POLITICAL RETRIBUTIVISM, LIBERAL DEFICITS & INSTRUMENTAL INSTITUTIONALISM: LINGERING QUESTIONS (AND WARM WORDS) FOR DAN MARKEL

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Strangers on this road we are on.
We are not two; we are one.

—The Kinks**

INTRODUCTION

I recall the first time I came face-to-face with Dan Markel. It was 2009, and I was a newly minted law professor, attending the annual meeting of the Law & Society Association. True to his enterprising spirit, Dan had spearheaded a small conference within the larger conference. He was moderating a panel and would not cede the stage. Well after protocol demanded a shift to audience question-and-answer, Dan continued to grill the speakers. I was struck (admittedly, not entirely positively) by this brash scholar who seemed to be sucking the air out of the room. But I recognized also that his challenges were insightful. He had done his homework. Dan always did his homework. Too many of us read workshop papers just closely enough to develop a

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**. THE KINKS, *Strangers*, *on* LOLA VERSUS POWERMAN AND THE MONEYGOROUND, PART ONE (Reprise Records 1970).

constructive comment or two. Dan understood the articles and essays front to back. He saw the flaws. He wasn't taking cheap potshots. His style was strident, but he was improving the authors' projects.

I am somewhat allergic to domineering personalities, but I felt compelled to introduce myself. We had a pleasant, if unremarkable, conversation. I figured I had made no impression.

Fast forward to the next summer. I had just posted to the Social Science Research Network my first paper as a pre-tenured faculty member at the University of Virginia School of Law. I am not otherwise on social media and therefore only expected feedback from the select group of mentors and colleagues from whom I had sought input directly. Academics are a generous lot, but they are likewise busy. When authors ask others to read drafts, they can expect a few to offer thoughtful and thorough comments, the majority to send brief notes detailing stray impressions, and silence from the rest. I try to fit in the first camp. Usually, I find myself in the second. And, embarrassingly, I have fallen sometimes into the third. But I have never done what Dan did. Here was this scholar to whom I had said only a few brief words a year earlier. Unsolicited, he sent me comments. So many comments. Pages and pages of comments. To be sure, Dan's feedback was highly critical, but it was likewise probative and highly useful. Dan understood that a barbed attack need not destroy. Rather, rough edges can serve as honing steel against which arguments are sharpened. To this day, I am tremendously grateful to Dan for his insights on that article. He substantially improved a project that would become central to my tenure file.[1]

Even though Dan was something of a pugilist, it was not always with an eye toward winning the day. Or, rather, his conception of winning was about the success of the endeavor more than point scoring. Dan appreciated that the academic's craft is collaborative—that legal scholars are, ultimately, all part of one team engaged in a common enterprise. That perspective explains Dan's generosity toward me—a colleague with whom he disagreed, substantively, on almost everything.

For my part, I warmed more slowly. I let our differences interfere. To me, Dan was not unlike Lon Fuller's fictive Justice Keen—a figure for whom rigid "fidelity to written law" took precedence over pressing countervailing moral and prudential concerns.[2] And my guess is that Dan, in turn, considered me akin to Fuller's fictive Justice Foster—a jurist who unduly favored equitable exceptions over the formal

1. *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010) [hereinafter Bowers, *Legal Guilt*].

2. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 639 (1949); *see generally* Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004).

application of rules. I chuckle to think that Dan would have extended Keen's assessment of Foster to me:

> My brother Foster's penchant for finding holes in statutes reminds one of the story told by an ancient author about the man who ate a pair of shoes. Asked how he liked them, he replied that the part he liked best was the holes. That is the way my *brother* feels about statutes; the more holes they have in them the better he likes them.[3]

In the nature of caricature, neither of Fuller's judges quite describes Dan or me. But no matter. The point is merely that Dan could have thought of me as I initially viewed him—as a *stranger*, an antagonist, best kept at arm's length. Instead, he welcomed and received me—just as Keen accepted Foster (ribbing aside)—as a *brother* in a collective professional undertaking. It was this inclusive attitude that made Dan the consummate "connector"—a scholar who drew other scholars together, digitally through the blog he created and physically through the conferences and colloquia he developed (most of which flourish to this day).[4] It is an attitude that has informed not only my approach to colleagues but also some of my recent scholarship.[5] I am grateful to Dan for that lesson.

I had the privilege to know Dan for fewer than five years. But I am pleased that our paths crossed so often during that stretch. He invited me to present to the roundtable he developed at my alma mater, New York University School of Law. In turn, the *Virginia Journal of Criminal Law* invited Dan to author the feature article for its inaugural

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3. Fuller, *supra* note 2, at 634 (emphasis added); *cf.* Josh Bowers, *What If Nothing Works? On Crime Licenses, Recidivism, and Quality of Life*, 107 VA. L. REV. 959 (2021) [hereinafter Bowers, *What if Nothing Works?*] (endorsing crime licenses for recidivist offenders); Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129 (2017) [hereinafter Bowers, *Annoy No Cop*] (endorsing particularistic exceptions from legal commands); Josh Bowers, *Upside-Down Juries*, 111 NW. U. L. REV. 1655 (2017) (endorsing equitable charging and sentencing screens); Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity"*, 66 STAN. L. REV. 987 (2014) [hereinafter Bowers, *Pointless Indignity*] (endorsing equitable Fourth Amendment protections); Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319 (2012) (endorsing equitable charging screens); *see* Bowers, *Legal Guilt*, *supra* note 1 (endorsing equitable charging discretion).

4. MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE 38, 49 (2000) (describing "connectors" as "people with a special gift for bringing the world together" by virtue of "something intrinsic to their personality, some combination of curiosity, self-confidence, sociability, and energy"); *see, e.g.*, PRAWFSBLAWG, https://prawfsblawg.blogs.com/ [https://perma.cc/EHL6-QBPD] (law blog founded by Dan); *Cardozo Hosts CrimFest 2022,* CARDOZO LAW (Jul. 19, 2022), https://cardozo.yu.edu/news/cardozo-hosts-crimfest-2022 [https://perma.cc/F5DS-WCTX] (annual criminal law conference founded by Dan); MARKELLOQUIUM!, https://www.markelloquium.org/ [https://perma.cc/38E2-RYLN] (monthly workshop founded by—and now named in honor of—Dan).

5. *See, e.g.*, Josh Bowers, *Mercy* in Extremis, *In-Group Bias, and Stranger Blindness*, 102 TEX. L. REV. 1561, 1572 (2024) [hereinafter Bowers, *Mercy* in Extremis] (endorsing "self-other merging" strategies whereby "commonalities are emphasized, rather than differences" to promote prosocial goals like generosity and mutual aid).

volume—an article to which I penned a perhaps too-scathing response (that Dan probably thought was not scathing enough). Finally, he organized and hosted my workshop visit to his home institution, the Florida State University College of Law.

That trip to Tallahassee was the last time I saw Dan. I particularly cherish one memory from my stay. It was a beautiful spring evening, and, after dinner, Dan and I took a walk around a campus lake. Over the next half an hour, we did not debate scholarship or even gossip about colleagues and institutional matters. To be sure, he had plenty of criticisms of my workshop paper, but he sheathed his sword until the next day's presentation. Instead, Dan revealed his human side. That night, he was vulnerable. He discussed difficult and private family struggles that would become all too public after his murder.

Until that evening, I'm not certain that I would have called us friends. But I now recognize that Dan already knew we were. And I am sorry—so very sorry, considering the tragedy that followed—that I could not see it sooner and never expressed it sufficiently. I thank Dan for his sincerity—and for his *willingness*, in that way, to be a better person than me and toward me.[6]

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Dan would not want me to end this essay on such a maudlin note. He would urge me, instead, to go on the aggressive. And, of course, he would want the opportunity to respond in turn. Because that is impossible, I find myself at something of a loss about how to proceed. In any event, Dan and I have already aired extensively most of our most-pressing disagreements in the pages of the *Virginia Journal of Criminal Law*.[7] My initial inclination was merely to scour that volume to uncover some new line of attack. But I just don't have the stomach for one-sided salvos (even if Dan might have welcomed them). Dan and I have debated enough.[8] I am left, then, with a set of thoughts about how current events affect Dan's central claims.

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6. On *willingness*, as I use that term here, I am reminded of E.B. White's observation: "No one should come to New York to live unless he is *willing* to be lucky." E.B. WHITE, HERE IS NEW YORK 10 (1949) (emphasis added). When tourists visit Law Vegas, they *hope* to be lucky at gaming, but it is largely out of their hands. There is, comparatively, a separate kind of luck involved in finding genuine human connection, and it takes an act of *will*—an emotional *openness*—to discover it.

7. Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1 (2012) [hereinafter Markel, *Retributive Justice*]; Josh Bowers, *Blame by Proxy: Political Retributivism & Its Problems, A Response to Dan Markel*, 1 VA. J. CRIM. L. 135 (2012) [hereinafter Bowers, *Blame by Proxy*]; Dan Markel, *Making Punishment Safe for Democracy: A Reply to Professors Bowers, Cahill & Duff*, 1 VA. J. CRIM. L. 205 (2012) [hereinafter Markel, *Reply*].

8. Dan shared with me a propensity to overwrite, and our exchange runs already over two hundred pages. I am inclined, on this score, to reuse an old joke from a colleague. After I circulated by email an overly long draft, my colleague "replied all" with a list of classic novels, including Ernest Hemingway's THE OLD MAN AND THE SEA and George Orwell's ANIMAL FARM, that were shorter. Since Dan's article was several-thousand words longer

This essay proceeds as follows. In Part I, I recount our prior exchange and provide the reader with a primer on Dan's thesis and my basic critique. Specifically, Dan argued that conventional retributive theory ought not to be concerned "with matching suffering or joy to moral desert," but ought, instead, to focus upon "the communication of condemnation to those who have . . . unreasonably flouted the polity's criminal laws," subject only to the qualification that the polity and its laws must be, in the first instance, sufficiently liberal and sensible.[9] By coupling moral culpability with formal rule-breaking, Dan contended that he had achieved two aims at once: he had articulated a theory of political obligation and of retribution. I responded, in turn, that he had done neither.

In Part II, I review the fundamental liberties Dan thought integral to liberalism and my skepticism about the methodology Dan had used to reach these conclusions. I then introduce what both of us missed. For all the pages of ink we spilt, neither Dan nor I devoted sufficient space, as a matter of ideal theory, to ascertaining the *structural and institutional preconditions* of democratic liberalism.

In Parts III and IV, I detail recent chaotic events that call into question whether Dan and I were right to presume the relatively good health and strength of American liberalism. And I conclude that—given the tumult of our culture and politics and the fragility of our liberal legal and democratic institutions—perhaps Dan's theory is attractive after all, not as a deontic proxy for moral blameworthiness but, instrumentally, as a means to express liberal-institutional support and to provide thereby a partial bulwark against the destructive political impulses that most threaten America's capacity to become a more *decent* society. *Political retributivism*, on this reading, could serve as one flank in a broader effort to refashion punishment around pressing civic need. And, by this argument—rooted in the pragmatic progressivism of Richard Rorty—I offer prudential reasons to be hesitant about criminal-legal abolitionism, endorsing instead a minimalist approach to law enforcement and punishment that concentrates systemic energy on those who would steal elections, not wallets.

I. A BRIEF RECAP

In his article, *Retributive Justice and the Demands of Democratic Citizenship*, Dan sketched a theory of "political retributivism," whereby actors would be morally obligated to obey even "dumb" (but not "spectacularly dumb") *malum prohibitum* criminal statutes provided they were enacted by a sufficiently liberal state.[10] And legal

even than mine, I can add F. Scott Fitzgerald's THE GREAT GATSBY and Kurt Vonnegut's SLAUGHTERHOUSE FIVE to the list of briefer seminal works.

9. Markel, *Retributive Justice*, *supra* note 7, at 25.

10. *Id.* at 1-2, 25, 27.

officials, in turn, would be morally bound to enforce these offenses and punish offenders, who Dan's theory transformed into blameworthy targets of retributive punishment simply by their acts of rule-breaking.[11] Finally, Dan posited that even laypeople should be compelled morally to provide reasonable assistance to liberal enforcement efforts.[12]

In my response essay, I argued that Dan had failed to articulate a genuine theory either of retribution or political obligation. First, I rehearsed a series of claims—familiar to philosophical anarchists—that, *contra* Dan, legal commands and the institutions that impose them carry no normative weight independent of substantive content.[13] As A. John Simmons observed:

> People cannot simply force institutions on me, no matter how just, and force on me a moral bond to do my part . . . . If I am morally bound to obey the law or to be a good citizen, the ground of this bond will be independent of the legal and political institutions in question . . . . [T]he fact that I have a "legal obligation" or a "duty of citizenship" will be a morally neutral fact; nothing will follow from this fact about any moral constraints on my actions.[14]

I will not rehash thoroughly the reasons why I support Simmons. It is enough to state my conclusion: *contra* Dan, I believed—and still believe—that there can never be a "moral obligation to obey the law *qua* law" regardless of how virtuous the state may be.[15] Our moral duties are only ever products of what we owe each other as fellow humans

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11. *Id.*

12. *Id.* at 1-2. As Dan explained:

> [I]n a liberal democratic polity, the imposition of state punishment . . . is intrinsically good regardless of the independent contingent benefits . . . [and] we are morally obligated (in a *pro tanto* way) to: (1) conform our conduct, in our capacities as non-officials, not only to *mala in se* criminal laws but also many *mala prohibita* laws, including many that look to us to be dumb but not illiberal; (2) render, in our capacities as non-officials, reasonable assistance to law enforcement of the previous categories of laws; and (3) enforce, in our capacities as officials, these categories of laws.

Id. at 1, 27.

13. For our debate on philosophical anarchism, *compare* Markel, *Retributive Justice*, *supra* note 7, at 44-55; *with* Bowers, *Blame by Proxy*, *supra* note 7, at 141, 144-47 (citing sources). *See generally* A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 23 (1981). Upon reviewing our exchange in preparation for this tribute essay, I was delighted to rediscover that Dan dismissively referred to philosophical anarchism (and, by implication, my affinity for it) as a "trendy view," as if, by drawing upon the philosophy, I were doing no more than expressing a love for avocado toast. Markel, *Retributive Justice, supra* note 7, at 17. It is this characteristically acerbic style of argumentation that I initially thought off-putting but that I grew to find more and more charming as I came to know Dan better and better. Stumbling upon this subtle jab now makes me miss Dan almost as much as anything else.

14. SIMMONS, *supra* note 13, at 23, 148.

15. Markel, *Retributive Justice*, *supra* note 7, at 18; Bowers, *Blame by Proxy*, *supra* note 7, at 139-40; *see also* Josh Bowers, *Instrumental Institutional Pride: Leftist Judging in the Age of Abolition and Trump*, at 36-37 [hereinafter Bowers, *Instrumental Institutional Pride*] (unpublished manuscript on file with author).

(extra-institutionally and extra-politically and legally)—that is, as "persons *qua* persons."[16] If we are lucky enough, we may find ourselves living in a *decent society*, and we may choose to be morally faithful to it by virtue of its virtue, but that is meaningfully different than owing a content-independent moral duty to its laws and institutions.[17]

By extension, I rejected the idea that one could somehow be made culpable merely by breaching legal duties. My point was that "formal legal designations" are largely irrelevant to the particularistic evaluation of desert that retribution necessarily entails:

> [T]he full measure of moral blameworthiness is to be found in neither code nor casebook, court nor classroom. It is the product of neither executive nor judicial pronouncement. To the contrary, it arises out of the exercise of human intuition and practical reason, applied concretely to the particular offender and his act.[18]

If my conception of retribution was right, then Dan had made a category error by invoking an amoral measure (rule-breaking) to serve as an overinclusive proxy for a highly contingent normative concept (badness).

Finally, I objected to some of Dan's hypotheticals, arguing that he had inconsistently applied his own theory, exempting from moral prescription in an arbitrary and *ad hoc* manner certain laws that were neither illiberal nor spectacularly dumb. Here, I seized on Dan's discussion of criminal copyright infringement, an offense that Dan believed no one was morally bound to follow or enforce.[19] I speculated that Dan had resisted punishment for this offense precisely because "its application would present a real-world problem."[20] As I explained:

> [M]any of [Dan's] friends and colleagues might violate it frequently. It is no secret in academic circles that incautious professors often knowingly fail to secure legally required permission for classroom use of copyrighted materials. And [Dan], understandably, does not want to turn on (and turn in) his friends and colleagues. He is unwilling to live the "moral" life of the Markelian busybody, because, intuitively, he knows that it is no kind of life.[21]

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16. SIMMONS, *supra* note 13, at 30.

17. *See infra* Part IV.B (discussing efforts to achieve a "decent society," as Avishai Margalit has defined the term).

18. Bowers, *Blame by Proxy*, *supra* note 7, at 136; *id.* at 143 ("[R]etributive valuation 'relies upon particularized exercise of practical intuition and intelligence, not on formal legal designations.' It requires a contextualized commonsense determination that is sensitive to all relevant circumstances."); *id.* at 136 (arguing that a "genuinely retributive" theory is "particularistic," whereas Markel's is "aggregative and formalistic," relying upon "broad categorization to answer a decidedly evaluative moral question").

19. *Id.* at 157 ("[E]ven Markel is not prepared to live up to the strictures of his theory. Specifically, he concedes that he would not divine a moral duty from a law criminalizing 'non-commercial exploitation of certain intellectual property.'")

20. *Id.*

21. *Id.*

My objection, on this score, was somewhat tangential to our overarching debate. I raise it now just to underscore that, by failing to live up to his own theory's normative demands, Dan had unintentionally expressed a personal moral goodness. At the time of our exchange, the term "Karen" had not yet entered the cultural lexicon. But Dan's ideal citizen (who would have been compelled to render some amount of "assistance to law enforcement" in the administration of even somewhat—but not spectacularly—dumb laws) bears a disturbing resemblance to the figure of the bigoted "Karen."[22] No doubt, Dan would respond that selective enforcement is illiberal and therefore morally merits no deference.[23] But Dan cannot so readily sidestep the issue. As Ekow Yankah has argued persuasively, the state risks racialized injustice whenever it conscripts "deputies"[24]—a hazard that is only compounded when, as Dan posited, the would-be deputy's actions are recast not as mere permission but as affirmative (and virtuous) moral duties. This is all to say that Dan was, in his private life, a much more decent person than the "Markelian busybody" that *political retributivism* would have commanded him to be.

II. DAN'S METHODOLOGY OF RIGHTS

In his article and reply, Dan devoted considerable attention to the distinct *substantive rights* and *trial procedures and defenses* he considered "critical to a liberal order," identifying, for instance, rights to sexual and reproductive autonomy; freedom of speech and association; and due process guarantees, including not only basic trial protections but also trial defenses of necessity, duress, desuetude, and even reasonable mistake of law.[25]

I responded, in turn, that Dan had "failed to provide a framework or clear set of criteria for determining" why these exact "procedures

22. Markel, *Retributive Justice*, *supra* note 7, at 19. *See* Bowers, *What if Nothing Works?*, *supra* note 3, at 984 (discussing the emergence of the "Karen" figure and tracing it to the prototypes of "Miss Ann" and "Mister Charlie," who likewise "saw fit to mind Black bodies for signs of supposed slip up").

23. Markel, *Reply*, *supra* note 7, at 260 (arguing that there is no moral obligation to obey laws "with pervasively bad enforcement patterns"). Indeed, uneven enforcement was apparently Dan's reason for deeming copyright infringement illiberal. *Id*. at 229 (explaining that a defense of desuetude may be liberally required and noting that an offense like "noncommercial exploitation of intellectual property . . . . might be subject to a morally viable desuetude defense if it turned out that the polity failed to enforce the law despite widespread flouting."). Even if there were something to the idea that (for all the many irregularly prosecuted crimes) enforcement of copyright infringement is egregious enough to become illiberal, I find it noteworthy that Dan singled out the very offense predictably committed most often by colleagues and friends working within his own professional space.

24. *See* Ekow N. Yankah, *Deputization and Privileged White Violence*, __ STAN. L. REV. __ (forthcoming 2025).

25. *See* Markel, *Retributive Justice*, *supra* note 7, at 7-8 (discussing particular substantive rights and trial defenses and procedures Dan identified as integral to liberalism); Markel, *Reply*, *supra* note 7, at 209, 229-32 (same); Bowers, *Blame by Proxy*, *supra* note 7, at 161-63.

and substantive rights" were integral to liberalism.[26] Admittedly, Dan purported to offer a test, explaining that the appropriate methodology was whether the procedural or substantive right in question was "*widely and correctly*" considered fundamental.[27] But, as I argued, this two-prong approach was, at once, unduly subjective and historically and culturally contingent.[28] Consider sexual and familial autonomy. As a matter of personal ethics, I am inclined to agree with Dan that an expansive conception of autonomy is morally indispensable, above and beyond even positive protections of constitutional law.[29] But Dan had offered no way to know whether our shared belief happened to be the "correct" belief. Moreover, why should it matter, ontically, whether our belief was "widely" shared?

I emphasized that, without sophisticated epistemological tools, moral truth (or the "correctness" of a given principle) remains always in the eye of the beholder:

> [W]hen [Dan] claims that drug taking is "correctly" thought *not* to be a fundamental liberty, he is . . . offering only *his view*. My view may well be different, and [Dan] offers no reason why his [quite expansive] view should trump the liberal state on the question of sexual autonomy, but the liberal state should trump my [quite expansive] view on the question of drug possession. Indeed, in the context of adultery, [Dan] comes close to acknowledging the subjective dimension of a theory that would make him philosopher king. Specifically, he observes that "liberal constitutional constraints . . . *in my view* . . . would not allow adultery laws because criminalization of adultery is incompatible with our liberal moral rights." . . . The result is not political obligation, but obligation only to [Dan's] subjective conception of substantive rights.[30]

And I highlighted the shifting and sociological nature of popular perspectives and convictions:

> Does [Dan's] theory take moral truth to be so historically contingent and socially constructed that [rights to adult consensual sexual intimacy] or racial intermarriage are liberal prerequisites in one generation but not another? I am almost certain that he does not believe this. Perhaps, then, he would leave the matter not to popular opinion, but to Court pronouncement. But that approach makes moral truth only somewhat less elastic. For example, unlawful [adult consensual sexual intimacy] would qualify as immoral before *Lawrence v. Texas*, but not after. . . . [T]o premise a moral theory on either popular or judicial

26. *Id.* at 158.

27. Markel, *Retributive Justice*, *supra* note 7, at 14 (emphasis added).

28. Bowers, *Blame by Proxy*, *supra* note 7, at 162.

29. For instance, Dan argued elsewhere that "fundamental associational liberties" include incest between consenting adults, something the Supreme Court has never protected. Dan Markel, Ethan J. Leib, & Jennifer M. Collins, *Rethinking Criminal Law and Family Status*, 119 YALE L.J. 1864, 1874 (2010).

30. Bowers, *Blame by Proxy*, *supra* note 7, at 161-62.

> perspective is to confuse the descriptive for the normative—to commit the naturalistic fallacy of deriving an "ought from an is."[31]

I remain convinced that Dan's metric was ultimately misguided and unworkable. But, for present purposes, my point is only that our debate about liberalism's *reach* was wildly incomplete as a theoretical matter. We were preoccupied principally with *substantive rights* and *adjudicative safeguards*—that is to say, the superstructure of legal liberalism. We had failed, however, to address the bedrock institutional preconditions that ground the liberal state's *existence* in the first instance.

Looking back now, I can't help but think that the reason we were content to leave the contours of the democratically liberal state under-theorized was because both of us remained confident that the liberal state was not *itself* under much threat. A passage from my essay is telling:

> [Dan] cannot expect his theory to constrain successfully the power o*f the procedurally liberal state* to criminalize substantive conduct—unless, of course, he can offer a far more robust conception of *which liberties* a liberal democracy must recognize and, more importantly, why.[32]

Notice my focus on *liberties*—that is, on the *products* and not the *producer*. I presumed that the "procedurally liberal state" was something of a constant. I took it for granted that modern western governments basically met—and would continue to meet—the institutional conditions necessary to constitute liberal states, whatever those preconditions were. To be sure, I likewise understood that there remained ample room for structural improvement; I have, after all, spent a career critiquing the pathologies of American criminal legalism.[33] And even Dan acknowledged that one could be "skeptical" about the more "defective" and "bankrupt" facets of our official systems, especially in

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31. *Id.* at 160. Dan offered what I still consider to be an unpersuasive response, cabining the "widely held" criterion into practical nonexistence. Specifically, Dan replied: "[T]he popularity of the right is not the relevant focus of attention . . . . The pervasiveness of the right is at most evidence of there being a moral right but it is not a necessary aspect of the moral right's existence." Markel, *Retributive Justice*, *supra* note 7, at 8, n.13. The assertion is pure deflection. We are still at sea as to how we may determine that a pervasively recognized moral right is fundamental, as Dan apparently conceded. Markel, *Reply supra* note 7, at 233 ("It is true that the *pervasiveness* of a right's recognition is distinct from whether a right is *correctly* recognized . . ., and I should have been more careful."). Ultimately, we are left, then, to circle back to whether a belief in the right is "correctly" held, which, as I argue above, is neither a sufficiently clear nor objective methodology for discerning that which is integral to liberalism. *Supra* notes 25-31 and accompanying text.

32. Bowers, *Blame by Proxy*, *supra* note 7, at 137 (emphasis added, emphasis in original omitted). I stand by this assertion as a matter of ideal political and punishment theory. But, from the standpoint of pragmatism, I have come to believe that even an under-theorized concept may still have practical value. *Infra* note 141 and accompanying text (discussing *indecency*, *indignity*, and *humiliation* as under-specified (but still potentially useful) concepts, and citing sources).

33. *Supra* notes 1, 3, 5, 7 and accompanying text (citing sources).

instances where the state had imposed punishment on "those shut out from the political process."[34] But, ultimately, he thought these problems were surmountable with only "incremental improvements" and "tweaks."[35] And, re-reading my own work, it is apparent that I also anticipated that America was (and would remain) largely *liberal enough* to support Dan's theory. Thus, we quibbled over substantive rights, rules, and standards, never reckoning with the baseline parameters of a democratically and legally liberal society. Like doomed passengers on the proverbial Titanic, we busied ourselves rearranging deck chairs, because neither of us expected that the boat realistically could sink.

Early in his introduction, Dan did just barely begin to touch on the structural and institutional dimensions of liberalism: "[By] a liberal democracy . . . . I simply mean a regime marked by the presence of free and fair elections, reasonably powerful legislatures, independent judiciaries, and a legal and political culture that respects . . . fundamental individual rights."[36] But he conceded concurrently that he did not have (nor could he articulate) "a fancy or elaborated account" of democratic liberalism.[37] When the topic periodically reemerged later in his article, Dan would either cite to this lite introductory sketch or offer a similarly abstract explanation.[38] Finally, at the end of his reply, he teased a more exact definition, musing that circumstances could arise where the polity might be said to have lost "the moral authority to generate new moral obligations for *mala prohibita* offenses."[39] But, again, he pulled back, refusing to locate this inflection point, instead acknowledging that "we lack a sense of how 'good' a liberal democracy has to be in order to generate these new . . . obligations" and concluding that "I do not suppose I have offered any good and final answers on this vexing issue."[40]

I am embarrassed, upon reflection, that I did not press Dan harder on this point. I demanded to know what liberal democratic states *do* but not what they *are*. I did only half the work, insisting that Dan had merely fallen short in the "task of differentiating *ontic* fundamental

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34. Markel, *Retributive Justice*, *supra* note 7, at 121-22.

35. *Id*. at 121.

36. *Id*. at 7.

37. *Id*.

38. *See, e.g.*, *id*. at 69 (arguing that the "various constraints" of the liberal state "require more clarity and development than I can offer here"); *id*. at 77 ("[C]riminal laws may not encompass activity that is properly covered by the core rights I mentioned in the introduction."); *id*. at 82 ("[W]e discussed and defined [liberal] criminal laws in the [i]ntroduction."); *id*. at 88 (mentioning without defining "animating values giving rise to democracy's moral authority"); *id*. at 128 (discussing preconditions of liberalism and noting that "the borders are fuzzy").

39. Markel, *Reply*, *supra* note 7 at 257, 261 ("[T]here has to be a point at which a regime becomes sufficiently illiberal that it cannot earn *any* deference.").

40. *Id*. at 252, 257.

liberties from *subjective* or *descriptive* fundamental liberties."[41] I should have recognized that Dan owed us more than a thoroughgoing explanation of the *rights* that liberal states ought to announce and apply; as a theorist, he needed to articulate persuasively what *makes states liberal* in the first instance. This is, of course, no easy task. Elsewhere, I have struggled even to articulate the good and bad "values, tenets, traits, and practices" that define the narrower concept of liberal-legal culture, settling ultimately on this unsatisfactory description:

> a desire to see both sides of issues, a preference for reasoned discourse, an obsession with decorum and tone, a presumption of good intentions (especially on the part of other institutional stakeholders), an epistemic humility about moral truth claims, an emphasis on finding common ground, a preference for peace and order over substantive justice, a hyperfocus on moderation, a predilection for formal rules and rights, and a preoccupation with human agency and personal responsibility over social solidarity.[42]

Given the difficulty of the endeavor (and finite journal pages), it is perhaps unfair for me to now fault Dan (and my former self) for not offering (and demanding) a more thoroughgoing explanation of democratic liberalism. Indeed, as I suggest later in this essay (and elsewhere), even an under-theorized concept still may have practical value.[43] But Dan was doing ideal political and punishment theory, not piecemeal pragmatism. And, as to that enterprise, we both pulled up short. I now recognize that—by supposing that Dan and I shared some basic notion of democratic liberalism (and that America more-or-less embodied it)—I had unintentionally embraced Dan's own flawed methodology that democratic liberalism *just is* whatever we "widely" purport it to be and, more to the point, that our basic assumptions on this score *just are* largely "correct."[44] I demanded no more, because I thought we needed no more. I was confident enough that (liberal enough) American institutions would persist. The past decade has made plain just how hollow those convictions were.

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41. Bowers, *Blame by Proxy*, *supra* note 7, at 162. And, to his credit, Dan admitted that I had done damage. Markel, *Reply*, *supra* note 7, at 231 ("I did not spend a lot of time elaborating upon what is fundamental about some rights as opposed to others. . . . Bowers . . . notes correctly that the limits of some of these rights would require further specification to be more persuasive.").

42. Bowers, *Instrumental Institutional Pride*, *supra* note 15, at 5-6.

43. *Infra* notes 141 and accompanying text (discussing *indecency*, *indignity*, and *humiliation* as under-specified (but still potentially useful) concepts, and citing sources).

44. *Supra* notes 26-31 and accompanying text (discussing Dan's methodology for discovering the liberties integral to liberalism by asking only what we "widely and correctly" consider fundamental).

III. A TURBULENT DECADE

What is this world in which we now live? Dan might have deemed the question irrelevant, countering that our current moment is conceptually of no matter. He was doing *ideal theory*, which is sociologically noncontingent.[45] In his own words, he was "trying to sketch a theory of retributive justice for a liberal democratic polity, not necessarily for the United States as it currently exists."[46] But I imagine that Dan also hoped that his theory would find pragmatic purchase. Indeed, he repeatedly raised that potential as a defense of his project, faulting conventional retributivist accounts that "emphasize moral desert alone or dominantly" as "misbegotten" and "less well-equipped (compared to political accounts like mine)" to provide the bases for the creation and perpetuation of liberal "institutions of state punishment."[47] In this way, Dan believed *political retributivism* could be a tool to help support the liberal state navigate "the fractious circumstances of [our] politics" and, in turn, to help us demonstrate "respect" for the state and each other "as we work out a peaceable way to get along"—as we strive, that is, to establish and maintain, what Henry Hart and Albert Sacks called, "the conditions necessary for community life."[48]

The challenge is that if we now find ourselves permanently past the point where peaceable coexistence is even possible—if our post-liberal politics and culture are irreparably fractious—then Dan's theory, in turn, has become literally *academic*.

A. Dan's America

When Dan died in 2014, Donald Trump was still best known as a colorful (if clownish and largely failed) New York businessman-turned-reality-television-star, from whom we had seen only flashes of the bigoted demagogue to come—when, for instance, he demanded capital punishment for the since-exonerated Central Park 5 or fueled the "Birther" conspiracy theory by questioning relentlessly and falsely the citizenship and eligibility for office of then-President Barack Obama.[49]

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45. On the Rawlsian distinction between "ideal" and "nonideal" theory, *see* Zofia Stemplowska & Adam Smith, *Ideal and Nonideal Theory*, in THE OXFORD HANDBOOK OF POLITICAL PHILOSOPHY (David Estlund ed., 2012); A. John Simmons, *Ideal and Nonideal Theory*, 38 PHIL. & PUB. AFFS. 5 (2010).

46. Markel, *Reply*, *supra* note 7, at 226.

47. Markel, *Retributive Justice*, *supra* note 7, at 24; *see also id*. at 68 (observing that punishing the failure to obey liberal laws may "serve to promote the vitality and attractiveness of . . . valuable social projects").

48. *Id*. at 51; HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 5-6, 102 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); *see also infra* notes 118-122, 241-248, 253-255 and accompanying text (discussing the manner by which *political retributivism* might be instrumentally advantageous in repairing fractured civic bonds).

49. Will Leitch, *"The Apprentice" is the Skeleton Key to Understanding Trump*, N.Y. MAG.: INTELLIGENCER (June 18, 2024), https://nymag.com/intelligencer/article/the-

For its part, the Republican party was licking its wounds after twice nominating for president "establishment" figures and soundly losing both elections to the nation's first Black president.[50] There were, to be sure, rumblings of the tempest to come. In 2008, John McCain selected Sarah Palin as his running mate, an incurious populist outsider with a nose for grievance but little sense of governance.[51] And the 2010 midterm elections witnessed the ascendance of the Tea Party movement.[52] But the right-wing push remained relatively fringe, and Palin was widely considered a drag on the Republican ticket.[53]

The state of American liberalism was far from pristine. For decades, critical race scholars and activists had registered their own warnings, calling into question America's commitment to liberal principles (like equal justice under law) and expressing doubt whether, in any event, a rights-based approach to social and racial problems was even the appropriate tact.[54] These detractors were rightly skeptical of the

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apprentice-is-the-skeleton-key-to-understanding-trump.html [https://perma.cc/7PRS-VYEP]; John Cassidy, *As a Businessman, Trump Was the Biggest Loser of All*, NEW YORKER (May 8, 2019), https://www.newyorker.com/news/our-columnists/as-a-businessman-trump-was-the-biggest-loser-of-all [https://perma.cc/5UVK-PA4J]; Jan Ransom, *Trump Will Not Apologize for Calling for Death Penalty Over Central Park Five*, N.Y. TIMES (June 18, 2019), https://www.nytimes.com/2019/06/18/nyregion/central-park-five-trump.html [https://perma.cc/GKT9-WUTQ]; Anthony Zurcher, *The Birth of the Obama "Birther" Conspiracy*, BBC (Sept. 16, 2016), https://www.bbc.com/news/election-us-2016-37391652 [https://perma.cc/D8VB-JDPY].

50. Jeremy W. Peters, *The Three Types of Republicans Donald Trump Created*, N.Y. TIMES (Jan. 21, 2021), https://www.nytimes.com/2021/01/21/us/politics/trump-republican-party.html [https://perma.cc/3XEW-UAZG].

51. David Smith, '*She Paved the Way for Trump': Will Sarah Palin Stay in the Republican Spotlight?*, GUARDIAN (Feb. 13, 2022), https://www.theguardian.com/us-news/2022/feb/13/sarah-palin-republican-party-trump-defamation-trial [https://perma.cc/7ETF-F2JU].

52. Aaron Blake, *The GOP's 'Tea Party' Class of 2010 is Heading for the Exits—Fast*, WASH. POST (Feb. 1, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/02/01/the-gops-tea-party-class-of-the-2010-is-heading-for-the-exits-fast/ [https://perma.cc/UG9T-7C3A] ("After the 2010 midterm election, a whopping 84 Republican freshmen joined the House, eager to shake up the institution after the tea party wave put many of them in office."); Jenny Beth Martin, *The Tea Party Movement is Alive and Well—And We Saw Trump Coming*, POLITICO: MAG. (Nov. 19, 2016), https://www.politico.com/magazine/story/2016/11/the-tea-party-movement-is-alive-and-well-and-we-saw-trump-coming-214469/ [https://perma.cc/JTM3-D8TX].

53. Philip Bump, *Sarah Palin Cost John McCain 2 Million Votes in 2008, According to a Study*, Wash. Post (Jan. 19, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/01/19/sarah-palin-cost-john-mccain-2-million-votes-in-2008/ [https://perma.cc/A5AU-3QGD]; Patricia Murphy, *Tea Party "is Dead": How the Movement Fizzled in 2012's GOP Primaries*, DAILY BEAST (Feb. 6, 2012), https://www.thedailybeast.com/tea-party-is-dead-how-the-movement-fizzled-in-2012s-gop-primaries/ [https://perma.cc/77XM-4ESV]; *see generally* JOHN AVLON, WINGNUTS: HOW THE LUNATIC FRINGE IS HIJACKING AMERICA (2010).

54. *See generally* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991); DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW (1970); DERRICK A. BELL, JR., FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV.

sufficiency of liberal legalism to resolve and remedy (and, beyond that, even to avoid further perpetuating) centuries of white violence—official and unofficial.[55] In other words, efforts to abolish prisons and defund police were already well underway.[56] Still, the push to empty cells and redistribute enforcement dollars had not yet entered the cultural zeitgeist, and an abolitionist vocabulary remained largely foreign even to members of the criminal-legal academy, including me and (I would imagine) Dan.

In this way, my debate with Dan took place on the cusp of a (still wholly incomplete) racial reckoning. Our symposium papers were entering the final editing stage when George Zimmerman killed Trayvon Martin, galvanizing resistance and sparking the Black Lives Matter movement.[57] One day before Dan died, police officers choked Eric Garner to death.[58] Less than three weeks later, Darrin Wilson gunned down Michael Brown in Ferguson, Missouri.[59] Four months after that, Officer Timothy Loehmann shot twelve-year-old Tamir Rice for brandishing a toy gun in a public park.[60] And, in a matter of a few short

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1331 (1988) [hereinafter Crenshaw, *Race, Reform and Retrenchment*]; Henry Lewis Gates, Jr., *Critical Race Theory and Freedom of Speech*, *in* THE FUTURE OF ACADEMIC FREEDOM 119 (Louis Menand ed., 1996); KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2019); KIMBERLÉ CRENSHAW, ET AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1995); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

55. *See, e.g.*, DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997).

56. *See, e.g.*, Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST. 212 (2000); 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 [https://perma.cc/896T-H3WF]; *cf. infra* notes 141-146, 167-174, 188-216 and accompanying text (discussing criminal-legal abolitionism);*see generally* Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015).

57. Reis Thebault, *Trayvon Martin's Death Set Off a Movement that Shaped a Decade's Defining Moments*, WASH. POST (Feb. 25, 2022), https://www.washingtonpost.com/nation/2022/02/25/trayvon-martins-death-set-off-movement-that-shaped-decades-defining-moments/ [https://perma.cc/S88M-V4J9]; Shannon Luibrand, *How a Death in Ferguson Sparked a Movement in America*, CBS NEWS (Aug. 7, 2015), https://www.cbsnews.com/news/how-the-black-lives-matter-movement-changed-america-one-year-later/ [https://perma.cc/UNM5-V45T]. The symposium that produced our exchange took place almost a year before Trayvon Martin's death. *Markel Discusses Morality of Criminal Law at Journal Symposium*, U. VA. LAW (Apr. 8, 2011), https://www.law.virginia.edu/news/videos-podcasts/markel-discusses-morality-criminal-law-journal-symposium [https://perma.cc/B94K-JADZ] (MP3 file of Dan's discussion on April 7, 2011 at the Virginia Journal of Criminal Law symposium available).

58. Al Baker, et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (Jun. 13, 2015), https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html [https://perma.cc/EAS8-3XKB].

59. *Timeline of Events in Shooting of Michael Brown in Ferguson*, AP (Aug. 8, 2019), https://apnews.com/article/shootings-police-us-news-st-louis-michael-brown-9aa32033692547699a3b61da8fd1fc62 [https://perma.cc/VCN7-3EH8].

60. Shaila Dewan & Richard A. Oppel, Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015),

years, the twin shocks of a global pandemic and the murder of George Floyd tore the nation apart at its cultural seams.[61]

B. Trump's America

Today, America is beset by division. Ours is the age of conspiracism, election denialism, and backlash. When I began this essay during the summer of 2024, rightwing pundits and politicians were roundly denouncing a felony jury verdict against Donald Trump for illegally interfering in the 2016 election.[62] The grounds for their objections were not that Donald Trump had not done the acts charged with the requisite *mens rea*, but that Joe Biden, the current president, was somehow complicit with a state criminal prosecution and, in any event, that a New York judge and jury could not impartially adjudicate the guilt of the leader of a locally unpopular national party.[63] The broadsides were not specific to the immediate criminal case. Even before Trump was elected president in 2016, he questioned the ability of a judge of Mexican descent to be fair to him in a civil case.[64] In the years since, legal or electoral determinations that cut against Trump and his sycophants have been recast as "rigged" processes, not as the decisions of an impartial judiciary or the democratic will of laypeople voting in ballot boxes or serving on grand and petit juries.[65]

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https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html [https://perma.cc/P3L8-D39J].

61. Maneesh Arora, *How the Coronavirus Pandemic Helped the Floyd Protests Become the Biggest in U.S. History*, WASH. POST (Aug. 5, 2020), https://www.washingtonpost.com/politics/2020/08/05/how-coronavirus-pandemic-helped-floyd-protests-become-biggest-us-history/ [https://perma.cc/4BQ9-H3TW]; Sheryl Gay Stolberg, *'Pandemic Within a Pandemic': Coronavirus and Police Brutality Roil Black Communities*, N.Y. TIMES (July 27, 2021), https://www.nytimes.com/2020/06/07/us/politics/blacks-coronavirus-police-brutality.html [https://perma.cc/R767-8RG6]; Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020), https://time.com/5847967/george-floyd-protests-trump/ [https://perma.cc/R2TL-K3HG].

62. Santul Nerkar, *How Partisan Media Outlets Covered Trump's Guilty Verdict*, N.Y. TIMES (May 31, 2024), https://www.nytimes.com/2024/05/31/business/media/trump-verdict-media-coverage.html [https://perma.cc/32FN-E76Y]; Lisa Mascaro & Mary Clare Jalonick, *Republicans Join Trump's Attacks on Justice System After Guilty Verdict in New York*, PBS NEWS (June 1, 2024), https://www.pbs.org/newshour/politics/republicans-join-trumps-attacks-on-justice-system-after-guilty-verdict-in-new-york [https://perma.cc/R6FD-D3WY].

63. Adam Serwer, *Trump Wishes His Trial Were Rigged*, ATLANTIC (May 31, 2024), https://www.theatlantic.com/ideas/archive/2024/05/trump-fair-manhattan-criminal-trail/678557/ [https://perma.cc/QC54-3F5H]; Danielle Kurtzleben, *Trump Repeats Claims—Without Evidence—That His Trial Was Rigged*, NPR (May 31, 2024), https://www.npr.org/2024/05/31/g-s1-2149/trump-trial-guilty-verdict-press-conference [https://perma.cc/FGR9-FY3Y]; Abdallah Fayyad, *Trump's Jury Doesn't Have to Like Him to Be Fair to Him*, VOX (Apr. 19, 2024), https://www.vox.com/24135181/trump-hush-money-jury-impartial-fair-trial [https://perma.cc/SG9A-LPYU].

64. Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict'*, WALL ST. J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442 [https://perma.cc/7LWK-7JDD].

65. Serwer, *supra* note 63 (quoting Trump's claim that his guilty verdict was a "disgrace"—the product of a "rigged trial by a conflicted judge who was corrupt"); Philip Bump,

In this way, Trump and the far right have managed to weaponize their own claims of illiberalism and antidemocratic chicanery. When vote counts or court cases go badly, it is not liberal governance at work but a leftist "deep state" that has corrupted our liberal institutions.[66] For much of the citizenry, the epistemic difference is lost between allegations of actual criminal conspiracies committed to undermine the legal and political order and outlandish conspiracy theories that provide fictitious bases for the illegal conduct of the criminal conspirators.[67] In an era of social media deep fakes and cheap fakes, truth and lies swirl together—what Bobby Chesney and Danielle Citron have called "the liar's dividend."[68] On both sides of our unmoored polity, the

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Trump Insists His Trial Was Rigged . . . Just Like Everything Else, WASH. POST (May 31, 2024), https://www.washingtonpost.com/politics/2024/05/31/trump-rigged-conviction-election/ [https://perma.cc/8TEQ-HB92]; Terrance Smith, *Trump has Longstanding History of Calling Elections 'Rigged' if He Doesn't Like the Results*, ABC NEWS (Nov. 11, 2020), https://abcnews.go.com/Politics/trump-longstanding-history-calling-elections-rigged-doesnt-results/story?id=74126926 [https://perma.cc/6BAQ-UKN8]; Timothy L. O'Brien, Opinion, *Elections Aren't the Only Things Trump Thinks are Rigged*, BLOOMBERG (Sept. 25, 2020), https://www.bloomberg.com/view/articles/2020-09-25/elections-aren-t-the-only-things-trump-thinks-are-rigged [https://perma.cc/4CTL-3EJU].

66. David Smith, *Lawless and Disorderly: Republicans Line Up Behind Trump After Conviction*, GUARDIAN (June 1, 2024), https://www.theguardian.com/us-news/article/2024/jun/01/trump-verdict-republicans-reaction-election [https://perma.cc/2XWN-YH75]; Andrew Mark Miller & Nikolas Lanum, *Conservatives Unload on 'Political' NYC Prosecution of Trump Outside the Courtroom: 'Damaging to the Country'*, FOX NEWS (May 29, 2024), https://noticias.foxnews.com/politics/conservatives-unload-political-nyc-prosecution-of-trump-outside-courtroom-damaging-country.amp [https://perma.cc/YG3A-QZZG]; David Klepper & Ali Swenson, *Trump Supporters View the Latest Indictment as Evidence of a Crime—Against Trump*, AP (Aug. 3, 2023), https://apnews.com/article/trump-jan-6-indictment-misinformation-e9d5077300dafa4c774429b7f82d8930 [https://perma.cc/3Y3N-ERQR].

67. SARAH KENDZIOR, THEY KNEW: HOW A CULTURE OF CONSPIRACY KEEPS AMERICA COMPLACENT (2022) (distinguishing between genuine conspiracies and conspiracy theories and highlighting the public's epistemic confusion between the two); *see generally* Matthew R.X. Dentith, *Conspiracies and Conspiracy Theories*, *in* THE PHILOSOPHY OF CONSPIRACY THEORIES 23 (2014).

68. Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1785-1786 (2019) ("As the public becomes more aware of the idea that video and audio can be convincingly faked, some will try to escape accountability for their actions by denouncing authentic video and audio as deep fakes. . . . [T]he public may have difficulty believing what their eyes or ears are telling them—even when the information is real."); *see also* Tom Dobber et al., *Do (Microtargeted) Deepfakes Have Real Effects on Political Attitudes*, 26 INT. J. PRESS/POL. 69 (2021); *see e.g.*, Brett Samuels & Rebecca Klar, *'Cheap Fake' Biden Videos Burst into National Spotlight*, HILL (June 19, 2024), https://thehill.com/policy/technology/4728510-white-house-push-back-cheap-fake-videos/ [https://perma.cc/L7DR-B27J]; Toluse Olorunnipa & Adriana Usero, *How Republicans Used Misleading Videos to Attack Biden in a 24-Hour Period*, WASH. POST (June 11, 2024), https://www.washingtonpost.com/politics/2024/06/11/biden-videos-republicans-cheap-fake-d-day/ [https://perma.cc/JG5N-QU5B]. Cheap fakes are misleadingly edited content; deepfakes are digitally fabricated. On cheap fakes, deep fakes, and their impact, *see* BRITT PARIS & JOAN DONOVAN, DEEPFAKES AND CHEAP FAKES: THE MANIPULATION OF AUDIO AND VIDEO EVIDENCE (2019); Michael Hameleers, *Cheap Versus Deep Manipulation: The Effects of Cheapfakes Versus Deepfakes in a Political Setting*, 36 INT. J. PUB. OP. RES. 1 (Mar. 2024).

takeaway is the same: all factions question the legitimacy of systemic power when it is wielded by opposing political forces.[69]

To be sure, not everyone who espouses crackpot conspiracies is mercenary. Some are rubes. The Satanic Panic of the 1980s is thought to have been a reaction to genuine (though deeply misguided) anxieties about women entering the workplace, leaving children in daycare.[70] Likewise, contemporary QAnon fairytales about a Democratic party overrun by "groomers" and "pedos" are seemingly responses to the expansion of LGBTQIA+ rights and the threat these liberties are perceived to pose to the traditional family order.[71] Unprincipled lawmakers exploit the alarm, producing a feedback loop. Thus, real-world legislative efforts to target transgender and non-binary people are supercharged by wild accounts of sex trafficking by furniture companies and pizza parlors.[72] Thereafter, the existence of such laws convinces the conspiracists that their fears were real and right all along.[73]

Of course, conspiracism has a long and ugly history. When Richard Hofstedtler wrote sixty years ago about "the paranoid style of American politics" and the opportunists who take advantage of it, he readily could have been describing the movement to "Make America Great Again" (MAGA) and its manufactured grievances:

> [T]he modern right wing . . . feels dispossessed: America has been largely taken away from them and their kind, though they are determined to try to repossess it and to prevent the final destructive act of subversion. The old American virtues have already been eaten away by cosmopolitans and intellectuals . . . by socialistic and communistic schemers . . . [and] by treasonous plots, having as their most powerful agents not merely outsiders and foreigners . . . but major statesmen who are at the very centers of American power.[74]

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69. Kurtzleben, *supra* note 63 (quoting President Biden: "It's reckless, it's dangerous, it's irresponsible for anyone to say this was rigged, just because they don't like the verdict. . . . [The justice system] should be respected. . . . We should never let anyone tear it down. It's as simple as that.").

70. Stuart A. Wright, *Satanic Cults, Ritual Abuse, and Moral Panic: Deconstructing a Modern Witch-Hunt*, *in* WITCHCRAFT AND MAGIC: CONTEMPORARY NORTH AMERICA 126 (HELEN A. BERGER, ED. 2005); Jessica Guldner, PATRIOTIC PANDEMONIUM: EXAMINING MORAL PANIC AND CIVIL RELIGION IN THE AMERICAN SATANIC PANIC OF 1980-1994, at 57-58 (May 2023) (Master's thesis, S. Ill. U. Edwardsville) (on file with author); Ali Breland, *How Q Became Everything*, MOTHER JONES (June 3, 2024), https://www.motherjones.com/politics/2024/06/how-q-became-everything-big-feature-wayfair-balenciaga [https://perma.cc/RQ4Q-VW6W]/.

71. Maggie Crain, Note: *Fear and Loathing in Animus: Moral Panic, the Contextualizing Tool for Challenging Gender-Affirming Care Bans* 39 WIS. J. L. GENDER & SOC'Y 21, 46-47 (2024); Breland, *supra* note 70.

72. Rachel E. Greenspan, *How the Wayfair Human-Trafficking Conspiracy Grew out of QAnon*, BUS. INSIDER (July 13, 2020), https://www.businessinsider.com/wayfair-human-trafficking-conspiracy-theory-tied-to-qanon-2020-7 [https://perma.cc/H3EZ-7VC7].

73. Crain, *supra* note 71.

74. Richard Hofstadter, *The Paranoid Style in American Politics*, HARPER'S MAG., (Nov. 1964), https://harpers.org/archive/1964/11/the-paranoid-style-in-american-politics/

Still, it would take the toxic mix of Internet culture, COVID isolation, and a charismatic and shameless would-be strongman to propel this "paranoid style" of politics to mainstream Republican prominence, radicalizing the party's purported center and transforming ordinary Americans into anti-government extremists who view rival-party governing majorities neither as institutional colleagues nor even political adversaries, but as an occupying force ruling over an illegitimate "regime."[75]

Dan lived in an era when courageous national leaders resisted such madness. When John McCain was the 2008 Republican presidential nominee, he famously pushed back against a conspiracy-minded supporter, defending his Democratic opponent, Barack Obama, as "a decent family man, citizen, that I just happen to have disagreements with on fundamental issues."[76] This was the conservative establishment Dan knew; this was the America Dan wrote about. To reread his article now, from this side of the Rubicon, is like studying an artifact from a lost world. It is almost charming, for instance, to stumble upon Dan's prosaic concerns about "legislators [who] impiously cut deals" and enact "dumb" laws.[77] Today, the very notion of deal-cutting

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[https://perma.cc/3A2S-ZYZX]; Joseph E. Kennedy, *The Storm is Coming for Criminal Law: QAnon, Collective Delusions and Punishment* 1, 21 [hereinafter Kennedy, *The Storm is Coming*] (unpublished manuscript on file with author) ("This modern version of the Hofstadter's paranoid style obviously speaks today to the many who talk about the need to 'take back our country,' a trope that has a distinctly right of center valence politically."). To be sure, there is some debate over whether conspiracism really is a predominantly right-wing phenomenon. *Id*. at 2 (discussing debate between Hofstadter and others, but citing data demonstrating clearly that the overwhelming majority of QAnon followers are rightwing); Sander van der Linden et. al, *The Paranoid Style in American Politics Revisited: An Ideological Asymmetry to Conspiratorial Thinking*, 42 POL. PSYCH. 23, 23 (2020) (finding that the "relationship between ideology and conspiratorial thinking was mediated by a strong distrust of officialdom and paranoid ideation, both of which were higher among conservatives, consistent with Hofstadter's account of the paranoid style in American politics").

75. RACHEL CARROLL RIVAS & ERIC WARD, THE YEAR IN HATE & EXTREMISM 2023: DECODING THE PLAN TO UNDO DEMOCRACY (SOUTHERN POVERTY LAW CENTER 2023) (detailing record rise in rightwing anti-government extremist groups and tying rise to ideology, rhetoric, and action of Republican politicians); Chaewon Kim, *How Right-Wing Extremism Uses the Covid-19 Pandemic: Focusing on Anti-Asian Rhetoric*, 7 LECTIO SOCIALIS 1, 1-2 (2023); Masood Fariver, *How Far Right Extremists Are Exploiting the COVID Pandemic*, VOICE OF AM. (Apr. 23, 2020), https://www.voanews.com/a/covid-19-pandemic_how-far-right-extremists-are-exploiting-covid-pandemic/6188116.html [https://perma.cc/WLU5-79WG]; *see, e.g.*, Zack Beauchamp, *What J.D. Vance Really Believes*, VOX (July 15, 2024), https://www.vox.com/politics/360283/jd-vance-trump-vp-vice-president-authoritarian [https://perma.cc/BUR7-55AN] (detailing Vance's affinity for illiberal and antidemocratic far-right figures and quoting Vance's call for "regime change" and his claim to be "postliberal").

76. Kayla Epstein, *Five of John McCain's Most Courageous Political Moments*, WASH. POST (Aug. 27, 2018), https://www.washingtonpost.com/politics/2018/08/27/five-john-mccains-most-courageous-political-moments/ [https://perma.cc/6X95-KH8U].

77. Markel, *Retributive Justice*, *supra* note 7, at 122.

("impious" or otherwise) feels largely anachronistic in a political culture where compromise is often considered ideological treason.[78]

Many of the loudest proponents of this intransigent view are affiliated with the Congressional Freedom Caucus, which consistently has prioritized grandstanding over cooperative governance.[79] One of its former members, Marjorie Taylor Greene, is particularly extreme, having backed, for instance, the secessionist idea of a "national divorce."[80] She rose to prominence as a conspiracist, accusing Democratic leaders of treason and portraying political enemies as part of a "global cabal of Satan-worshipping pedophiles."[81] Despite (or because of?) her outlandish positions, she has emerged as a Republican party leader, with important appointments to the House Homeland Security Committee, Oversight and Accountability Committee, and the Select Subcommittee on the Coronavirus Pandemic (never mind that she was previously banned from Twitter for repeatedly spreading COVID misinformation).[82]

Like Dan, I am Jewish, so I am particularly sensitive to Greene's use of the expression, "global cabal." This and related terms are increasingly common parlance on the American right.[83] More to the point, such words have long and noxious histories, readily familiar to

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78. Alain Franchon, Opinion, *"For Republicans, Compromise is Treason because Democrats are Not an Opposition but Enemies of the Homeland"*, LE MONDE (Feb. 15, 2024), https://www.lemonde.fr/en/opinion/article/2024/02/15/for-republicans-compromise-is-treason-because-democrats-are-not-an-opposition-but-enemies-of-the-homeland_6525956_23.html [https://perma.cc/V954-HZ9J]. Of course, not all compromises are morally defensible compromises. *Infra* notes 143-144 and accompanying text (discussing resistance to Nazi Germany and to antebellum America).

79. Jonathan Blitzer, *The Sound and Fury of the House Freedom Caucus*, NEW YORKER (June 1, 2023), https://www.newyorker.com/news/the-political-scene/the-sound-and-fury-of-the-house-freedom-caucus [https://perma.cc/3MEB-S4KE].

80. Andrew Feinberg, *Marjorie Taylor Greene Calls for a National Divorce Between Republican and Democratic States*, INDEPENDENT (Dec. 30, 2021), https://www.independent.co.uk/news/world/americas/us-politics/marjorie-taylor-greene-national-divorce-states-b1984460.html [https://perma.cc/LF3H-R2P7].

81. Camila Domonoske, *QAnon Supporter Who Made Bigoted Videos Wins Ga. Primary, Likely Heading to Congress*, NPR (Aug. 12, 2020), https://www.npr.org/2020/08/12/901628541/qanon-supporter-who-made-bigoted-videos-wins-ga-primary-likely-heading-to-congre [https://perma.cc/3QYG-W6NH]; Andrew Kaczynski & Em Steck, *GOP Candidate Marjorie Taylor Greene Spread Conspiracies About Charlottesville and "Pizzagate"*, CNN (Aug. 25, 2020), https://www.cnn.com/2020/08/25/politics/kfile-marjorie-greene-spread-conspiracies/index.html [https://perma.cc/ZQ7F-LK9E].

82. *Marjorie Taylor Greene*, CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES https://clerk.house.gov/Members/G000596 [https://perma.cc/N7F7-YT2X] (last visited Feb. 20, 2025); *Marjorie Taylor Greene: Twitter Bans Congresswoman over Covid Misinformation*, BBC (Jan. 2, 2022), https://www.bbc.com/news/world-us-canada-59854916 [https://perma.cc/ABX7-ATT2].

83. Karen Yourish et al., *How Republicans Echo Antisemitic Tropes Despite Declaring Support for Israel*, N.Y. TIMES (May 11, 2024), https://www.nytimes.com/2024/05/09/us/antisemitism-republicans-trump.html [https://perma.cc/T2AS-NVH5]; *Marjorie Taylor Greene: Twitter Bans Congresswoman over Covid Misinformation*, BBC (Jan. 2, 2022), https://www.bbc.com/news/world-us-canada-59854916 [https://perma.cc/LZ7R-4F6V].

any close reader of the "Protocols of the Elders of Zion", a literary forgery that pretends to recount a real-world Jewish plot for global domination.[84] In 2017, the nation watched in horror as likely fanboys of that fictitious early twentieth-century tract attacked students and other progressive counter-protestors on the grounds and surrounds of the University of Virginia, my home institution.[85] I write these words not three blocks from where one of that hateful rabble used his car as a battering ram to murder an innocent woman and injure nineteen others.[86]

The white supremacists who descended on Charlottesville, with chants of "Jews will not replace us," were mouthing a version of the so-called "Great Replacement" theory—a nativist, racist, and antisemitic canard that Jews are masterminding a Black and Brown takeover of white America.[87] This vile notion has inspired not only Charlottesville's domestic terrorists but also mass murderers in Charleston, South Carolina; Pittsburgh, Pennsylvania; Buffalo, New York; and as far away as Christchurch, New Zealand.[88] Nor is such bigotry confined to the fever swamps of Alt-Right online message boards; to the contrary, it has infected even the discourse of conventional Republican politicians and cable news pundits who are polite enough to swap in "western culture" for "white America," and "globalists" and "Soros-funded politicians" for Jews, but the dog-whistles remain loud enough for anyone who cares to listen.[89]

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84. *See generally* THE PARANOID APOCALYPSE: A HUNDRED YEAR RETROSPECTIVE ON THE PROTOCOLS OF THE ELDERS OF ZION (Richard Landes & Steven T. Katz eds. 2012); WILL EISNER, THE PLOT: THE SECRET STORY OF THE PROTOCOLS OF THE ELDERS OF ZION (2005); STEVEN L. JACOBS & MARK WEITZMAN, DISMANTLING THE BIG LIE: PROTOCOLS OF THE ELDERS OF ZION (2003). I refuse to cite to the actual PROTOCOLS.

85. Emma Green, *Why the Charlottesville Marchers Were Obsessed with Jews*, ATLANTIC (Aug. 15, 2017), https://www.theatlantic.com/politics/archive/2017/08/nazis-racism-charlottesville/536928/ [https://perma.cc/7K89-3KR4]; *see generally* ANIKO BODROGHKOZY, MAKING #CHARLOTTESVILLE: MEDIA FROM CIVIL RIGHTS TO UNITE THE RIGHT (2023).

86. Minyvonne Burke & Marianna Sotomayor, *James Alex Fields Found Guilty of Killing Heather Heyer During Violent Charlottesville White Nationalist Rally*, NBC NEWS (DEC. 7, 2018), https://www.nbcnews.com/news/crime-courts/james-alex-fields-found-guilty-killing-heather-heyer-during-violent-n945186 [https://perma.cc/6GR4-CNSA].

87. Colin Bossen, *Political Theology, Discovery and the Roots of "The Great Replacement"*, 66 RACE & CLASS 3 (2024); Milan Obaidi, et al., *The "Great Replacement" Conspiracy: How the Perceived Ousting of Whites Can Evoke Violent Extremism and Islamophobia*, 25 GRP. PROCESSES & INTERGROUP RELATIONS 1675 (2022).

88. Elle Reeve, *How White 'Replacement Theory' Evolved from Elderly Racists to Teens Online to the Alleged Inspiration for Another Racist Mass Homicide*, CNN (May 21, 2022), https://www.cnn.com/2022/05/20/us/replacement-theory-white-supremacist-buffalo-shooter/index.html [https://perma.cc/NDP2-64S2]. "Replacement theory" is really just a "reboot" of the centuries' old "Blood Libel"—one more loathsome claim that Black, Brown, or semitic hordes are bent on the perversion of (nonexistent) purebreds. *See generally* RAPHAEL ISRAELI, BLOOD LIBEL AND ITS DERIVATIVES: THE SCOURGE OF ANTISEMITISM (2012).

89. Steve Rose, *A Deadly Ideology: How the "Great Replacement Theory" Went Mainstream*, GUARDIAN (June 8, 2022), https://www.theguardian.com/world/2022/jun/08/a-deadly-ideology-how-the-great-replacement-theory-went-mainstream

During Donald Trump's 2020 campaign for reelection, some of his most loyal foot soldiers were members of the Proud Boys, modern-day neofascists, who swapped brownshirts for Fred Perry polos.[90] Trump refused to disavow these odious bigots, instead instructing them, during a presidential debate, to "stand back and stand by."[91] They did as they were told, laying low until after Trump's election loss, at which time Trump directed his followers to come to the White House to rally against the peaceful transfer of power.[92] Trump promised that the gathering would "be wild," and it was.[93] He encouraged the large crowd "to fight like hell," before urging them to march to the Capitol to disrupt Congress's certification of the election winner.[94] Hundreds ultimately stormed the building with several Proud Boys leading the charge.[95] Rioters destroyed property and assaulted Capitol police officers.[96] At one point, members of the mob even called for the execution of Trump's own vice president, Mike Pence, because he had refused Trump's entreaties to block the constitutionally mandated tabulation of electoral votes.[97] As the violence unfolded, Trump stood back (and

[https://perma.cc/R4M3-UQLG]; Nicholas Confessore & Karen Yourish, *A Fringe Conspiracy Theory, Fostered Online, is Refashioned by the G.O.P.*, N.Y. TIMES (May 15, 2022), https://www.nytimes.com/2022/05/15/us/replacement-theory-shooting-tucker-carlson.html [https://perma.cc/979B-VRT8]; Yourish et al., *supra* note 83; The QAnon Anonymous Podcast, *Studying the Black Pill*, at 1:00:23 (July 5, 2024), https://podcasts.apple.com/us/podcast/studying-the-black-pill-feat-elle-reeve-e285/id1428209307?i=1000661276500 [https://perma.cc/P6GG-SE6D] (quoting journalist Elle Reeve: "The Republican party is not shouting, 'Jews will not replace us.' But you see on Fox News people talk about Replacement Theory. Maybe they don't say, 'Jews are replacing white people with people of color.' But they say, 'Democrats are, in order to gain power.'").

90. Aram Roston, *The Proud Boys are Back: How the Far-Right Group is Rebuilding to Rally Around Trump*, REUTERS (June 3, 2024), https://www.reuters.com/investigates/special-report/usa-election-proudboys/ [https://perma.cc/3P5H-A5R6].

91. Kathleen Ronayne & Michael Kunzelman, *Trump to Far-Right Extremists: "Stand Back and Stand By"*, AP (Sept. 30, 2020), https://apnews.com/article/election-2020-joe-biden-race-and-ethnicity-donald-trump-chris-wallace-0b32339da25fbc9e8b7c7c7066a1db0f [https://perma.cc/9PTN-3QQN].

92. Dan Barry & Sheera Frenkel, *"Be There. Will be Wild!": Trump All but Circled the Date*, N.Y. TIMES (July 27, 2021), https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html [https://perma.cc/7PUZ-ATPX].

93. *Id.*

94. Ryan J. Reilly, *Judge Says Trump May Have Been Urging Supporters to "Do Something More" Than Protest on Jan. 6*, NBC NEWS (Dec. 28, 2022), https://www.nbcnews.com/politics/donald-trump/judge-says-trump-may-urging-protests-jan-6-rcna63538 [https://perma.cc/AZP6-CS4D]; Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021), https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial [https://perma.cc/VY2L-H239].

95. Daniel Rothbart & David M. Stebbins, *The Proud Boys Raging Righteously at the U.S. Capitol on January 6, 2021: A Hate Group in Action*, 29 J. PEACE PSYCH. 426 (2023); Marshall Cohen & Avery Lotz, *The January 6 Insurrection: Minute-by-Minute*, CNN (July 29, 2022), https://www.cnn.com/2022/07/10/politics/jan-6-us-capitol-riot-timeline/index.html [https://perma.cc/97RJ-2AJK]; *see generally* DAVID NEIWERT, THE AGE OF INSURRECTION: THE RADICAL RIGHT'S ASSAULT ON AMERICAN DEMOCRACY (2023).

96. Cohen & Lotz, *supra* note 95.

97. *Id.*

stood by) in the White House, refusing for hours to take any action to end the melee.[98]

As federal prosecutors would later charge, the storming of the Capitol was merely one part—the violent arm—of a multiprong plot to overturn the presidential election results. Donald Trump or members of his administration and legal team likewise supported or participated in schemes to advance fraudulent slates of state presidential electors, to harass election workers, to urge local and state authorities to change electoral results, to convince Department of Justice officials to back unsupported claims of election fraud, and even to replace the sitting Attorney General, Jeffrey Rosen, with a lackey who would do Trump's bidding.[99] Although Trump ultimately retained Rosen—apparently only after other Department of Justice heads threatened mass resignation—Rosen reported that Trump had admitted openly the corrupt rationale for the planned termination: "One thing we know is you, Rosen, aren't going to do anything to overturn the election."[100]

Four years later, Trump has reemerged victorious, regaining the office he still denies he previously lost.[101] For many of his most-ardent supporters, his extensive baggage apparently constituted a feature, not a bug.[102] On the campaign trail, he dehumanized his adversaries, while some of his followers demanded "the rope" for perceived

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98. *Id*.

99. Lazario Gamio & Karen Yourish, *Trump's Pattern of Pressure to Overturn the 2020 Election*, N.Y. TIMES (Jan. 8, 2024), https://www.nytimes.com/interactive/2024/01/08/us/trump-2020-overturn-timeline.html [https://perma.cc/9VZU-TKDP]; Luke Broadwater & Maggie Haberman, *Newly Released Messages Detail Roots of the "Fake Electors" Scheme*, N.Y. TIMES (Mar. 4, 2024), https://www.nytimes.com/2024/03/04/us/politics/chesebro-troupis-jan-6-messages.html [https://perma.cc/DQ5P-2BB5]. Infamously, Trump called Georgia's Attorney General, Brad Raffensperger, to urge him to "find 11,780" votes, which was "one more" than the figure by which Trump trailed Joe Biden in that state. Hailey Fuchs & Chris Cameron, *Listen to Trump Pressure an Official to "Find" Enough Votes for Him to Win Georgia*, N.Y. TIMES (Aug. 14, 2023), https://www.nytimes.com/2023/08/14/us/elections/trump-georgia-election-audio-raffensperger.html [https://perma.cc/UD6L-4QQX].

100. Aaron Blake, *3 Takeaways from the Senate Report on Trump's Brazen Efforts to Overturn the 2020 Election*, WASH. POST (Oct. 7, 2021), https://www.washingtonpost.com/politics/2021/10/07/3-takeaways-senate-report-trumps-brazen-efforts-overturn-2020-election/ [https://perma.cc/ZA44-L3XD]; Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Oust Acting Attorney General*, N.Y. TIMES (Oct. 13, 2022), https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html [https://perma.cc/HPY3-NWNJ].

101. Sara Dorn, *Trump Clinches Republican Nomination*, FORBES (Mar. 12, 2024), https://www.forbes.com/sites/saradorn/2024/03/12/trump-clinches-republican-nomination/ [https://perma.cc/AT4Q-CR39].

102. Chauncey Devega, *Why Trump's Followers Still Love the Boss: Crime is a Feature, Not a Bug*, SALON (Jan. 26, 2004), https://www.salon.com/2024/01/26/why-followers-still-love-the-boss-is-a-feature-not-a-bug/ [https://perma.cc/RNF5-H5CL]; Annika Brockschmidt, *The 'Unified Reich' Scandal is a Feature Not a Bug of Trump's Brand of American Fascism*, RELIGION DISPATCHES (May 22, 2024), https://religiondispatches.org/the-unified-reich-scandal-is-a-feature-not-a-bug-of-trumps-brand-of-american-fascism/ [https://perma.cc/D5D6-ATYX].

enemies—an extension of Trump's initial campaign promise to "lock . . . up" his 2016 presidential opponent.[103] Of course, not all Trump voters approved of his worst excesses, but a winning coalition was at least willing to look past (or forget) the illiberal chaos of his first term—the separation of migrant families at the border, the kids in cages, the travel ban, the militarized response to largely peaceful anti-racist protestors, and the two impeachments (the first, for withholding support from Ukraine until it launched an illiberal investigation into his then-political rival; the second, for conduct and inaction during the insurrection).[104]

More to the point, Trump has returned to power with a judicial wind at his back. Last summer, the Supreme Court resolved in his favor a presidential immunity claim that many observers considered meritless.[105] Specifically, in an effort to ensure that a muscular chief executive might take "bold and unhesitating action[s]," the Court held that the president could not be prosecuted criminally for an "official act," including acts undertaken to steal an election or even, as the dissenters noted, to assassinate a rival.[106] It was a stunningly destabilizing decision that left Justice Sotomayor in "fear for our democracy" from a president who might readily exploit the decision to become a veritable "king above the law."[107] And Trump seemingly took note of

103. Io Dodds, *MAGA Faithful Call for Riots and Lynchings After Trump's Guilty Verdict*, INDEPENDENT (May 31, 2024), https://www.the-independent.com/news/world/americas/us-politics/donald-trump-guilty-riots-violence-b2554889.html [https://perma.cc/MD2A-LVVW]; *cf.* Rebecca Falconer, *Trump Says "Sometimes Revenge Can Be Justified"*, AXIOS (June 7, 2024), https://www.axios.com/2024/06/07/trump-dr-phil-interview-revenge [https://perma.cc/L68R-U2RC]; Marianne LeVine, *Trump Calls Political Enemies 'Vermin,' Echoing Dictators Hitler, Mussolini*, WASH. POST (Nov. 13, 2023), https://www.washingtonpost.com/politics/2023/11/12/trump-rally-vermin-political-opponents/ [https://perma.cc/GEJ2-L9LF].

104. Adrián Blanco Ramos, *Fifty Years of Investigations on Trump, Visualized*, WASH. POST (Aug. 24, 2023), https://www.washingtonpost.com/politics/2023/04/01/trump-investigations-history-timeline/ [https://perma.cc/WU9R-M9Q9]; David A. Graham, *The Many Scandals of Donald Trump: A Cheat Sheet*, ATLANTIC (Jan. 23, 2017), https://www.theatlantic.com/politics/archive/2017/01/donald-trump-scandals/474726/ [https://perma.cc/M4PS-AYCX]; THE AMERICAN PRESIDENCY PROJECT, DONALD J. TRUMP EVENT TIMELINE, https://www.presidency.ucsb.edu/documents/donald-j-trump-event-timeline (last updated Sept. 12, 2024) [https://perma.cc/4B37-22BZ].

105. Trump v. United States, 603 U.S. 593 (2024).

106. *Id.* at 595; *id*. at_685_(Sotomayor, J., dissenting); *id*. at 686 (Jackson, J., dissenting) ("I agree with every word of [Justice Sotomayor's] powerful dissent.").

107. *Id.* at 685-86(Sotomayor, J., dissenting); *see also* Mark Joseph Stern, *Don't Believe John Roberts. The Supreme Court Just Made the President a King*, SLATE (Jul. 1, 2024), https://slate.com/news-and-politics/2024/07/supreme-court-john-roberts-opinion-trump-immunity-nightmare.html [https://perma.cc/CA93-V744]; Patrick Marley, *Supreme Court's Trump Immunity Ruling Poses Risk for Democracy, Experts Say*, WASH. POST (Jul. 1, 2024), https://www.washingtonpost.com/politics/2024/07/01/supreme-court-immunity-trump-democracy/ [https://perma.cc/DK82-SYKU].

Sotomayor's concern, crowing "long live the king" in a recent social media post.[108]

Two months into Trump's second term, he has put his monarchical aspirations into action. His administration has apparently disregarded court orders, urged impeachment of a federal judge who issued an unfavorable ruling, illegally deported people, defanged independent watchdog agencies, outsourced governmental power to unelected private actors, threatened universities, weaponized the Department of Justice against prominent Democratic politicians, penalized law firms for representing unpopular clients and causes, unconstitutionally impounded Congressionally allocated funds, dismantled wide swaths of the civil service, pardoned violent rightwing insurrectionists, and punished those who previously had investigated Trump and his people.[109] Payback, not policy, is the order of the day.

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108. Benjamin Oreskes, *"Long Live the King": Trump Likens Himself to Royalty on Truth Social*, N.Y. TIMES (Feb. 23, 2025), https://www.nytimes.com/2025/02/19/us/politics/trump-king-image.html [https://perma.cc/5UFS-VHGC].

109. Sheldon Pollack, *The US Government Has Sent Columbia University a Ransom Note*, GUARDIAN (Mar. 19, 2025), https://www.theguardian.com/commentisfree/2025/mar/19/government-trump-columbia-university [https://perma.cc/69RQ-Z2NV]; Daniel Ortner, *Trump Attacks on Law Firms Threaten the Foundations of Our Justice System*, FIRE (Mar. 18, 2025), https://www.thefire.org/news/trumps-attack-law-firms-threatens-foundations-our-justice-system [https://perma.cc/3UR2-3N42]; Lexi Lonas Cochran, *Universities in Precarious Position as Trump Uses Research Funding as a Wedge*, HILL (Mar. 16, 2025), https://thehill.com/homenews/education/5195511-universities-colleges-research-funding-trump-doge-columbia-harvard-mit-johns-hopkins/ [https://perma.cc/GT8D-T9TB]; Katherine Faulders, *Trump Administration Ignores Judge's Order to Turn Deportation Plane Around: Sources*, ABC NEWS (Mar. 16, 2025), https://abcnews.go.com/US/trump-admin-ignores-judges-order-bring-deportation-planes/story?id=119857181 [https://perma.cc/FF2N-UXS4]; Dana Goldstein, *Brown University Professor is Deported Despite a Judge's Order*, N.Y. TIMES (Mar. 16, 2025), https://www.nytimes.com/2025/03/16/us/brown-university-rasha-alawieh-professor-deported.html [https://perma.cc/CRF6-RDFN]; Ashley Wu et al., *Where Trump, Musk and Doge Have Cut Federal Workers So Far*, N.Y. TIMES (Mar. 12, 2025), https://www.nytimes.com/interactive/2025/02/11/us/politics/trump-musk-doge-federal-workers.html [https://perma.cc/T5M7-75AG]; Scott Pelley et al., *Watchdogs Fired by Trump Raise Alarms Over Future of Independent Government Oversight*, CBS NEWS (Mar. 9, 2025), https://www.cbsnews.com/news/trump-firings-watchdogs-inspectors-general-60-minutes/ [https://perma.cc/R4JJ-ZJ4L]; Erwin Chemerinsky, Opinion, *The One Question that Really Matters: If Trump Defies the Courts, Then What?*, N.Y. TIMES (Mar. 7, 2025), https://www.nytimes.com/2025/03/07/opinion/trump-courts-judges.html [https://perma.cc/TW7G-MW5X]; Spencer S. Hsu, *D.C. U.S. Attorney Probing Democrats Over Alleged Threats, Documents Show*, WASH. POST (Feb. 20, 2025), https://www.washingtonpost.com/dc-md-va/2025/02/19/trump-justice-operation-whirlwind-democrats/ [https://perma.cc/7875-RNY5]; Moira Donegan, *It is Elon Musk Who is Now Running the United States. Not Donald Trump*, GUARDIAN (Feb. 6, 2025), https://www.theguardian.com/commentisfree/2025/feb/06/elon-musk-us-government-power [https://perma.cc/7E4U-DSYN]; Ryan Lucas, *Trump Official Targeting Jan. 6 Investigators Worked on Those Cases Himself*, NPR (Feb. 12, 2025), https://www.npr.org/2025/02/12/g-s1-48193/trump-doj-january-6-cases [https://perma.cc/RN3W-YD6B]; Erwin Chemerinsky, *Trump's Order to Freeze Spending is Patently Unconstitutional*, L.A. TIMES (Jan. 28, 2025), https://www.latimes.com/opinion/story/2025-01-28/trump-executive-order-federal-spending-impoundment-congress [https://perma.cc/DBC2-4W9B]; Ken Dilanian & Ryan J. Reilly, *Trump Administration Fires DOJ Officials Who Worked on Criminal Investigations of the President*, NBC NEWS (Jan. 27, 2025), https://www.nbcnews.com/politics/justice-department/trump-administration-fires-

Even during the campaign, the writing was on the wall. Trump supporters boasted of a coming "post-constitutional order," which would be premised upon the far-right manifesto, *Project 2025: Presidential Transition Project*, an illiberal roadmap that one senior member of a previous Republican administration once called "a whole array of ideas that are designed to let Donald Trump function as a dictator."[110] Trump may have tried to distance himself from the proto-authoritarian blueprint in the leadup to the election, but many of its architects worked in Trump's first administration, and several more have attained positions of greater power in the second.[111] Indeed, Trump's own vice-president even penned an introduction to a book advancing Project 2025's prescriptions.[112] *Conservative* is the wrong term for such a revanchist and even nihilistic approach to governance—for the desire

doj-officials-worked-criminal-investigation-rcna189512 [https://perma.cc/6VNC-BKMW]; Katherine Doyle, *Trump Defends Jan. 6 Pardons of Violent Criminals*, NBC NEWS (Jan. 21, 2025), https://www.nbcnews.com/politics/donald-trump/trump-defends-jan-6-pardons-violent-criminals-rcna188669 [https://perma.cc/4KKR-ZDC5].

110. PROJECT 2025: PRESIDENTIAL TRANSITION PROJECT, https://www.project2025.org [https://perma.cc/44HV-62XF] (last visited Feb. 22, 2025); T.J. Harker, *The Post-Constitutional Order*, AM. MIND (June 21, 2024), https://americanmind.org/salvo/the-post-constitutional-order/ [https://perma.cc/H4MQ-464U]; Peter Stone, *"Openly Authoritarian Campaign": Trump Threats of Revenge Fuel Alarm*, GUARDIAN (Nov. 22, 2023), https://www.theguardian.com/us-news/2023/nov/22/trump-revenge-game-plan-alarm [https://perma.cc/L9KM-H6JA] (quoting Donald B. Ayer, Deputy Attorney General under President George H. W. Bush); *see also What is Project 2025, the Conservative Plan to Remake the Federal Government?*, NEWSWEEK (July 29, 2024), https://www.newsweek.com/project-2025-explainer-trump-biden-election-1918848 [https://perma.cc/K5HE-7BET]; Will Ragland & Joe Radosevich, *Project 2025: The Plan to Seize Power by Gutting America's System of Checks and Balances*, CTR. AM. PROG. (July 8, 2024), https://www.americanprogress.org/article/project-2025-the-plan-to-seize-power-by-gutting-americas-system-of-checks-and-balances/ [https://perma.cc/V5MF-5GJB]; Beth Reinhard, *Trump Loyalist Pushes 'Post-Constitutional' Vision for Second Term*, WASH. POST (June 8, 2024), https://www.washingtonpost.com/politics/2024/06/08/russ-vought-trump-second-term-radical-constitutional/ [https://perma.cc/533G-4N4Q] (describing the same term used by Trump's former Budget Director).

111. Faith Wardwell, *The Key Project 2025 Authors Now Staffing the Trump Administration*, NBC NEWS (Mar. 12, 2025), https://www.nbcnews.com/politics/trump-administration/key-project-2025-authors-now-staffing-trump-administration-rcna195107 [https://perma.cc/W5MZ-WFNN]; Kiara Alfonseca & Katherine Faulders, *How Trump Has Infused Parts of Project 2025 into his Administration*, ABC NEWS (Dec. 9, 2024), https://abcnews.go.com/Politics/trump-project-2025-administration/story?id=116019369 [https://perma.cc/56FB-44UA](detailing nominations and appointments of Project 2025 architects); Laura Barrón-López & Shrai Popat, *A Look at the Project 2025 Plan to Reshape Government and Trump's Links to Its Authors*, PBS NEWS (July 9, 2024), https://www.pbs.org/newshour/show/a-look-at-the-project-2025-plan-to-reshape-government-and-trumps-links-to-its-authors [https://perma.cc/2UD8-3LW9]; Tessa Stuart & Andrew Perez, *Trump's Claim to 'Know Nothing' About Project 2025 is Ridiculous*, ROLLING STONE (July 5, 2024), https://www.rollingstone.com/politics/politics-features/donald-trump-project-2025-1235053996/ [https://perma.cc/T6XB-WNBE].

112. Andrew Prokop, *J.D. Vance has Made it Impossible for Trump to Run Away from Project 2025*, VOX (July 25, 2024), https://www.vox.com/politics/362917/jd-vance-project-2025-book-kevin-roberts-trump [https://perma.cc/R64G-32F3]; Jacob Knutson, *J.D. Vance Wrote Forward of Upcoming Book from Project 2025 Architect*, AXIOS (July 25, 2024), https://www.axios.com/2024/07/25/vance-project-2025-book-trump-heritage-foundation [https://perma.cc/FNG7-RD68].

to entrench rightwing power, strip Americans of hard-fought fundamental liberties, and dismantle whatever institutions cannot be categorically and perennially controlled.[113]

A decade ago, Dan and I expressed concern about the potential erosion of discrete liberal rights—for instance, the "substantial degree of sexual and reproductive autonomy" we both believed to be integral to liberalism.[114] We were correct to worry, as the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization* has made plain.[115] Today, those liberties (and many others) are very much under threat.[116] But Dan and I failed to appreciate just how close we were then—and just how much closer we are now—to the wholesale disintegration of the liberal legal order upon which such rights are premised. I am reminded, on this score, of Judge Learned Hand's commentary on the conditions of systemic collapse:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[117]

We stand today at the precipice. I do not know precisely where we should go or how we get there. But I remain convinced that hope is not lost. More to the point, in the face of the ongoing and upcoming struggle, I find myself unwilling to give up on our liberal institutions (imperfect though they are and always have been). To the contrary, I am—for wholly instrumental reasons—gravitating cautiously closer to them. And, in that effort, Dan's theory could help.

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113. Max Boot, Opinion, *Republicans Aren't Conservatives. They're Nihilists*, WASH. POST (Aug. 3, 2021), https://www.washingtonpost.com/opinions/2021/08/03/republicans-arent-conservatives-theyre-nihilists/ [https://perma.cc/QX4X-UQLJ]; *cf.* Chesney & Citron, *supra* note 68, at 1785 (asking whether Trump is a "post-modernist" or "nihilist").

114. Markel, *Retributive Justice*, *supra* note 7, at 7.

115. Dobbs v. Jackson, 142 S.Ct. 2228, 2261 (2022) (overturning *Roe v. Wade*).

116. *See, e.g.*, Dept. of State v. Muñoz, 602 U.S. __, 11-12 (2024) (Sotomayor, J., dissenting) (warning of the chipping away of fundamental rights); Kim Forde-Mazrui, Dobbs *and the Future of Liberty and Equality*, 72 CLEV. ST. L. REV. 1 (2023); Jennifer S. Bard, *The Legacy of* Dobbs*: How the Supreme Court is Soon Likely to Eliminate the Protections of* Bostock *and* Obergefell *Against Laws Designated to Discriminate Against LGBTQ Individuals* (unpublished manuscript on file with author).

117. Learned Hand, *The Spirit of Liberty*, New York, NY (May 21, 1944) (transcript available at https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=1199 [https://perma.cc/ME2V-6SZM]); *see also* J. HARVIE WILKINSON III, ALL FALLING FAITHS: REFLECTIONS ON THE PROMISE AND FAILURE OF THE 1960S 41 (2019 ed.) ("I know as a judge that law draws its life from assent, not coercion; from citizens who carry an allegiance to the legal order in their hearts.").

IV. INSTRUMENTAL INSTITUTIONAL PRIDE AND THE HIDDEN PROMISE OF POLITICAL RETRIBUTIVISM

Dan described *political retributivism* as a deontic theory, according to which a liberal state's imposition of punishment is "intrinsically good regardless of the independent contingent benefits."[118] In passing, however, Dan referenced also an instrumental benefit—*to wit*, that *political retributivism* could provide "democratic self-defense against low-level rebellions."[119] In my response, I picked up on this extrinsic end, acknowledging that Dan's theory could potentially be "intuitively appealing" to those "who value . . . preservation of . . . the liberal order."[120] But I was dubious that *political retributivism* carried such pragmatic promise. I noted that "a central precept" of liberalism is that we ought generally to "maintain[] a *healthy distrust* toward state authority—particularly when the state pursues social control through the criminalization of morally neutral conduct," and I worried that, if Dan's theory were to take hold, it could undercut this welcome skepticism by creating "a presumption of moral guilt whenever an individual violates the just-liberal law of a just-liberal state."[121] My concern, in other words, was that *political retributivism* loaded the dice in favor of public perceptions of systemic legitimacy.[122] But in light of present circumstances, I have come to the conclusion that loading the dice may be just what we need.

A. Institutional Pride & Skepticism

In recent years, my scholarship has focused on a version of this dice-loading concern—specifically, the role of *institutional pride* in American life and law. In other articles and essays, I have criticized judges and prosecutors for allowing their professional pride to cloud their decisionmaking and action.[123] There, my argument was that a morally inflected approach to legal and judicial professionalism tends to translate to a form of favoritism for systemic insiders and their interests—an *in-group bias* that, in some circumstances, may supercharge

118. Markel, *Retributive Justice*, *supra* note 7, at 27.

119. *Id.*; *see also id.* at 64 (referencing the "instrumental benefits of democracy"); *id.* at 68 (observing that punishing the failure to obey liberal laws may "serve to promote the vitality and attractiveness of . . . valuable social projects").

120. Bowers, *Blame by Proxy*, *supra* note 7, at 136 (observing that Dan's theory is "intuitively appealing to all of us who value preservation of . . . the liberal social order").

121. *Id.* at 148 (emphasis added).

122. On perceptions of systemic legitimacy, *see generally* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211 (2012).

123. Bowers, *Mercy* in Extremis, *supra* note 5; Josh Bowers, McCleskey *Accused: Justice Powell and the Moral Price of Institutional Pride*, 2 AM. J.L. & EQUAL. 122 (2022) [hereinafter Bowers, McCleskey *Accused*]; Bowers, *Instrumental Institutional Pride*, *supra* note 15.

tolerance for the subordination of systemic outsiders.[124] I noted that, when we talk about implicit structural racism, we may just be pinpointing downstream consequences of *institutional pride*.[125] Put differently, once we claim to discover some moral magic in law *qua* law (and legal institutions *qua* institutions), we tend to fail to evaluate adequately morally and prudentially appropriate courses of action.[126]

Indeed, this is a principal reason why I am attracted to the philosophical-anarchist position that political and legal duties (and corresponding institutions) should carry no normative weight independent of their substantive content (or conduct). And it is likewise an explanation for why legal positivists insist upon "a sharp separation between law and morality."[127] As H. L. A. Hart explained: "[T]he danger [is] that the existing law may supplant morality as a final test of conduct and so escape criticism."[128] Or, as Frederick Schauer observed: "To take law and morality as necessarily conjoined is to run the risk of minimizing the moral space between the products that legality has given us until today and the goals we might wish an ideal legal system to accomplish."[129]

To minimize the biases that flow from *institutional pride*, I have urged legal professionals to default to postures of *institutional skepticism*.[130] But, more recently, I have come also to recognize that a genuine skeptic should be skeptical about everything, including skepticism.[131] When we find ourselves in circumstances where social cohesion has splintered dangerously, and governance is unduly perceived to be illegitimate by broad swaths of the polity, it may come time to abandon skepticism in favor of an attitude of strategic *institutional pride*—an *instrumental*, rather than *moral* sense of sanctimoniousness—calculated to fortify our liberal institutions against further

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124. Bowers, *Mercy* in Extremis, *supra* note 5 (examining the psychological phenomenon of *in-group bias*, and citing sources).

125. *Id.*; Bowers, *Instrumental Institutional Pride*, *supra* note 15, at 10.

126. SIMMONS, *supra* note 13, at 200-01 (discussing the risk is that citizens who have "blindly complied" with law directives may come to believe, erroneously, that, by their obedience, they can "avoid the responsibility of weighing . . . competing moral claims on . . . action"); *supra* notes 13-17 and accompanying text (discussing philosophical anarchism).

127. JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 25 (1984); H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 595 (1958) (defending a "separation of law as it is and law as it ought to be").

128. Hart, *supra* note 127, at 598.

129. Frederick Schauer, *Positivism as Pariah*, in THE AUTONOMY OF LAW 46 (Robert P. George ed., 1996); *cf.* William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. SOC. JUST. 7, 15 (2007) ("We must never confuse law and justice. What is legal is often not just. And what is just is often not at all legal.").

130. Bowers, McCleskey *Accused*, *supra* note 123; Schauer, *supra* note 129, at 42-43 (endorsing a "sceptical attitude towards legal institutions . . . and towards . . . assumptions that existing laws and their accompanying or generating institutions are desirable").

131. *See* Bowers, *Instrumental Institutional Pride*, *supra* note 15.

erosion. In other words, if pride has power, we may put that power appropriately to work to shore up productive civic bonds.[132]

This is something of a counterintuitive extension of a core claim of the critical legal studies movement—specifically, that "all law is politics."[133] Some critical legal scholars have drawn on that insight to justify deserting "formal law and politics" and its "liberal and neoliberal" rights-based "frame" in favor of a "horizon beyond legalism."[134] But it would be a mistake reflexively to abandon liberal institutions. Even if it is true that privileged figures have traditionally used legal liberalism to entrench hierarchy, possibilities remain to repurpose liberal structures as tools to counteract subordination.[135] As Maurice Mitchell observed: "[W]e need institutions for a powerful and durable movement. Organizations and institutions are political vehicles. They are also spaces where individuals develop skills, connection, and ideological alignment. Institutions transmit knowledge, hold strategy, and cultivate power."[136] Comparatively, radical "utopian" proposals to dismantle institutions and discard rules and rights risk either paralysis or the creation of a social order so lacking in stability that disfavored groups are left under-protected.[137]

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132. Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457, 463 (2015) [hereinafter Yankah, *Republican Responsibility*] (arguing that criminal law ought to "represent[] a reciprocal duty that flows between a citizen and their civic community").

133. *See generally* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 153 (1990) (describing the general thesis of critical legal studies that "all law is politics" and "right wing politics at that").

134. Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L. J. 2497 (2023) [hereinafter Akbar, *Non-Reformist Reforms*] (endorsing "non-reformist" social movements); *see also* Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1787 (2020) [hereinafter Akbar, *Abolitionist Horizon*]. As Duncan Kennedy argued: "Rights discourse is internally inconsistent, vacuous, or circular . . . . Moreover, the discourse of rights imposes constraints on . . . radical transformation." Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 47-49 (David Kairys ed., 3d ed. 1982) (observing that liberal legalism has a "bias" for "manipulable, atomized, and . . . traditionally individualistic" formal rights over "substantive inequality" and "justice between social classes, races, or sexes").

135. Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies have what Minorities Want?*, 22 Harv. C.R. & C.L. L. REV. 301, 30515 (1987) ("Discretionary judgments colored by racism or other forms of prejudice are made possible by replacing rules, guidelines and rights with fluid, informal decisionmaking. . . . For minorities . . . rights serve as a rallying point and bring us closer together."); *see also* Maurice Mitchell, *Building Resilient Organizations*, FORGE (Nov. 29, 2022), https://forgeorganizing.org/article/building-resilient-organizations/ [https://perma.cc/PB5A-HQ66]; *infra* Part IV.D (describing the potential to remake criminal legalism).

136. Mitchell, *supra* note 135.

137. Delgado, *supra* note 135, at 312,314 ("In general, the positive aim [of radical theorists in the critical legal studies movement (CLS)] is to establish a Utopia in which true community would prevail. . . . [But] there are no guarantees that racism would not resurface . . . . If racism were to surface in a CLS-style Utopia, there would be no rules, rights, federal statutes, or even courts to counteract it."); *see* Part IV.C (discussing abolitionism and critiques of it).

B. Achieving a Decent Country

It is something of an empirical and contingent question when and whether we need more *institutional pride* or *skepticism*. In the first instance, we ought to be "guided by ideas" (albeit not overly specified and unduly rigid goals).[138] For present purposes, my rough substantive commitment is to Avishai Margalit's idea of "the decent society," which he described as consisting of a state that "do[es] not act in ways that give the people under [its] authority sound reasons to consider themselves humiliated."[139] In turn, Margalit defined "humiliation" as "treating people as if they were not human beings but merely things, tools, animals, subhumans, or inferior humans."[140]

Of course, no society has ever achieved thoroughgoing *decency*. And contemporary America is no exception with its antiegalitarian rules of so-called democratic representation and a criminal-legal system typified by a shameful institutional indifference to "pointless indignity" and instances of "gratuitous humiliation" imposed disproportionately upon Black, Brown, and poor peoples.[141] The immediate inquiry, then, is whether contemporary systems of American governance are so thoroughly *indecent* that the only appropriate reaction is outright resistance and abolition. To be sure, such sad circumstances have

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138. ROBERTO MANGABEIRA UNGER, THE SELF AWAKENED: PRAGMTISM UNBOUND 37-38, 43 (2009); *cf.* RICHARD RORTY, ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH CENTURY AMERICA 28 (1998) ("Instead of seeing progress as a matter of getting closer to something specifiable in advance, we see it as a matter of solving more problems.").

139. AVISHAI MARGALIT, THE DECENT SOCIETY 11 (Naomi Goldblum trans., 1996).

140. *Id.* at 121.

141. Atwater v. City of Lago Vista, 532 U.S. 318, 346-47 (2001) (noting that an arrest was a "pointless indignity" and a "gratuitous humiliation" but nevertheless constitutionally reasonable); *see also* Bowers, *Annoy No Cop*, *supra* note 3; Bowers, *Pointless Indignity*, *supra* note 3; *cf. supra* notes 54-56, 167 and accompanying text (citing abolitionists and critical race theorists); *see, e.g.*, Paul Finkelman, *The Proslavery Origins of the Electoral College,* 23 CARDOZO L. REV. 1145, 1145 (2002); FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION (1999).

I recognize that, all at once, I have offered up several contested (and only somewhat analogous) terms—*indecency*, *humiliation*, and *indignity*. But, notably, Margalit likewise linked the concepts. *See, e.g.*, MARGALIT, *supra* note 139, at 11, 36-44, 89-90, 96-101, 270 ("A decent society cares about the dignity of its prisoners."). And even if these concepts remain hopelessly underspecified (and perhaps even partially inconsistent), they still convey, I think, a set of underlying ideas that may be usefully appreciated in a folk sense. As Oscar Schachter observed regarding the concept of *dignity*: "[I]t has been generally assumed that a violation . . . can be recognized even if the abstract term cannot be defined. 'I know it when I see it even if I cannot tell you what it is.'" Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 849 (1983) ("[Dignity's] intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors."); *accord* Jeremy Waldron, *Cruel, Inhuman, and Degrading Treatment: The Words Themselves*, at 5, 9-10 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1278604 [https://perma.cc/ZNY6-HZGW] ("Just because a word or phrase is evaluative and hence contestable does not mean that we might not gain from reflecting upon its meaning."); *see, e.g.*, Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 188 (2011) ("Dignity is not a fixed category, but rather a series of meanings that share a Wittgensteinian family resemblance").

historically arisen. Thus, efforts to work with or for Nazi Germany have rightly been labeled appeasement or worse.[142] And William Lloyd Garrison was likewise justified in demanding the dissolution of our antebellum constitutional order.[143] But is the punishment industrial complex similarly unsalvageable?

Another approach to the question is to ask what kind of political left we want—a "reformist" or a "revolutionary" movement.[144] In contemporary criminal-legal abolitionist circles, *reformism* has become something of a pejorative term. According to Amna Akbar, the "reformist reform" principally serves the interests of "the ruling class," which seeks to "do as little as possible" to "reestablish its rule" and "quell revolt" that might otherwise "force deeper changes and self-rule."[145] By contrast, the "non-reformist reform" aims promisingly "to undermine the prevailing political, economic, social order, construct an essentially different one, and build democratic power toward emancipatory horizons."[146] The lesson, in a nutshell, is go big or go home.

Writing at the turn of the last century, however, Richard Rorty offered an alternative perspective on the tradeoffs between *reformist* and *revolutionary* politics. Rorty outlined a pragmatic philosophy rooted in the belief that the project of America is always imperfect, always becoming—that the nation is at its best when it aspires, even incrementally, to be better.[147] Rorty identified this ethos that "our nation remains unachieved" with the Progressive era—a period during which a powerful "reformist" movement got things done by cultivating a

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142. TIM BOUVERIE, APPEASEMENT: CHAMBERLAIN, HITLER, CHURCHILL, AND THE ROAD TO WAR (2019); *see, e.g.*, James J. Weingartner, *Law and Justice in the Nazi SS: The Case of Konrad Morgen*, 16 CENT. EUR. HIST. 276, 293 (1983) (describing the Third Reich legal career of Georg Konrad Morgen and concluding that, despite investigating and prosecuting concentration-camp officials, "Morgen was no crypto-liberal working to undermine the Nazi regime and its instruments of coercion, nor was the SS judicial system an oasis of the rule of law in the totalitarian desert."). *See generally* AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES (2010).

143. William Lloyd Garrison, *On the Dissolution of the Union*, LIBERATOR (June 15, 1855), at http://fair-use.org/the-liberator/1855/06/15/on-the-dissolution-of-the-union [https://perma.cc/CR89-NW5S] ("Away with the Constitution—it smells of blood!").

144. RORTY, *supra* note 138, at 51, 104.

145. Akbar, *Non-Reformist Reforms*, *supra* note 134, at 2520; *see also* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 120 (2009) ("Those who work inside [the system] can tinker with the punishment regime, but they probably cannot overhaul it."); Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 759 (2018) ("[R]eformist reforms misdiagnose the depth of the problem. Such reforms attempt to fix broken systems without realizing that these systems are working to re-entrench and legitimize current power arrangements.") (internal quotation marks omitted).

146. Akbar, *Non-Reformist Reforms*, *supra* note 134, at 2497.

147. RORTY, *supra* note 138, at 8-10, 104; *see also* FREDERICK DOUGLASS, ORATION: DELIVERED IN CORINTHIAN HALL, ROCHESTER 4-5 (July 5, 1852) ("Seventy-six years, though a good old age for a man, is but a mere speck in the life of a nation. . . . The eye of the reformer is met with angry flashes, portending disastrous times; but his heart may well beat lighter at the thought that America is young, and that she is still in the impressible stage of her existence.").

platform of "hope," thereby using a broad coalition of "leftists and liberals" to draw upon the emotional energy of "national pride" to "smudge the line" between respective differences.[148]

For Rorty, "national pride" was always ever only an instrumental value, not a moral virtue—a social adhesive that was beneficial in calibrated doses but prudentially problematic if overspread: "National pride is to countries what self-respect is to individuals: a necessary condition for self-improvement. Too much national pride can produce bellicosity and imperialism, just as excessive self-respect can produce arrogance."[149] In other words, Rorty saw patriotism not as a moral good but rather as a *tool* to drive Americans' pursuit of progress—a progress, in turn, defined not by technological advancement or economic growth but by the diminishment of state-imposed "sadism and selfishness" (which is, of course, just another name for *indecent* treatment).[150]

If the Progressive era marked a heyday for this broad left-liberal alliance, the Vietnam War, according to Rorty, signaled its decline.[151] As leftists grew disaffected with America's muscular policies, some chose to "step back from their country" and its governance, rejecting "the very idea that democratic institutions might once again be made to serve social justice."[152] Unlike the "pragmatic, participatory Left" of the first half of the century, this "new Left" gave "cultural politics preference over real politics," adopting a "spectatorial, disgusted, mocking" posture toward what it considered to be an "unforgiveable" nation.[153] Instead of "reforming the laws," these radicals and progressives developed an almost "fundamentalist" obsession with accurately "naming the system" and with shaming the defenders of "late capitalism."[154] Concrete programs ceded to hazy "dreams" of "being rescued by an angelic power called 'the people.' "[155] For such leftists, the only ideologically permissible action plans were "bottom-up initiatives, conducted

148. RORTY, *supra* note 138, at 8-10, 14, 17, 44, 51 (describing a political tent big enough to house "Malcolm X and Bayard Rustin . . . Susan B. Anthony and Emma Goldman").

149. *Id*. at 3, 8-10 (urging progressives to keep "skeptical eyes" open to signs of state failure but also to seek opportunities sought to "give America reason to be proud of itself in the future").

150. *Id*. at 91-92, 95 (urging the left "to mobilize" its "pride"). Indeed, like me, Rorty expressly drew from Avishai Margalit's notion of the *decent society*. *Id*. at 25 (citing Margalit); *see also supra* Part IV.B and accompanying text (discussing Margalit's concept of a *decent society*).

151. *Id*. at 3, 8-10.

152. *Id*. at 36.

153. *Id*. at 3-4, 35, 80-82, 94 (describing the wide sense among this group that "national pride is no longer appropriate" and that there was something "deeply wrong with their country," which was not "correctable by reforms").

154. *Id*. at 45-46, 78-80.

155. *Id*. at 14, 91-92, 102.

by workers and peasants who have somehow been so freed from resentment as to show no trace of prejudice."[156]

Rorty blamed the ineffectiveness of this emerging "cultural Left" on its penchant for political theory and urged the movement to "kick the philosophy habit"—to rid itself of the moral inclination to "totalize" the "American adventure" in a fixed "frame of reference" supplied by theory.[157] Rorty felt that there was, in leftwing theory-making (and myth-making), a misconception wholly at odds with a pragmatic piecemeal approach—namely, the wrongheaded belief that "the higher your level of abstraction, the more subversive of the established order you can be."[158] And Rorty likewise worried that these quixotic visions—what Shakespeare called "such stuff as dreams are made on"—might distract leftists from political engagement, diverting attention to unproductive academic exercises like "problematizing familiar concepts" and debating "inadequately theorized" propositions.[159] For Rorty, then, the entire enterprise of "moral idealism" amounted to a kind of naivety—a "utopian foolishness" that remained largely unintelligible, acontextual, and unwelcoming to outsiders:

> If we look for people who made no mistakes, who were always on the right side, . . . we shall have few heroes and heroines. . . . America is not a morally pure country. No country ever has been or ever will be. Nor will any country ever have a morally pure, homogenous Left. In democratic countries you get things done by compromising your principles in order to form alliances with groups about whom you have grave doubts.[160]

This gets at the difference between what I have called *instrumental* and *moral pride*. [161] The strategic person aims "to mobilize" pride to build successful and well-focused coalitions.[162] The morally proud person opts, instead, to exclude—sometimes arrogantly—prospective

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156. *Id*. at 7, 53 ("The history of leftist politics in America is a story of how top-down initiatives and bottom-up initiatives have interlocked."). As Rorty observed: "[T]hey never told us how 'the people' would learn . . . how to handle [governance] . . . once we were rid of both the bureaucrats and entrepreneurs . . . . [T]he country of one's dream must be a country one can imagine being constructed, over the course of time, by human hands." *Id*. at 17, 35, 102-03.

157. *Id*. at 36, 91-92, 95-96.

158. *Id*. at 92-93; Delgado, *supra* note 135, at 307-08 ("The . . . critique of piecemeal reform is familiar, imperialistic and wrong. . . . It smacks of paternalism to assert that the possibility of revolution later outweighs [immediate material concerns]").

159. RORTY, *supra* note 138, at 93; WILLIAM SHAKESPEARE, THE TEMPEST, Act IV, Scene I 133 (1611).

160. RORTY, *supra* note 138, at 14, 35, 45, 52; Mitchell, *supra* note 135 ("Holding on to . . . overly idealistic demands that keep us small but pure ignores the basic strategic imperative of building power."); *cf*. Bowers, *Mercy* in Extremis, *supra* note 5, at 1567-70 (discussing the negative consequences of *in-group bias*).

161. *Supra* Part IV.A.

162. RORTY, *supra* note 138, at 91-92.

allies who have failed to demonstrate ideological *bona fides*.[163] To be sure, appeals to "moral universalism" may still do some good work.[164] Thus, Rorty acknowledged that the *cultural left* had managed to change the discourse, reducing "the amount of sadism" in public life by calling out the "endless humiliation[s] inflicted" upon politically powerless groups.[165] But efforts to achieve even greater progress were derailed by an insistence that fellow travelers exhibit unconditional allegiance to "maximalist" theories and impractical "purity," defined by Maurice Mitchell as viewing "anything less than the most idealistic position as a betrayal of core values and evidence of corruption, cowardice, lack of commitment, or vision."[166]

Ultimately, then, Rorty's lesson was to counsel caution about revolutionary political initiatives. But I imagine that he would likewise agree that, for pragmatists, no approach—radical or restrained—is sacrosanct. It would be a mistake, therefore, to categorically dismiss criminal-legal abolitionism. Indeed, some of the best critical-legal scholars working today have devoted considerable attention to the project, taking care to try to develop sophisticated, potentially viable (and sometimes even somewhat incremental) roadmaps for success.[167] Their analyses and prescriptions deserve to be taken seriously, which I now do.

C. Abolition Horizons

Proponents of criminal-legal abolition come in several stripes,[168] but their basic aspiration is to eliminate "sites of coercion, violence, and exploitation" and replace them with, for instance, "community-based restorative justice and peacemaking programs."[169] I am sympathetic to

163. Mitchell, *supra* note 135 (arguing that "purity" based politics is counterproductive).

164. RORTY, *supra* note 138, at 35.

165. *Id*. at 65, 80-81.

166. *Id*. at 45, 52, 81-82; Mitchell, *supra* note 135.

167. *See, e.g.*, Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis,* 120 MICH. L. REV. 1199 (2022); Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2022); Paul Butler, *From "Fuck Tha Police" to Defund the Police: A Polemic, with Elements of Pragmatism and Accommodation, Hopefully Not Fatal, as Black People Hope about Encounters with the Police in* FIGHT THE POWER: LAW AND POLICY THROUGH HIP-HOP SONGS 21 (Gregory S. Parks & Frank Rudy Cooper eds., 2022); Akbar, *Non-Reformist Reforms*, *supra* note 134; Jocelyn Simonson, *Police Reform through a Power Lens*, 130 YALE L.J. 778 (2021); Dororthy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617-37 (2019); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015) (describing abolitionism as a "gradual project of decarceration"); Christopher Williams, *Abolition in The Real World: A Case Study of Cash Bail Abolition in Illinois* (unpublished manuscript on file with author) (characterizing a successful effort to eliminate cash bail in Chicago as an abolitionist movement); Benjamin Levin, *Abolish What?* (unpublished manuscript on file with author).

168. Levin, *supra* note 167 (offering a taxonomy of different conceptions of abolitionism).

169. Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 2 (2022).

such initiatives and underlying claims that mass incarceration and the use of excessive force by law enforcement are irremediable outgrowths of chattel slavery.[170] Indeed, I am even on the record endorsing "modest" pilot programs designed "to test bolder concepts like legalization, prison abolition, and defunding police."[171] And I am likewise untroubled that some of these proposals could be considered illiberal (or at least a-liberal) in the sense that they are animated less by a prototypically liberal regime of neutral rules and rights and more by communitarian principles, like compassion, social solidarity, public health, and mutual aid.[172] Again, my commitment is not *per se* to liberalism (or illiberalism) but to the pursuit of a more *decent society*.[173] On this reading, all forms of social ordering (liberal and illiberal, institutional and abolitionist) are theoretically on the table as potentially workable means to achieve greater *decency*. As Margalit observed, the pursuit of the *decent society* defies categorization "under the familiar 'isms' of liberalism or socialism."[174]

Roberto Mangabeira Unger offered a methodology to evaluate whether a given governance approach might draw us closer to *decency*. Specifically, he championed a form of "political experimentalism" termed "radicalized pragmatism."[175] In the first instance, it demands debiasing—that is, a rejection of "institutional fetishism" and its corresponding "false semblance" that our established models of governance are proper models to which we ought to "bow down" as if they

170. Bowers, *What if Nothing Works?*, *supra* note 3, at 971, 983 (favorably citing "commentators [who] have identified the origins of modern policing in antebellum slave patrols," and endorsing proposals to replace "punitive prohibition" with "modes of social organization, oriented principally around harm reduction and related ideas, like forgiveness, human capabilities, autonomy, public health, social solidarity, and human flourishing"); *supra* notes 54-56, 144-146 and accompanying text (discussing prison abolition and its roots, and citing sources).

171. Bowers, *What if Nothing Works?*, *supra* note 3, at 960 (proposing recidivist "crime licenses" for quality-of-life crimes); Daniel Abrahamson & Josh Bowers, *Kicking the Habit: The Opioid Crisis, America's Addiction to Punitive Prohibition, and the Promise of Free Heroin*, 80 OHIO ST. L.J. 787 (2019) [hereinafter Abrahamson & Bowers, *Kicking the Habit*] (proposing addiction-maintenance for individuals with longtime drug dependencies).

172. *See, e.g.,* Bowers, *What if Nothing Works?*, supra note 3, at 971 (endorsing an approach to quality-of-life crimes oriented around such communitarian principles); *cf.* ALLAN C. HUTCHINSON & PATRICK MONAHAN, THE RULE OF LAW: IDEAL OR IDEOLOGY 108, 114 (1987) ("Liberalism has always been ambivalent about the significance and the desirability of the value of community. For liberal theory, all roads begin with atomic, prepolitical individuals maximizing their self-interest. . . . [I]ndividuals drift with no communal connections . . . [as opposed to] a modus vivendi that encourages caring and sharing and actualizes the possibility for meaningful connection with others."); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 36-37, 50 (1988) (describing radical reform projects that tend to focus on "attachment" and "connection" as contrary to liberal projects that tend to focus on "autonomy" and "individualism").

173. *Supra* notes 136-137 and accompanying text.

174. MARGALIT, *supra* note 139, at 5 ("I have tried not to classify the decent society under the familiar 'isms' of liberalism or socialism.").

175. UNGER, *supra* note 138, at 7-8, 26-28, 35-38, 43.

were "natural and even sacred."[176] But Unger recognized likewise that we cannot know *ex ante* where, if anywhere, we should go from here: "[A]lthough we may fancy ourselves philosophers enjoying the view from the stars, we are in fact *lawyers contending with irreducible ambiguity and foreclosing alternative solutions out of practical need*."[177]

Applying Unger's radical-pragmatic lens to the problem at hand, I remain unpersuaded that criminal legalism ought to be eliminated. Admittedly, I can marshal only qualitative evidence to support my claim. But, given the "practical needs" of contemporary America, I have grown evermore convinced that the most attractive "alternative"[178] is just to refocus a more-minimal form of criminal legalism on those who would otherwise use criminal legalism *indecently* to dominate and humiliate us.[179] In turn, we may come to model a more-*decent* system of state coercion. As Avishai Margalit observed: "[A] society is a decent one if it punishes its criminals—even the worst of them—without humiliating them."[180] In this way, Margalit understood that state punishment is not wholly inconsistent with *decency*.[181]

Of course, I could be wrong to focus upon legal institutions as means to counteract Trumpian *indecency*. Like Unger, I am just another lawyer "contending with irreducible ambiguity," and in that effort I may be misreading the tea leaves.[182] I likewise recognize that Unger would probably object to my use of his radical-pragmatic methodology to land upon a somewhat conventional (and institutional) proposal for criminal-legal *minimalism*.[183] But Unger also appreciated that "it is part of

176. *Id*. at 26, 29-32, 35, 49-50.

177. *Id*. at 37-38, 43 (emphasis added) ("[E]xperimentalism is . . . a way of moving within the established context that allows us to anticipate within the context the opportunities that it does not yet realize and may not even allow."); *see also* Rorty, *supra* note 138, at 24 ("The future will widen endlessly. Experiments with new forms of individual and social life will interact and reinforce one another.").

178. UNGER, *supra* note 138, at 37-38, 43.

179. *Supra* Part III; *infra* Part IV.D-E.

180. MARGALIT, *supra* note 139, at 262.

181. *Id*. at 108, 268 ("It is possible to think about punishment without any inherent association with humiliation.").

182. UNGER, *supra* note 138, at 37-38, 43. Indeed, Sam Moyn recently claimed that an emphasis on law and its institutions is precisely the wrong tact to counteract Trumpism's *indecency*. Samuel Moyn, Opinion, *Liberals Bet They Could Beat Trump with the Law. They Lost*, N.Y. TIMES (Nov. 22, 2024), https://www.nytimes.com/2024/11/22/opinion/trump-legalism-trials.html [https://perma.cc/C724-7PYC]. Perhaps Moyn is right. But I see conditions on the ground differently. And in the face of "irreducible ambiguity," all we ultimately have with which to work is our own beliefs and actions—our own read of the available evidence and what we do with that reading. As Joseph Singer has forcefully argued: "Our legal and philosophical discourse has confused the issue of whether a belief is justified with the issue of whether it is true. . . . What we do and believe matters. It does *not* matter that I cannot prove this to be so; what matters is the human assertion of responsibility." Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 52-53 (1984).

183. West, *supra* note 172, at 2 (describing Unger as the "premiere spokesperson for the communitarian left"); *see, e.g.*, RSA, *Freedom, Equality, and a Future Political Economy: The Structural Change We Need*, YOUTUBE, at 3:04 (Dec. 11, 2013),

the project of human empowerment and freedom to diminish the dependence of change on calamity."[184] And the lesson of the Capitol insurrection is that *calamity* might not be as far off as we once believed.[185] In such circumstances, I cannot bring myself to insist righteously upon radical systemic overhaul, rather than pragmatic reformation of our (all-too-fragile) existing institutions.[186] As Joe Kennedy observed in his examination of the dangerous and proto-authoritarian far-right QAnon conspiracy: "Some 'storms' are simply best weathered with a steady hand."[187]

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My opposition to abolitionism is threefold.[188] First, the project poses political problems. To be sure, there have been meaningful and effective reforms that are potentially abolitionist in nature. For instance, Chris Williams has argued forcefully that Chicago's successful push to abolish cash bail qualified as an abolitionist effort.[189] And there have likewise been other activists and advocates of abolitionism who have done good, able (and even modest) work designing accessible blueprints for political action.[190] But there is also an insistence by some proponents (particularly scholars) on an alienating, jargon-laden, and

https://www.youtube.com/watch?v=_CBW3aFvxVs&ab [https://perma.cc/63SN-JXGF] (Roberto Mangabeira Unger stated, "Nothing is more important than structural change."). On *criminal-legal minimalism*, *see* 101 WASH. U. L. REV. 1771-2077 (2024) (Issue 6: symposium volume on "criminal justice minimalism").

184. UNGER, *supra* note 138, at 49-50; *see also* Crenshaw, *Race, Reform and Retrenchment*, *supra* note 54, at 1386 (discussing Unger and noting that, "rather than discarding liberal legal ideology," Unger aimed to "focus and develop its visionary undercurrents"); *cf. id.* at 1386 (recognizing that, under certain circumstances, the best pragmatic course to radical reform is not a "'direct assault against the bourgeois state' " but rather "the pragmatic use of liberal ideology" as a means of "maneuvering within and expanding the dominant ideology to embrace the potential for change" (quoting Joseph Femia)); Duncan Kennedy, *The Liberal Administrative Style*, 41 SYRACUSE L. REV. 801, 806 (1990) (arguing that "though I like screaming myself," the appropriate path forward "depends on the circumstances," and, in some circumstances, it is "better [to] obey" institutions because "too many people will get hurt if we don't go along," so "we shouldn't smash it now").

185. *Supra* Part III.

186. *Infra* notes 207-216 and accompanying text (discussing the way in which anti-institutional leftists may exhibit a "righteous" kind of in-group bias not dissimilar from the partiality displayed by the institutionally proud on the other side).

187. Kennedy, *The Storm is Coming*, *supra* note 74, at 32 (invoking the rallying cry of QAnon conspiracists that "the Storm is coming"); *cf.* ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 76 (1976) (critiquing liberalism but recognizing that, "like life insurance," it may be an understandable attempt "to make the best of a bad situation"); HUTCHINSON & MONAHAN, *supra* note 172, at 98 (critiquing liberalism but recognizing that "liberal democratic institutions" are characterized by a "resiliency and stamina" that serves to "minimize conflict and promote stability"); Vincent Chiao, *What Is the Criminal Law For?*, 35 LAW & PHIL. 137, 138 (2016) (arguing that a healthy criminal legal system may foster institutional stability).

188. UNGER, *supra* note 138, at 36-39.

189. Williams, *supra* note 167.

190. *See, e.g.*, *Abolition Now!*, CRITICAL RESISTANCE, https://criticalresistance.org/ [https://perma.cc/5524-W944] (last accessed Mar. 6, 2025) (offering somewhat more practical reform proposals); *supra* note 167 and accompanying text (citing sources).

abstract vernacular—*abolitionism*, not *minimalism*; *non-reformist reforms*, not *reformist reforms*.[191] Of course, the measure of a political initiative's moral or prudential worth should not be public popularity. But, as Randall Kennedy observed, so long as the median voter cannot yet visualize "a polity in which police and prisons are 'unimaginable,' " such an "aspiration" is bound to remain too "far-fetched" to "gain substantial political traction."[192] After all, we cannot expect ordinary Americans to envision "utopian horizons" when even abolition's champions recognize that "[i]t is hard to pin down what prison abolition means."[193]

This is not to say that, to be useful, a concept must always be fully theorized.[194] To the contrary, I have argued elsewhere that the underspecification of abolition provides a sound basis for experimenting with it—for doing the work, instead of parsing the prose.[195] But our experiments must, in the first instance, be politically viable, not just fanciful recommendations to establish novel modes of social existence that "nobody is yet able to imagine being actualized" beyond the pages of impenetrable academic journals.[196] As Rorty put it:

> The voting public, the public which must be won over if the Left is to emerge . . . into the public square, sensibly wants to be told the details. It wants to know how things are going to work . . . . The public, sensibly, has no interest in getting rid of capitalism [or, for our purposes, prisons and police] until it is offered details about the alternatives.[197]

We risk backlash when we pursue reform projects that transcend public comprehension. As Jürgen Habermas famously argued, there is an

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191. Randall Kennedy, *Racial Promised Lands?* 18 [hereinafter Kennedy, *Racial Promised Lands?*] (unpublished manuscript on file with author); *see, e.g.*, *supra* notes 134, 145-146, 207 and accompanying text (citing sources).

192. Kennedy, *Racial Promised Lands?*, *supra* note 191, at 24-25. Something of the same challenge confronts other radical abolitionist efforts—for instance, the effort to abolish the U.S. Immigration and Customs Enforcement. *See, e.g.*, Rogé Karma, *Why Democrats Got the Politics of Immigration So Wrong for So Long*, ATL. (Dec. 10, 2024), https://www.theatlantic.com/ideas/archive/2024/12/democrats-latino-vote-immigration/680945/ [https://perma.cc/U49S-PSGZ]. *See generally* Peter L. Markowitz, *Abolish ICE . . . and Then What?*, YALE L.J. F. 130 (2019).

193. Roberts, *supra* note 56, at 6; *see also* Steven Arrigg Koh, *Criminal Law's Hidden Consensus*, 101 WASH. U. L. REV. 1805, 1813 (2024) ("[O]wing to a general skepticism of reform as perpetuating structural inequality, critical accounts often lack a concrete account of what follows in the absence of criminal law.").

194. *Supra* note 141 and accompanying text (discussing *indecency*, *indignity*, and *humiliation* as under-specified (but still potentially useful) concepts, and citing sources).

195. Bowers, *What if Nothing Works?*, *supra* note 3, at 967-69.

196. RORTY, *supra* note 138, at 102.

197. *Id.* at 104-05 (noting that "[s]omeday, perhaps, cumulative piecemeal reforms will be found to have brought about revolutionary change[,]" but, in the meantime, "[w]e should not let speculation about a totally changed system, and a totally different way of thinking about human life and human affairs, replace step-by-step reform of the system we presently have."); *but cf.* Williams, *supra* note 167, at 10 (observing that "abolitionists care about short-term projects" also).

inevitable interplay between "the lifeworld" that describes our everyday experience and "the system" that describes our modes of governance.[198] No "system" can long survive if is not sufficiently "anchored" to the "lifeworld."[199] No abolitionist alternative, in other words, can far outpace popular conceptions of the possible and desirable.[200]

Second, abolitionism may sacrifice valuable legal tools that could be used to protect historically disadvantaged groups in times of increasing vulnerability.[201] It is not only law-and-order conservatives, like Justice Clarence Thomas, and moderate scholars, like Randall Kennedy, who have claimed that criminal legalism optimally may provide a subsidy to the precise communities that state institutions have traditionally underserved;[202] Angela Onwuachi-Willig has similarly argued that subordinated groups have been traumatized, historically, by

198. KENNETH WAIN, THE LEARNING SOCIETY IN A POSTMODERN WORLD 161 (2004) ("The lifeworld 'remains the subsystem that defines the pattern of the social system as a whole'" (quoting Habermas)).

199. *Id*. (observing that "systemic mechanisms need to be anchored in the lifeworld" (quoting Habermas)).

200. Notably, studies show that all demographics—even historically disadvantaged groups—tend to oppose defunding the police and abolishing prisons. *See, e.g.*, Kim Parker & Kiley Hurst, *Growing Share of Americans Say They Want More Spending on Police in Their Area*, PEW RES. CTR. (Oct. 26, 2021), https://www.pewresearch.org/short-reads/2021/10/26/growing-share-of-americans-say-they-want-more-spending-on-police-in-their-area/ [https://perma.cc/XYJ8-Q8SN]; John Gramlich, *U.S. Public Divided Over Whether People Convicted of Crimes Spend Too Much or Too Little Time in Prison*, PEW RES. CTR. (Dec. 6, 2021), https://www.pewresearch.org/short-reads/2021/12/06/u-s-public-divided-over-whether-people-convicted-of-crimes-spend-too-much-or-too-little-time-in-prison/ [https://perma.cc/5M6R-YM39] (indicating that though a higher percentage of Black Americans believe criminals spend "too much time in prison," a majority still thinks criminals spend "too little" or "about the right amount of time" in prison).

201. Delgado, *supra* note 135, at 301, 305 (observing that "minorities have not flocked" to "[u]topia[n]" programs, because they tend to offer benefits that are only "far off in time" and "far from adequate" and because they are "hazy about what would provide minorities comparable protection if rights no longer existed"); Kennedy, *Racial Promised Lands?*, *supra* note 191, at 25 ("No political movement can do away with human evil and thus moot the necessity for protection against it."). As Tommie Shelby explained:

> [W]e don't really know how human beings would conduct themselves in the post-capitalist utopia. . . . The optimistic thought seems to be that if we were to create just societies and a just global order, and to treat (rather than punish) those with mental illnesses, prisons would be obsolete. Yet interpersonal violence was prevalent before the emergence of racism and capitalism . . . . [T]he thirst for power, greed, jealousy, lust, and wrath . . . have been present in every society of recorded history."

TOMMIE SHELBY, THE IDEA OF PRISON ABOLITION 193-94 (2022).

202. *Chicago v. Morales*, 527 U.S. 41, 114-15 (Thomas, J., dissenting) ("Today, the Court focuses extensively on the 'rights' of gang members and their companions. It can safely do so—the people who will have to live with the consequences of today's opinion do not live in our neighborhoods."); Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1267-68 (1994) ("Racially invidious under-enforcement purposefully denies African-American victims of violence the things that all persons legitimately expect from the state . . . [including] civil order . . . [and] equal *protection* of the law"); *see also* Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L. REV. 1153, 1166-67 (1998).

criminal-legal indifference to racial violence.[203] Likewise, Steven Koh observed: "[T]he impulse to critique legal systems may be warranted, but a wholesale critical account, trending toward abolition, may be dangerous and harmful to the very communities such advocates are calling to protect."[204] Compounding the problem, a utopian emphasis on "the long view" could create near-term destabilization, the presence of which right-wing populists might take advantage of to drag us closer to theocracy, ethnonationalism, and other forms of state-imposed *indecency*.[205] That is to say, the Overton window, once loosened, opens both ways.[206]

Third, and most relevant to our theme, abolitionists may display, in their "proudly radical" and "self-consciously maximalist" ambitions, a self-satisfaction analogous to the smugness exhibited by legal liberals who harbor an abiding moral affection for *status quo* structures.[207] After all, no ideological faction has a monopoly on *moral pride*; all human collectives—governmental and otherwise—have conceits and corresponding *in-group biases* that may cloud judgments about how best to order society.[208] It is not, simply put, an exclusively leftist or liberal phenomenon.[209] Indeed, on the other side of the ideological spectrum,

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203. Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 SOCIO. THEORY 335, 336 (2016) (discussing the failure of the state to bring Emmett Till's killers to justice and concluding that "[c]ultural trauma occurs when members of a collective feel they have been subjected to a horrendous event that leaves indelible marks upon their group consciousness, marking their memories forever and changing their future identity in fundamental and irrevocable ways.").

204. Koh, *supra* note 193, at 1844; *see also* RORTY, *supra* note 147, at 98 (arguing that it is "no comfort to those in danger of being immiserated" that an alternative form of governance may one day arise).

205. RORTY, *supra* note 147, at 98.

206. *See generally* THE MACKINAC CENTER, *The Overton Window*, https://www.mackinac.org/OvertonWindow [https://perma.cc/5SH4-Q2HJ] (last viewed Mar. 7, 2025) ("The core concept is that politicians are limited in what policy ideas they can support—they generally only pursue policies that are widely accepted throughout society as legitimate policy options. These policies lie inside the Overton Window.").

207. Kennedy, *Racial Promised Lands?*, *supra* note 191, at 20 ("[Abolitionists] generally disavow compromise aimed at winning over adversaries or fence-sitters. They harbor a thoroughgoing disgust of the status quo."); Bowers, *Mercy* in Extremis, *supra* note 5 (discussing the relationship between pride and *in-group biases*); Bowers, *Instrumental Institutional Pride*, *supra* note 15 (critiquing liberals' moral institutional pride); Bowers, McCleskey *Accused*, *supra* note 123 (same).

On the maximalism of abolitionist efforts, *see* Akbar, *Non-Reformist Reforms*, *supra* note 134, at 2519 ("[R]eform as an end goal—reformism—is a project distinct from reform toward revolutionary or transformative ends. If capitalism is the problem, then abolition rather than reform should be the goal. Parallel arguments are made for white supremacy, heteropatriarchy, and the prison-industrial complex."); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 410 (2018) (arguing for "fundamentally transforming the relationships among state, market, and society."); *see also supra* Part IV.B (critiquing maximalism).

208. Bowers, *Mercy* in Extremis, *supra* note 5, at 1562 ("These bubbles go by many names: family, religion, ethnicity, identity, occupation, hobby, trade.").

209. That said, I have detailed elsewhere the way in which—by training and disposition—legal liberals are particularly prone to an *exceptionally* powerful sense of pride and

the illiberal right has created its own purportedly virtuous "religion of fear" (which Joe Kennedy called a "secular sacred" faith) around the demonization of disadvantaged groups that have been made disproportionate targets of draconian criminal-legal and immigration systems.[210] The irony is that all our self-made moral myths (whether communitarian, liberal, or punitive) exhibit a similar old-style commitment to potentially problematic notions of blameworthiness—to the sanctimonious notion that some "stains are ineradicable."[211] In this way, each morally proud political faction has "reinvented sin" in a quasi-biblical fashion, condemning *strangers* who do not share the *in-group*'s principled convictions.[212]

But each ideological faction is not similarly situated when it comes to the *consequences* of moral pride. When moderate legal and political liberals honor their affections, they concurrently draw meaningful influence from formidable mainstream institutions. And the illiberal right has found effective means to coopt and wield governmental authority to subordinate marginalized groups whom they self-righteously fear and hate.[213] But the left is comparatively hobbled precisely because a core tenet of its "civic religion" is an instinctive aversion to systemic coercion.[214] In other words, some radicals and progressives are ideologically and normatively *allergic* to statist strength—to what they consider the "demonic" force called governmental "power."[215] In turn, the more moral energy they direct to proudly anti-institutional utopian visions, the less official power they can expect to wield.[216]

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corresponding *in-group bias*. *Id*. at 1584-85; *see also* Bowers, *Instrumental Institutional Pride*, *supra* note 15, at 5-6; *cf*. HUTCHINSON & MONAHAN, *supra* note 172, at 98 (describing the pervasive and conventional commitment to liberal institutionalism as a "utopian" form of "orthodoxy").

210. RORTY, *supra* note 147, at 17; Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity through Modern Punishment*, 51 HASTINGS L.J. 829, 833 (2000); *see also* MARGALIT, *supra* note 139, at 89 (describing the *indecent* treatment of *others* as "demons").

211. RORTY, *supra* note 147, at 32, 95 (describing an anti-institutional "vocabulary built around the notion of sin"); *cf*. Bowers, *What if Nothing Works?*, *supra* note 3, at 1056 (discussing the "disturbing and familiar echo of *prohibitionism* in the demand by some would-be communitarians" for heavy-handed enforcement of COVID restrictions).

212. RORTY, *supra* note 147, at 95; Bowers, *Mercy* in Extremis, *supra* note 5, at 1567-78 (discussing the role of pride in shaping *in-group bias* against outsiders and strangers, and analyzing *The Parable of the Good Samaritan*).

213. RORTY, *supra* note 147, at 44.

214. *Id*. at 38.

215. *Id*. at 1, 4, 91-94, 102 (describing the *cultural left* as "haunted" by "power").

216. *Supra* notes 137, 144-146, 157-160, 189-212 and accompanying text (discussing abolition and "maximalist" theories). Rorty saw the writing on the wall. In a famous passage that presciently anticipated the rise of Donald Trump and the MAGA movement, he warned that if leftists continued to retain a posture of pious exclusivity—of proud intransigence—eventually "something will crack":

> The nonsuburban electorate will . . . start looking around for a strongman to vote for.. . . One thing that is very likely to happen is that the gains made in the past forty years by black and brown Americans . . . will be wiped out. Jocular contempt for

D. Criminal Legalism Remade

If the modern left plays its cards rights, it has a rare opportunity to seize institutional power (obviously, not for another four years at least, but perhaps soon thereafter). It is a matter of reclaiming civic and institutional pride from a movement that, under the sway of a demagogue and his grievances, has largely abandoned the terrain. So-called conservatives once celebrated law enforcement but now treat federal agents, prosecutors, and judges as evil emissaries of a lawless "deep state."[217] Their leader, Donald Trump, may call his followers "patriots," but he labels his own nation a "cesspool" governed by a "swamp" that he "alone" can "drain."[218] It is a remarkable about face for a party that once laid special claim to Americanism. Rightwing "chauvinists" historically rose to power by espousing the belief that "the country is basically in good shape."[219] But they have now abandoned that position, leaving the left with the chance to advance its own patriotic narrative about America's noble struggle to be better. A lane has opened, in other words, for leftists to reclaim their country—to affect an attitude of *institutional pride* as an instrumental means to remake, but not abolish, criminal law. As the "never Trump" political strategist, Sarah Longwell, recently made plain: "One of the reasons that I was a Republican is I felt like Democrats were down on America. . . But now Trump's the one talking negatively about America."[220]

> women will come back into fashion.. . . All the sadism which the academic Left has tried to make unacceptable to its students will come flooding back.. . . [M]y imagined strongman . . . will invoke [a] glorious memory . . . [but] will be a disaster for the country and the world.[216]

RORTY, *supra* note 147, at 90-91; *cf. supra* Part III.

217. *See generally* JENNIFER MERCIECA, DEMAGOGUE FOR PRESIDENT: THE RHETORICAL GENIUS OF DONALD TRUMP (2020); Charles U. Zug, *Thank God for the Deep State: Presidential Demagoguery and the "Unitary Executive"*, 12 AM. POL. THOUGHT 113 (2023); Emily Pears, *Demagoguery in America*, NAT. AFFS., (2022), https://www.nationalaffairs.com/publications/detail/demagoguery-in-america [https://perma.cc/3CV5-WCZT]; Robert B. Horwitz, *Trump and the "Deep State"*, 42 POL'Y STUD. 473 (2021); Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1660 (2018); *see also supra* Part III.

218. CAROL LEONING & PHILIP RUCKER, I ALONE CAN FIX IT: DONALD J. TRUMP'S CATASTROPHIC FINAL YEAR (2021) (ebook); Doyle McManus, *Biden Says America is "Coming Back." Trump Says We're "in Hell." Are They Talking about the Same Nation?*, L.A. TIMES (Mar. 11, 2024), https://www.latimes.com/politics/story/2024-03-11/column-biden-says-america-is-coming-back-trump-says-were-in-hell-are-they-talking-about-the-same-nation [https://perma.cc/MT6D-HD5T].

219. RORTY, *supra* note 138, at 10, 14 (describing the twentieth-century American right).

220. THE WILDERNESS PODCAST, *What Undecided Voters Think of Kamala Harris (Ep.6)*, at 34:20 (Jul. 28, 2024), https://tunein.com/podcasts/News--Politics-Podcasts/The-Wilderness-p1141799/?topicId=410735114 [https://perma.cc/G4GW-ACD4]; *Id.* at 34:37 ("Listening to the Barack Obama's 2004 [Democratic] Convention speech, my first impression of it was . . . 'oh, a Democrat who's talking about patriotism and loving America,' but it's not . . . the airbrushed patriotism of . . . 'I like the flag too.'"); *see also* Zack Beauchamp, *The Conservative Movement is Rejecting America*, VOX (Apr. 1, 2021, 1:40 PM), https://www.vox.com/policy-and-politics/2021/4/1/22356594/conservatives-right-wing-democracy-claremont-ellmers [https://perma.cc/V8XF-U2NF].

Steve Koh offered a minimalist model of criminal legalism built around just this proud left-liberal vision.[221] Koh described two criminal-legal schools of thought—a "critical school" that includes abolitionists, and a "traditional school" that includes proponents of conventional principles of punishment, like retribution, deterrence, and incapacitation.[222] To these schools, Koh added something of a unity camp—a "civil sphere" school of criminal legalism that would use law enforcement and punishment to "affirm solidarity" and advance civic republican ideas, like promoting "social cohesion within a pluralist democracy."[223] According to Koh, the principal harms such a system would remedy are criminal acts that tear at our "social fabric"—for instance, the corruption of the crooked politician, the violence of the renegade cop or racist vigilante, or the civil unrest of the insurrectionist.[224] As Koh explained:

> Imagine a universe in which Capitol rioters are never prosecuted, George Santos is allowed to continue to serve in Congress with no consequences, or Derek Chauvin is never prosecuted after unlawfully killing George Floyd. The results of such action would be deeply corrosive—indeed, perhaps fatal—to any civil society.[225]

In other words, rather than focusing on the traditional or critical archetypes of, respectively, blameworthy individuals or oppressive institutions, Koh sought to "uphold deep values—fair elections, public integrity, and law enforcement equity."[226] In such a criminal-legal system, the architects of the January 6 insurrection would face stiffer penalties than the foot soldiers, and foot soldiers would face stiffer penalties than low-level drug offenders (who, optimally, would be carved out of the criminal legal system altogether and into public-health interventions, like addiction maintenance).[227]

This is politics, to be sure. But it is not just a mercenary matter of weaponizing criminal legalism to dismantle the Republican party. Rather, it is a political project to shore up societal "bonds of trust" in the

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221. Koh, *supra* note 193.

222. *Id.* at 1806.

223. *Id.* at 1831, 1835, 1845 (arguing that criminal law ought to focus upon "the election insurrectionist, corrupt politician, . . . deadly police officer . . . [and] racist vigilante").

224. Koh, *supra* note 193, at 1835, 1837-38 ("As long as our democracy exists around certain republican ideals, some notion of solidarity must continue to exist around such ideals and consequences must ensue for those who have violated such deep values."); *see also* Yankah, *Republican Responsibility supra* note 132, at 463.

225. Koh, *supra* note 193, at 1838.

226. *Id.* at 1831.

227. *Id.* at 1837 ("Civil sphere analysis agrees with the critical school's critique of mass incarceration. . . . Civil sphere theory points to the same pathological system but articulates the pathology from a slightly different angle."); *cf.* Abrahamson & Bowers, *Kicking the Habit*, *supra* note 171 (endorsing harm-reduction measures, like addiction maintenance); Bowers, *What if Nothing Works?*, *supra* note 3 (same).

effort to foster a more *decent* democracy and state.[228] The alternative is today's destructive factionalism where "deeper antipathies rooted in blood relations and identities" fester.[229] But this is likewise where Koh and I part ways. His moral project was to cultivate a *polity-wide* sense of solidarity—"a feeling of identity with, or at least empathy for, *every other member* of one's society."[230] For Koh, then, the source of our ills was *disunity itself*—just the ugly fact that "[w]e have come to the point where we see one another as the enemy."[231] But, to my thinking, what Koh failed to appreciate is that the illiberal right *is* our enemy; it is our enemy precisely because the conduct of its enthusiasts represents an internal threat to the *decency* of our society and state.[232]

Instead of facing this enemy head-on, Koh imagined that leftists and liberals might find *common ground* with the illiberal right. Thus, Koh credited the Stop the Steal movement's disingenuous claims that it was, in fact, committed to "election integrity"—assertions that any objective listener ought to have found utterly fantastic.[233] To be sure, I might be willing to concede that some of the individuals who stormed the Capitol were dupes who genuinely believed that democracy was in danger, but the movement's leaders were, I am convinced, almost entirely craven opportunists.[234] It speaks well of Koh that he has tried to see the best in them and has imagined, in turn, a tent big enough for all to fit. But what we genuinely need right now is not the largest communal shelter, but rather a bunker of sorts, sturdy enough to protect the rest of us from those who would design their own official encampments to *indecently* keep *outsiders* out.[235] We otherwise risk a kind of

228. Koh, *supra* note 193, at 1838.

229. *Id*.

230. *Id*. at 1833 (emphasis added).

231. *Id*. at 1834, 1843 ("Without meaningful public accountability for such crimes, American solidarity will corrode.").

232. *Supra* Part III.

233. Koh, *supra* note 193, at 1823 (crediting the election-integrity claims of members of Congress who led the effort to overturn the election, and concluding that "right-wing communities that identify with the January 6th insurrectionists . . . generally agree on a deep value: free and fair elections are critical in the American republic."); *see, e.g.*, Charles Homans, *How "Stop the Steal" Captured the American Right*, N.Y. TIMES MAG. (July 28, 2022), https://www.nytimes.com/2022/07/19/magazine/stop-the-steal.html [https://perma.cc/Y2NT-E8UY].

234. *See* Kristina M. LaPlant, Keith E. Lee, & James T. LaPlant, *Stopping the Steal and Selling the Big Lie: An Analysis of Tweets and Certification Votes Among House Republicans in the Wake of the 2020 Presidential Election*, 52 AM. POL. RES. 141 (2024).

235. MARGALIT, *supra* note 139, at 105 ("[T]he central idea of humiliation [i]s the rejection of a person or a group of people from the human commonwealth."); *see, e.g.*, Amy B. Wang & Mariana Alfaro, *Trump Pushes False Claims About Migrants Eating Dogs in Springfield, Ohio*, WASH. POST. (Sept. 10, 2024), https://www.washingtonpost.com/politics/2024/09/10/trump-immigrants-eating-dogs-springfield-ohio-fact-check/ [https://perma.cc/6UTK-JSYB]. I should make plain that when I speak of the *indecent* right, I am speaking of how they would govern, not how they might live socially. This is not to say that they live virtuous lives, just that when Margalit wrote of indecency, he was referring only to institutional governance. MARGALIT, *supra* note 139, at 1 ("A civilized society is one

gaslighting—the normalization of humiliation and the transformation of cruelty, in Margalit's words, into "familiar scenery that does not demand special examination, since it is assumed that things are the way they are supposed to be."[236]

I am left unwilling to welcome right-wing revanchists into our fold. Rather, my message is just this: if you would refashion our nation into an anti-plural, anti-democratic, and anti-egalitarian ethnostate grounded on reactionary ideas like "integralism" and "the dark enlightenment," then, to quote Lou Reed, "there's no ground common enough for me and you."[237] Anything else is rank appeasement and preemptive surrender.[238]

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whose members do not humiliate one another, while a decent society is one in which the institutions do not humiliate people.").

236. MARGALIT, supra note 139, at 102 ("Seeing something as normal means seeing it as something that can be taken for granted. . . . What is humiliating for self-respecting natives in the colonialist experience is the fact that the humiliating masters see their surroundings as normal . . . [that they need not] see other people precisely."); GEORGE ORWELL, IN FRONT OF YOUR NOSE (1946), *reprinted in* THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL: VOLUME IV, at 125 (Sonia Orwell & Ian Angus eds., 1968) ("To see what is in front of one's nose needs a constant struggle."). On *gaslighting*, *see* Paige L. Sweet, *The Sociology of Gaslighting*, 84 AM. SOC. REV. 851 (2019).

237. *Cf.* LOU REED, *Good Evening Mr. Waldheim*, *on* NEW YORK (Sire Records 1989) ("[O]h, common ground/Is common ground a word or just a sound?/Common ground, remember those civil rights workers buried in the ground/. . . Oh, is it true, there's no ground common enough for me and you?"). On *integralism*, *see* Adrian Vermeule, *Integration from Within* 2 AM. AFFS. 202 (Spring 2018) ("[I]t is a matter of finding a strategic position from which to sear the liberal faith with hot irons, to defeat and capture the hearts and minds of liberal agents, to take over the institutions of the old order that liberalism has itself prepared."). On criticisms of it, *see* Micah Schwartzman & Jocelyn Wilson, *The Unreasonableness of Catholic Integralism*, 56 SAN DIEGO L. REV. 1039, 1041-43 (2019) ("Catholic integralism . . . conflict[s] with a conception of reasonableness that requires cooperating on fair terms, including by respecting the freedom and equality of citizens."); Matt Ford, *The Emerging Right-Wing Vision of Constitutional Authoritarianism*, NEW REPUBLIC (Apr. 2, 2020), https://newrepublic.com/article/157132/emerging-right-wing-vision-constitutional-authoritarianism [https://perma.cc/Q4LS-SP5T]. On the *dark enlightenment* and criticisms of it, *see* Olivia Goldhill, *The Neo-Fascist Philosophy that Underpins Both the Alt-Right and Silicon Valley Technophiles*, QUARTZ (June 18, 2017), https://qz.com/1007144/the-neo-fascist-philosophy-that-underpins-both-the-alt-right-and-silicon-valley-technophiles [https://perma.cc/5EV4-G73W]. I refuse to cite to actual *dark-enlightenment* materials, but, disturbingly, the Republican vice-presidential nominee, J.D. Vance, does not appear to be as allergic to the noxious philosophy. Gil Duran, *Where J.D. Vance Gets His Weird, Terrifying Techno-Authoritarian Ideas*, NEW REPUBLIC (July 22, 2024), https://newrepublic.com/article/183971/jd-vance-weird-terrifying-techno-authoritarian-ideas [https://perma.cc/C9S9-9MWY].

238. *Supra* note 142 and accompanying text (discussing appeasement); *cf.* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271 (2020); MARK BRAY, ANTIFA: THE ANTI-FASCIST HANDBOOK 158 (2017) ("[A]llowing fascism to develop and expand runs the documented risk of sliding into 'totalitarianism.' . . . Do we need to wait until the swastikas are unfurled from government buildings before we defend ourselves?").

E. Instrumental Political Retributivism

By this point, a keen reader might perceive an inconsistency (or twelve) in my argument. After echoing Richard Rorty's rejection of utopian philosophies, I am now relying, at least partially, upon Steve Koh's "civil sphere *theory*."[239] The difference is that, for my purposes, I do not invoke Koh's theory *as universal theory* but rather as a piece of a functional blueprint to advance my only principled objective, which is our pursuit of a *decent society*. In other words, theories can do prudential work—just as politics, social solidarity, criminal legalism, institutional pride, patriotism, or innumerable other concepts can do prudential work.[240] Rorty rightly counseled that we should "leave nothing fixed" and "take nothing as authoritative," but, ironically, in his unyielding aversion to grand theories Rorty was, perhaps, just too much of a *quietist* and not enough of a thoroughgoing pragmatist—not enough, that is, of a pragmatist who might be willing to use almost *anything and everything*.[241]

This, then, brings us back to *political retributivism* and, more to the point, how might we *use* it. Significantly, Dan described his theory in public-relations terms—as a "communicative" campaign designed to impart the moral wrongfulness of violating a liberal order's rules.[242] Conceptually, my earlier views on Dan's theory remain unchanged; I still reject *political retributivism* as a non-consequentialist punishment principle.[243] But I have come to believe that Dan was on to something when he discussed the way in which communities might *internalize* his theory's punishment messages. The precise mechanics of transmission are beyond the scope of this essay,[244] but (accepting Dan's expressivist ambitions as well founded), an explicit (even if disingenuous) reliance upon his punishment rationale could telegraph an expedient sense of *institutional pride* and a corresponding moral aversion to retrograde affronts to our (only somewhat) liberal democratic

239. *Supra* notes 221-238 and accompanying text (discussing Koh's theory and Rorty's rejection of such universal theories); *see* RORTY, *supra* note 138, at 93 (urging leftists "clamber back down from their books to a level of abstraction on which one might discuss the merits of a law, a treaty, a candidate, or a political strategy").

240. *Supra* notes 118-187, 221-236 and accompanying text (discussing these concepts).

241. RORTY, *supra* note 138, at 20, 30, 93. On philosophical quietism, *see* Philip Pettit, *Existentialism, Quietism, and the Role of Philosophy*, *in* THE FUTURE FOR PHILOSOPHY 304 (Brian Leiter ed. 2024). On the question of whether Rorty was a *philosophical quietist*, *see* Hanne Andrea Kraugerud & Bjørn Torgrim Ramberg, *The New Loud: Richard Rorty, Quietist?*, 16 COMMON KNOWLEDGE 48 (2010).

242. Markel, *Political Retributivism*, *supra* note 7, at 26 ("An account like mine is fairly described as a form of *communicative* retributivism.").

243. *Supra* Part I.

244. *Cf.* Daniel S. Nagin & Cody W. Telep, *Procedural Justice and Legal Compliance*, 13 ANN. REV. L. & SOC. SCI. 5 (2017) (reviewing whether "perception-based studies" of the legitimacy of law enforcement "are strongly associated with legal compliance" and finding a strong correlation but no definitive "causal connection" between changes in state policy and action, perceptions of legitimacy, and ultimate legal compliance).

order.[245] It is a matter of driving Dan's narrative forward in order to put a political thumb on liberal institutional scales (and to oppose, in turn, authoritarian fists).

On this reading, *political retributivism* might be of instrumental value, even as it remains no moral virtue.[246] As Maurice Mitchell observed: "Our opponents are formidable and dangerous. We must assess the power we *actually have* at all times and in every circumstance so that we don't either leave *power* on the table or overreach and come up empty."[247] Concretely, *political retributivism* is one means (among many) to harness criminal-legal institutional power.

I opened this essay by faulting Dan for having failed to offer a sophisticated definition of liberalism, but I now see that the omission matters only to the extent it has hindered the capacity for *political retributivism* to function effectively as a *tool*. In any event, we should not expect any individual mechanism to do enough work, standing alone. There are other worthwhile tools (conceptual and tangible) that could likewise prove helpful, however nominally, in the execution of a winning gameplan. Indeed, Joseph Raz described the entire legal order as just such a tool—an amoral "instrument," little different from a "sharp knife."[248] Knives, of course, have no intrinsic normative quality. But "those who control [them] have power, which, like all power, can be abused."[249] And the sharpest knife in the liberal-institutional drawer is criminal legalism. In the face of creeping autocracy, why would we want to sheath it?

CONCLUSION

American leftists are particularly bad at wielding power. Too often, they allow the emotional satisfaction of "performative" politics, infighting, and "call-out" and "cancel" culture to take precedence over productive notions of national and civic pride.[250] Rather than

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245. On expressivist theories of criminal law, *see generally* Joshua Glasgow, *The Expressivist Theory of Punishment Defended,* 34 LAW & PHIL. 601 (2015).

246. *Cf.* UNGER, *supra* note 187, at 56-57 (rejecting an "idealist . . . approach to legal order" but noting that the "meanings" we "attribute" to legalism may still be of practical importance).

247. Mitchell, *supra* note 135 (emphasis added).

248. JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW & MORALITY 225-226 (2d ed. 2009).

249. Joseph Raz, *The Law's Own Virtue*, 39 OXFORD J. LEG. STUD. 1, 13 (2019) ("[W]hile the law can be used to achieve much that is good, its existence also creates opportunities for much evil.. . . The law is a powerful structure, and those who control it have power, which, like all power, can be abused.").

250. What we now refer to as *performative* politics, Rorty described as a "spectatorial" and "disgusted" attitude. RORTY, *supra* note 138, at 3-4, 80-82, 94, 98-99 (arguing that the *cultural left* must start "shedding of its semi-conscious anti-Americanism, which is carried over from the rage of the late Sixties"); *supra* Part IV.B. It is an attitude that is as misguided now as it was then. Adrienne Matei, *Call-Out Culture: How to Get it Right (and Wrong),* GUARDIAN (Nov. 1, 2019), https://www.theguardian.com/lifeandstyle/2019/nov/01/call-out-

committing to the hard (and often messy) work of left-liberal alliance building, they "trash" those they consider ideologically impure. Rather than working within existing systems, they reflexively reject any conventional mode of institutional governance as oppressive.[251] As a result, they alienate themselves from each other. More to the point, they alienate themselves from a body politic that still seeks meaning in familiar governmental structures and that remains, for this reason, drawn to the American experiment, notwithstanding its imperfections. Rorty recognized the challenge and the opportunity:

> Americans still want to feel patriotic. They still want to feel part of a nation which can take control of its destiny and make itself a better place.. . . Without the American Left, we might still have been strong and brave, but nobody would have suggested that we were good. As long as we have a functioning political Left, we still have a chance to achieve our country.[252]

Dan, likewise, appreciated the promise of just such a proud approach. He was, of course, no pragmatist in the Rorty mold, but he readily understood that the leftist-versus-liberal paradigm had grown tired and stale.[253] Thus, he offered *political retributivism* not only as theory of moral obligation but also as a means of liberal democratic self-defense—a normative framework and criminal-legal vocabulary by which we might develop collectively a "healthy civil sphere" strong enough to counteract the *indecent* efforts of others who otherwise might *other* us.[254] On the deontic score, I remain convinced that Dan was wrong. Intrinsically, we are morally indebted to each other only

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culture-obama-social-media [https://perma.cc/HQH7-HDF7]; Emily S. Rueb & Derrick Bryson Taylor, *Obama on Call-Out Culture: "That's Not Activism"*, N.Y. TIMES (Aug. 10, 2020), https://www.nytimes.com/2019/10/31/us/politics/obama-woke-cancel-culture.html [https://perma.cc/Z2S3-QYQ4] (quoting Barrack Obama: "Like, if I tweet or hashtag about how you didn't do something right or used the wrong verb, then I can sit back and feel pretty good about myself, cause, 'Man, you see how woke I was, I called you out.' "); Loretta Ross, Opinion, *I'm a Black Feminist. I think Call-Out Culture is Toxic*, N.Y. TIMES (Aug. 17, 2019), https://www.nytimes.com/2019/08/17/opinion/sunday/cancel-culture-call-out.html [https://perma.cc/2BY5-8B3H] ("[T]here are better ways of doing social justice work."); Brendan Gauthier, *Bill Maher Goes After the #BernieOrBust Movement: "There are Real Enemies Out There*, SALON (Mar. 12, 2016), https://www.salon.com/2016/03/12/bill_maher_goes_after_the_bernieorbust_movement_there_are_real_enemies_out_there/ [https://perma.cc/4HR7-RW5B] (quoting Bill Maher: "This is gonna be the death of liberals, this nitpicky intramural attacking of friends for insufficient purity . . . [it's like] compulsively cleaning up one little corner of the room that's already pretty clean, while there are giant piles of shit everywhere else."). *See generally* A. Freya Thimsen, *What is Performative Activism?*, 55 PHIL. & RHETORIC 83 (2022).

251. Delgado, *supra* note 135, at 308-09 (describing the leftist practice of "trashing").

252. RORTY, *supra* note 138, at 99, 107 ("If the Left forms no such alliances, it will never have any effect on the laws of the United States.")

253. *Id*. at 42; *supra* Part IV.E (discussing instrumental promise of *political retributivism*).

254. Koh, *supra* note 193, at 1832 ("In a healthy civil sphere, individuals will thus feel that other citizens are similar to them. . . . In an unhealthy civil sphere, polity members 'other' each other—lacking any perceived sense of similarity or sameness.").

and not to any state or its institutions.[255] My lingering question for Dan is simply whether, if this assertion is correct, he would be content with an instrumental payoff only. Would Dan still champion *political retributivism* if, rather than imposing moral duties, it simply *reported for duty*, as a conscript in a ceaseless struggle to build a better society?

I recognize, of course, that Dan would not lightly abandon his deontic position. But I likewise know that, even as he disagreed with me, he would continue to welcome me as an ally with open arms—because he always did. Dan's friendship more than his scholarship is his genuine legacy. Thank you, Dan, for your camaraderie. Thank you for your unwavering generosity. Thank you for your persistent engagement. Thank you for the laudable moral pride you brought to our collective endeavor. And thank you, most of all, for your abiding *decency*. We miss you.

255. *Supra* Part I.