite the advances in academic and activist communities, “if you just say ‘prison abolition’ on CNN, you’re going to have a lot of people shaking their heads.”²⁴³

Part of the danger for abolitionists lies in the language. It is, on its face, absolutist, even if some of the people in the movement hold out space for the “dangerous few” or whatever one calls the residual category of people that require some form of confinement or social control because no other mechanism will alleviate the threat they pose to others.²⁴⁴ While abolitionists acknowledge some people will still harm others, even with societal changes and investments, they do not get into the details about how to handle those individuals or how to deal with recidivists who do not respond to restorative or transformative justice models. Abolitionists sometimes focus more on a way of thinking rather than providing concrete plans. One key founding figure of the movement calls it “a practice, an analytical method, a present-tense visioning, an infrastructure in the making, a creative project, a performance, a counterwar, an ideological struggle, a pedagogy and curriculum, an alleged impossibility that is furtively present[.]”²⁴⁵

While those in the movement might be satisfied to proceed with an amorphous vision, getting enough members of the voting public to go along to make abolition a reality will require more concrete answers. The average voter who hears the goal is the end of all prisons will immediately want to know what is going to serve the utilitarian and retributive justice functions currently served by incarceration. As Randall Kennedy notes, unlike the abolition of slavery, which demanded the end of something that was “unequivocally evil and served no good social function,” prisons aim to serve utilitarian and retributive justice functions and protect the public from people who would otherwise engage in harms, even if prisons might generally perform that task poorly.²⁴⁶ Moreover, ending slavery was something that people could envision because other countries were prospering without it.²⁴⁷ Every modern society uses prisons in some form or other,²⁴⁸ and calling for the end of an institution that performs a social function—or is at least perceived to do so—necessarily begs the question of what will take its place.

243. Kushner, *supra* note 2 (quoting Michelle Alexander).

244. See *supra* notes 89–92 and accompanying text.

245. Rodriguez, *supra* note 37, at 1578.

246. KENNEDY, *supra* note 154, at 444.

247. *Abolitionism Timeline*, GILDER LEHRMAN CTR. FOR STUDY SLAVERY, RESISTANCE, & ABOLITION, YALE UNIV., <https://glc.yale.edu/abolitionism-timeline> (last visited Feb. 10, 2023).

248. Bagaric et al., *supra* note 89, at 395–96.

Moreover, even though Americans could see that a society could function successfully with the abolition of slavery because it had already been pursued in other countries and some states,²⁴⁹ the abolition of slavery ultimately still required a civil war. How can the abolition of prisons succeed, short of revolution and a war, as a political argument, given the far higher burden it has of demonstrating proof of concept when modern jurisdictions all rely on some form of incarceration?

Abolitionists often deflect that question. They believe the answer will emerge eventually because they “trust in the power of [a] conscious collective effort.”²⁵⁰ They also sometimes answer that the current system does not have a complete answer to that question either because dangerous people continue to exist in society even with prisons.²⁵¹ Prisons, however, can provide just deserts to people who do harm once they are apprehended and convicted, even if in most cases the punishment is retributively too harsh. Moreover, prison is sufficiently harsh to serve as a deterrent when the odds of detection are high enough.²⁵² The abolitionist frame does not provide a substitute for these functions that prison now serves, so it makes it appear as if harms can be committed with impunity. Even more fundamentally, what abolitionists miss with evasive answers about prisons’ shortcomings is the political effect of such a response. While they might be right that prison creates net harms, the public does not rationally analyze whether more net harms are prevented or not under the current approach. Instead, they want to know that there is some option out there for those situations, even if it is not perfectly employed. The tough approach gives them a feeling of security, even if it is not actually making things safer overall.²⁵³ And it serves as a valuable expressive function to let the wrongdoer know that society, as a collective, disapproves of the conduct. As Kennedy puts it, “by seeking to apprehend, detain, deter, and punish lawbreakers, society . . . signals a profound disapproval of criminal encroachment upon others. That signal is rendered all too indistinct by abolitionist theor[ies].”²⁵⁴ Voters make choices, and if one option is concrete with what it will do, even if poorly implemented, and the other is couched

249. See *Abolitionism Timeline*, supra note 247.

250. KABA, supra note 2, at 167.

251. *Id.* at 61.

252. See, e.g., U.S. SENT’G COMM’N, LENGTH OF INCARCERATION AND RECIDIVISM 4 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200429_Recidivism-SentLength.pdf.

253. Mariame Kaba acknowledges this, noting that prisons and police make “the vast majority of people . . . feel secure Secure means that the scary, awful, monster people are kept at bay by those institutions. That is the story that gets told and reinforced by media, by our parents, by our culture.” KABA, supra note 2, at 94.

254. KENNEDY, supra note 154, at 446.

as “rejection of certainty,”²⁵⁵ it is pretty easy to forecast how that will play out politically.

It is hard to imagine a political context where most voters take seriously an approach that does not provide a satisfying answer, at least in theory, to all potential harms, including those that do not fit the societal deprivation at the heart of the abolitionist framing. The public’s collective knowledge of crime comes from the stories it sees on the news and the fictional accounts that mirror the bad actor frame. If you cannot explain what you are going to do with people who commit crimes despite structural advantages—the likes of Ted Bundy, Bernie Madoff, and R. Kelly—you are going to lose voter support and credibility because retributive justice and the imposition of just deserts matter. Politicians who do not believe in sufficiently serious consequences in the most serious cases will undoubtedly face a bombardment of political ads painting them as insensitive to victims and indifferent to crime itself. While abolitionism may not be “a politics mediated by emotional responses,”²⁵⁶ the fact is that American politics is dictated by emotion because that is what drives voters. Politicians and voters do not rationally weigh the costs and benefits of each approach to determine which model, on net, will ultimately lead to the least amount of harm. People do a terrible job thinking in broad general terms and have a variety of cognitive biases that lead them to focus on precisely those individual cases that have driven our policies for decades.

Indeed, far less ambitious reforms than the complete abolition of prison have fallen short because of a perceived failure to address worst-case scenarios. Consider the recent example of bail reform efforts around the country that are designed to reduce the number of people incarcerated in jails while awaiting trial.²⁵⁷ Opponents of bail reform have pointed to high-profile killings and rising crime rates and blamed them on bail reform even when there are no such links.²⁵⁸ Those opposed to bail reform have likewise tried to link it with recent spikes in homicides around the country, even though those increases have occurred in jurisdictions with and without changes to their bail

255. LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* 126 (2020).

256. KABA, *supra* note 2, at 133.

257. *Id.* at 93.

258. See, e.g., Luis Ferré-Sadurní et al., *Push for More Restrictive Bail Law Gains a Key Ally: Gov. Hochul*, N.Y. TIMES (Mar. 17, 2022), [nytimes.com/2022/03/17/nyregion/bail-reform-hochul-ny.html](https://www.nytimes.com/2022/03/17/nyregion/bail-reform-hochul-ny.html) (describing Democratic Governor Kathy Hochul’s support for reinstating bail for some minor and nonviolent crimes in response to high-profile crimes in New York); Ames Grawert & Noah Kim, *The Facts on Bail Reform and Crime Rates in New York State*, BRENNAN CTR. FOR JUST. (Mar. 22, 2022), <https://www.brennancenter.org/our-work/research-reports/facts-bail-reform-and-crime-rates-new-york-state>.

and pretrial detention regimes.²⁵⁹ Despite the shaky empirical foundation of their claims, opponents of bail reform have succeeded in getting rollbacks to bail reform efforts.²⁶⁰

The desire to see someone who has inflicted harm on someone else face sufficient consequences may overwhelm any rational thought about net safety benefits. It is hard to know how many people would choose their desired retributive justice ends even at the sacrifice of public safety because most people see both aims as satisfied by prison and do not realize that they are sometimes at odds with each other. Abolitionists would thus need to break through the narrative that sees prison as effective at achieving both the retributive justice and utilitarian goals of punishment before seeing any success at convincing the public their approach is better. However, the typical abolitionist framing is incompatible with this argument as it rejects a notion of “punishment” in a retributive justice sense. Abolitionists focus on prevention and then accountability and consequences for harms that occur, resulting in a frame that seems “regulatory rather than punitive.”²⁶¹ For serious harms—like mass murders, the sexual assault of children, sedition, torture—the abolitionist framework may not offer consequences that adequately express the condemnation necessary for public acceptance.²⁶² As Doug Husak has observed, “experts from multiple disciplines concur that the intuition to punish wrongdoers is a key part of what it means to be a member of the human species” and is “essential for social cohesion.”²⁶³ It is not, in other words, a passing political dynamic that might change, but a constant in the human condition. If the state does not provide such punishment, individuals may well turn to vigilante justice²⁶⁴—and in an abolitionist framework, there is nothing to stop them.

The key to the abolitionists’ utilitarian argument is also a difficult political sell because it requires substantial investments and a long-time horizon to work. Getting Americans to resist short-term impulses for longer-term benefits is always a tall order, and the

259. See John Gramlich, *What We Know About the Increase in U.S. Murders in 2020*, PEW RSCH. CTR. (Oct. 27, 2021), <https://www.pewresearch.org/fact-tank/2021/10/27/what-we-know-about-the-increase-in-u-s-murders-in-2020/>.

260. Jamiles Lartey, *New York Rolled Back Bail Reform. What Will the Rest of the Country Do?*, MARSHALL PROJECT (Apr. 23, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states>; Michelle L. Price, *NY Bail Law Fight Emblematic of Democrats’ Debate on Crime*, NBC N.Y. (Apr. 2, 2022, 10:56 AM), <https://www.nbcnewyork.com/news/local/ny-bail-law-fight-emblematic-of-democrats-debate-on-crime/3627559/>.

261. Sandra G. Mayson, *The Concept of Criminal Law*, 14 CRIM. L. & PHIL. 447, 461 (2020).

262. Husak, *supra* note 162, at 31.

263. *Id.* at 53.

264. *Id.* at 42.

abolitionist framing is the most extreme version of this dynamic. The structural reform they rely on will take decades, if not generations, to bear the positive outcomes abolitionists have in mind. Even if we invested billions in education today, for example, it would likely take a decade or more to see a substantial positive effect on crime. Other structural reforms they propose would likewise have long lag times. To the extent crime continues in the meantime and particularly awful instances of violence and death result—and there is no doubt that will happen—there will be constant pressure to abandon the plan that relies on long-term measures for short-term and immediate relief. James Forman, Jr.'s account of the politics of Washington, DC, offers a clear case study of this dynamic. District residents wanted all the structural investments abolitionists tout. But as crime and a drug epidemic ravaged their communities,²⁶⁵ they wanted something immediate, too. It was that desire for immediate relief that led them to accept policing and incarceration, all while hoping for the longer-term investments as well.²⁶⁶ These ended up being mutually exclusive dynamics.²⁶⁷ It is hard to see how the structural changes could come fast enough to obviate the need for detention and emergency responses to address harms in the here and now. In a democracy, voters will never just accept a “wait-and-it-will-eventually-turn-out-okay” approach. They will instead vote people out who are not perceived as being immediately responsive to their needs.

This problem is not unique to crime and punishment. We face the same problem with climate change, infrastructure, health care, and a host of other issues. Getting those longer-term fixes represents a huge political hurdle when the public wants something immediate. The American political process does not reward long-term investments. Election cycles come too quickly, and politicians need to show voters immediate results and benefits to get reelected. There is no reason to think that the politics of crime would be any different in terms of being able to wait for long-term results, and in fact every reason to believe it will be much worse. This dynamic explains why the tough-on-crime narrative has been so successful for more than five decades.²⁶⁸ The tough-on-crime agenda offers an immediate response, albeit a flawed one, to harms.

Even if they could occur immediately, it is not clear voters would support the societal changes abolitionists want. The abolitionist view

265. JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 140–41, 146 (2017).

266. *Id.* at 129, 134, 139–46.

267. See Barkow, *supra* note 195, at 1971–72 (“People concerned with violence want immediate action, and there is no sign that there is enough voter support to invest in communities to get at the structural decay that causes so much criminal activity and drug use in the first place.”).

268. See *supra* notes 37–65 and accompanying text.

“requires radically overhauling the U.S. capitalist economy and replacing it with a socialist or communist system,”²⁶⁹ as well as eradicating racism, patriarchy, and borders.²⁷⁰ It is the definition of understatement to say this is a heavy political lift.²⁷¹ Associating criminal law reforms with a shift to a more communal society makes an already difficult task even harder, as the public could fear any move to relax the status quo is putting them on a path to communism. Given the polarized landscape of American politics and the fact criminal justice reform has been the rare bipartisan space for some improvements, it is certainly a risk to the effort to have it associated with this kind of radical social change.²⁷²

Backlash, then, is a significant risk of abolitionist arguments. If that were the only downside, however, perhaps it is a risk worth taking because abolitionists could see how the framing plays out and then change course if the costs become too great. To be sure, the harms caused by the backlash would be real ones—actual people might serve longer sentences as a result—but there is a risk in any political movement, and sentences are already so long in America that there is only so much room for the backlash to go.

Backlash, however, is not the only risk. An even greater risk is that abolitionists will needlessly oppose political reforms that will benefit currently incarcerated people for an abolitionist future that will never materialize. Abolitionists, it should be noted, do not oppose

269. Roberts, *supra* note 2, at 46. It is hardly a given that these changes would achieve the abolitionist goals. See Langer, *supra* note 2, at 65–66 (observing that some communist societies that were earlier touted as models by abolitionists turned out to be “authoritarian states that did not respect basic human rights and rule of law standards, did not have high levels of economic development or social justice, and had prisons”).

270. McLeod, *supra* note 84, at 1617 (“Abolitionist organizers understand their work to be related to the historical struggles . . . against immigration enforcement and border fortification.”); Roberts, *supra* note 2, at 7.

271. For a discussion of why socialists and communists have failed in American history, including their failure “to attract broad support because of their sectarian orientation and concern with ideological purity rather than the give and take essential to success in American politics,” see Eric Foner, *Why Is There No Socialism in the United States?*, HIST. WORKSHOP, Spring 1984, at 57, 71. For a recent analysis of how Republican attacks linking Democrats to socialism also led to Democratic losses in elections, see Kane, *supra* note 229.

272. We have seen other attempts at reform die because of an association with a radical agenda, even if the reforms themselves were more modest. For example, see SKLANSKY, *supra* note 176, at 90 (noting that reasonable efforts to give communities greater control over policing failed in the early 1970s because the proposals were associated with left-wing radicals—an association that turned off too many voters even in liberal enclaves like Berkeley and Washington, DC). See also Jerome H. Skolnick, *Neighborhood Police*, NATION, Mar. 22, 1971, at 372, 372 (noting that the proposal for smaller neighborhood policing units failed in part because it was supported by radical groups like the Black Panthers and the Red Family).

all reforms, nor do all abolitionists agree on what reforms to support or oppose. They support efforts to decarcerate, and some will also support efforts to ease the suffering of those currently incarcerated, but typically only if those efforts do not conflict with the goals of abolition itself.²⁷³ Thus, many abolitionists oppose what they call “[r]eformist’ reforms,” which are reform measures that offer improvements to the status quo but entrench and legitimize the existing penal framework.²⁷⁴ For example, some abolitionists object to investing in improvements to prisons and jails or the construction of new ones to replace existing, decaying structures because “[b]uilding new cells and prisons helps to extend the life of the [prison-industrial complex] as a system” and “goes directly against a long-term abolitionist goal of eliminating the system.”²⁷⁵ In the words of the No New Jails Network, “[a] cage is a cage, and it cannot be reformed—from municipal and county jails to state prisons to federal penitentiaries, to immigrant detention, juvenile detention, psychiatric wards, coercive institutionalization, and ‘black boxes.’”²⁷⁶ If staff shortages prevent programming or require lockdowns, these abolitionists still oppose hiring new staff because they want to create conditions to force downsizing and release.²⁷⁷ These abolitionists therefore reject any proposal that would improve existing prison conditions because they believe “the best way to improve conditions

273. See Langer, *supra* note 2, at 45.

274. THOMAS MATHIESEN, *THE POLITICS OF ABOLITION REVISITED* 231–32 (2014). Instead, these abolitionists favor radical reforms, which Marbre Stahly-Butts and Amna A. Akbar describe as reforms that shrink the system, rely on organization “that contradict[s] prevailing arrangements,” empowers people who are directly impacted, acknowledges prior harms and seeks to repair them, and “improves, or at least does not harm, the material conditions of directly impacted people.” Stahly-Butts & Akbar, *supra* note 9, at 1552. As with so many aspects of prison abolition, however, there is no consensus. Not every abolitionist opposes reformist reforms that improve the lives of those currently incarcerated. See, e.g., Sanchez, *supra* note 24, at 1652 (arguing that prison should be treated like a “social cancer” where we “fight to eradicate it but never stop treating those affected by it”); About, ATX ANARCHIST BLACK CROSS, <https://atxanarchistblackcross.wordpress.com/about/> (last visited Feb. 8, 2023) (“We value the work that is being done towards reforms that will improve the daily lives of those that are incarcerated, even though reform does not align with our principles.”).

275. CRITICAL RESISTANCE, *THE CR ABOLITION ORGANIZING TOOLKIT* 32 (2012), <http://criticalresistance.org/wp-content/uploads/2012/06/CR-Abolitionist-Toolkit-online.pdf>.

276. *Manifesto*, NO NEW JAILS NETWORK (July 2020), <https://www.nonewjails.org/manifesto>.

277. See, e.g., CURB (@CURBprisons), TWITTER (Nov. 11, 2021, 6:39 PM), <https://twitter.com/CURBprisons/status/1458942509413924864> (“Don’t replace guards that quit[.]”).

for people inside is to get them out.”²⁷⁸ Under this logic, abolitionists would reject attempts to shift to more humane carceral facilities, such as those used in Nordic countries,²⁷⁹ because they oppose further investment in carceral structures.

Abolitionists have likewise rejected electronic surveillance as an alternative to incarceration because it is, in their view, still state control. Michelle Alexander, who self-identifies as an abolitionist, rejects electronic monitoring because it represents an “open-air digital prison” and can easily lead to incarceration for violating requirements.²⁸⁰ “I find it difficult to call this progress. As I see it, digital prisons are to mass incarceration what Jim Crow was to slavery.”²⁸¹ House arrest and monitoring, to some abolitionists, are forms of incarceration because they inhibit people’s movements, create financial burdens, and stigmatize people.²⁸² But many people who are currently incarcerated may prefer electronic monitoring to prison, even if both are forms of state control. If some directly impacted people want such a reform, should it still be opposed? Is it worth holding out for a third option of no surveillance whatsoever, even if that option is unlikely ever to materialize?

Some abolitionists also object to sentencing reductions and other reforms that benefit only a subclass of people and exclude others, such as laws that draw lines between nonviolent offenses and violent ones, even when those laws reduce incarceration and bring significant relief to people.²⁸³ For example, abolitionist Ruth Wilson Gilmore criticized

278. Liz Samuels & David Stein, *Perspectives on Critical Resistance*, in CR10 PUBLICATIONS COLLECTIVE, ABOLITION NOW!: TEN YEARS OF STRATEGY AND STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX 1, 7 (2008), <http://criticalresistance.org/wp-content/uploads/2012/06/Critical-Resistance-Abolition-Now-Ten-Years-of-Strategy-and-Struggle-against-the-Prison-Industrial-Complex.pdf>.

279. See, e.g., Amelia Gentleman, *Inside Halden, the Most Humane Prison in the World*, GUARDIAN (May 18, 2012, 4:48 PM), <https://www.theguardian.com/society/2012/may/18/halden-most-humane-prison-in-world>.

280. Michelle Alexander, Opinion, *The Newest Jim Crow: Recent Criminal Justice Reforms Contain the Seeds of a Frightening System of “E-carceration.”*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html>.

281. *Id.*

282. MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS 35–44 (2020).

283. See CRITICAL RESISTANCE, *supra* note 275, at 33 (“There are certain strategies [...] (like the trade-off between ‘violent’ and ‘non-violent’ prisoners or constructing new jails and prisons to create better conditions) that undercut the work that abolitionists do and create the distinction between abolition and reform.”); Stahly-Butts & Akbar, *supra* note 9, at 1563–64 (“Reforms that benefit some at the expense of others, such as laws that criminalize some immigrants because of past criminal records while advancing the legal status of others, are

support for California's Proposition 47, which reclassified certain drug and theft felony sentences as misdemeanors and applied retroactively,²⁸⁴ because of her view that it reinforces the idea that some people deserve incarceration and ends up buttressing racialized determinations of who is dangerous.²⁸⁵ But almost 4,700 people were resentenced and released under Proposition 47 within three years of its passage,²⁸⁶ and thousands more will never go to prison because of the changes.²⁸⁷ Money saved from the measure has been invested in trauma-recovery services and public school programs in order to provide social support to people and prevent future harms from occurring.²⁸⁸ So although abolitionists opposed it, it ultimately passed, furthered many goals of the movement, and brought immediate critical relief to thousands. Had the abolitionists who opposed the measure succeeded, however, none of that would have occurred.

To take another example, some abolitionists came out against passage of the First Step Act on similar grounds, arguing that the law excluded certain categories of offenses from earning early-release credits and used a risk-assessment tool that would disproportionately exclude people of color.²⁸⁹ Bret Grote, the legal director at the

. . . reformist reforms [that] create divisions that take away from the power of the movement[.]”).

284. *Proposition 47: The Safe Neighborhoods and Schools Act*, CAL. CTS., <https://www.courts.ca.gov/prop47.htm> (last visited Feb. 8, 2023); UC HASTINGS SCHOLARSHIP REPOSITORY, CRIMINAL SENTENCES, MISDEMEANOR PENALTIES, CALIFORNIA PROPOSITION 47, at 35 (2014), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2325&context=ca_ballot_props.

285. Ruth Wilson Gilmore, *The Worrying State of the Anti-Prison Movement*, SOC. JUST.: BLOG (Feb. 23, 2015), <http://www.socialjusticejournal.org/the-worrying-state-of-the-anti-prison-movement/>. Gilmore's critique did not address the impact of Proposition 47 on decarceration. The Public Policy Institute of California found that California jail populations fell after the enactment of Proposition 47, though capacity-constrained releases also fell. BRANDON MARTIN & MAGNUS LOFSTROM, PUB. POL'Y INST. OF CAL., JUST THE FACTS: CALIFORNIA'S COUNTY JAILS 2 (2021), https://www.ppic.org/wp-content/uploads/JTF_CountyJailsJTF.pdf.

286. Michael Waxman, *Backlash Against Proposition 47: Why the Criticism of California's Criminal Justice Reform is Misguided*, GEO. J. ON POVERTY L. & POL'Y: BLOG (July 30, 2017), <https://www.law.georgetown.edu/poverty-journal/blog/backlash-against-proposition-47-why-the-criticism-of-californias-criminal-justice-reform-is-misguided/>.

287. Marisa Lagos, *Proposition 47 Criminal Justice Reform Projected to Save State over \$122 Million*, KQED (Jan. 16, 2020), <https://www.kqed.org/news/11796149/voter-approved-criminal-justice-reform-expected-to-save-state-over-122-million>.

288. *Id.*

289. See, e.g., Press Release, JusticeLA, Statement: JusticeLA Opposes FIRST STEP Act (May 30, 2018), <https://justicelanow.org/wp->

Abolitionist Law Center in Pittsburgh, described the act as “a craven, ineffectual piece of pseudo-reform that does more to legitimize the status quo than it does to deal with the state’s racist fixation on human captivity.”²⁹⁰ While the law’s relief was narrow and the risk component flawed, it was an improvement over the status quo for thousands of people.²⁹¹ It made reductions to crack cocaine sentences retroactive, benefiting approximately 3,000 people who were given earlier release dates as a result.²⁹² A fix to the calculation of good-time credits in the law shortened confinement times for another 3,100 people.²⁹³ Reductions in mandatory minimum sentences in the law will mean that, going forward, roughly 2,000 people per year will receive prison sentences that are 20 percent shorter.²⁹⁴ The act also permitted individuals to file motions for compassionate release directly with courts instead of having to convince the Bureau of Prisons (“BOP”) to file for them, a gatekeeping function that BOP wielded to disallow most motions from ever reaching a judge.²⁹⁵ That change led to a fivefold increase in the number of compassionate release grants from the year before enactment (24 grants) to the year after enactment (145 grants).²⁹⁶ In the wake of the COVID-19 pandemic, this change in the law proved critical to the health and safety of incarcerated people, with 1,805 people getting compassionate release in fiscal year 2020 (typically over the government’s objection).²⁹⁷ For the thousands of people who have been freed by the First Step Act, its benefits are real and significant. Again, however, none of this would have occurred if the abolitionist opposition succeeded.

Abolitionist organizations have opposed bail reform efforts on similar logic. Survived and Punished NY, an abolitionist organization in New York, fought against proposed bail reform legislation in 2019

content/uploads/2017/10/JLA-First-Step-Act-Response.pdf; SCHENWAR & LAW, *supra* note 282, at 5.

290. Shandre Delaney, *What’s in the First Step Act for Prisoners?*, LAW @ THE MARGINS (Feb. 3, 2019) (quoting Bret Grote), <https://lawatthemargins.com/whats-in-the-first-step-act-for-prisoners/>.

291. Ames Grawert, *What Is the First Step Act—And What’s Happening with It?*, BRENNAN CTR. FOR JUST. (June 23, 2020), <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it>.

292. *Id.*

293. *Id.*

294. *Id.*

295. U.S. SENT’G COMM’N, *THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION* 47 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf.

296. *Id.*

297. U.S. SENT’G COMM’N, *COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC* 3 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf.

that eliminated cash bail for most misdemeanors and nonviolent crimes.²⁹⁸ They acknowledged the reform would reduce pretrial detention, but they opposed the measure because it would maintain cash bail for sex offenses, violent felonies, and some other categories of crimes, and they rejected that kind of line drawing.²⁹⁹ Critical Resistance, another abolitionist organization, urged the rejection of California Proposition 25, which would have eliminated cash bail and replaced it with pretrial risk-assessment measures.³⁰⁰ Critical Resistance opposed the law's embrace of risk-assessment tools that use factors like criminal history because they "are deeply rooted in racial bias" in light of biased policing practices.³⁰¹ It is a valid concern,³⁰² but the problem is that pretrial detention is not going away anytime soon, if ever. Therefore, abolitionist opposition to reforms such as these is a gamble. They are giving up on improvements over the status quo that would release thousands from incarceration today in the hope of getting a sweeping end to, or diminishment of, pretrial detention that may never materialize.³⁰³

298. See Jesse McKinley & Vivian Wang, *New York State Budget Deal Brings Congestion Pricing, Plastic Bag Ban and Mansion Tax*, N.Y. TIMES (Mar. 31, 2019), <https://www.nytimes.com/2019/03/31/nyregion/budget-new-york-congestion-pricing.html>; Survived & Punished NY, "Bail Reform" & Carceral Control: A Critique of New York's New Bail Laws, LAW & POL. ECON. PROJECT (Feb. 11, 2020), <https://lpeproject.org/blog/bail-reform-carceral-control-a-critique-of-new-yorks-new-bail-laws/>.

299. Survived & Punished NY, *supra* note 298 ("Because the State now reserves money bail for a category of people it labels 'undeserving,' the new law acts as a major impediment to their future liberation.").

300. LEGIS. ANALYST'S OFF., PROPOSITION 25: REFERENDUM ON LAW THAT REPLACED MONEY BAIL WITH SYSTEM BASED ON PUBLIC SAFETY AND FLIGHT RISK. 3 (2020), <https://lao.ca.gov/ballot/2020/Prop25-110320.pdf>; *California: Vote No on Props 20 & 25!*, CRITICAL RESISTANCE (Oct. 14, 2020), <https://criticalresistance.org/updates/california-vote-no-on-props-20-25/>.

301. *California: Vote No on Props 20 & 25!*, *supra* note 300.

302. See Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487, 489 (2021).

303. A more fundamental objection to the abolition opposition to drawing lines between types of crimes is that there may be real culpability differences between people who commit different offenses that the law can and should recognize. Some harms are more serious than others, and people who intend to cause the more serious harms are more culpable. Giving those people harsher consequences is consistent with retributive justice and notions of moral desert, so the abolitionist demand to lump everyone together may be forcing people who are less culpable to suffer and not get the benefit of reforms that they are, in fact, more deserving of receiving. To be sure, where the lines are drawn in many of these laws leaves much to be desired, but the underlying concept of distinguishing categories is not unreasonable. In fact, it is consistent with bedrock notions of culpability. Abolitionists reject those notions, however, because they are focused on social circumstances and their relationship with crime and ignore the fact that individuals in the same social circumstances are

This is the biggest political risk of abolition: opposing measures that will bring real, tangible relief to thousands of people for a future that is unlikely ever to materialize. It is one thing to stick to the rhetoric of abolition in the hope of giving that message broader cultural purchase. It is another to oppose actual reforms that will benefit people living with the burdens of incarceration right now. To be sure, not every piece of compromise legislation that benefits some people today is worth the trade-off if it saps the political energy for bolder action that could be achieved and benefit far more people later. Sometimes reforms help to legitimize an organization or practice that should instead be eliminated or fundamentally changed.³⁰⁴ But incremental reform can often be the superior strategy that will ultimately lead to bolder action because each step forward produces data and evidence that leads to additional action.³⁰⁵ Indeed, the abolition of slavery began first with incremental changes that ultimately paved the way for greater political support for its total eradication.³⁰⁶

making very different choices from one another—and that those choices reflect different levels of culpability.

304. See Steiker & Steiker, *supra* note 26, at 424 (observing that “entrenchment effects is a familiar leftist critique of all plans for incremental reform”).

305. *Id.* at 425, 427 (noting incremental reforms can be non-entrenching when they, among other things, build up institutions that can be used to support abolition through information gathering and public education or help support data collection and dissemination); *cf.* Steiker & Steiker, *supra* note 14, at 214. Some abolitionists have supported this approach, or what they call abolition by attrition. BEN-MOSHE, *supra* note 255, at 269 (citing PRISON RESEARCH EDUCATION ACTION PROJECT, *INSTEAD OF PRISONS* (1976)). But that approach seems to be far less dominant in the current movement and its adherence to the notion that, “[t]o do the work of liberation means to leave no one behind.” *Id.* at 125.

306. See Sarah L.H. Gronningsater, *Born Free in the Master’s House: Children and Gradual Emancipation in the Early American North*, in *CHILD SLAVERY BEFORE AND AFTER EMANCIPATION: AN ARGUMENT FOR CHILD-CENTERED SLAVERY STUDIES* 123, 123–25 (Anna Mae Duane ed., 2017) (discussing the “design, politics, and effects of gradual emancipation” and in particular the way that child-centered emancipation led to “the staggered development of freedom within black communities and families”); Nicholas P. Wood, *A “Class of Citizens”: The Earliest Black Petitioners to Congress and Their Quaker Allies*, 74 *WM. & MARY Q.* 109, 143 (2017) (noting how early African American and Quaker abolitionists achieved modest victories that were “not as complete as abolitionists would have liked” but “laid the foundation for abolitionism throughout the coming decades”). For a general overview of the politics of the abolition of slavery, see Brooks, *supra* note 184, at 294, 296, 307 (describing recent scholarship exploring “abolitionism as a policy-oriented political project” that was “both generative of radical political thought and aimed at producing specific policy victories” and its later limits in “shaping public opinion, political debate, and Republican policymaking during Reconstruction and the years after its collapse”).

The progress of federal drug sentencing is a more recent example of this kind of incremental, steady progress. Small changes to the sentencing guidelines for crack cocaine paved the way for later congressional action because Congress could see that the reductions in crack cocaine sentences did not lead to higher recidivism rates.³⁰⁷ The empirical evidence from those changes, in turn, allowed the Sentencing Commission to make even bolder revisions to the sentencing guidelines and reduce all drug sentences, both prospectively and retroactively, ultimately benefiting more than 30,000 people with earlier releases from prison of about two years.³⁰⁸ And that change paved the way for the First Step Act, the results of which could lead to further changes down the road.

Reasonable people disagree over whether it pays to take a legislative win today to give some people freedom now and build a record that allows for more reform later, or whether it is better to pass on compromise because a given reform leaves too many behind and stifles broader momentum. Many abolitionists, however, have bright-line objections that result in the sacrifice of tangible benefits right now for incarcerated people and their loved ones for a future payoff that may never materialize. It is a huge political risk that, if they are successful in blocking these efforts, comes with significant costs.

Whether abolitionists are making the right political gamble today thus depends on the likelihood they will prevail in the future. The next Subpart seeks guidance from another recent abolitionist movement to assess the odds.

C. *Lessons from Deinstitutionalization*

One guidepost for whether the optimistic or pessimistic take on abolition will ultimately prevail is history. Abolitionists point to the end of slavery as their historical precedent,³⁰⁹ but that example offers a cautionary tale as much as a promising one. It ultimately took a bloody civil war to succeed, and even then, it prevailed only with respect to the negative agenda of abolishing slavery. Moreover, that negative agenda prevailed in part because of incremental progress along the way, a strategy that some abolitionists reject insofar as it relies on releasing only some people from prison today and not others. And, of course, there were successful examples of slavery's abolition around the world and within the United States to show the feasibility

307. Memorandum from the U.S. Sent'g Comm'n on Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment 1-3 (May 31, 2011), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

308. U.S. SENT'G COMM'N, *supra* note 63, at 1.

309. See CRITICAL RESISTANCE, *supra* note 87, at 1.

of a thriving society without it.³¹⁰ There is no such successful model to show what a modern society looks like without some form of incarceration, and it seems highly unlikely that, if it were to occur, the United States would be the first place this incarceration-free experiment took hold given that we rely on incarceration more than any other nation on earth.³¹¹

Perhaps even more critically, the abolition of slavery had a positive agenda that fared poorly. W.E.B. Du Bois noted that the abolition of slavery required more than the end of slavery itself to be successful.³¹² It also required “civil and political rights, education and land, as the only complete guarantee of freedom, in the face of a dominant South which hoped from the first, to abolish slavery only in name.”³¹³ Reconstruction was supposed to achieve this positive vision but notoriously and tragically failed.

An even more relevant example for assessing the likely political path of prison abolition comes from a more recent abolition movement: the deinstitutionalization movement of the 1960s and 1970s. That movement, like the prison abolition movement, had a negative and positive agenda. Like the goal of eliminating prisons, those supporting deinstitutionalization aimed to empty large state mental asylums.³¹⁴ State hospitals were, in the words of President Kennedy, “shamefully understaffed, overcrowded, unpleasant institutions from which death [had] too often provided the only firm hope of release.”³¹⁵ Like prison abolitionists, the goal was not merely the negative one of doing away with state hospitals; those supporting deinstitutionalization wanted to see these failing institutions replaced with investments in community care.³¹⁶

Deinstitutionalization shows that even if the public and political officials can be mobilized to see the flaws of an existing institution, it is a far higher hurdle to get them to invest in something new that benefits poor people. From 1955 to 1961, the press and mental health

310. See *CHRONOLOGY-Who Banned Slavery When?*, REUTERS (March 22, 2007, 2:18 AM), <https://www.reuters.com/article/uk-slavery/chronology-who-banned-slavery-when-idUSL1561464920070322>.

311. Widra & Herring, *supra* note 45.

312. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880*, at 213 (2013 ed.)

313. *Id.*

314. The movement had two pillars: “the campaign to close large state mental hospitals, and the campaign to close large state facilities housing people with intellectual and developmental disabilities.” Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 *CARDOZO L. REV.* 1, 7 (2012).

315. JOHN F. KENNEDY, *MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATIVE TO MENTAL ILLNESS AND MENTAL RETARDATION*, H.R. DOC. NO. 88-58, at 2 (1963).

316. Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 *UTAH L. REV.* 343, 365.

professionals “propagandized” the American public and Congress on the need to switch from the “evils of warehousing to community care[.]”³¹⁷ Later, in the 1970s, there was a push to remove people with intellectual and developmental disabilities from institutions.³¹⁸ Congress agreed and set a goal of constructing 2,000 community mental health centers.³¹⁹ The deinstitutionalization part of the plan was “a cautionary tale of success,”³²⁰ with mental hospital populations plummeting 80 percent between 1955 and 1985, with a decline of more than 440,000 people.³²¹ It was especially effective in reducing the institutionalized population of those with intellectual and developmental disabilities, going from a population of 194,650 in 1967 to 69,557 in 2015.³²²

It is hard, however, to view the positive agenda of deinstitutionalization of those with mental illness as a success. Fewer than half of the community mental health centers that were supposed to provide services ever got built,³²³ and the ones that were created largely provided services such as marriage counseling and family therapy to people who had never been institutionalized.³²⁴ Only 20 percent of the chronic patients released from state facilities and a minority of all other mentally ill patients found a supportive therapeutic environment after their release.³²⁵ A 1977 General Accounting Office report “concluded that many of the nation’s community mental health programs were inadequate and poorly planned, and that patients were discharged from state hospitals before adequate support services, such as housing or jobs, were provided.”³²⁶ A report commissioned by President Carter in 1978 concluded that a “substantial number of Americans” lacked adequate

317. HENRY A. FOLEY, *COMMUNITY MENTAL HEALTH LEGISLATION: THE FORMATIVE PROCESS* 139 (1975).

318. BEN-MOSHE, *supra* note 255, at 69.

319. PHILIP K. ARMOUR, *THE CYCLES OF SOCIAL REFORM: MENTAL HEALTH POLICY MAKING IN THE UNITED STATES, ENGLAND, AND SWEDEN* 239–40 (1981).

320. BEN-MOSHE, *supra* note 255, at 4.

321. Weisberg, *supra* note 316, at 364.

322. BEN-MOSHE, *supra* note 255, at 40.

323. Jonathan Alter et al., *Homeless in America*, *NEWSWEEK*, Jan. 2, 1984, at 1, 27.

324. Weisberg, *supra* note 316, at 364; Abigail Trafford, *Mental Patients: A “Forgotten Minority” in U.S.*, *U.S. NEWS & WORLD REP.*, Nov. 19, 1979, at 49, 49.

325. *See Departments of Labor and Health, Education, and Welfare and Related Agencies Appropriations for Fiscal Year 1974: Hearing on H.R. 8877 Before the Subcomm. of the S. Comm. on Appropriations*, 93d Cong., 5221 (1973) [hereinafter *Appropriations Hearing*] (statement of Dr. Alfred Freedman, President, American Psychiatric Association).

326. Joann Stevens, *Experts Say Mental Health Patients Sent to Communities Without Enough Planning, Support and Services*, *WASH. POST*, June 21, 1979, at DC2.

mental health care.³²⁷ The election of Ronald Reagan and the Democrats' loss of control in the Senate in 1980 was the end of bipartisan support for mental health reforms, as Republicans wanted to shrink the federal role and place greater fiscal responsibility on the states to provide mental health care.³²⁸ After increasing expenditures for mental health care tenfold between 1963 and 1978, funds fell 19 percent between 1980 and 1982 alone.³²⁹ Cuts in federal welfare funding further harmed this population, as many people with mental illness relied on welfare payments to stay in marginal boarding homes.³³⁰ A large number of mentally ill people ended up in nursing homes, which contained more mentally ill persons than any other care setting by 1981.³³¹ Most nursing homes were ill-equipped to handle these people, so they overmedicated them with drugs, thus returning these patients to environments that resembled the "snake pit" wards of the large state hospitals that sparked the deinstitutionalization movement in the first place.³³² A huge portion of the mentally ill population ended up homeless, with former mental patients comprising between one-third to one-half of the total population of unhoused people by the early 1980s.³³³ Many people with mental illness have ended up transinstitutionalized in prisons and jails.³³⁴ And those who have remained in mental hospitals because they are viewed as "dangerous" are disproportionately people of color.³³⁵ The

327. PRESIDENT'S COMM'N ON MENTAL HEALTH, 1 REP. TO THE PRESIDENT vii (1978).

328. See MICHAEL J. DEAR & JENNIFER R. WOLCH, *LANDSCAPES OF DESPAIR: FROM DEINSTITUTIONALIZATION TO HOMELESSNESS* 161 (1987).

329. *Id.*

330. See PAUL LERMAN, *DEINSTITUTIONALIZATION AND THE WELFARE STATE* 12–13 (1982).

331. Margaret W. Linn & Shayna Stein, *Nursing Homes as Community Mental Health Facilities*, in *HANDBOOK ON MENTAL HEALTH POLICY IN THE UNITED STATES* 267, 267 (David A. Rochefort ed., 1989).

332. See MURRAY LEVINE, *THE HISTORY AND POLITICS OF COMMUNITY MENTAL HEALTH* 79–80 (1981).

333. See AM. PSYCHIATRIC ASS'N, *THE HOMELESS MENTALLY ILL: A TASK FORCE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION* 78–79 (H. Richard Lamb ed., 1984).

334. The populations in mental institutions and prisons and jails overlap, but there are also important differences between the two. See Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 87 (2011) [hereinafter Harcourt, *Reducing Mass Incarceration*]; see also Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1780 (2006) [hereinafter Harcourt, *From the Asylum to the Prison*].

335. Harcourt, *Reducing Mass Incarceration*, *supra* note 334, at 86.

end result of deinstitutionalization, at least for those with mental illnesses,³³⁶ was thus a “stunning public policy failure[].”³³⁷

Deinstitutionalization offers several cautionary tales for the prison abolition movement. First, like the failure of Reconstruction after emancipation, it shows that, as difficult as it is to achieve a negative agenda, even if one gets through that part of a plan, the positive agenda necessary for true success is harder still. Today’s prison and jail populations are in large part the legacy of the failures of Reconstruction and deinstitutionalization. Even if carceral detention is abolished, it (or a functional substitute) would reemerge if the positive agenda fails because abolitionists concede that, in the case of their movement, the positive agenda is necessary for the negative one. You cannot abolish prisons without eradicating the reasons for them, and abolitionists believe the positive agenda is the key for that. Thus, if the positive agenda does not materialize, the forces that produced incarceration in the first place will lead to its reemergence because people will demand some measure of security and consequences for the harms being caused.³³⁸ While the abolition of slavery and deinstitutionalization each also relied on a positive agenda, the success of their respective negative agendas was not inextricably linked to positive investments in the same way it is with prison abolition. In those two movements, the positive agenda failed, which undermined the ultimate goals they had, but the institutions they sought to eradicate could remain abolished (or, in the case of deinstitutionalization, radically diminished) even though the positive agenda never materialized. The lack of the positive agenda did not create a political climate that called for the reemergence of the abolished institution. That is not true with prison abolition—one is necessary for the other.

Moreover, the funding necessary for the prison abolition agenda is orders of magnitude greater than what was required for the positive agenda for the deinstitutionalization of state mental hospitals. If the more limited funding for deinstitutionalization did not come

336. The story for those with intellectual and developmental disabilities is less bleak because they adjusted far more readily to life outside of institutions. Moreover, the practice of institutionalizing that group had largely fallen out of favor among professionals, so the public and professional opinion was already in favor of keeping these individuals out of institutional settings. See BEN-MOSHE, *supra* note 255, at 65–67, 237. Thus, as one commentator notes, “[i]n the field of developmental disabilities, the abolitionary vision seems to have won the battle,” though “[i]n the field of psychiatric disabilities and the movement to abolish psychiatry and its institutions, the picture is murkier.” *Id.* at 106–07.

337. David Mechanic & David A. Rochefort, *Deinstitutionalization: An Appraisal of Reform*, 16 ANN. REV. SOCIO. 301, 302 (1990).

338. For a general discussion of how alternatives to criminal law and punishment might share the same problems identified by abolitionists, see generally Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381 (2022).

through,³³⁹ there is no reason to believe the far greater funding for the prison abolitionist agenda will. While abolitionists speak of community involvement, the funding necessary for the prison abolitionists' positive agenda would need to come from the state and federal levels because local communities lack the budgets for what would be necessary.³⁴⁰ Deinstitutionalization shows just how hard it is to get those investments from either federal or state governments. Indeed, this is one respect in which prison abolition is a much harder political climb than defunding the police. Policing is largely local, so communities have a greater say in its operation and funding.³⁴¹ Prisons are operated and funded by the state (or by the federal government in the case of federal prisons),³⁴² so their dismantling requires state and federal political mobilization, just as the positive agenda would need to turn to those same sources for funding. It is much harder to get the necessary political consensus at the state and federal levels than at the community level for any criminal justice reform, much less prison abolition.

Second, the deinstitutionalization movement shows the dangers of setting policy with an incomplete narrative. Supporters of deinstitutionalization had a simplistic notion of what constituted mental illness.³⁴³ They spoke of mentally ill people as if they were a homogenous group and described the typical case as "mothers . . . who just can't afford for the sake of their children, their relationship in their church, the PTA[,] . . . they just can't afford to be committed to

339. See Weisberg, *supra* note 316, at 364.

340. See Gardner, *supra* note 163, at 807 ("[W]hat is the value of locating crime policy at the neighborhood level (assuming this to be coterminous with the community level) when welfare policy transformation is only tenable at the state and federal levels?").

341. See McLeod, *supra* note 84, at 1634–36.

342. CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUST., THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 8, 10 (2012), <https://www.vera.org/publications/price-of-prisons-what-incarceration-costs-taxpayers>; DEP'T OF JUST., FEDERAL PRISON SYSTEM (BOP): FY 2021 BUDGET REQUEST 1–5 (2020), <https://www.justice.gov/doj/page/file/1246666/download>.

343. At the most extreme end were those like Thomas Szasz, who believed mental illness as a diagnostic category was a "myth" and was instead a social construct. THOMAS S. SZASZ, *THE MYTH OF MENTAL ILLNESS: FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT* 294–97 (1964). He opposed all forms of involuntary confinement, and, like today's prison abolitionists "whose goal is to untie the Gordian knot between crime (its production, crime rates, and the construction of criminality) and incarceration, Szasz's goal was to untie the knot between deviance/abnormality and biomedicalization, leading to psychiatric confinement." BEN-MOSHE, *supra* note 255, at 96. And like today's prison abolitionists, Szasz also compared his quest to the abolition of slavery and resisted lesser reforms. *Id.* at 104.

an institution[.]”³⁴⁴ They naively assumed mental illness was easily correctable, particularly with advances in psychotropic drugs starting in the mid-1950s that could help alleviate the symptoms of many mental illnesses.³⁴⁵ The chairman of a congressional hearing in 1973 asked whether there were still people with mental illness in the country or was “it about over?”³⁴⁶ They likened the release of people from mental hospitals to people from general hospitals returning to communities after an appendectomy.³⁴⁷ There were, admittedly, many people in state hospitals who fit this picture and could adjust easily upon release. But there were many others with serious mental health conditions, such as psychotic disorders, who struggled after release. This was particularly true because people needed to navigate a maze to obtain assistance from the government. They needed federal welfare and care from multiple, uncoordinated government agencies, and many were too severely mentally ill to fill out the necessary forms or locate the right agency for help.³⁴⁸ One professional commented that “[e]xpecting the chronically ill patient to use the current mental health system is like expecting a paraplegic to use stairs.”³⁴⁹ Other chronically ill patients needed more than just help navigating the complicated system. They needed full-time custodial care. Advocates and legislators, however, let their own narratives of who constituted the mentally ill “rather than evidence [form] the basis on which new policy proposals were formulated.”³⁵⁰ The result was a policy response that worked for many, but not all, of the people actually housed in asylums. Prison abolitionists face the

344. *Mental Health: Hearings on H.R. 3688, H.R. 3689, and H.R. 2567 Before a Subcomm. of the H. Comm. on Interstate & Foreign Com.*, 88th Cong. 160 (1963) [hereinafter *Mental Health Hearings*] (statement from Frank G. Clement, Governor of Tennessee).

345. CHRISTOPHER SLOBOGIN ET AL., *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 817 (7th ed. 2020).

346. *Community Mental Health Centers—Oversight: Hearing Before the Subcomm. on Pub. Health & Env’t of the H. Comm. on Interstate & Foreign Com.*, 93d Cong. 12 (1973) (statement of Rep. Paul G. Rogers, Chairman, H. Subcomm. on Pub. Health & Env’t).

347. *Mental Health Hearings*, *supra* note 344, at 234 (statement of Dr. Harold L. McPheeters, Director of Mental Health for the State of Kentucky and Secretary-Treasurer of National Association of State Mental Health Program Directors).

348. 42 U.S.C. § 9401 (2020); U.S. GOV’T ACCOUNTABILITY OFF., *YOUNG ADULTS WITH SERIOUS MENTAL ILLNESS: SOME STATES AND FEDERAL AGENCIES ARE TAKING STEPS TO ADDRESS THEIR TRANSITION CHALLENGES* 8, 21 (2008), <https://www.gao.gov/assets/gao-08-678.pdf>.

349. Emily Friedman, *The Light that Failed: Psychiatric ‘Deinstitutionalization’ Has Betrayed Its Promise*, 57 J. AM. HOSP. ASS’N 88, 90 (1983).

350. GERALD N. GROB, *FROM ASYLUM TO COMMUNITY: MENTAL HEALTH POLICY IN MODERN AMERICA* 224 (1991).

same danger because focusing on social structures alone as the cause of harms will not address all the causes of and incentives for people harming one another in a society. The cases that are not addressed by rhetoric do not disappear, and they ultimately cause problems for the credibility and success of the policy response.

A third lesson from deinstitutionalization is that, in addition to underestimating the seriousness of some mental illnesses, policymakers overestimated the family and community options that would be available. They blithely assumed patients released from mental hospitals would return to welcoming communities and normal and happy lives with "friends and relatives,"³⁵¹ utterly failing to recognize the world of isolation in which so many people with chronic mental illness actually lived and the public's unwillingness to make investments in their well-being and care. Of the former patients in homeless shelters, roughly 90 percent had neither friends nor family.³⁵² There was thus no community for many of these individuals to return to. As Robert Weisberg observed:

[O]ne key factor in this public disaster was the entrancement of people out in society generally, mental health professionals, and some politicians, with the notion that there was something out there called the community to which drugged and incarcerated mental patients could return, and where they would be respected, if not cured, and thrive far better.³⁵³

Sadly, the community reaction to those with mental illness was worse than unwelcoming; it was hostile. While the public was more accepting of mental illness in the 1960s than it had been in the past, overall they showed contempt for those with serious mental illness.³⁵⁴ Contrary to the assumptions baked into the narrative of deinstitutionalization advocates, many people preferred to have mentally ill family members treated in distant hospitals than nearby in their communities.³⁵⁵ There was widespread opposition to the construction of community mental health centers "by municipal jurisdictions and neighborhood residents who fear[ed] client presence and who avoid[ed] the burdens of support[.]"³⁵⁶ Even when

351. *Mental Health Hearings*, *supra* note 344, at 208 (statement of Dr. Henry N. Pratt, Director of the Society of the New York Hospital, American Hospital Association).

352. Ellen L. Bassuk, *The Homelessness Problem*, 251 *SCI. AM.* 40, 42-43 (1984).

353. Weisberg, *supra* note 316, at 363.

354. JUM C. NUNNALLY, JR., *POPULAR CONCEPTIONS OF MENTAL HEALTH: THEIR DEVELOPMENT AND CHANGE* 46 (1961) (discussing surveys showing people regarded those with mental illness "with fear, distrust and dislike").

355. DIANA RALPH, *WORK AND MADNESS: THE RISE OF COMMUNITY PSYCHIATRY* 22 (1983).

356. DEAR & WOLCH, *supra* note 328, at 28.

community mental health centers existed, the chronically mentally ill did not interact with members of the community. Sue Estroff conducted an ethnographic study at a community mental health center that won national acclaim, but even there, those with mental illness associated with each other but had minimal contact with the broader community.³⁵⁷ They had no permanent jobs in the community, nor did they play any other active role.³⁵⁸ These people, limited by their mental illness and lack of financial resources, were shunned and feared much like the institutionalized patients of old.³⁵⁹ Estroff concluded that “[t]he roles, expectations, stereotypes, and responses that accompany being [mentally ill] have changed [very] little.”³⁶⁰ The Joint Commission on Mental Illness and Health similarly unveiled a picture of the American public in which they did “not feel as sorry as they [did] relieved to have out of the way persons whose behavior disturbs and offends them.”³⁶¹ A Task Force of President Carter’s Commission on Mental Health similarly found that “those who fear[ed] mental illness [saw] mental patients as both unpredictable and dangerous.”³⁶² This view of the mentally ill as dangerous persisted throughout deinstitutionalization.³⁶³ A full 12 percent of 8,100 respondents to a 1981 survey believed that mentally ill people in state hospitals should be killed.³⁶⁴

There is no reason to believe the community response to those who have committed crimes will be more welcoming than the response to those who were institutionalized for mental health reasons, particularly given the overlap between the two populations.³⁶⁵ On the contrary, it is likely to be far more hostile. Those with mental illnesses have some legislative protections in the Americans with Disabilities Act and the Fair Housing Act, and they

357. SUE ESTROFF, *MAKING IT CRAZY: AN ETHNOGRAPHY OF PSYCHIATRIC CLIENTS IN AN AMERICAN COMMUNITY* 48, 58 (1981).

358. *Id.* at 60–61.

359. *Id.* at 58–61.

360. *Id.* at 254.

361. JOINT COMM’N ON MENTAL ILLNESS & HEALTH, *ACTION FOR MENTAL HEALTH: FINAL REPORT* 58 (1961).

362. PRESIDENT’S COMM’N ON MENTAL HEALTH, *IV TASK PANEL REPORTS: REPORT OF THE TASK PANEL ON PUBLIC ATTITUDES AND USE OF MEDIA FOR PROMOTION OF MENTAL HEALTH* app. at 1876 (1978). A review of all post-World War II survey literature likewise found popular conceptions of mental illness saturated with fear and mistrust. J. Fracchia et al., *The Effect of Increased Information upon Community Perception of Ex-Mental Patients*, 91 *J. PSYCH.* 271, 273–75 (1975).

363. Judith G. Rabkin, *Determinants of Public Attitudes About Mental Illness: Summary of the Research Literature*, in *ATTITUDES TOWARD THE MENTALLY ILL: RESEARCH PERSPECTIVES* 15, 20–23 (Judith G. Rabkin et al. eds., 1980).

364. John A. Talbott, *The Chronic Mental Patient: What Have We Learned?*, 3 *AM. J. SOC. PSYCHIATRY* 37, 37 (1983).

365. See Harcourt, *Reducing Mass Incarceration*, *supra* note 334, at 87.

come from a broader range of socioeconomic classes than those in the prison population.³⁶⁶ Yet they still faced enormous resistance. It is hard to put much faith in a more robust community response when it comes to the population of people who are incarcerated and what would be needed to keep communities safe. For example, Mariama Kaba points out that you need “to really know your neighbor, figuring out when you should be intervening when you hear and see things, feeling safe enough within your community that you feel like, yeah, my neighbor’s punching their partner, I’m going to knock on the door[.]”³⁶⁷ An abolitionist guide to domestic violence recognizes the potential danger in these situations and therefore calls for some members of the community violence interruption team to “have training in basic self-defense, hand-to-hand combat, and defense against a range of weapons[.]”³⁶⁸ It is hard to imagine many communities in America with sufficient bonds to make that model feasible, particularly given what we learned about the community response to deinstitutionalization.³⁶⁹ Máximo Langer notes that “it is unclear in these accounts how we would transition from our mass, socially complex, and specialized societies to these small communities.”³⁷⁰

Moreover, the concept of community is itself ill-defined.³⁷¹ Even if we could specify the geographic or shared interests that make a relevant group a community, some communities will want a punitive approach and reject the abolitionist vision.³⁷² And communities are likely to have major disagreements within them about the right approach. Even in communities that are disproportionately negatively affected by America’s penalism, widespread support remains for the use of law enforcement and prisons as a strategy for combating crime and to punish law enforcement officers who use

366. See U.S. DEP’T OF HOUS. & URB. DEV., FAIR HOUSING FOR INDIVIDUALS WITH MENTAL HEALTH, INTELLECTUAL, OR DEVELOPMENTAL DISABILITIES: A GUIDE FOR HOUSING PROVIDERS 2, <https://www.hud.gov/sites/dfiles/FHEO/images/MD%20Fact%20Sheet%20-%20HP.pdf>; Jitender Sareen et al., *Relationship Between Household Income and Mental Disorders*, 68 ARCH GEN PSYCHIATRY 419, 422–26 (2011).

367. KABA, *supra* note 2, at 98–99.

368. DANIEL ERNESTO ROBELO, ANTI POLICE-TERROR PROJECT & JUSTICE TEAMS NETWORK, INTERRUPTING INTIMATE PARTNER VIOLENCE: A GUIDE FOR COMMUNITY RESPONSES WITHOUT POLICE 44 (2022).

369. See NUNNALLY, *supra* note 354, at 46.

370. Langer, *supra* note 2, at 65.

371. Jánszky, *supra* note 167, at 1332–33.

372. See *id.* at 1346. This is particularly true given the way American communities are segregated by race and the distrust that fosters among people in marginalized communities. See Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 733 (2020) (“[S]egregation makes sustainable reform impossible because concentrated legal estrangement and institutional distrust are overdetermined in marginalized, segregated places.” (footnote omitted)).

excessive force.³⁷³ It is hard to see the abolitionist approach prevailing throughout a community to get the necessary support to make it succeed. Abolitionists also rely on the community to respond to any harms that do occur by deciding on what should be done as “a collective project decided together in community.”³⁷⁴ If the community is unwilling to make those investments, the abolitionist model unravels. And deinstitutionalization shows that relying on an ethic of care from communities is hardly a given. If that was true for the population with mental health problems, most of whom show no propensity for violence,³⁷⁵ it will be even more so for a population that has among them a much larger group of people who have already demonstrated a willingness to cause others harm.

A fourth lesson from the deinstitutionalization movement is in how the media and entertainment industry undermined the objectives by focusing on stories of people with mental illness as violent.³⁷⁶ As one researcher concluded, the media were “the greatest source of public information—and often misinformation—about mental illness.”³⁷⁷ The tendency of the media to focus on people with mental illness as violent, even though individuals who commit violent acts are a tiny percentage of those with mental health issues, led the public to believe they were too dangerous to integrate into the community.³⁷⁸ They thus resisted the necessary community care models. This fear will be even greater for people who have already engaged in criminal acts.

All of this is eerily similar to the dynamics at work in criminal law and punishment and calls for abolition. Allegra McLeod is aware of this very risk when she notes that “the positive project of abolition . . . is decidedly not an effort to replicate the institutional transfer

373. Langer, *supra* note 2, at 61–63; *see also id.* at 65 (“[S]mall communities can be oppressive and exclusive in their own ways.”).

374. KABA, *supra* note 2, at 61; *see also id.* at 148 (noting that restorative justice “asks the community to step in fully, to be less of a bystander and more of an actor in trying to repair harm”).

375. *See* Emilee Green, *Mental Illness and Violence: Is There a Link?*, ILL. CRIM. JUST. INFO. AUTH. (May 4, 2020), <https://icjia.illinois.gov/researchhub/articles/mental-illness-and-violence-is-there-a-link>.

376. *See* Steven E. Hyler, *DSM-III at the Cinema: Madness in the Movies*, 29 *COMPREHENSIVE PSYCHIATRY* 195, 195–97 (1988); Steven E. Hyler et al., *Homicidal Maniacs and Narcissistic Parasites: Stigmatization of Mentally Ill Persons in the Movies*, 42 *HOSP. & CMTY. PSYCHIATRY* 1044, 1045, 1048 (1991); M. Matas et al., *Mental Illness and the Media: Part II. Content Analysis of Press Coverage of Mental Health Topics*, 31 *CANADIAN J. PSYCHIATRY* 431, 431–32 (1986); Nancy Signorielli, *The Stigma of Mental Illness on Television*, 33 *J. BROAD. & ELEC. MEDIA* 325, 327–30 (1989).

377. Anne Mayer & Diane D. Barry, *Working with the Media to Destigmatize Mental Illness*, 43 *HOSP. AND CMTY. PSYCHIATRY* 77, 78 (1992).

378. *See* Fracchia et al., *supra* note 362, at 275.

that occurred in the aftermath of the deinstitutionalization of mental institutions.”³⁷⁹ But without a political vision of how to achieve the positive agenda, that risk is all too real. Abolitionists imagine a utopian society where every basic need is met. Never in American history has there been anything close to a political coalition to endorse that kind of support. Even at the height of the New Deal or the Great Society, there were limits to how far voters were willing to go in providing support.³⁸⁰ Abolitionists want adequate funding for housing, mental health, substance abuse, and every other basic need,³⁸¹ but deinstitutionalization shows that getting even the more limited funding for mental health is a herculean task that has yet to be achieved decades later. Moreover, financial investment alone is insufficient for the abolitionist vision to be realized, as it also requires the end of capitalism, racism, and paternalism.³⁸² For abolitionists to succeed, it would take a revolution, which, in a very real sense, is what they have in mind.³⁸³ And as if all that were not enough, even a complete change in American societal structure would not achieve the ultimate goal of no crime because people will harm each other regardless of how a society is structured.

To the extent that abolitionists want to build off the criminal justice reform movement and bipartisan dissatisfaction with mass incarceration and its failings, it is critical to note that there is nothing close to a similar bipartisan effort to create the kind of social programs abolitionists require. Prison is expensive, to be sure, but the kind of investment required to revamp society in the manner that the abolitionists have in mind would be orders of magnitude more expensive. The recent failure of the Build Back Better plan, with its modest childcare and other supports, shows there is just no appetite for anything close to what abolitionists envision.³⁸⁴ Moreover, to the extent there is a bipartisan backlash against mass incarceration, it rests in part on the inclusion of fiscal conservatives who see prison as an expensive, bloated government program that fails to achieve

379. McLeod, *supra* note 27, at 1164.

380. See Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1568, 1571–72, 1571 n.51 (1996) (book review).

381. See *supra* notes 111–14 and accompanying text.

382. See *supra* notes 117–25 and accompanying text.

383. *Manifesto for Abolition*, *supra* note 5 (“[W]e also refer to *all* revolutionary movements, insofar as they have abolitionist elements—whether the abolition of patriarchy, capitalism, heteronormativity, ableism, colonialism, the state, or white supremacy.”); Stahly-Butts & Akbar, *supra* note 9, at 1547, 1550 (noting that abolitionists work toward “a revolution” that includes “organizing against capitalism” and “ending patriarchy” (quoting Barbara Jordan, a founder of the Combahee River Collective)).

384. Kelly Anne Smith, *Biden’s Build Back Better Plan Is Dead. Now What?*, FORBES ADVISOR (Mar. 2, 2022, 1:12 PM), <https://www.forbes.com/advisor/personal-finance/build-back-better-plan-dead/>.

results.³⁸⁵ While they might be willing to shrink the footprint of criminal punishment to limit the government's reach in that area, there is no sign that they want to spend money in its place—orders of magnitude more money at that—to support the kind of society abolitionists envision to eliminate prisons outright.

There was a similar dynamic at play in the coalition that supported deinstitutionalization. Legislators at the initial hearings on deinstitutionalization overwhelmingly focused on the economic benefits of closing state hospitals and questioned mental health professionals about the costs, but they did not spend much time on the therapeutic value of shifting to community mental health centers.³⁸⁶ Indeed, “the advent of Medicaid and Medicare funding, which made possible largescale release of chronic patients to community nursing homes” might have been “the single largest contributing factor to deinstitutionalization.”³⁸⁷ Saving money was absolutely critical to the coalition pushing deinstitutionalization, which explains why they put their efforts into closing hospitals but not the positive agenda of building adequate replacements.³⁸⁸ As America elected presidents who were less interested in federal investments in improving society than Presidents Kennedy and Johnson were, money for mental health shrank even further, with President Nixon refusing to allocate the full amount authorized by Congress for mental health.³⁸⁹ Senator Edward Kennedy noted that “one of the most discouraging aspects of recent times is the failure [to fund] the whole mental health program by the administration.”³⁹⁰ Nixon's Secretary of Health, Education, and Welfare, Caspar Weinberger, viewed mental health investments as “one big demonstration project” and wanted to see an end of federal support

385. See Tina Rosenberg, Opinion, *On One Issue, Americans Are United. Too Many Are Behind Bars.*, N.Y. TIMES (Oct. 30, 2019), <https://www.nytimes.com/2019/10/30/opinion/on-one-issue-americans-are-united-too-many-are-behind-bars.html> (“The prison system is a perfect conservative target: a hugely expensive failure of a government program that deprives people of their freedom.”).

386. See BEN-MOSHE, *supra* note 255, at 57.

387. SLOBOGIN ET AL., *supra* note 345, at 818.

388. See BEN-MOSHE, *supra* note 255, at 57 (noting that the push to close state hospitals was driven in part by a desire to reduce costs, but that same incentive structure meant a lack of interest in investing in social services).

389. HANDBOOK ON MENTAL HEALTH POLICY IN THE UNITED STATES 133 (David A. Rochefort ed., 1989) (From 1970 to 1973, the Nixon Administration allocated only \$50.5 million for mental health expenditures out of the \$340 million authorized by Congress.).

390. *Physicians Training Facilities and Health Maintenance Organizations: Hearings on S. 935, S. 703, S. 837, S. 1182, S. 1301, S. 2827, and S. 3327 Before the Subcomm. on Health of the S. Comm. on Lab. & Pub. Welfare*, 92d Cong. 2488 (1972) (statement of Sen. Edward M. Kennedy, Chairman, Subcomm. on Health of the S. Comm. on Lab. & Pub. Welfare).

for it.³⁹¹ President Ford likewise recommended a "gradual reduction of Federal participation."³⁹² The Reagan Administration's approach of using block grants to states for a variety of programs that included mental health services along with other social services was a further disaster for mental health funding, which ranked low on the priorities for state and local governments.³⁹³ Fiscal conservatives supported the shrinking of big state hospitals, but they bristled at investing in community services.³⁹⁴ Even when officials were told at hearings in 1972 that thousands of former state hospital patients were released only to "roam the streets, live in ramshackle boarding houses or nursing homes which do not meet minimum safety standards or . . . add to the burgeoning rolls of our welfare agencies," legislators still did nothing and instead continued to focus on costs and savings.³⁹⁵ They heard testimony describing people who had "lived in State institutions for 10 and 20 years and [had] no family to return to, no jobs and no place in the community," but they still just focused on cost savings and not investing in the lives of people in those situations.³⁹⁶ That is the reason only the former goal of emptying the hospitals succeeded, while the latter goal of putting community support in its place never materialized. If the more modest funding needs of deinstitutionalization failed, there is little reason to hope for the far larger project that prison abolition would require.

CONCLUSION

Prison abolitionists often like to point out that the abolition of slavery seemed impossible at the time, until it wasn't. They use the language of abolition to recall that successful campaign and associate their own efforts with the righteous history of the end of slavery. But there are important differences. Those who sought the abolition of

391. *Appropriations Hearing, supra* note 325, at 5282 (statement of Sen. Richard S. Schweiker, Member, Subcomm. of the S. Comm. on Appropriations).

392. *Departments of Labor and Health, Education, and Welfare and Related Agencies Appropriations for Fiscal Year 1976: Hearing on H.R. 8069 Before a Subcomm. of the S. Comm. on Appropriations*, 94th Cong. 746 (1975).

393. *Misuse of Federal Funds for the Mentally Ill: Hearing Before the Hum. Res. & Intergovernmental Rels. Subcomm. of the H. Comm. on Gov't Operations*, 102d Cong. 2, 26(1991); *When a Mental Health Idea Boomerangs*, U.S. NEWS & WORLD REP., Sept. 24, 1984, at 6, 6.

394. See Bagenstos, *supra* note 314, at 21 ("It should not be surprising that the coalition of deinstitutionalization advocates and fiscal conservatives largely achieved their goal of closing and downsizing institutions and that deinstitutionalization advocates were less successful in achieving their goal of developing community services.")

395. *Departments of Labor and Health, Education, and Welfare Appropriations for 1973: Hearings Before a Subcomm. of the Comm. on Appropriations*, 92d Cong. 424 (1972) (statement of Mike Gorman, Executive Director, National Committee Against Mental Illness).

396. *Id.*

slavery could look to other countries and see them flourishing without slavery.³⁹⁷ No modern nation provides a model of what society looks like without prisons.³⁹⁸ Prison abolition is also different from slavery because there is no way to achieve the negative agenda without the positive one succeeding. Slavery could be abolished even without a successful effort at Reconstruction, but the same is not true of the abolition of prisons, as prison abolitionists readily admit. It is hard to see how a political coalition emerges for the ambitious positive agenda abolition requires, especially given the history of smaller-scale efforts like deinstitutionalization. And even if the positive agenda were pursued, it will not eliminate all crime. Because the negative agenda depends on the positive one, it is all too easy to see how things will go bust. The positive agenda cannot emerge fast enough for people to trust the end of prisons because crime will continue to occur in the meantime. It is hard to see how abolition can succeed in its end goal. But the risk is not simply that calls for abolition will not achieve the end of prisons. There is also the danger that more modest efforts to decarcerate and limit the reach of criminalization and punishment in America could be curtailed because of a negative association with abolition and its failure to address real harms that alarm and infuriate the public. Politicians may fear being labeled as abolitionists if they support any reform. Other reforms that could make life better for people currently suffering in prisons and jails might fail because they lack sufficient support if too many advocates opt to hold out for bolder options that are consistent with an abolitionist vision but that are unlikely to ever materialize.

These are real risks, and they should be considered if one is assessing the political future of an abolitionist movement. Some will disagree with the assessment offered here and conclude that the political benefits of mobilization and public education around abolition outweigh the potential risks and that eventually people's views will change from where they are today. Maybe deinstitutionalization failed because it lacked the right leadership vision, and abolition will succeed because its leaders are more sophisticated in what it will take as a matter of community organizing.

It is an age-old question whether to hold out for radical revolution that may never come or to accept reforms that will undoubtedly benefit people right now. People may disagree about how to resolve that question, but it is important not to ignore it. There are real political trade-offs with an abolitionist agenda, and even though it is

397. *Abolitionism Timeline*, *supra* note 247.

398. Bagaric et al., *supra* note 89, at 395–96 (“The fact that prisons are used in every country and there is no other prototype for containing the determinedly wicked people from harming others speaks loudly about the plausibility of the abolitionist ideal.”).

not intentional, the costs will be borne by the millions of incarcerated people and their loved ones who could benefit from a political strategy that is less revolutionary but would nevertheless bring them relief in their lifetimes.