GRAND PUNISHMENT THEORY: AN ESSAY IN HONOR OF DAN MARKEL

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INTRODUCTION

Over the course of numerous articles, Dan Markel developed a brilliant, if somewhat baroque, theory of retributive punishment—what he called the "confrontational conception of retributivism."[1] Dan was not shy about crediting his influences; indeed, his theory can be fairly considered as a summary and consolidation of the best of retributive thinking of the last half of the 20th century.[2] CCR also stands as a representative of something I'm going to call in this article "grand punishment theory." Grand punishment theory makes bold and striking claims about what punishment is for and what it can do—importantly, about the *good things* it can do. On Dan's theory, punishment was not just about deterring crime and incapacitating criminals. Rather, punishment for Dan affirmed the autonomy and responsibility of the offender, upheld equal justice under law, and enacted what he called "democratic self-defense."[3] Punishment, on his theory, was about no small thing: ideals of political life and about human dignity were all wrapped up in it. These grand ideals were what made Dan's theory exciting and inspiring. At one point, I signed

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1. *See, e.g.*, Dan Markel, *What Might Retributive Justice Be? An Argument for the Confrontational Conception of Retributivism*, *in* RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 49 (Mark D. White ed., 2011); Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 929 (2010); Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1187 (2009); Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 413 (2005); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1431 (2004); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2183-91 (2001). For ease of exposition and citation in this article, I rely most heavily on *What Might Retributive Justice Be?* (which I will abbreviate simply as *WMR*).

2. *WMR*, *supra* note 2, at 50 (CCR "builds upon prior accounts of retributive justice ranging from Kant and Hegel all the way to Duff, Finnis, Hampton, Moore, Morris, Murphy, and Rawls.").

3. *WMR*, *supra* note 2, at 54.

on to this project, co-authoring two papers with Dan which defended and elaborated upon his theory.[4] It is our great loss that we were not able to watch and see how CCR might have developed and changed in the past decade—how Dan might have revised his theory in response to growing skepticism about the criminal justice system.[5] My guess is Dan would have doubled down in support of the legitimacy, the necessity, and most of all the *value* of retributive punishment.

In looking back at my own writing, especially papers I wrote in the years following my co-authorship with Dan, I see myself slowly getting disillusioned with retribution as a way of justifying punishment.[6] But I now think I was also nursing a broader frustration with grand punishment theory. Grand punishment theory, as I shall articulate it below, tends to idealize people and their actions and makes ambitious claims about what states can accomplish through punishing. CCR exemplifies these tendencies to a great degree, and so is a nearly perfect example of grand punishment theory. My views about punishment over the years, by contrast, have become more and more humdrum. Punishment, for me, is mostly about one way of solving a problem: the problem of public safety in complex, modern societies. More to the point, punishment for me is at best a necessary evil, and not anything especially valuable, much less an "intrinsic good," as CCR believes.[7] Although Dan wrote a lot about the *state* needing to be humble, theories really should be humble, too.[8] They should not promise too much. CCR promises a lot.

My paper has three parts. In the first part, I spell out the three tendencies of grand punishment theory, using CCR as my main example to illustrate these tendencies. First, CCR treats people (idealistically) as free-choosing, autonomous, and responsible actors, who by their crimes express their "defection" against the state.[9] Second, CCR roughly assumes that modern liberal democratic states

4. Markel & Flanders, *supra* note 2, at 929; Dan Markel, Chad Flanders & David Gray, *Beyond Experience: Getting Retributive Justice Right*, 99 CALIF. L. REV. 605 (2011);

5. *See, e.g.*, *WMR*, *supra* note 2, at 64 (indicating a desire to explore whether CCR "has much of anything to say to people unfortunate enough to live in polities that are not governed by liberal democratic institutions").

6. *See* Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87 (2010); Chad Flanders, *The Case Against the Case Against the Death Penalty*, 16 NEW CRIM. L. REV. 595 (2013); Chad Flanders, *Pardons and the Theory of the "Second-Best,"* 65 FLA. L. REV. 1559 (2013); Chad Flanders, *Can Retributivism Be Saved?*, 2014 BYU L. REV. 309 (2014).

7. *WMR*, *supra* note 2, at 50 (describing the "intrinsic goodness of retributive punishment independent of the external social ends it might serve"); *id.* at 60 (CCR aims at the "effectuation of certain intrinsic goods" such as affirming the offender's status as an equal and responsible agent); *id.*at 61 ("intrinsic goods" secured by retribution).

8. *See* Markel, *State, Be Not Proud*, *supra* note 2, at 463 (rejecting a posture of "overweening confidence" when it comes to state imposition of the death penalty); *see also WMR*, *supra* note 2, at 57 (state must conduct its "rites of retribution with a degree of modesty").

9. *WMR*, *supra* note 2, at 54 (offender can be seen as "defecting from a legitimate legal order").

are *mostly* legitimate and *mostly* follow due process and the rule of law in investigating and punishing crime. Third, CCR holds out the promise that punishment a) affirms the dignity of offenders by treating them as responsible, b) upholds the equal justice of the laws, and c) defends the democratic state. In Part II of my paper, I raise some doubts about CCR not only in its particulars but as a very good example of why grand punishment theory is so problematic. I argue that grand punishment theory expects too much of punishment in practice and in the process abstracts from how criminal law in the real world works. As a result, grand punishment theory can distort as much as it illuminates. In the last part of my paper, I update the debate over grand punishment theory to the present day, and consider abolitionism as a sort of grand theory. Theories of abolishing punishment, I suggest, also exemplify some of the more troublesome aspects of grand punishment theory, although almost in the opposite direction as CCR: abolitionism pins its hope in getting rid of punishment and what grand things *that* might achieve. But the better path is not to be overly ambitious in talking about punishment and just treat it as what it is—just one flawed, probably necessary, and not very grand tool to help promote public safety.

I. GRAND PUNISHMENT THEORY: AN OVERVIEW

Grand theories of punishment, of which there are many flavors, share three common tendencies. The first is that they tend to have pretty idealistic or idealizing views about human beings: who they are, how they act, what they can do. These views tend to be simple, even simplistic. The second is that these grand theories can tend to have an almost boundless faith in the power and the justice of state actors. The final tendency is to emphasize, and in fact overpromise, what punishment can achieve. These three tendencies are interrelated. They form an overall picture in which human beings, acting with deep purpose and meaning, are met and addressed by state actors who are also acting with deep purpose and meaning, in order to bring about important goods. There are many variations on this theme: there can be grand moral education theories of punishment or grand expressivist theories of punishment just as there can be grand retributive theories of punishment. Since Dan's theory was retributive, however, I want to spell out these grand theoretical tendencies as I see them as work in his "confrontational conception of retribution." At the end of this Part, I will also say some brief, hopefully suggestive, things about how other punishment theories end up amounting to "grand theories."

We can start with human actors, and CCR's assumptions about them. CCR treats people as autonomous, and therefore responsible,

and therefore having dignity.[10] Punishment, Dan writes, "communicates to [the offender] a respect for his dignity as an autonomous moral agent."[11] People choose what they want to do, and how to do it, including whether to obey or disobey the law. Moreover, these choices express certain values and a certain orientation to the state. If a person chooses to obey the law, he is respecting the laws of the state. But things change if a person chooses to disobey the law: they become a rebel.[12] To use Dan's word, criminals elect to "untether" themselves from the law.[13] People who break the law are showing their disrespect for the state and its laws, and indirectly for the people whom the state represents.[14] They are holding themselves out as better than other people.[15] Criminals, in this picture, are not just people motivated by greed or by envy or by thrill-seeking, although they also may be motivated by all these things. Criminals, according to CCR, are at bottom mini-revolutionaries[16] against the "political order"[17]: they are rising up against the state and its laws, asserting their own independence from the rules that the law-abiding subject themselves to. Notice, for example, Dan's rhetoric in a representative passage: criminals are not "merely flouting a particular law with which [they] may disagree, but rather [they are] also defecting from an agreement about the basic structures of liberal democracy."[18] Criminals may not say this when they break the law, they may not feel it, they may not even think it. It is, however, what their actions, at bottom, really mean.[19]

If the state is going to be able to legitimately stand up to and punish these rebels, then some things also have to be true about the state itself. After all, there may be some states that really deserve to be rebelled against, because they are unjust.[20] But on CCR, the state gets

10. *WMR*, *supra* note 2, at 52 (punishment communicates to offenders that "they are autonomous agents capable of responsibly choosing between lawful and unlawful actions").

11. *Id.* at 51.

12. *Id.* at 52 (quoting C.S. Lewis for the idea that retributive punishment "plants the flag of truth within the fortress of a rebel soul"); *id.* at 67 n.31 (speaking of offenses as "rebellions," but clarifying that only some rebellions should be dealt with through the criminal law).

13. *Id.* at 53.

14. *Id.* at 54 (offender misconduct "not merely against the victim but also against the people and their agent, the state").

15. *Id.* (offender makes implicit or explicit claim "to superiority over others").

16. *Id.* (offender "in a sense, revolts" against society's rules).

17. *Id.* (offenders make a claim of superiority "against the political order").

18. *Id.* at 53.

19. *Id.* at 54 (criminal "implicitly says, 'I have greater liberty than you' "). Dan at one point says that it might be seen as too "grandiose" for most offenders to say that their state of mind is one of rebellion, but this worry can be responded to by noting that he is trying to justify punishment *ex ante* not *ex post*. *Id.* at 55. I indirectly address this response in Part III.

20. Such bad states, in Dan's view, might lack "moral standing" and could be "estopped from holding the wrongdoer to account" over certain law violations. Dan Markel, *Retributive*

to address rebels, and plant the flag of the state's truth in their wayward souls. In order to do this, the state has to be more or less just.[21] It also, relatedly, has to have fair mechanisms and procedures for adjudicating guilt and innocence.[22] In other words, if the state is going to punish, it has to punish fairly—the offenders are the problem, not the state, *they* are the one who are "defecting from a legitimate legal order to which [they have] good reason to give allegiance."[23] CCR seems to assume that many governments, including those in the United States, are just enough and legitimate enough to punish those who rise up against the laws of the state.[24] They are liberal and democratic, or liberal and democratic *enough*.[25] Dan seemed to resist the idea that the United States was a kind of failed or corrupt or racist state, so that it couldn't properly punish people who broke its law.[26] Maybe the United States isn't perfectly just—there were places where it could stand to be a little more humble—but it is just *enough*, so that it could impose most punishments against most offenders.

This gets us to the third aspect of grand theories of punishment, and the most important—the aspect that really makes grand theories in my mind *grand*. They aim high. Indeed, the first two aspects of the theory are just building blocks before we get to the true crescendo. We have free-willed agents who act with purpose, and states that are just enough to be able to punish. These are the preconditions. But why *should* states punish people who act against the laws? For CCR, they do so for the sake of three main goods: confirming the autonomy and responsibility of defenders, enforcing equal liberty under law, and

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Justice and the Demands of Democratic Citizenship, 1 VA. J. CRIM. L. 1, 127 (2012). A "wicked regime" might lack standing to enforce *any* laws. *See id.* at 127 n.307.

21. Oppressive and tyrannical regimes, for example, presumably could not justify punishment under CCR. *WMR*, *supra* note 2, at 55 (rejecting punishment for "breaking laws that reinforce tyranny or oppression").

22. *See id.* at 56 ("The state's involvement in both the adjudication and the sanction of wrongful misconduct is thereby warranted—so long as the judiciary is independent and capable of reviewing abuses.").

23. *Id.* at 54.

24. Dan spelled out the qualifications a state needed to punish under CCR as including:

> free and fair elections, reasonably powerful legislatures, independent judiciaries, and a legal and political culture that respects the fundamental individual rights of procedural due process, free speech, free association and petition, free exercise of religion, freedom of movement, substantial privacy, equal protection, and the right to a substantial degree of sexual and reproductive autonomy.

Markel, *supra* note 21, at 7.

25. Dan speaks of "liberal democracies that are generally respectful of persons' rights and liberties." *WMR*, *supra* note 2, at 55. Dan also adds a requirement of an independent judiciary. *Id.* at 56.

26. Dan was "sheepish about saying that today the United States (whether at the national or state level) cannot count as a sufficiently successful liberal democracy to create new moral obligations." Markel, *supra* note 21, at 128.

democratic self-defense.[27] The first two goals are closely related to the two assumptions above. If people are free and responsible, they can choose whether to obey the law or not. And if they do not obey the law, it does them no real wrong if we hold them responsible for not conforming their behavior to the law. In fact, we are in a real way respecting them and the choices they make.[28] If you are a responsible agent, that means you can and should take responsibility for your choices—that you should *want* and *expect* to take responsibility. For equal liberty under law and democratic self-defense, if a state is just and democratic, it seems to follow that enforcing the law against those who disobey it will promote the values of that state. The state gets to punish on behalf of those who have been hurt by the criminal, and the state can assert the worth of the victim—by raising up the victim and pushing low the criminal, the state stands for equality.[29] Further, a democratic state, by punishing those who break its laws, stands up for the people who have enacted those laws.[30] Punishment really is about truth, justice, and the American way.

As I mentioned above, CCR is just one example of grand punishment theory. We could run through the same three steps as they appear in other theories as well. Moral education theories also assume that people's criminal acts can be ascribed a sort of deep meaning—their illegal acts show that they do not fully understand or are not on the same page as the state.[31] The state, in response, has to have the capacity and authority to develop and encourage the proper understanding in those who disobey the laws. And punishment exists to bring about not just the incapacitation of the offender, but the offender's moral reform—their hoped-for transformation from someone who breaks the laws to someone who correctly internalizes those laws and acts according to them.[32] Or take a communitarian

27. *WMR*, *supra* note 2, at 54 (summarizing goals of punishment under CCR as "effectuating responsibility," "instantiating equal liberty under law," and "democratic self-defense").

28. Markel & Flanders, *supra* note 2, at 931 ("When the state adjudicates and punishes a person's unlawful wrongdoing, it affirms his moral agency through that process because he can express remorse, recognize his wrongdoing, and endeavor to avoid that conduct in the future."). *See also WMR*, *supra* note 2, at 51. This notion of respect may have its roots in the Kantian idea that punishment respects an individual's choice to disobey the law by treating that person as a freely choosing moral agent. For a skeptical discussion, see Flanders, *Can Retributivism Be Saved?*, *supra* note 7, at 317.

29. *WMR*, *supra* note 2, at 54 (imposing retributive punishment "reduce[s] the plausibility of individuals' false claims of superiority" and communicates to the offender that we "all enjoy the same package of liberties under law").

30. *Id.* at 55 (punishment "defends" the polity against the political "rebellion" of criminal offenders).

31. *See, e.g.*, Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFFS. 208 (1984).

32. *Id.* at 213 ("[P]unishment is justified as a way to prevent wrongdoing insofar as it can teach both wrongdoers and the public at large the moral reasons for *choosing* not to perform an offense.").

grand theory, in the Kleinfeldian mode.[33] Criminal acts show people who are alienated from their community. The community, via punishment, has to bring them back into the fold, and heal the damage that they have done to the community by their bad actions. The state has the power, and the authority, to do this: to "restitch" the broken fabric of the society.[34] Each of these theories has the same pattern. They have theories about how people act and what they mean by their actions, a reservoir of hope and possibility for state authorities acting to correct and change and fix bad actors, and the promise of real transformation coming about as a result of punishment, whether that's put in terms of the values of equality, morality, or community.[35]

II. WHAT'S WRONG WITH GRAND THEORIES OF PUNISHMENT

We should want to engage with grand theories of punishment on the level of whether they are true or false: are people really like this, can states accomplish these things? These are important questions, but it is also important to assess generally how grand punishment frames the questions it asks. Grand punishment theory represents, I want to argue, a kind of distorted, even ideological, way of looking at punishment, as if punishment is something we should put our faith in to realize all sorts of larger purposes and values. But this gets things almost completely upside down. Punishment is better viewed just as a particular way, and in many respects a very deeply flawed way, of dealing with the pressing problem of public safety. Grand theories move our focus away from this—to high hopes of what punishment can accomplish, if only we put our minds to it. Grand theories can seem to elevate discussions about crime and punishment, to be sure, but this to me is a bug of those theories and not a feature. In this Part, I will try to explain why. I start by examining some of the premises of grand punishment theory to see how they fit with the way the world is. I then use CCR again as my main example and go through each of the main parts of the theory as I outlined them in the previous section: the assumptions about people and their actions, the ideas about what states can do, and the goals that are supposedly realized through punishment.

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33. Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485 (2016).

34. *Id.* at 1500 ("[C]rime is that which offends, threatens, and undermines a community's shared norms and the community's members' sense of being bonded to one another. The usual metaphor here is of a social fabric: crime is a tearing of the social fabric, and punishment is a restitching of that torn social fabric. As with Hegel, this view of punishment does not make sense without the prior view of crime.").

35. I would put my sketch of a Rawlsian theory of punishment also under the "grand theory" category. *See* Chad Flanders, *Criminals Behind the Veil: Political Philosophy and Punishment*, 31 BYU J. PUB. L. 83 (2016).

CCR views human wrongdoing as the product of autonomous agents expressing their revolt or rebellion against the state. Is this plausible? Explanations of crime can be made on various levels of course, but this one is at a very high level of generality, and also a very high level of sophistication. One might instead point to more ordinary, even mundane, explanations of human behavior. For most human actions, that is, most of the actions we take every day, one would be hard pressed to describe as fully autonomous (whatever this in the end means)—most human actions are motivated at least in part by need, or anger, or by fear, or by desire.[36] In committing a criminal act, one's will, even if basically free, might be buffeted about by all of these forces. It is no accident that material deprivation corresponds to rates of criminality—deprivation does not dictate criminal behavior, of course, but it certainly is a relevant *factor*. And you don't have to be an out and out determinist to worry that a picture of criminal behavior as solely a free choice of agents is not entirely well grounded. CCR paints more of an aspirational picture, strange as that sounds: it is an optimistic picture of people free enough to freely choose crime rather than be thrust into choosing it.[37] They are moral agents who have made the autonomous choice to act unlawfully.[38]

Then there is the question of what criminal acts mean, whether or not they are totally and completely free. Let's take a concrete example. When a person is guilty of domestic assault, is his act best seen as a kind of revolt against the state? Or are crimes like domestic assault something that is better described in more contextual terms, as directed more towards a particular person rather than an abstract entity like the government? There is something strange about recharacterizing all criminal actions as a form of treason, but this is what CCR ultimately does. And once again, there is something weirdly optimistic and idealizing about this picture: as if any person who breaks the law is elevated to a political criminal, no matter that he has abused his partner, or broken into someone's car, or shoplifted. CCR says these people who break the law are treated as "worthy interlocutors" and so as proper candidates for punishment.[39] A lot of important distinctions and gradations about crimes and criminals get

36. Dan says that CCR is inappropriate for the mentally impaired, but does not say too much about what mental impairment entails apart from extreme cases. *See WMR*, supra note 2, at 52; *see also* Dan Markel, *May Minors Be Retributively Punished After* Panetti *(and* Graham*)?*, 23 FED. SENT'G REP. 62, 62 (2010) (juveniles may not be appropriate objects of retributive punishment).

37. Jeffrie Murphy pointed out the abstract and ideal nature of this picture of freely choosing agents in his *Marxism and Retribution*. Jeffrie G. Murphy, *Marxism and Retribution*, *in* PUNISHMENT: A PHILOSOPHY AND PUBLIC AFFAIRS READER 3, 23-28 (A. John Simmons et al. eds., 1995).

38. *WMR*, *supra* note 2, at 51.

39. *Id.* at 52.

lost in the shuffle in favor of an abstract picture of the "rebel" versus the state. Every crime becomes like a mini-January 6th.

This leads us to how CCR looks at the state. As spelled out above, the state has to be mostly just if it is going to carry out its punishments legitimately, especially in light of the purposes that punishment aims to achieve under the CCR. So CCR assumes that states have to be mostly just in their operations, both in terms of the substantive criminal law and with criminal procedure. Dan didn't spell out much of what this would look like, although it seems to be something he was working on—viz., the problem of applying CCR in less than perfectly just states. My sense is that he would reject the idea that a state that is not wholly just cannot punish, and he would argue that conditions in the United States were just enough so that the state could properly punish.[40]

But even if we agree with this, there might be other problems. States may bear some responsibility to create conditions according to which people can act freely enough to be punished. When states fail at doing this, they may lose their right to punish in particular instances, even if they hang on to an abstract authority to punish. Dan resisted the related idea that bad prison conditions might mean that people had been over-punished.[41] Dan separated this out into lawsuits against prison officials: he didn't want to give people discounts on the punishment they owed the state.[42] On both these points—on holding people responsible, and giving them breaks on their punishment—Dan was reluctant to move away from his ideal of states being legitimate enough to punish. The better view might be to hold that in many cases, even a state which has not failed as a global matter might fail in a lot of particular cases, and so lose its ability to punish in those cases. How this would get cashed out doctrinally is a separate matter. But it seems to me plausible at a theoretical level.

All of this is mostly a prelude to the goals of CCR, which is where I think most of the harmful distorting work occurs. CCR says that one of the values it realizes is that it treats people as responsible for their choices, and this is to treat them with a certain sort of dignity. But this relies on an idealized view of autonomy, which I commented on, above. It is not obvious to me that in every case treating people as fully autonomous is the only way to treat them with dignity. There has to be a way that we can recognize people as flawed, incompletely free, but

40. *See supra* notes 24-26.

41. Markel & Flanders, *supra* note 2, at 961 ("If a retributivist bears moral responsibility for bad effects proximately caused by the state—for example, the acts of a sadistic or negligent warden—it does not follow that the solution is to adjust the offender's sentence, say, by releasing him early. If an unconstitutional tort occurs during the punitive encounter, the state's obligation may reasonably take the form of compensation, apology, injunctive relief, or administrative reform.").

42. *See id*. at 960-61.

still possessing a type of dignity. After all, this seems to be something that happens when we manage to forgive someone for a wrong they have done.[43] We do not treat those whom we forgive as *things* but as more or less broken human beings. And the idea of equal liberty under law depends on the state really promoting a type of equality when it punishes. But this assumes that things really are equal between people. One does not have to be a Marxist to think that the criminal law actively upholds and reinforces existing property divisions, and that punishment also tends to fall on those who are already mostly materially deprived. Upholding an abstract idea of equality—as CCR does—can mean masking what is in fact a very materially unequal society. When we look at racial injustice in the criminal justice system, the idea that the criminal law in present day America promotes equality starts to look even more hollow. That gets us to democratic self-defense, which is the most obscure of CCR's punishment goals. If it is just the idea that a society with democratically enacted laws gets to enforce those laws on behalf of the people, then I have no real problem with this. Calling this "democratic self-defense" seems a little grandiose, however.[44]

This leads me to my broader critique of grand punishment theory. It aims way too high, especially when it comes to an institution like punishment and more broadly when it comes to the criminal justice system. These are things that should strike us as grim necessities, not institutions that we use to advance all sorts of high-minded ideals. Certainly, treating people with respect and dignity, equal justice under the law, and democracy are worthy goals. The question, though, is where we should focus on their realization, institution-wise. Do we do it through protecting people's rights, and making possible their pursuits of happiness by giving them necessary resources? Or do we realize them via an institution that exists to deliberately incapacitate and harm people? Phrased that way, it seems more than a little odd to view criminal justice as a means to the lofty ends that CCR tries to put it to. Dan might respond that what CCR does is also to stand up for victims, and for the people more generally. Dan will even agree that we should not *want* to punish people—it would be better all things considered if crime didn't occur so that we wouldn't have to punish. But when it does occur, the state has to respond, and if it doesn't respond, those values (equal justice, autonomy, liberty) hang in the balance, and could be lost. Punishment then becomes a necessary thing, Dan might say, and even a necessary *good* thing.

Again, I don't disagree that crime offends all sorts of values that we share, but it is another, separate question as to whether punishment

43. *See* Flanders, *Can Retributivism Be Saved?*, *supra* note 7, at 319 (forgiveness as compatible with treating people with respect).

44. As Dan himself worried. *See WMR*, *supra* note 2, at 55 ("One might also wonder if the account of democratic self-defense might seem inaccurate, even grandiose . . . .").

is the place we should look to reaffirm those values. We can tend to victims in all sorts of ways outside of punishing those who have made them victims.[45] But the larger point is this. Should we look to punishment as a way to advance abstract liberal and democratic ideals? Or should the goal be more modest, *viz.*, to not badly *offend* those ideals in punishing people for the sake of public safety? Criminal justice and punishment ought to be places where we worry more about abusing people's rights rather than promoting and vindicating abstract values.[46] Governments the world over have criminal justice systems in place because crime is a serious social problem, and threatening and incapacitating people is sometimes an effective way to deal with that problem. Dressing up *those* facts in the way that grand punishment theory does risks two real dangers. First, there is the risk that punishment can't really deliver on what it promises. Punishment can't make people free and autonomous if they aren't already, and it won't deliver equal justice under law in a badly unequal society. In most cases, the person who is being punished will already be in a subjected and demoralized condition. Punishment isn't going to lift them up by treating them as responsible or as autonomous agents, or make up for the various ways they were, in the past, treated as less than they might have deserved. It probably won't do much for the victim, either.

But there is a second, related risk. If we talk in terms of grand punishment theory, we may actually believe punishment advances these goals and believe that punishment is this great thing, even when it isn't. We are standing up to rebels while also treating them with respect! Grand punishment theory may, in other words, convince us that we are doing the right thing—or at least not the wrong thing—in punishing the way that we do because, well, of all the intrinsic values that punishment represents (Truth, Justice, and the American Way). But the rhetoric can outstrip what is happening in the real world. We may confuse the ideal with the reality.[47] Indeed, Dan sometimes speaks as if punishment *brings into being* responsible agents.[48] We get a clearer and more sober-eyed view of the way things work if we step away from expecting too much of punishment, and punishment theory. We need to be clear eyed in the stories we tell ourselves about why we punish, when we punish. The less elaborate and high-falutin those theories are, the better.

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45. *See generally* Chad Flanders, *Making Invisible Victims Whole: A Reply to Diamantis*, 37 WIS. J. L., GENDER & SOC'Y 125 (2022).

46. More appropriate in this context is Nietzsche's wise aphorism: "Whoever fights monsters should see to it that in the process he does not become a monster." FRIEDRICH NIETZSCHE, BEYOND GOOD & EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE 89 (Walter Kaufmann trans., 1989).

47. JAMES A. MICHENER, THE DRIFTERS 49(1982) ("The permanent temptation of life is to confuse dreams with reality.").

48. *See, e.g.*, *WMR*, *supra* note 2, at 54 (punishment "effectuat[es] responsibility").

III. ABOLITIONISM AS GRAND THEORY

A lot of academic punishment theory, it turns out, is done in a grand style. It may be an occupational hazard of writing about punishment *theory* that you tend to inflate what the goals of punishment are and exaggerate to what extent societies can reach those goals. The problem, as I tried to set about above, is that in abstracting from the real world, things get distorted and we may end up expecting too much out of punishment. It is better that, especially when it comes to punishment, that we have low expectations. The goal should be to do no harm, rather than to try to realize high-flying ideals. Leave those to other parts of the government—parts of the government that have less to do with the express infliction of sanctions designed to make people worse off.[49] But we should be careful not to take this lesson too far. My argument against ideal theories of punishment is not an argument against punishment *per se*. That is to say, I am not an abolitionist. In fact, and what I want to argue in this Part, is that abolitionism, too, sometimes engages in a version of grand theorizing. With abolitionism, however, the problem is not expecting too much of punishment, but expecting too much of its abolition. Abolitionism is a kind of grand theorizing about punishment but in reverse.[50]

Consider for a moment how this might be so. Abolitionism seems to have a theory about why people act out in ways that break the law. These are usually reducible to social factors, such as the material deprivation I discussed above in the context of CCR.[51] This is, in its own way, a kind of idealizing about people: people are at bottom good and want to cooperate with others, but social factors get in the way and result in people acting badly. This is the flip side of the autonomy thesis—that people act out because they freely *want* to break the law, and rebel against the government. Maybe the truth is more like something in the middle. People do have a certain amount of agency, but it is not perfect agency. They have enough agency for others to hold them accountable for what they do, but not so much that their actions are of the bold, aggressive type that some retributivists imagine, which sets up a sort of dynamic clash between state and person. People are creatures of their circumstances, but not wholly so. Deterrence by threats of punishment can work; sometimes incapacitation is justified

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49. I say more about this in the conclusion.

50. The characterization of abolitionism that follows is, I admit, inexact. I am more interested in capturing a mood or a sensibility in abolitionism rather than giving a detailed account of that theory. For an excellent diagnosis of the idealizing tendency of abolitionism, see Daniel Fryer, *Idealizing Abolition*, 17 CRIM. L. & PHIL. 553 (2023).

51. Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 250 (2023) ("Abolitionists focus on economic deprivation and structural biases but tend to ignore individual motivations for crime that exist regardless of social structure, such as greed, envy, and anger."); *id.* at 257 (detailing structural forces that "propel people into entanglement with criminal legal systems").

because of what people do, and our fear that they may want to choose to do it again.

Now think about the kind of faith that abolitionists have in government. It too can be idealistic.[52] Abolitionists have to assume that other governmental institutions will be effective and be able to take the place and fill the roles that criminal justice and punishment have previously occupied.[53] As many have said, abolitionism is not wholly a negative project, nor can it be. Abolitionism does not purport to have solved the problem of why human beings hurt and steal from one another. If we take away institutions of criminal justice, we may not have "crime" in a strictly definitional sense anymore, but there will still be the underlying actions that constitute crime—we will still have people who harm others. And here is where abolitionists hope that other institutions will come in to fill the gap left by the abolition of the criminal justice system.

But this requires a lot of idealization, in at least two ways. First, it assumes that these institutions are in fact up to the job of preventing and deterring crime at least as well as existing institutions of crime and punishment. Second, abolitionists have to assume that these *new* institutions (whatever they turn out to be) will not be subject to the same corrupting and harmful tendencies as the institutions of the criminal justice system. In the same way that CCR assumed that the criminal justice system was legitimate enough to be the type of thing that could hold offenders accountable for their actions, abolitionists have to assume that *other* institutions will be "good enough" to be able to aid and not leave vulnerable those who are victims of crime. Maybe we can build institutions that are like this, but this is certainly a massive project and one that has to put a lot of faith in a lot of different institutions getting their acts together.

Finally, just as grand theories of punishment expect a lot of punishment—what we can achieve by punishing wayward citizens who break the law—so too does abolitionism expect a lot from the *abolition* of punishment. The baleful effects of the criminal justice system will be gone and what will replace it are institutions that foster community and healing, even love, rather than those which further divide people apart. Because the focus will be on the social roots of criminal behavior, there will be less crime and fewer people being hurt

52. Brandon Hasbrouck, *Reimagining Public Safety*, 117 NW. U. L. REV. 685, 711 (2022) ("Abolition democracy demands life-affirming institutions to ensure the liberty and material security of all members of society.").

53. The upshot of abolitionism seems to be a much *greater* role for government in society. Barkow, *supra* note 52, at 270 ("Abolitionists concede that the complete elimination of crime requires more than just a monumental financial investment in schools, housing, and job training—a heavy lift in its own right."); *id.* at 271 (abolitionist view "calls for communism or socialism as the governing model so that sufficient basic needs can be met through government provision").

and made vulnerable.[54] Best of all, without any punishment, states will not have to be in the business of deliberately inflicting suffering on people.[55] It is very hard not to like this picture, certainly as an ideal. But it is utopian in the end. It is utopian in almost the same way as CCR is utopian, in its hope that the criminal justice system can be a place that promotes and realizes human dignity, equal liberty under law, and democracy. In each of their ways, CCR and abolitionism have very high hopes for the criminal justice system—CCR with what we can do with it, and abolitionism with what we can do once we get rid of it. It seems to me that there is a middle ground here, but to get there, we have to step down from the heights of grand theorizing.

CONCLUSION

If we had to give a name to the approach we get when we give up grand theorizing, it would probably be a version of *pragmatism*.[56] Crime is a problem, and we have to think about ways to solve the problem that crime represents. It seems to me that criminal law and criminal punishment is one way of trying to address this problem. But we have to be realistic about what punishment is, and what it can achieve. Against CCR, I think we shouldn't expect too much in the way of intrinsic values when we punish. We should punish to the extent that we need to in order to reduce crime, but we shouldn't think that at the same time we are realizing all these great, intrinsic values. On the contrary, when we punish we should be worried more about doing *wrong*: treating people in cruel and inhumane ways.[57] Mixing grand ideals in with such a tool like punishment that is so routinely abused seems to me to be asking for trouble. But we should not go too far in

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54. On one popular account:

> Abolitionists don't stop at the prison walls, however: They aim to reshape our society as a whole. We are not doing nearly enough to address the root causes of poverty, addiction, homelessness, and mental-health crises, abolitionists contend, and criminalizing poverty through harsh fines and debt regulation; criminalizing addiction through drug laws; criminalizing homelessness by conducting sweeps of people sleeping in parks; and criminalizing mental illness by turning prisons into de facto psychiatric hospitals is all treating the symptom instead of the disease. This is one of the key differences between reform and abolitionism: The former deals with pain management and the latter with the actual source of the pain.

John Washington, *What is Prison Abolition?*, THE NATION (July 31, 2018), https://www.thenation.com/article/archive/what-is-prison-abolition/ [https://perma.cc/AR5V-YV3K].

55. *See, e.g.*, Hasbrouck, supra note 53, at, 688 (policing perpetuates violence rather than curing it).

56. Note that pragmatism is also a theory. In resisting grand punishment theory, I should not be mistaken as opposing theory *tout court*. For more on the benefits of punishment theory, see my *In Defense of Punishment Theory, and* Contra *Stephen*, 10 OHIO ST. J. CRIM. L. 243 (2012).

57. Dan writes, "Punishment realizes many goods—while also, of course, causing some bads . . . ." *WMR*, *supra* note 2, at 60. The acknowledgment of the bads of punishment only as an aside is, I think, pretty revealing of his overall approach to punishment theory.

idealizing a world without punishment, either. This is a grand theoretical mistake in the other direction: getting rid of a tool because it is not perfect, under the impression that other institutions will in fact be perfect and solve all the problems punishment was meant to solve. Our theories should be geared not to ideals of what punishment can achieve or ideals of a world without punishment, but something much simpler. We need theories that explain the role of the criminal justice system in promoting the unexciting, but very important, value of public safety.