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LAW AS PUNISHMENT
LAW AS REGULATION

Edited by

Austin Sarat,

Lawrence Douglas,

and Martha Merrill Umphrey

LAW AS PUNISHMENT / LAW AS REGULATION

The Amherst Series in Law, Jurisprudence, and Social Thought

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To Stephanie, Lauren, Emily, and Ben (AS)

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On the Blurred Boundary between Regulation and Punishment

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Seven-year-old Megan Kanka lived with her parents and two siblings on a quiet street in suburban Hamilton Township, New Jersey. On July 29, 1994, Megan was lured into the home of a neighbor, Jesse Timmendequas, on the promise that she could visit with his new puppy. Shortly afterward, thirty yards from her front doorstep, Timmendequas raped and murdered her. Unbeknownst to Megan's parents or anyone else in their neighborhood, fifteen years earlier he had pled guilty to the attempted aggravated sexual assault of a five-year-old girl in another New Jersey town. He was given a suspended sentence but, after failing to go to counseling, he went to prison for nine months. In 1981, he pled guilty to the assault of a seven-year-old girl and was imprisoned for six years.

Reaction to Megan's death and Timmendequas's arrest was immediate and explosive. More than 400,000 citizens signed a petition addressed to the New Jersey state legislature demanding enactment of legislation that would increase penalties for sex offenders, require them to register with local law enforcement whenever they established a new residence, and provide notification of the whereabouts of sex offenders to the communities in which they reside. Eighty-nine days later the legislature enacted what was to become known as "Megan's Law."

In 1996, President Clinton signed the Jacob Wetterling Crimes against Children's Act, one provision of which required every state to develop a procedure for notifying the public when a person convicted of certain crimes is released near their homes. Today each of the fifty states requires some form of public notification,[1] and, as the discovery of Jaycee Dugard, who survived being kidnapped at age 11 and held captive for 18 years, in August 2009 demonstrates, the

problem of child sexual abuse is sadly still very much with us.[2] The same year that President Clinton federalized Megan's Law, the Third Circuit Court of Appeals heard a challenge to the constitutionality of the original, New Jersey version of the law. That case provides a striking lesson in legal categorization and in the difficulty of saying what punishment is and what differentiates it from nonpunitive, regulatory measures. It also illustrates the judiciary's tendency to develop legal categories by taking a top-down perspective, in this instance determining what counts as punishment by starting with the intention of the legislature.

As is generally known, law depends on various modes/forms of classification. How an act or a person is classified may be crucial in determining what rights obtain, what procedures are employed, and what understandings get attached to the act or person. Critiques of law often show the arbitrariness of its classificatory acts, but no one doubts their power and consequence. Thus, as a regulatory act, detention is associated with such practices as the creation of quarantines in the face of a medical emergency or the holding of refugees seeking political asylum. In the post-9/11 period the Bush administration turned to noncriminal detention of suspected terrorists and immigration detention as a means of fighting the "war on terror."[3] As a punitive act, detention is associated with practices of incarceration that follow the determination of guilt in a criminal trial. Detention as regulation is meant to carry no moral opprobrium and is controlled by norms that give administrative or executive agencies great discretion and flexibility; detention as punishment is controlled by constitutional-juridical norms that constrain state power.

Law as Punishment/Law as Regulation considers law's physical control of persons/bodies and how that control illuminates competing visions of the law: as a tool of regulation, and as an instrument of coercion/punishment. In this book we inquire about the distinction between regulation and punishment as a way of understanding the power and legitimacy of this crucial legal classification. At the start of the twenty-first century, what remains of the distinction between punishment and regulation? What can we learn about law's more general practices of classification by attending to punishment/regulation?

The petitioner in *Artway v. The Attorney General of the State of New Jersey*, the legal challenge to Megan's Law, engaged in his own classificatory activity, insisting that the law categorize Megan Law's registration and notification re-

quirements as punitive. He claimed, among other things, that they constituted a second punishment for sex offenders who had been imprisoned and therefore violated the prohibition of double jeopardy.[4] At the heart of the decision in *Artway* was the question of how one could determine whether a legal enactment was regulation or punishment.

The court began by noting that if registration and community notification did not count as "punishment" then they could not violate double jeopardy no matter how painful and burdensome registration and notification might be to those subject to them. In its effort to categorize those requirements, the court developed a three-part test. The court argued that whether registration and community notification was punishment depended on the legislation's "(1) actual purpose, (2) objective purpose, and (3) effect . . ."[5]

Starting with the law's actual purpose, the court noted, "If the legislature intended Megan's Law to be 'punishment,'" i.e., retribution was one of its actual purposes, then it must fail constitutional scrutiny. If, on the other hand, "the restriction of the individual comes about as a relevant incident to a regulation," the measure will pass this first prong.[6]

If the legislature's actual purpose does not appear to be to punish, "we look next to its 'objective' purpose. This prong," the Court said, "in turn, has three subparts."

> First, can the law be explained solely by a remedial purpose? . . . If not, it is "punishment." Second, even if some remedial purpose can fully explain the measure, does a historical analysis show that the measure has traditionally been regarded as punishment? . . . If so, and if the text or legislative history does not demonstrate that this measure is not punitive, it must be considered "punishment." Third, if the legislature did not intend a law to be retributive but did intend it to serve some mixture of deterrent and salutary purposes, we must determine (1) whether historically the deterrent purpose of such a law is a necessary complement to its salutary operation and (2) whether the measure under consideration operates in its usual manner, consistent with its historically mixed purposes. . . . Unless the partially deterrent measure meets both of these criteria, it is "punishment."[7]

The court continued, "[If] the purpose tests are satisfied, we must then turn to the effects of the measure. If the negative repercussions—regardless of how they are justified—are great enough, the measure must be considered punishment."

Focusing on Megan's Law itself and reconstructing its legislative history,

the *Artway* court found "that the legislature's actual purpose was not punishment. It speaks of 'identify[ing] and alert[ing] the public' to enhance safety and 'preventing and promptly resolving incidents.' Protecting the public and preventing crimes are . . . 'regulatory' and not punitive."[8] With respect to "objective purpose", the court again invoked the regulation/punishment distinction. Comparing the registration of sex offenders to required registration of membership corporations, lobbyists, professional gamblers, and of citizens under a military draft, the court held that "[r]egistration is a common and long-standing regulatory technique with a remedial purpose."[9] Here the court explained that

> the solely remedial purpose of helping law enforcement agencies keep tabs on these offenders fully explains requiring certain sex offenders to register. Registration may allow officers to prevent future crimes by intervening in dangerous situations. Like the agent who must endure the snow to fetch the soupmeat, the registrant may face some unpleasantness from having to register and update his registration. But the remedial purpose of knowing the whereabouts of sex offenders fully explains the registration provision just as the need for dinner fully explains the trip out into the night. And the means chosen—registration and law enforcement notification only—is not excessive in any way. Registration, therefore, is certainly "reasonably related" to a legitimate goal: allowing law enforcement to stay vigilant against possible re-abuse.[10]

Finally, turning to the actual effect prong of its three-part test, the court acknowledged that "there doubtless are some unpleasant consequences of registration." It found, however, that this "impact, even coupled with the registrant's inevitable kowtow to law enforcement officials, cannot be said to have an effect so draconian that it constitutes 'punishment' in any way approaching incarceration."[11]

Several things may be said about the *Artway* court's effort to differentiate punishment from regulation. First, its test is complicated and difficult to administer.[12] Second, it reflects an anxious effort to police and stabilize an uncertain and blurred boundary, trying to name different forms of state power and different experiences of that power. Third, it insists on an absolute distinction between punishment and regulation instead of attempting to understand regulation and punishment in relational terms, with regulation the more inclusive concept. Punishment, in this account, might be seen as a particular type or manifestation of the state's effort to regulate human conduct and subject it to

the "governance of rules."[13] As one scholar puts it, "[R]egulation is the promulgation of rules by government accompanied by mechanisms for monitoring and enforcement."[14]

Thrust by the language of the double jeopardy clause as well as the Eighth Amendment's prohibition of "cruel and unusual punishment" into a definitional morass, courts regularly try to stabilize the boundary between punishment and regulation.[15] In this sense the *Artway* court provided a somewhat more elaborate version of a familiar set of definitional moves. In the jurisprudence of double jeopardy and the Eighth Amendment courts have insisted that the mere fact that pain is imposed by, or that unpleasant consequences are associated with, a legal enactment is not sufficient to establish that such a law is punitive.[16] Here the courts associate themselves with those who exercise state power rather than those on whom state power is exercised. For them, what is crucial is the perspective of those who authorize or administer the state's regulatory and punitive power.[17]

To offer another example of this tendency, thirty years prior to *Artway* the Supreme Court wrestled with the blurred boundaries between regulation and punishment in *Kennedy v. Mendoza-Martinez*.[18] That case arose from the efforts of the federal government to enforce the Nationality Act of 1940 and the subsequent Immigration and Nationality Act of 1952 by stripping two draft evaders of their American citizenship. Justice Goldberg, writing for the *Kennedy v. Mendoza-Martinez* majority, said that in determining whether this response to draft evasion was punitive the Court would consider:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry.[19]

Most of the attributes of *Kennedy v. Mendoza-Martinez's* effort to distinguish regulation from punishment are mirrored and extended in H. L. A. Hart's classic five-part definition of punishment. In *Prolegomenon to the Principles of Punishment,* Hart establishes the following criteria for an act to be considered punishment:

(i) It must involve pain or other consequences normally considered unpleasant.

(ii) It must be for an offence against legal rules.

(iii) It must be of an actual or supposed offender for his offence.

(iv) It must be intentionally administered by human beings other than the offender.

(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.[20]

Despite such classificatory efforts, efforts to demarcate a stable boundary separating punishment from other phenomena, that boundary has been destabilized in a variety of ways and by a variety of factors. As Carol Steiker puts it in describing the criminal-civil distinction:

> This blurring or destabilization of the criminal-civil distinction is partly due to the increase in the sheer number of "hybrid" legal institutions and practices: From civil penalties to punitive damages, civil forfeiture to criminal restitution, legal devices that are arguably criminal-civil hybrids seem to be more common than they were a century ago. But this shift in actual practice is partly a function of shifts in the conceptual or intellectual foundations of the criminal-civil distinction (which are themselves, in turn, reinforced by changes in institutions and practices). This complex relationship between conceptual and institutional change lies at the roots of the current instability of the criminal-civil distinction in all of its messy manifestations.[21]

In social and political thought recognition of the blurred boundaries between regulation and punishment is associated most clearly with the work of Michel Foucault. In the familiar Foucauldian account, historically state imposed punishments were crucial to the efforts of sovereigns to maintain the obedience of their subjects. Through public demonstrations of awesome power, the public was rendered fearful.[22] As Foucault tells it, taking the individual as its object, this way of proceeding was very inefficient and undermined the legitimacy of the very state it was used to protect. Another way of ordering citizens emerged with the rise of what Foucault calls "discipline." Disciplinary power is a diffused form of governance that employs a variety of agents and institutions to organize individuals for maximum efficiency.[23]

While disciplinary power may take the individual as its object, it is aimed at the control of populations through biopolitical techniques designed to ensure their welfare. In *The History of Sexuality Volume 1*, Foucault writes:

> If the development of the great instruments of the state, as institutions of power, ensured the maintenance of production relations, the rudiments of anatomo- and bio-politics created in the eighteenth century as techniques of power present at every level of the social body and utilized by very diverse institutions (the family and the army, schools and the police, individual medicine and the administration of collective), operated in the sphere of economic processes, their development, and the forces working to sustain them.[24]

The diversity of the institutions that Foucault identifies as utilizing biopower and the fact that their common aim is to govern populations suggests that discipline has substantial overlap with various types of decentered regulation.[25]

The rise of disciplinary power, and subsequently of regulation, as a mode of governance and the decline of spectacular punishments deployed by the sovereign does not mean that discipline or regulation have replaced sovereignty and punishment. Indeed Foucault himself argues that sovereignty hasn't disappeared; instead it has been subsumed by disciplinary power's new manifestation: "I wouldn't say exactly that sovereignty's old right—to take life or let live—was replaced, but that it came to be complemented by a new right which does not erase the old right but which does penetrate it, permeate it."[26] For Foucault, punishment may not be the predominant system of governance, yet it is present in a changed form, subsumed by the regime of regulation.[27] Boundaries are blurred, classificatory schemes destabilized, as regulation "penetrates" and "permeates" punishment.

Law as Punishment/Law as Regulation attends to this blurring and destabilization in the various and complex relations of punishment and regulation as modes of governance but also as cultural phenomena helping to constitute legal subjects. We are less interested in the "accuracy" of philosophical or juridical definitional exercises than in helping to contextualize those efforts and understand their significance. Moreover, we want to question the adequacy of a view of punishment/regulation that neglects the perspectives of those who are at the receiving end of these exercises of state power. Contributors to this book examine various instances of punishment and regulation to illustrate points of overlap and difference between them, but also to capture the lived experience of the state's enterprise of subjecting human conduct to the governance of rules. They remind us that the power of law as punishment/law as regulation is inscribed on the bodies of persons, but that it also insinuates itself into their consciousness. Thus the blurring of boundaries between punishment and

regulation is not a problem just for courts but also for citizens seeking spaces of freedom within and beyond law's gaze.

Markus Dubber opens this book by noting the complex and unsatisfying efforts to articulate differences between punishment and regulation and reframing the discussion of the distinction between punishment and regulation, labeling the former law and the latter police. Doing so, Dubber claims, relocates this classification in a particular historical genealogy. Reconceptualizing the terms of the discussion in this fashion suggests that while law operates on the individual, the object of police regulation tends to be collective.

One of the distinctions frequently invoked as crucial to the difference between punishment and regulation is the difference between private and public. However, the notion of private law and public regulation relies, according to Dubber, on an overly simplistic model and history of law. It disregards, for example, the increasing privatization of the penal process that is currently underway.

Comparing punishment and regulation is like comparing apples and oranges, because they are two fundamentally different things. Regulation, Dubber contends, is an empty label unless it is combined with a mode of governance. That mode of governance, which parallels and complements law, is the concept of police. Police and law are contemporary manifestations, Dubber argues, of the ancient Greek distinction between household governance and public governance.

In Greek political thought, Dubber explains, governance of the household (*oikos*) rested in the hands of the householder (*oikonomos*), who was responsible for the organization and management of humans, animals, and property of the *oikos*. All of the constituents of the *oikos* were incapable of governing themselves and thus required the *oikonomos* to govern them. The *oikonomos* was capable of self-government and subsequently of participation in the *agora*. Thus Greek social order contained two fundamentally different governing models: the heteronymous government of the *oikos* and the democratic arrangement of free and equal *oikonomos* in the *agora*.

The shift toward state sovereignty and republican self-government resulted, Dubber contends, in the politicalization of the heteronymous model of government and the shift from autonomy to heteronomy. Through a process of abstraction and "scientization" heteronymous government developed into a

science of police in which policing was responsible for regulation of the welfare of the state household. In the United States, the police power has been significant in the expansion of the jurisdiction of the state into virtually every aspect of citizens' lives. While law's object is the autonomous individual, the object of policing is not the individual but the corporation or the enterprise that must be managed.

Dubber notes that the distinction between law and police is also useful in analyzing the operation of penal institutions. There we see the coexistence of penal regulation and penal law as alternative systems rather than complementary parts of a single penal process. Penal law allows the state to punish but simultaneously treats the object of punishment as an autonomous individual due rights and respect. Penal regulation differs from penal law drastically in that it does not treat criminals as autonomous individuals but instead as resources that must be managed.

The effort to understand the way the state can punish and, at the same time, recognize the object of punishment as a rights-bearing being is crucial to Corey Brettschneider's chapter "Rights within the Social Contract: Rousseau on Punishment." Here Brettschneider argues that the same logic that imbues the state with the legitimate authority to punish also imposes restraints on that authority. He suggests that scholarship on punishment put more emphasis on the political legitimacy of state punishment rather than the moral question of what is deserved by criminals. Brettschneider turns to Rousseau's social contract based justification for punishment as a crucial resource in that effort.

Although frequently viewed as a collectivist ideal, Rousseau's social contract promotes, Brettschneider contends, a requirement of individual consent that makes it a bastion for the rights of individuals and, in particular, criminals. For Rousseau a punishment can be just only if individuals consent to it. He derives this requirement from the very idea of a social contract. The social contract, as Rousseau conceives it, is not a real agreement but is instead a hypothetical that "serves as the thought experiment by which the legitimacy of law is measured." As a thought experiment, the requirement that all people would consent to the contract ensures that it would have terms that "respected the freedom and equality of each citizen." Punishment, Brettschneider suggests, as one component of the social contract is restrained by these same bounds of respect for individual citizens.

Brettschneider compares Hobbes's theory of punishment with Rousseau's view that the state's legitimate ability to punish is both generated and checked by the unanimous consent of the people. Hobbes grounds his justification for the state in the necessity of securing the lives of individuals. This enables Hobbes's sovereign to make examples of individuals when necessary by putting them to death regardless of their right to life. Brettschneider argues that Hobbes's social contract lacks the kind of protection of individuals that Rousseau's version of the social contract provides. For him, Rousseau, not Hobbes, can produce an account of punishment compatible with the maintenance of legitimate political authority.

In Brettschneider's view, Rousseau's insistence on the centrality of consent obliges the state to demonstrate that all individuals would find a punishment justifiable. For example, although Rousseau argues on behalf of capital punishment, he really justifies it only in very limited cases in which there is absolutely no other way to prevent a criminal from doing further harm to society. In such cases he believes that all would agree to the necessity of the death penalty. If the state cannot show that all individuals consent to punishment, it would violate the social contract and threaten the legitimacy of the state. Additionally, the requirement that consent be unanimous eliminates the possibility of individuals being sacrificed for the greater good because it demands that each individual be treated as a rights-bearing, equal citizen.

In the following chapter, Alec Ewald is less sanguine about the meaningfulness of the restraints that Brettschneider identifies as essential to political legitimacy and of the Roussian demand that each individual be treated as a rights-bearing, equal citizen. In "Collateral Consequences and the Perils of Categorical Ambiguity," Ewald examines various of the "collateral consequences" of punishment—for example, the loss of the franchise and the blurring of the boundary between regulation and punishment. Ewald contends that however they are classified, such collateral consequences are a new manifestation of the exclusionary tradition in American citizenship law.

As is widely acknowledged, the United States currently imprisons its citizens at an unprecedented rate. Mass-imprisonment shapes racial and class inequalities and affects the lives of millions of Americans. In addition, the carceral state expands its reach largely through collateral sanctions. Collateral sanctions are restrictions that are an "indirect" result of conviction and separate from the

actual criminal conviction. The system for distributing collateral sanctions is complex and involves federal law, local authority, and nonstate actors.

Despite enormous variation in the type and range of collateral sanctions, three federal restrictions are imposed on all individuals convicted of felonies. All felons lose the ability to serve on a jury, to own and operate a firearm, and to serve in the military. Other restrictions imposed by various entities include denial of entry into certain occupations and of the right to vote, as well as denial of student loans, food stamps, public housing, and work assistance.

Collateral sanctions, Ewald argues, blur the boundaries between regulation and punishment. Treating collateral sanctions as regulation or as punishment has several significant implications. First, if a collateral sanction is defined as a punishment, a restriction imposed on an individual convicted before the enactment of that restriction may violate the prohibition of ex post facto lawmaking. Second, a defendant must be made aware of all penalties prior to pleading guilty. If collateral sanctions are punishments, defendants must be informed of all collateral sanctions prior to pleading guilty. On the other hand, if collateral sanctions are not punishments attorneys and judges are not obligated to inform defendants of collateral sanctions prior to a guilty plea or during sentencing.

For Ewald, those sanctions represent a continuation of an exclusionary tradition long present in American politics. While democracy rests on the assumption that adult citizens possess legal equality and political autonomy, throughout American history the political landscape has not promoted equality of citizens. Rousseau to the contrary notwithstanding, collateral sanctions continue the American practice of denying full citizenship to groups by depriving convicted criminals, including those who have served their prison sentences and been released, of rights and opportunities enjoyed by other citizens. The imposition of collateral restrictions creates millions of quasi-citizens who do not enjoy the full rights and privileges of citizenship and requires, in effect, that a history of innocence is a requisite to full citizenship.

Susanna Lee's "In the Prison of the Mind: Punishment, Social Order, and Self- Regulation" continues Ewald's interest in exploring the impact of the blurred line between regulation and punishment in the lives of persons subject to the state's regulatory/punitive power.

She does so through a reading of Richard Price's novel *Clockers*, using that

reading to explore the perspectives of those persons and to describe the blurring of boundaries between regulation and punishment as that blurring is played out in the "lived experience" of the characters in that novel.

Lee treats regulation as the promulgation of rules by the state along with the mechanisms for enforcing those rules or, in a more general sense, as any mechanism of social control that affects individual behavior. Punishment, Lee contends, is inseparable from regulation and is deeply entwined in it in two ways. First, regulation is a system of rules that if followed allow one to avoid punishment. In this sense, regulation precedes punishment. Such regulations are universal in that everyone must follow them. Lee cites the examples of paying taxes, driving a registered car, following traffic laws, and refraining from littering as the kinds of regulations all individuals must follow. In this sense regulation defines the limits of freedom. The second kind of regulation is regulation as punishment. This form is imposed on individuals who have committed an infraction and includes such things as imprisonment, probation officer visits, and drug testing.

The plot of *Clockers* centers around Strike Dunham, a drug dealer in New Jersey, and his straight-laced, hardworking brother Victor. The regulation that Spike experiences is punitive. Spike must go to routine meetings with a probation officer. At these meetings Spike is subjected to the critical gaze of the probation officer who is attempting to identify aspects of noncompliance in Spike's attire, mannerisms, finances, and statements. Knowing that he will be subject to this gaze Spike self-regulates, carefully selecting his wardrobe, monitoring his behavior, and choosing his words.

Victor functions as a counterpart to Strike. Victor attempts to comply with regulations to avoid punishment. He works two jobs, has a wife and children, and is struggling to get his family out of public housing. Yet simultaneously Victor seeks to reconfigure his relationship to regulation by modifying the regulatory space he occupies.

The distinctions between Strike and Victor are inverted in the novel when a rival drug dealer whom Strike had been encouraged by an older dealer to kill turns up dead and Victor confesses to the crime, produces the murder weapon, and claims the killing was done in self-defense. The novel examines the various forms of regulation the characters experience, how they influence their behavior, and how ultimately they may explain who murdered the rival drug dealer.

Clockers highlights regulation preceding punishment and regulation as punishment, demonstrating through its narrative structure and plots, as Lee puts it, that "regulation carries within it the constant promise or threat of punishment, and reminds the subject—in ways subtle and not subtle—of her fundamental and enduring punish-ability, and even of her status as already punished."

Paul Butler concludes this book with his chapter "Stop and Frisk: Sex, Torture, Control." Butler wants to reconfigure the discourse surrounding the punishment/regulation classification by showing that punishment may occur prior to any criminal conviction, that the space of regulation is in many instances already punitive even though the law refuses to recognize it as such. Like Ewald and Lee, Butler insists that the punishment/regulation classification take seriously the experiences and perspectives of those subject to state power and that those experiences and perspectives are shaped by the dynamics of racial, gender, and class hierarchies.

Butler takes as his example the tactics of stop-and-frisk routinely used by police officers in order to assert their dominance on the streets. Far from the drama of Foucault's description of the execution of the regicide Damien, stop-and-frisks occur in the nether world of low visibility police-citizen interaction. Stop-and-frisks were authorized by the Supreme Court's decision in *Terry v. Ohio,* which enabled the police to detain individuals they suspect of a crime temporarily, and to pat them down if they suspect they are armed.

The *Terry* case involved a Cleveland detective who became suspicious of two African-American men he witnessed walking up and down a street and looking in a store window. The officer, believing they were going to rob the store, detained the men, patted them down, and located weapons on them. The Supreme Court ruled that the Fourth Amendment protection against unreasonable search and seizures did not apply in *Terry* because the police officer had probable cause to initiate a search of Terry. The Court argued that the police's conduct relative to search and seizures only had to be reasonable under the Fourth Amendment, and reasonableness could be determined by balancing the government's interest in investigating crime and protecting officers against the individuals' privacy interests.

Taking the perspective of those on the receiving end of state power, Butler argues that, although stop-and-frisks do not meet the legal definition of punishment, they are punitive, even torturous. Individuals who have been stopped

and frisked describe feeling as though they have been violated or invaded. While the intrusive nature of frisks is acknowledged in the *Terry* opinion, and the intimate, sexual violation it entails is detailed in police manuals, the Supreme Court accords it little significance.

Frisking, like other forms of punishment, deals directly with the body and involves, as Butler sees it, the imposition of sovereign power on it. Frisking is an assertion of a "non-punitive" power by the police, yet it is experienced as punishment by those subject to it. Refusing to see its punitive, torturous character blinds us to the way power operates for those on the bottom of race, gender, and class hierarchies and allows punishment to operate beyond the boundaries of penal law.

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Taken together, the contributors to *Law as Punishment/Law as Regulation* highlight the slipperiness of the operations of state power as they seek to name the various modalities of its exercise. By bringing together the perspectives of producers of state power and those over whom that power is exercised, their work offers us ways of understanding the consequences of different classifications of punishment and regulation. And, perhaps most important of all, they show the importance of connecting the subjects of punishment and regulation to the political and cultural forces that shape their operation and that ground their claims to power over us.

Notes

1. Some states have developed a three-tiered system for categorizing the offenders by risk to the public. Tier One, which is a low risk of reoffending, Tier Two, which is a moderate risk of reoffending, and Tier Three, which is a high risk of reoffending. By using the three-tiered system, the state determines who in the public gets notified of the offender's residence. In some states, Tier Two notices go out to schools, day care centers, and organizations that have children under their care. Tier Three notices go out to families living within a certain radius of the offender's home.

2. See Jesse McKinley and Carol Pogash, "Kidnapped at 11, Woman Emerges after 18 Years," *The New York Times* (August 27, 2009), found at http://www.nytimes.com/2009/08/28/us/28abduct.html. For recent developments in the policy arena, see Abby Goodnough and Monica Davey, "Effort to Track Sex Offenders Draws Resistance," *The New York Times* (February 9, 2009), found at http://www.nytimes.com/2009/02/09/us/09offender.html.

3. See Robert Chesney and Jack Goldsmith, "Detention of Terrorists and the Acceleration of the Convergence Trend," The Legal Workshop, *Stanford Law Review* (June 25, 2009), found at http://legalworkshop.org/2009/06/25/detention-of-terrorists-and-the-acceleration-of-the-convergence-trend. See also Amnesty International, "Jailed without Justice: Immigration Detention in the U.S." (March 2009), found at http://www.amnestyusa.org/immigrant-rights/immigrant-detention-report/page.do?id=1641033; and Teresa A. Miller, "Blurring the Boundaries between Immigration and Crime Control after September 11th," found at http://www.bc.edu/schools/law/lawreviews/meta-elements/journals/bctwj/25_1/04_TXT.htm.

4. *Artway v. The Attorney General of the State of New Jersey*, 81 F.3d 1235 (1996). See also "Megan's Law and Its Progeny: Whom Will the Courts Protect?" 39 *Boston College Law Review* (1997), 201; and Alexander D. Brooks, "Megan's Law: Constitutionality and Policy," 15 *Criminal Justice Ethics* (1996), 24.

5. *Artway v. The Attorney General of the State of New Jersey*, 81 F.3d 1264 (1996).

6. Ibid., 1284.

7. Ibid.

8. Ibid., 1285.

9. Ibid.

10. Ibid., 1286.

11. Ibid., 1287.

12. See Carol S. Steiker, "Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide," 85 *Georgetown Law Journal* (1997), 775. Referring to the Supreme Court's efforts to distinguish punishment from regulation, Steiker observes, "The Court's work has been conceptually muddled, to say the least. Sometimes the Court seems to be attempting to define punishment either for the purposes of particular types of state activity (such as forfeitures or contempt proceedings) or for the purposes of particular types of constitutional protections (such as the prohibitions of double jeopardy or excessive fines). On the rare occasion when the Court has attempted to define punishment more globally, it has resorted to a list of 'factors,' which it has acknowledged are neither necessary nor sufficient for its purposes, and for which it has been unable to offer an underlying rationale" (at 781).

See also John Coffee, Jr., "Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done about It," 101 *Yale Law Journal* (1992), 1875; Abraham Goldstein, "White-Collar Crime and Civil Sanctions," 101 *Yale Law Journal* (1992), 1895; Kenneth Mann, "Punitive Civil Sanctions: The Middleground between Criminal and Civil Law," 101 *Yale Law Journal* (1992), 1795; Paul H. Robinson, "Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders," 83 *Journal of Criminal Law and Criminology* (1993), 693; Franklin Zimring, "The Multiple Middlegrounds between Civil and Criminal Law," 101 *Yale Law Journal* (1992), 1901; Symposium: "The Civil-Criminal Distinction," 7 *Journal of Contemporary Legal Issues* (1996), 269; Sym-

posium: "The Intersection of Tort and Criminal Law," *76 Boston University Law Review* (1996), 1.

13. Lon Fuller defines law as "the enterprise of subjecting human conduct to the governance of rules." See *The Morality of Law*, New Haven: Yale University Press, 1964, 106.

14. Julia Black, "Critical Reflections on Regulation," London: Centre for Analysis of Risk and Regulation at the London School of Economic and Political Science, 2002, 2. See also Robert Baldwin, Robert Scott, and Christopher Hood, *A Reader on Regulation*, Oxford University Press, 1998.

"Regulation can mean more than just the enforcement of informal rules. . . . Much regulation is accomplished without recourse to rules of any kind. It is secured by organizing economic incentives to steer business behavior, by moral suasion, by shaming, and even by architecture." See Christine Parker and John Braithwaite, "Regulation," in *The Oxford Handbook of Legal Studies*, ed. Peter Cane and Mark Tushnet, Oxford: Oxford University Press, 2003, 120.

15. See Carol Steiker, "Foreword: The Limits of the Preventive State," 88 *Journal of Criminal Law and Criminology* (Spring 1998), 771.

16. See Charles L. Scott and Joan B. Gerbasi, "Sex Offender Registration and Community Notification Challenges: The Supreme Court Continues Its Trend," 31 *Journal of the American Academy of Psychiatry and Law* (2003), 494.

17. For a different perspective, see Adam Kolber, "The Subjective Experience of Punishment," 109 *Columbia Law Review* (2009), 182.

18. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). See James Provost, Jr., and Ralph Rohner, "Can Congress Denationalize? The Supreme Court's View in Kennedy v. Mendoza-Martinez," 12 *Catholic University Law Review* (1963), 114.

For other examples of cases wrestling with the punishment/regulation distinction, see *United States v. Halper*, 490 U.S. 435 (1989); *Hudson v. United States*, 118 S. Ct. 488 (1997); *Addington v. Texas*, 441 U.S. 418, 428 (1979); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952); *United States v. Ward*, 448 U.S. 242, 251 (1980)

19. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), 169. The focus on history is derived from several cases starting with *Cummings v. Missouri* 71 U.S. 277 (1867), where the Court found that requiring individuals to take a loyalty oath demonstrating they had never been loyal or sympathetic to the Confederacy does not constitute punishment because it does not have precedent as such in American, English, or French law. A few decades later *Ex Parte Wilson*, 114 U.S. 417 (1885) and *Mackin v. United States*, 117 U.S. 348 (1886) found that imprisonment in a penitentiary and hard labor constitute punishment because they have historically been used as such. Finally, *Wong Wing v. United States*, 163 U.S. 228 (1896), upholding the Chinese Exclusion Act, found that it was historically precedented to expel people from the country as had been done since Roman times.

20. H. L. A. Hart, "Prolegomenon to the Principles of Punishment," reprinted in H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, New York: Oxford University Press, 1968. See also Michele Cotton, "Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment," 37 *American Criminal Law Review* (2000), 1313; and Joel Feinberg, "The Expressive Function of Punishment," in *Doing and Deserving: Essays in the Theory of Responsibility*, Princeton: Princeton University Press (1970), 95.

21. Steiker, "Punishment and Procedure," 783–84.

22. Machiavelli argued that obedience to a ruler's regime was best secured by generating fear: "Men are less hesitant about offending or harming a ruler who makes himself loved than one who inspires fear," and "[F]ear is sustained by the dread of punishment that is always effective." see Niccolò Machiavelli, *The Prince*, ed. Quentin Skinner and Russell Prince, Cambridge: Cambridge University Press, 1988, 59. Thomas Hobbes argued in a similar fashion that the purpose of punishment was to secure obedience to the Leviathan: "A punishment, is an Evill inflicted by publique Authority, on him that hath done, or omitted that the will of men may thereby the better be disposed to obedience." Thomas Hobbes, *Leviathan*, ed. C. B. Macpherson, London: Penguin Books, 1968, 353.

23. Hugh Baxter summarizes Foucault's distinction between sovereign power and disciplinary power in a way that seems to parallel the distinction between punishment and regulation: "Sovereign power is . . . negative, extractive, and destructive. Disciplinary power, by contrast, employs surveillance, organization, and training to make its object, primarily the human body, more useful and productive." Hugh Baxter, "Review Essay: Bringing Foucault into Law and Law into Foucault, Foucault and Law: Towards a Sociology of Law as Governance," 48 *Stanford Law Review* (1996), 449.

24. Michel Foucault, *The History of Sexuality*, New York: Vintage Books, 1990, 141.

25. Braithwaite elucidates this concept in "Accountability and Governance under the New Regulatory State":

> [G]overnment is no longer a unified set of state instrumentalities. The sovereign is not dead, but it is just one source of power. Moreover, the state is an object as well as subject of regulation. It is regulated by the IMF, Moody's, the Security Council, the International Organisation for Standardisation, the World Trade Organisation, among other institutions. We live in a world where many centres of power both steer and row. And each steers its own rowing being mindful of the steering and rowing being undertaken by other private and public institutions.

John Braithwaite, "Accountability and Governance under the New Regulatory State," 58 *Australian Journal of Public Administration* (2002), 90.

26. Michel Foucault, "Society Must Be Defended," lectures at the College de France, 1975–76, New York: Picador, 1997, 241.

27. For Agamben the biopolitical, and hence regulatory, reality of modernity is based

in the dominance of the state of exception and the entrance of bios and zoē into a zone of indistinction. In ancient Greece, zoē referred to "the simple fact of living common to all living beings (animal, men, or gods)," and bios indicated "the form or way of living proper to an individual or group." Georgio Agamben, *Homo Sacer*, Stanford: Stanford University Press, 1998, 1. Zoē was excluded from the polis and remained confined to the *oikos*. Agamben identifies the politicization of zoē as the decisive event of modernity. Biopolitics represents the entrance of zoē into the political sphere inhabited by bios and subsequent blurring.

Regulatory and Legal Aspects of Penality

MARKUS D. DUBBER

The distinction between law and regulation has proved elusive. As "regulatory studies" has come into its own as a field of inquiry to parallel that of "legal studies" or just plain "law," pursued by "regulationists" rather than jurisprudes (or just plain lawyers), the question occasionally arises not just what regulation is, but also how regulation differs from law. Naturally, one approach is to claim one concept as subordinate to the other, so that either all regulation is law or that all law is regulation or, to put it differently, that regulation is simply one form of law or vice versa. Jurisprudes tend to be less anxious about the relationship of their subject to regulation than their regulationist colleagues, perhaps owing to the considerably longer history of inquiries into law. Regulationists not only tend to be more concerned about the distinction of their subject from law but also—and this isn't any more surprising—are more likely to consider law a subspecies of regulation than the other way around. Not only is regulation distinct from law; it is superior to it. The distinction between regulation and law then quickly turns to an inquiry into the place of law within the larger regulatory framework and the discovery that law is not only part of some broader regulatory scheme but also a considerably smaller part than one might have thought, given the attention lavished on law over the past millennia.

Regulationists spend a good deal of time trying to get a handle on their subject; of course, jurisprudes, too, have been known to ponder the nature of law. There is a refreshing variety of definitions of regulation, ranging from, for instance, "improving the efficiency of the economy by correcting specific forms of market failure such as monopoly, imperfect information, and negative externalities,"[1] at the narrower end of the spectrum, to "the intentional activity of attempting to control, order or influence the behavior of others,"[2] or, broader

still, "influencing the flow of events,"[3] or, somewhere in between, "sustained and focused control exercised by a public agency over activities that are socially valued."[4]

It would be futile, not to mention tedious, to recite the myriad definitions of regulation that have been proposed.[5] At the same time, it would be presumptuous to join the debate about what regulation is or is not, or ought or ought not to be. As a non-regulationist, I am not concerned with carving out a disciplinary niche or creating a scholarly identity, or with setting a regulationist research agenda. As a lawyer, I am interested in the definition of regulation primarily insofar as it is thought to relate in some way to the definition of law. Not that lawyers are only interested in law, and regulationists in regulation. To the contrary, I suspect that the definition of regulation and the definition of law are intimately related, as two aspects of a single inquiry. That single inquiry is the inquiry into the nature and limits of (state) power.

I regard the distinction between regulation and law as a fairly recent—and unfortunately largely ahistorical—manifestation of a broader distinction between two modes of governance, police and law, the roots of which can be traced back to the origins of the conceptualization of governance in ancient Greece in terms of economic heteronomy within the private sphere of the household and political autonomy within the public sphere of the *agora*. The modern concept of law is the manifestation of the Enlightenment's discovery of the autonomous person as the moral subject-object in the political sphere. As such, the modern concept of law was defined in explicit contradistinction to the concept of police, which some two centuries before had emerged as the scientized and bureaucratized and in this sense modernized form of economic household governance of the princely state.[6]

Thinking about what regulation is therefore also means thinking about what law is. At the same time, thinking ahistorically and afunctionally about regulation is no more appropriate than thinking ahistorically and afunctionally about law. It occasionally appears, even in the regulation literature, as though regulation were an artificial and therefore flexible concept, in contrast to law, which has some definite meaning, or essence, that could be discovered with diligence and some luck. Instead, I prefer to think about law as a concept that not only is no less historically contingent than is regulation, but also is contingent in precisely the same way for the simple reason that law without regulation makes

no more sense than does regulation without law. This point becomes clear as soon as one recognizes regulation as a recent attempt to capture police as a basic mode of governance. For law was defined against police, with not only far-reaching theoretical implications but with very palpable effects in political history, given that the modern concept of law forms a crucial part of the Enlightenment's comprehensive critique of traditional alegitimate practices and institutions.

There is an uninteresting sense, then, in which "regulation" is more of a label than is "law," insofar as regulation can be seen as the label for police, which is the proper counterpart, historically and conceptually, for law, as the central modes of governance that were defined, and have remained, in tension with one another. A recent thoughtful contributor to the regulation definition debate, Julia Black, called on regulationists to focus on the question of which concept "lies underneath" the regulation label.[7] That concept is police. Police, in turn, can be seen as a historically contingent label for a yet more basic mode of governance with yet more distant (and, presumably, therefore deeper) roots, household governance, or more fundamental still, heteronomy. Likewise, law is but a recent label for political governance in the public forum (literally) or, in Athens, the *agora*, which was based on self-government, or autonomy, of equal subject-objects.

Exploring the contrast between regulation and law therefore is useful from the perspective of legal studies, and not merely for the regulationist's purpose of defining her subject matter, because it places inquiries into law within a new (and, I think, the appropriate, or at least a fruitful) context, theoretically and historically. Regulationists are quite right that the study of law ought not to be pursued (exclusively) in isolation from other modes of governance, though they would hardly be the first to make this point. Regulation studies might benefit from an exploration of the deeper distinction between regulation and law not merely, and not even primarily, by helping to define its disciplinary realm but more importantly by illuminating the very context that regulationists find lacking in the study of law. For all its talk of interdisciplinarity, globalism, and the general breadth and flexibility of its methods, subjects, and objectives, regulation studies has yet to develop a compelling account either of its place within the theory of state power in particular, never mind of power in general, or of its place within the history, or if you prefer the genealogy, of

(state) government. Too much attention has been paid to efforts to distinguish the regulationist enterprise from the "traditional" inquiry into law and legality, at the expense of carving out with any precision the ideas and practices that "lie underneath," theoretically and historically, of regulation, however defined. A conceptual-historical exploration of the distinction between police and law may help to supply this missing foundation and context.

Having reframed and deepened the distinction between regulation and law as that between police and law as manifestations of the foundational distinction between familial heteronomy and political autonomy, it might be helpful to explore the distinction as it plays out in the context of the state's penal power. Punishment, or the penal process more generally, recommends itself as a locus for investigating the distinction between regulation/police and law for several reasons. Criminal law is often cited as paradigmatic law in the regulation literature for its supposed emphasis on rules and a hierarchical "command-and-control" structure; in fact, some influential accounts of regulation exclude the penal process from the realm of regulation altogether (at least insofar as crimes do not count as "activities that are socially valued,"[8] and their disposition cannot be redirected toward goals such as building community and enriching democracy).[9] At the same time, the power to punish is said to derive from the state's power to police—that is, to maintain and maximize the public welfare in all of its aspects.[10] Criminal law itself recognizes a host of so-called regulatory (or police) offenses and uneasily accommodates regulatory "measures" aimed at human dangers, while theoretical writings about criminal law traditionally have treated criminal law doctrine as applied moral theory, without sufficient regard to the political nature of punishment as an exercise of state power, to the point that criminal law's supposed moral system obscured its identity as a system of law.

Regulation and Law

A quick look at some of the distinctions between regulation and law that the regulatory literature has drawn or, more often, implied suggests confusion not only about the concept of regulation but also about the concept of law. Law appears in the regulatory literature not only, and not even primarily, as the explicit other against which regulation defines itself. More commonly, law

simply appears in passing, as glimpses of legality in attempts to capture if not the nature of regulation, then the distinction among types of regulation.

One distinction that recurs frequently in discussions of the distinction between regulation and law is that between private and public, or rather between "*private* law" and "*public* regulation." Little time is spent on the vexing question of the distinction between private and public in the abstract, presumably because regulationists are no more eager to appear mired in formalist orthodoxy than their jurisprudential colleagues. The private/public distinction, after all, has been the subject first of criticism and then of sustained ridicule for the better part of a century, beginning with the American Legal Realists, whose ideas, or more precisely whose scathing critiques, have shaped American jurisprudential thought since the early twentieth century, somehow managing to avoid the label of orthodoxy they successfully, and permanently, pinned on their jurisprudential predecessors. The very attempt to draw the distinction has drawn charges of reactionary antidemocratic self-interest.[11] Given the progressive, forward-thinking, if not outright communitarian outlook common among regulationists, it is perhaps not surprising that one is hard pressed to find an endorsement of the private/public distinction in the regulatory literature. If anything, regulatory scholarship appears eager to transcend the distinction, and at least some regulationist projects explicitly highlight the public aspects of apparently private law, most notably in the provocative work of Hugh Collins on regulatory aspects of contract law,[12] which itself spawned an intriguing broader project of regarding other bodies of legal doctrine from a regulatory perspective.[13]

But if the distinction between public and private is, if not outright devious, at least not particularly helpful, provided it can be drawn at all, then it can hardly serve as the basis for distinguishing law from regulation. Obviously the difficulties inherent in the public/private distinction in general cannot be evaded simply by contrasting "private law" with "public regulation." The idea seems to be that there is something "private" about law, rather than that regulation is to be contrasted with "private law" as opposed to with "public law." But the every existence of a category of "public law" is inconsistent with this attempt at differentiation between law and regulation in general. And yet the image of "law" in the regulatory literature often is one of private law, and the law of contract in particular, which appears to be regarded as a system of rules

governing the interaction of individuals exercising their free will independent of a larger social or political context of any kind. Occasionally, one also finds references to formalist theories of tort law that stress the autonomy and internal logic of tort law doctrine.[14] But surely, these are not the only, and arguably not even the predominant, conceptions of contract or tort law. In fact, even within the confines of contract law or tort law doctrine and theory themselves, it would not be difficult to discover the very private/public distinction that the regulation literature assumes accounts for the distinction between law and regulation.

Drawing the distinction between regulation and many, perhaps most, conceptions of private law, rather than the conception of private law held up by regulationists as representative of law as private, may be difficult. More problematic still is drawing the distinction between public law and regulation. While many have challenged the distinction between regulation and public law, few have challenged the existence of public law. Recent work in jurisprudence—that is, work in jurisprudence since the early twentieth century—has tended to point up the public aspects of apparently private law, to the point of suggesting that public law is all-encompassing and private law but an anachronistic cover for the protection of private property interests from public control. The one exception here seems to be a long influential strain in English jurisprudence that denied the existence—or at the very least the desirability—of public law, if only in England, because it was thought incompatible with a peculiarly English commitment to an idea of "common law," understood as a uniform set of legal principles that applied to private and public actors alike. It seems unlikely that, and ironic if, regulationists should endorse this view, inevitably traced to A. V. Dicey, which is subject to various criticisms, including that its celebration of common law as the embodiment of the rights of Englishmen, jealously guarded by common law judges, obscures the roots of the "common law" in the king's effort to centralize power against a patchwork of local justice, meted out by inferior lords; that it proceeds from Dicey's caricature of French administrative law, which functions as the public law straw man in his dismissal of the very project of public law; that it falsely, and narrowly, identifies public law with administrative law and mistakes the desirability of public law with the desirability of (a very specific set of nineteenth-century French) public law institutions and of legal immunity for officials who populate these institutions.

The distinction between private law and public regulation, then, relies on a cramped, outdated, and parochial view of private law and public law (and, in fact, common law, about which more later on), one that has long since been challenged and, at least in the United States, abandoned in favor of a view that either jettisons the distinction between public law and private law as nonsensical, inherently reactionary if not antidemocratic, or at least unhelpful if only because private law is public in that it, for instance, fulfills public functions, is subject to public supervision, control, and manipulation, and is backed by public sanctions.

Perhaps regulation might be distinguished not from private law, but from law as private. Regulation as public would then be distinguished from law as private. This distinction, however, would add nothing to the distinction between public law as public and private law as private. Apart from the difficulties of drawing the distinction between public and private in this context, this distinction would merely highlight the connection between public law and regulation.

Perhaps (public) regulation should be compared not with private law, but with public law. The public nature of public law, however, is anything but obvious; in fact, the definition of public law is no more settled than is the definition of private law.[15] If one turns to the common-sense notion that public law is state law, in the sense that the state is a party to a relationship or a dispute governed by it or in the sense that it concerns state actions and actors, then regulation is tethered to the state, which would preclude common attempts to broaden the regulatory inquiry in general ("influencing the flow of events") and to "decenter" it in particular (to capture what is thought to be the distinctive feature of "the new regulatory state" and its "self-regulation" and "public-private partnerships").[16]

Perhaps public law and regulation are thought to be public in the sense that they both pursue the "public welfare" or "public interests" of some kind or another. While this view of the publicness of public law would not be without merit (depending on how one defines "public interests" in particular, as the interests of the public or as the public's interest in a given state of affairs, or conflict), it does not in fact underlie the distinction that is ordinarily drawn between public law and private law, which focuses on state officials as the producers or objects of public law, rather than on its objective. At any rate, it would be

inconsistent with another common attempt to differentiate between regulation and law on the ground that one is concerned with *welfare* (and interests), while the other is concerned with *justice* (and rights). So, once again, the distinction between regulation and law ends up simply tracking that between public law and private law, with no room to differentiate between regulation and public law. As we will see, however, the distinction between justice and welfare plays an important role in the distinction between law and police. Once regulation is understood as a manifestation of, or simply a modern label for, police as a mode of governance (or at least some of its aspects), attempts to differentiate between regulation and law in light of the distinction between welfare and justice appear more promising.

Yet broader than the distinction between justice and welfare is that between the *deontological* and *instrumental* approaches that are said to characterize law and regulation, respectively. Again, the claim that a prospective instrumentalist rationale is characteristic of regulation, while law is committed to a retrospective deontological view ignores the reality of a wide array of conceptions of law, not all of which (or even most of which) dismiss an instrumentalist method as disciplinarily inappropriate. Once again, much of American jurisprudence (academic and judicial) over the past century has been explicitly instrumentalist. To take an example from the area of criminal law, to be explored in greater detail below, the American Law Institute's highly influential Model Penal and Correctional Code explicitly rejected a retributivist approach to criminal law as outdated and barbaric and instead crafted a comprehensive treatmentist system for the diagnosis and peno-correctional treatment through rehabilitation and, where appropriate, incapacitation of abnormally dangerous offenders.[17] Committedly progressive regulatory studies once again operate with an oddly outdated view of law.

The concept of *common law* already has made an appearance in our discussion of the distinction between regulation and law in light of that between public and private (law). Here some regulationist scholarship appears to operate under the Diceyan assumption that all common law is, by definition, private law. At any rate, the idea appears to be that law is common law, presumably understood in the sense of "case law" or judge-made law or the law of judicial precedent reaching back for centuries if not millennia through the history of English law, whereas regulation is *statute law*, or law (or perhaps simply norms)

promulgated by the legislature (or perhaps the executive). This distinction, between common law and statute law, is as outdated and parochially English as other distinctions the regulation literature has invoked and has long been abandoned in the United States and, I suspect, today can no longer claim dominance even in English jurisprudence.

The idea that only judge-made law is "real" law, whereas all other law is interstitial, even novel, may be appealing to English judges and may help account not only for the long-standing English resistance to codification but also for the limitation of that resistance to English law, as codification by English lawyers in the colonies was thought preferable, by the English, to the development of common law in dominions without a sufficient supply of English common law–making judges.[18]

Limiting the production of law to the judiciary also implies a similarly narrow minded and long-since debunked view that judges do not contribute to the regulatory enterprise. Here, too, regarding regulation as police illuminates the distinction between regulation and law by placing it into a broader context; while the police power in the United States traditionally has been associated with the legislature, and by delegation the executive, the judiciary has wielded considerable police power of its own, illustrated most obviously by the power to recognize so-called common law (!) misdemeanors rooted in the power to police defined by Blackstone as the power to ensure that "the individuals of the state, like members of a well-governed family, . . . conform their general behaviour to the rules of propriety, good neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations."[19]

Finally, there are several distinctions between regulation and law that, oddly, also have been used to differentiate among various types of regulation in the event that the distinction between regulation and law is abandoned in favor of the view that law is but one type of regulation. Law is frequently associated, if not identified, with "hierarchical" "*command-and-control*"[20] regulatory regimes which are contrasted with more "*responsive* (or reflexive)"[21] regimes, a contrast that tends to be associated with the transition from the "welfare state" (and its old-style regulation) to the "new regulatory state," which spends more time "steering" than it does "rowing." Law (or "legalistic" regulation) is also said to be *formal*, and regulation (or at least "new" regulation) *informal*. Similarly, law is said to operate through *rules*, backed up by enforcement schemes and

threats of sanction for noncompliance. Nonlegalistic regulation, by contrast, works through "*incentives*," and "by moral suasion, by shaming, and even by architecture."[22]

In this context, law tends to be treated as synonymous no longer with private law (and contracts in particular), but with criminal law, a field of law that is generally cited as a, if not the, paradigmatic instance of public law. Apart from this notable shift of definitional contrast from contract law to criminal law, the regulation literature once again operates with a quite undifferentiated and outdated view of criminal law. Rather than vaguely Diceyan as in the case of the image of the common law, and vaguely Langdellian in the case of contract law, the common-sense regulationist view of criminal law appears to be vaguely Austinian, defined by sovereign commands directed at subjects under a general duty of obedience. Needless to say, this deeply hierarchical view of criminal law, though influential and descriptively illuminating, is not without significant alternatives, both in doctrine and particularly in the scholarly literature. The essential *informality* of the penal process, which relies heavily on official discretion at all levels, illustrated, for instance, by the widespread practice of plea bargaining, has been documented in great detail. Similarly, it has long been argued that criminal norms include rules as well as standards, specific and narrowly defined commands as well as intentionally broad, even vague, proscriptions, specifically designed to render "law enforcement" more effective.[23] An entire literature has sprung up describing, and critiquing, the privatization of important aspects of the penal process, from the prevention and investigation of offensive behavior (by the private security industry) to the infliction of punishment (in private prisons). The image of criminal law in the regulationist literature, then, is no less one dimensional than its view of contract law, tort law, common law, and law in general.

Regulation as Police

The difficulties faced by attempts in the regulationist literature to distinguish regulation from law and therefore regulatory studies from legal studies may hamper regulationist efforts at disciplinary self-definition. In this paper, I'm more interested in understanding the source of these difficulties and in extracting illuminating aspects of the proposed distinctions. The problem is, I

believe, that comparing regulation with law so far has been comparing apples with oranges. The problem is not that defining regulation against law is inappropriate, theoretically or historically, once regulation is properly understood. The proper understanding of regulation, I suggest, is as a modern label for a long-familiar mode of governance, police.

The proposed distinctions between regulation and law fall short not because they don't capture important differences, but because the differences they capture distinguish law from police, not law from regulation. Law is a mode of governance; so is police. Regulation is an empty concept, an arbitrary label, unless it is tethered to the rich concept of police, which parallels and complements law since the Enlightenment. Police and law in turn are modern manifestations of the age-old distinction between spheres of heteronomy and autonomy, first theorized in Greek political thought as the distinction between private household governance and public state governance.

Greek political thought distinguished carefully between the hierarchical mode of governance appropriate for the household and the egalitarian mode of governance appropriate for the city-state. In private, the citizen governed his household with essentially limitless discretion, subject only to flexible standards of *oeconomic* prudence. Household governance rested on the radical distinction between householder (*oikonomos*) and household (*oikos*). Every constituent of the household, from humans to animals to inanimate objects to real property, formed part of the economic resource of the household, the commonwealth, the maintenance and maximization of which lay in the hands of the householder. In public, the citizen/householder appeared as equal among equals. Greek democracy, thus, was public autonomy, or self-government, of citizens by citizens for citizens, whose public autonomous status corresponded with, and in fact derived from, their heteronomous government of the household in private. Whereas the household and all its constituents were as incapable of self-government, marked for other-government, only the householder possessed the capacity for self-government required for participation in the public sphere.

This dual system of private heteronomy and public autonomy persisted in Roman politics, with the *pater familias* replacing the *oikonomos*, the *familia* the *oikos*, and the *forum* the *agora*. As the republican ideal in Roman government faded, the familial mode of governance was extended or transplanted from the

micro family to the macro family of the Roman imperial state, though at least in theory the autonomy-based legitimation derived from the imperium's foundation in the Roman people persisted even as the emperor assumed the title of *pater patriae*.[24] On a smaller scale, military commanders and magistrates had gained quasi-patriarchal power.

The assumption of state sovereignty, in general, in the face of republican self-government can be seen as a publicization of the private power of the *pater familias*. The family, in other words, was the model for heteronomous government and the transformation of the republic from autonomy to heteronomy also meant its transformation from a body of citizens who gather in the forum to debate the public issues of the day so that they might govern one another through the force of the better argument, to a household whose members were the objects, but no longer the subjects, of government. In imperial Rome, then, the only householder who remained was the emperor, and the only family the Roman empire.

Already in Greek political thought, the distinction between the modes of governance appropriate for household and for state government, respectively, was contested. Plato was considerably less anxious than Aristotle to distinguish between state and household.[25] Even if Aristotle did not regard the state as a household itself, he saw it as "made up of households" and began his *Politics* with a discussion of household governance, positing the household as the original political association, "the original seed of the polis."[26]

After the collapse of the Roman republic, it appears that the idea of public self-government largely fell from view. Government meant heteronomous patriarchy on the basis of various models of familial governance, from every man's micro family to the lords and their households and eventually the king and his royal household, the compartments of which evolved into branches and agencies of state government to the Christian church with its pope and its inferior family-households (bishoprics, monasteries, and so forth).[27] In early modern Europe, the subject of government is the prince, who keeps wise counsel so that he may rule his subordinates prudently, if he so chooses. Machiavelli's *Prince* is the early modern analogue to Marcus Aurelius' *Meditations* and even earlier handbooks on *oeconomics*.[28] It assumes a starkly heteronomous system of government, whose sovereign subject rules by limitless discretion according to norms he defines and adopts. The only limitation on his sovereignty, if it can

be called that, is the extent of his sovereignty in space (territoriality) and time. In time, the sovereignty ends only with a catastrophic event, external (through war) or internal (treason or felony, in the original sense of breach of fealty).[29]

It is no accident that modern liberal political thought, in Locke's *First Treatise*, mounts an attack on patriarchalism, an attempt to (re)assert the ruler's householder authority. As *pater patriae* (the "naturall Father to all his Lieges," as James I put it),[30] the king remains radically distinct from, and superior to, the objects of government, as the householder stands in relation to his household. Political equality does not mean equality—and certainly not identity—of governor and governed, of subject and object, but equality of objects. All members of the household are equal vis-à-vis the householder-king; they are equally unequal. Liberalism, then, is the attempt to revive a long dormant mode of governance, autonomy (of which consent is but one, procedural, manifestation),[31] after centuries of heteronomous familial government in various guises.

By the time Locke publishes his *Two Treatises*, familial governance has begun a process of abstraction and scientization that, on the Continent, has transformed the prudential guidebook genre into a "science of police" (*Polizeiwissenschaft*), where police is understood broadly as the welfare of the commonwealth or, rather, of the state household. Police scientists produce exhaustive accounts of the myriad activities of government and, with the help of new analytic tools of measurement and prediction, scrutinize the efficiency of various economic arrangements, calculate the proper ratio of imports and exports, the price of grain and milk, and ponder general techniques of good governance, administrative expertise, and bureaucratic performance. Police science, in other words, is the study of administration, that is to say, it is regulatory studies.[32] The scope of police science is as wide as its subject, police, which encompasses every aspect of government, from water police to grain police, from forest police to health police, from education police to crime police, and so on.

While police science flourished in France, Germany, and elsewhere in Continental Europe, the English were slow to warm to the idea of police as a mode of governance.[33] The term "police" was taboo if only because it was associated with ostensibly oppressive French government. Adam Smith, steeped in the comprehensive project of critique and revision that was the Scottish Enlightenment and unhampered by such parochial (English) prejudice, lectured in his early Glaswegian days on "Justice, Police, Revenue and Arms."[34] A few years later,

Blackstone in his influential *Commentaries on the Laws of England* noted that the king, the "father" of his people, and "paterfamilias of the nation," maintains "the public police and oeconomy[, i.e.,] the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners."[35] (Recall that this passage helped shape the common law misdemeanor doctrine until well into the twentieth century.)

At the turn of the century, Patrick Colquhoun was churning out a series of police treatises that rival Continental police science in comprehensiveness of ambition. He called for the establishment of a national police system,[36] and wrote extensively on a wide variety of other police aspects, including, among others, river police,[37] education police,[38] as well as treatises on the police of the micro household,[39] and, eventually, the macro household, a sort of *Wealth of Nations* for the British Empire.[40] By 1829, the time was ripe in England, if not for the broad recognition of police as a mode of governance in theory, then for the establishment of that most French of police institutions in practice: a "Metropolitan Police Force" for London under then–Home Secretary Robert Peel. As in the case of codification, which was thought unnecessary, and certainly inappropriate, in the case of the English themselves but prudent when it came to governing (in fact, policing) the king's dominions, a police force for Dublin had been established some forty years earlier (1786), which became the model, and the training ground, for colonial police throughout the British Empire.[41] (Glasgow had put in place a police force as early as 1779.)

Smith, in the meantime, had turned his attention to a new inquiry, "political economy," which is merely police science by another name and by other means. As Rousseau had pointed out in his *Discourse on Political Economy* (1755),

> The word Economy, or OEconomy, is derived from oikos, a house, and nomos, law, and meant originally only the wise and legitimate government of house for the common good of the whole family. The meaning of the term was then extended to the government of that great family, the State. To distinguish these two senses of the word, the latter is called general or political economy, and the former domestic or particular economy.

The English attitude toward the very notion of police bears a striking resemblance to the English attitude, personified by Dicey later in the nineteenth

century, toward the concept of public law in general, and administrative law in particular. Like the concept of police some decades earlier, so too the concept of public law was derided as deeply un-English and distinctly French. Public law, like police, was attacked in principle, while in practice the English state went about the business of governing within generally vague and continuously evolving limits, against the background of a much-celebrated body of English constitutional law that was not less, but more entrenched for the fact that it was not committed to paper. The rejection of administrative law in principle, as in the case of police, ultimately did not prevent, but merely postponed, its recognition in institutional form, as police forces in one case, and as administrative law courts and a body of administrative law doctrine in the other.

The similarity in the English attitudes toward police and public law is not surprising: administrative law is one of the modern remnants of (certain aspects of) the comprehensive police project, which splintered into various subprojects in the nineteenth century and today survives largely in the narrow institutionalized form of the police force, whose connection to the broader police project tends to be obscured by decades of institutional practice. If administrative law represents the attempt to cabin the exercise of police power within the (procedural) limits of law, then regulation, or regulatory studies, is concerned with (the study of) the exercise of police power without regard to these limits. (Depending on which view of administrative law one takes, the distinction between it and regulation is either more or less pronounced; the distinction is more obvious under what has been called the "green light" approach to administrative law, as facilitating regulation, than under the "red light" approach, which focuses on administrative law as a means to control and constrain regulation.)[42]

The connection between regulation and police comes into sharper focus when we shift attention from the obscurantist English approach to the subject to countries less committed to denying the existence of police as a basic mode of governance. In the United States, the police power played a central, and at least initially explicit, role in the establishment and expansion of state government.[43] Not only the significance of the police power was acknowledged by legislatures, commentators, and courts alike; so was its breadth, depth, flexibility, discretionary nature, and essential connection to the very notion of sovereignty. The police power, or "the power to govern men and things,"[44] it became commonplace to note, "is, and must be from its very nature, incapable of any very

exact definition or limitation."[45] The police power, "the most essential, the most insistent, and always one of the least limitable of the powers of government,"[46] encompasses "the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." As such "[it] extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property,"[47] and underlies a vast expanse of legislation and regulation at all levels of national and local governance, including, notably, the power to punish.

The police power was the sovereign's power to govern the state so as to maintain or to maximize police—that is, the public welfare in all of its aspects, including, particularly in the United States, its moral welfare, a concern that played a central role in the doctrine of common law misdemeanors, in which the courts assumed a police power of their own in the absence of legislative intervention. The police power was not only limitless in scope, and defined by its very indefinability, but also without meaningful (legal) restraint. As one early-twentieth-century commentator pointed out, the police power functions as an "idiom of apologetics" in U.S. constitutional law.[48] Attempts by courts—genuine or not—to cabin the police power were roundly rejected in the wake of the U.S. Supreme Court's now infamous opinion in *Lochner v. New York*, striking down a New York state law limiting bakers' work hours on the ground that "the real object and purpose were simply to regulate the hours of labor between the master and his employes (all being men, sui juris)," rather than to protect the police (i.e., the welfare) of the public as a whole.[49]

The dissents in *Lochner* carried the day when, after sustained political and scholarly critique, the Supreme Court decided (again) to get out of the business of scrutinizing the exercise of the police power. The dissents' point was straightforward: there are no meaningful constitutional limits on exercises of the police power. Justice Harlan, quoting a previous Supreme Court case, cautioned that "neither the [14th] Amendment—broad and comprehensive as it is—nor any other Amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people." The states' legislatures, Harlan argued, enjoyed unlimited discretion to exercise their police power—that is, "their conceded power to guard the health and safety of

their citizens by such regulations as they in their wisdom deem best." Justice Holmes was more oblique, if also more memorable, quipping that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics" (cited as a prominent endorsement of laissez-faire policies) and listing other exercises of the police power that the Supreme Court had affirmed.[50]

Today, the police power has virtually disappeared from the face of American jurisprudence, both in the doctrine and in the scholarly literature. It has been relegated to certain pockets of constitutional law (for instance, in the doctrine of regulatory takings, originated by Holmes). The concept of police itself survives largely in the narrow sense of police force; references to "police science" that still appear in the field of "criminal justice" concern investigative and forensic techniques, and other matters related to the operation of police forces (in the pursuit of "law enforcement").

The nineteenth-century tradition of police power treatises in the U.S. came to an end with its most ambitious achievement, Ernst Freund's massive *The Police Power*, published in 1904.[51] Freund instead turned to studies of *Legislative Regulation*,[52] and *Administrative Power over Persons and Property*,[53] transforming himself from the last and greatest American scholar of the police power into one of the first and most ambitious American scholars of administrative law.[54] Administrative law, as the law governing the operation and production of the new and ever multiplying regulatory agencies, soon evolved into a sprawling legal discipline, with a distinct body of jurisprudence and the attendant scholarly literature and place in the curriculum of American law schools.

While administrative law focuses on the attempt to place some constraints, however marginal, on the activities of regulatory agencies, the main object of the study of the police power, the internal analysis of the activity of administration, and therefore ultimately of the exercise of state power, has fallen from view. The study of regulation (re)discovers this long neglected field of inquiry. Regulatory studies returns scholarly attention to the colorful and complex variety of governmental activities and institutions that once occupied the study of the police power, in the United States, and the science of police, in Europe. In Europe, a similar development occurred; while law faculties focused on the thin slice of administrative law that hovers on the edges of the mass of everyday administrative activity, the study of police science disappeared from university curricula and retreated into the less comprehensive and more pragmatic bu-

reaucratic training programs where it originated before its transfer into universities in the eighteenth century.[55] Curiously, Germany, though having replaced the last remnants of the comprehensive concept of police with administrative agencies (forest police, river police) by the mid-twentieth century continues to recognize a doctrine of "police law," a subcategory of administrative law that deals with the state's authority, through its administrative agencies and police force, to prevent danger to public security or order, including but not limited to, the prevention of criminal offenses.[56]

Once regulatory studies are viewed in the broader historical and theoretical context of the study of police as a mode of governance, regulationists' attempts to define their subject matter against law appear in a new light. To fully appreciate regulation's relation to law, and not merely to police, it helps to recall the origins, or rather the historical and theoretical context, of the modern concept of law. That concept was defined in explicit contradistinction to the concept of police, as it had developed by the late eighteenth century, evidenced, theoretically, in Rousseau's definition of political economy and in Blackstone's account of the public police and oeconomy, and practically in the applied police science of governments throughout Europe, notably in Prussia and France, but also in the smaller principalities scattered around the Continent.[57] It is against this ideal and reality of a "well-ordered police state" (*Polizeistaat*) that the concept of law, and its attendant ideal of the law state (*Rechtsstaat*), or the rule of law, must be understood.

As early liberalism, exemplified by Locke, defined itself through a critique of patriarchalism, so the critical Enlightenment, exemplified by Kant, defined itself through a critique of police, the scientized and fully developed account of state government as government of the macro household. The Enlightenment challenged the very foundation of the police model: the radical distinction between governor and governed. Moral thought was grounded in a rich, yet abstract, concept of the person, who was entitled to dignity not by reason of superior status, but merely on account of a characteristic shared by all persons as such, the capacity for self-government, or autonomy. In the political realm, personal autonomy implied equal rights of all persons, including the right to govern themselves. The right to political autonomy was no longer reserved for householders and their modern analogues, and did not reflect a capacity for self- and other-government limited to a select few, but the universal capacity

for autonomy of all persons as such. The dualism of private heteronomy and public autonomy was replaced by the right to public autonomy regardless of each person's status as householder or household member in private life. In the public sphere, every person was equal, entitled to be persuaded rather than commanded, much like Athenians in the *agora* and Romans in the forum, with the crucial difference that the public sphere was open to everyone, including those who were governed, rather than governors, outside the affairs of state.

Law was the mode of governance appropriate for this new vision of the object of government as identical to its subject, endowed with the capacity for self-government, and no more. The ideal of the rule of law, and of the *Rechtsstaat*, simply was the ideal of a state governed by law thus understood, as a manifestation of the equal right to personal autonomy.

In light of this fundamental distinction between police and law, the distinction between regulation and law is not that between *public regulation* and *private law*, or even between public regulation and public law, but between two aspects of the study of police: one that focuses on the actual activity of administration as it occurs and evolves constantly in the complex system of government that is the modern state, and the other that concentrates on the marginal procedural constraints that the rule of law attempts to place on the practice of regulation. In this light, it also makes sense that regulationists would consider their subject matter as far broader than that studied by jurisprudes; the scope of ("red-light") administrative law pales in comparison to that of the activities of all organs of government at all levels and, in the most expansive views of regulation, of anyone or anything else that might "influence the flow of events."

The distinction between *justice* and *welfare* that regulationists draw between law and regulation similarly reflects one way of capturing the distinction between law and police. The idea here is that police is concerned with maintaining, or maximizing, the public welfare (a term that has often been used synonymously with police), where the public welfare is merely the welfare of the state considered as a macro household. Law, by contrast, is concerned with the manifestation of justice, where justice is understood as the recognition of dignity of each person as endowed with the universal capacity for autonomy. Law gives persons their due as persons; police is not concerned with persons, but with the welfare of the household. Similarly, it might be said that law is concerned with rights, whereas police considers interests, or rather the public

interest, with each constituent's interest being relevant insofar as it figures into the public interest. The distinction between *deontological* and *instrumental* approaches can also be seen as related insofar as the manifestation of personal autonomy, as the characteristic feature of law, can be distinguished from a mode of governance that looks to identify means to the achievement of certain ends. Insofar as the distinction rides on that between a retrospective and a prospective, or a remedial and a prophylactic, approach, it reflects a common feature of definitions of police through the centuries.[58]

The distinction between *common law* and *statutes* (or *codes*), another candidate for the distinction between law and regulation discussed above, likewise has been said to track the distinction between law and police,[59] though here as there the distinction seems to rest on, and to merely restate, certain assumptions regarding the respective roles of "law courts" and legislatures, and, by delegation, executive agencies. Law and police are no more neatly associated with one governmental branch than are law and regulation.

The distinction between *formality* and *informality* that is said to differentiate law from regulation reflects that between law and police insofar as law, in the negative sense of the rule of law, attempts to place constraints on the essentially discretionary exercise of police authority. That is not to say, of course, that a subject of police governance may not decide that it may be prudent to enunciate formal rules, and to put in place formal procedures. (It has been pointed out, for instance, that the IMF recommends the "rule of law" as a "good governance" item.)[60] In fact, while Julia Black is right to remind us that there is no "rule of regulation" analogous to the rule of law, the exercise of police power may, in fact, come to resemble that of law power (for example, prospectivity, specificity, publicity).[61] Unlike the rule of law, however, the rule of regulation is itself not a rule, but entirely discretionary; the householder-governor is free to accept or reject it, as he is subject only to the rules he imposes upon himself.

Another, related, contrast between law's *rules* and regulation's more flexible "steering" mechanisms, including "incentives," "moral suasion," and "shaming,"[62] similarly captures a distinctive feature of police governance. Police governance, in this light, appears as creative and even experimental, in its unconstrained selection among myriad policing tools. By contrast, law appears as stale and narrow, limiting itself to those rules that manifest the autonomy of its subject-objects. The use of shaming, for instance, threatens to reduce, or

simply to identify, its object (the shamed) as occupying an inferior status vis-à-vis its subject (the shamer).[63] This is objectionable from the standpoint of law, because it not only concerns itself with an individual's social status, rather than personhood, but reflects or effects the shamed's inferiority, in violation of the principle of the equality of persons. Police governance is untroubled by these concerns; if shaming is effective in achieving whatever goal the police governor/householder deems prudent to pursue, then it is preferable to another tool that is less effective.

One common distinction between law as hierarchical "*command-and-control*" governance and regulation as egalitarian partnering, does not reflect a contrast between law and police. In fact, this distinction between law and regulation has it exactly backward. Recall that police, as the modern scientized manifestation of householder governance, is essentially hierarchical, pitting the autonomy-capable superior householder against the autonomy-incapable inferior household resource, human or not. Again, while it is certainly possible that police governance may choose to frame its regime as a partnership, or as "steering" rather than "rowing" (or, if you prefer, as "nudging" rather than "pushing"),[64] that possibility itself derives from the householder's virtually unlimited discretion, which assumes the radical inequality of governor and governed.

In the end, the construction of the object of government and, therefore, also of its subject, emerges as one of the central points of distinction between law and police, and therefore regulation. Law concerns itself with persons. The defining mark of personhood is the capacity for self-government, or autonomy. In the political sphere, this means that the only legitimate form of government is self-government, which in turn implies the identity of the subject and object of government. The object of regulation, by contrast, tends to be not the individual, but the corporation or the enterprise, or more precisely corporations or enterprises in general.[65] More generally, regulation as police governance does not regard, or address, its objects as persons in the sense of individuals endowed with the capacity for autonomy. It does not distinguish between individuals and corporations, and between "natural" persons and "legal" or "artificial" persons, simply because the paradigmatic target of police governance is the resource, whose naturalness or artificiality, humanness or aliveness, is relevant only insofar as these features might call for different strategies of resource management.[66]

Note in this context that recent regulatory studies often mention the effectiveness of "self-regulation," which is preferred to outdated, crude, and legalistic "command-and-control" regimes. Self-regulation here may be usefully contrasted with self-government: while only a person is capable of self-government, as a manifestation of the bundle of rational capacities that make autonomy possible, corporations and other hierarchical groups can be incorporated into a centralized police regime, much as the family, or inferior estates, were eventually integrated into the king's macro household (through the grant of franchises, privileges, immunities, and the like); they can regulate themselves—that is, their constituents, in the limited sense of serving as loci of delegated local police power.

Legitimacy also plays a fundamentally different role in law governance than it does in police governance, and therefore of regulation. Police is essentially alegitimate. Regulation similarly does not concern itself with legitimacy, but with effectiveness. As Black points out, regulation does not "invoke or lay claim to any mystique or even legitimacy." Regulationists "do not expect regulation to be internally rational or consistent; it might be, more likely it will not. But no significance attaches to either conclusion."[67] Legitimacy (or rationality, or consistency) is relevant only insofar as it affects effectiveness. And even then, it is not the regulator's legitimacy that is at stake, but the legitimacy of the *regulated*; so a corporation might regulate itself into compliance in order to maintain its "legitimacy" (more precisely, its reputation) among its peers or public partners.[68]

Penal Regulation and Legality

Penality well illustrates the distinction, but also the tension, between regulation and law, with penal regulation and penal law coexisting as alternative comprehensive accounts of a penal regime, rather than as complementary partial accounts of parts of that process. The coexistence of these accounts also raises the broad and somewhat abstract question of the relationship between regulation and law in a narrower, and perhaps more manageable, context. Given a police-based account of regulation and the explicit and historically as well as conceptually fundamental distinction between law and police, the question of the relationship between penal regulation and penal law cannot simply be resolved by treating one as a subcategory of the other.

Penal law, then, is no more merely a form of penal regulation than vice versa. At the same time, as parallel comprehensive accounts of a penal regime, the relationship of penal regulation and penal law cannot be one of rule to exception, though it might turn out that certain aspects of an actual penal regime fit more comfortably with one model than with another. It may therefore turn out that, in a given positive penal regime, one model may be seen as predominant. For theoretical purposes, however, it might be best to regard regulation and law as lenses through which a given penal regime can be viewed and analyzed.[69]

Separate from the empirical question of the prevalence of regulatory or legal aspects in a penal regime is the normative question of whether one aspect should predominate, perhaps even to the exclusion of the other. Insofar as normative inquiry concerns itself with the legitimacy of the exercise of state power, the regulatory lens on penality illuminates nothing for the simple reason that legitimacy in this sense is irrelevant to the regulatory project. Regulatory analysis, again, investigates effectiveness, not legitimacy. In this sense, it is entirely instrumental, and legitimacy is not an end the achievement of which it measures.

If normative inquiry is understood in a broader sense of evaluation, and of compliance with norms of any kind, including those governing the choice of ends and the relationship between means and ends, penal regulation is of course susceptible to normative analysis; one regulatory can prove more effective than another with respect to an end that may be more suitable than another. The legitimacy of the means, and of the intermediate ends, would then derive from their connection to some ultimate end, say, "welfare," that is taken to be the (only?) "legitimate" end of government that is thought not to require further legitimation. This end then tends to be taken to apply to all loci of governance, including but not limited to state government.

As many regulationists point out, unlike law, regulation is not only, or even primarily, a mode of state governance. To take an example from the penal realm, this form of astatal regulatory inquiry would not draw a fundamental distinction between parallel and complementary public and private penal processes, constituted by public and private providers of "security services," ranging from the definition of offensive behavior (private offenses) by private entities (for example, corporations, enterprises), to the prevention, investigation, and (preliminary) enforcement of both private and public offenses, to the imposition and "adjudication" of private offenses by private entities (internal review boards,

disciplinary panels), and finally the execution of private sanctions (discipline, severance) and of public sanctions (in private "detention centers").

From the perspective of law, "public-private partnerships" in the penal realm would be scrutinized on legitimacy grounds to determine the extent to which they are consistent with the principle of personal autonomy. For instance, penal law might consider the legitimacy of delegating any or all penal tasks (from the definition of norms, to their imposition, to the infliction of sanctions for their violation) to a private for-profit enterprise that regards its object of control as an economic resource for the maximization of the wealth of the enterprise, or rather its owners or shareholders. Note that, in this case, the group the welfare of which is to be maximized does not include the object of control, unlike in the case of household governance, where the welfare of the household constituent is relevant insofar, even if only insofar, as it affects the welfare of the household.

Penal law, in other words, structures and grounds the state's power to punish not only by requiring that the objects of punishment be treated as persons capable of autonomy (even if they exercise that capacity through criminal conduct) but also by insisting that the objects of offense receive the same treatment. Punishment, in penal law, in sum is the reassertion of the personhood of the "victim" through punishment of the "offender" consistent with his personhood. In penal law, the victim, as a person, has a right to have the offender punished, just as the offender, as a person, has a right to be punished.[70] By contrast, in penal regulation individual victims and offenders are alike not as right bearing persons, but as human resources subject to state management.[71]

Regarding penality through the lens of regulation as police reveals not only obvious, explicit, regulatory features of all aspects of the penal process, including the host of regulatory (or police) offenses, which include not only legislatively generated statutes but also penal regulations promulgated by executive agencies, the imposition of penal discipline in administrative tribunals, ranging from immigration courts to prison disciplinary boards to military "commissions," and the infliction of penal control on sexual predators, terrorism suspects, and immigration detainees.[72] More important, the penal process as a whole, rather than specific elements, emerges as a regulatory enterprise.

For instance, the often drawn distinction between "real" or "malum in se" and "regulatory" or "malum prohibitum" (or "police" or "public welfare") of-

fenses fades once central doctrines of the law of "real" crime are seen from a regulatory perspective.[73] In a regime of penal regulation, mens rea is relevant not as a manifestation of the capacity for autonomy in the form of an intentional act, but as a regulatory control device: reinterpreted as an indicator of exceptional dangerousness, mens rea plays a role in the effective regulation of human threats to the public welfare (that is, "police"). A hierarchy of mental states, or modes of culpability, is established to reflect a range of degrees of dangerousness, from the "highest" mental state, intent or purpose or willfulness or malice or depravity, to the "lowest," criminal negligence.[74] Strict liability does not indicate the absence of exceptional dangerousness, but merely acts as a placeholder for the exercise of discretion by the appropriate actor (police officer, prosecutor, judge, prison official, parole board, probation officer, and the like) to determine whether penal regulation is warranted (in whatever form, from a costly and shaming criminal case resulting in a fine to prolonged imprisonment in the case of possession offenses) because of the dangerousness of the actor or the act (or, in the case of possession offenses, the item over which the actor exercised dominion or control).[75]

In general, from a regulatory perspective, the function of the doctrines of the general part of criminal law, setting out the conditions of criminal liability, as well as of the definitions of offenses in its special part (which is dispersed within penal codes, other statutes, and administrative regulations, at all levels of government, from federal to municipal), along with the norms of criminal procedure, is merely to guide and to facilitate the detection and disposition of human threats to the public welfare.[76] To borrow a term from administrative law, penality as regulation is a "green-light" regime.

It is tempting, then, to suggest that penality as law appears as a "red-light" administrative regime. But penal law, as law, is not a subspecies of, or simply another name for, administration. While the rule of law places constraints on state power, it also structures, and may even demand, its exercise. So, for instance, while penal regulation is essentially discretionary, with all substantive and procedural norms serving as guidelines for the exercise of administrative discretion, penal law may require the invocation of penal sanctions if necessary to protect or manifest the equal personhood of a victim even if the offender no longer poses a threat to the public welfare, or prosecution would be ineffective for one reason or another.

Notes

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1. Giandomenico Majone, "The Rise of the Regulatory State in Europe," *Politics* 17 (1994): 77, 79.

2. Julia Black, "Critical Reflections on Regulation," *Australian Journal of Legal Philosophy* 27 (2002): 1, 25; see also *Regulating Law*, ed. John Braithwaite, Nicola Lacey, Christine Parker, and Colin Scott (Oxford: Oxford University Press, 2004), passim.

3. Angus Corbett and Stephen Bottomley, "Regulating Corporate Governance," in Braithwaite et al., *Regulating Law*, 60, 61; Christine Parker and John Braithwaite, "Regulation," in The Oxford Handbook of Legal Studies, ed. Peter Cane and Mark Tushnet (Oxford: Oxford University Press, 2003), 119.

4. Majone, "The Rise of the Regulatory State in Europe," 81.

5. For a recent attempt at tabulating definitions, see Black, "Critical Reflections on Regulation."

6. For a general account of the distinction between police and law, see Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005).

7. Black, "Critical Reflections on Regulation," 81.

8. Majone, "The Rise of the Regulatory State in Europe," 81.

9. Some regulationists have suggested that "restorative justice" can serve these broader goals, and therefore is a proper subject for regulatory studies. See Parker and Braithwaite, "Regulation."

10. See, for example, *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); Wayne R. LaFave and Austin W. Scott, Jr., *Substantive Criminal Law*, 2d ed., § 2.10 (St. Paul: West Publishing, 1986); Clarence E. Laylin and Alonzo H. Tuttle, "Due Process and Punishment," *Michigan Law Review* 20 (1922): 614, 622; *Sutton v. New Jersey*, 244 U.S. 258 (1917).

11. Morton J. Horwitz, "The History of the Public/Private Distinction," *University of Pennsylvania Law Review* 130 (1982): 1423, 1427–28 ("It is not only a symptom of the unraveling of all sense of community, but also a relapse into a predatory and vicious conception of politics").

12. Hugh Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999).

13. See Braithwaite et al., *Regulating Law*.

14. Ernest Weinrib's work is often cited as an illustration. See his *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995).

15. See Markus Dubber, "Criminal Law between Public and Private Law," in *The Boundaries of the Criminal Law*, ed. R. A. Duff et al. (Oxford: Oxford University Press, 2011), 191.

16. Black, "Critical Reflections on Regulation."

17. Markus D. Dubber, *Criminal Law: Model Penal Code* (New York: Foundation Press, 2002).

18. See, for instance, James Fitzjames Stephen's 1878 draft criminal code, which failed in England, but was exported to Canada, New Zealand, and parts of Australia, and Macaulay's Indian Penal Code of 1862. In Germany, colonial subjects were thought to require a different sort of criminal code, one that placed greater emphasis on the deterrent function of criminal sanctions than on the commitment to the principle of personal responsibility thought to underlie the German Penal Code. See Wolfgang Naucke, "Deutsches Kolonialstrafrecht 1886–1918," *Rechtshistorisches Journal* 7 (1988): 297.

19. William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Oxford: Oxford University Press, 1769), 176. For another illustration, see what has been called the "common law power to make an order to keep the peace vested in any judge or magistrate." *Regina v. Parks*, 75 C.C.C. (3d) 287 (Can. S. Ct. 1992); see also Blackstone, supra, at 248 ("preventive justice"); cf. Peter Ramsay, "Vulnerability, Sovereignty, and Police Power in the ASBO," in *Police and the Liberal State*, ed. Markus D. Dubber and Mariana Valverde (Stanford: Stanford University Press, 2008), 157 (origins of ASBO in common law judges' preventive justice power).

20. Parker and Braithwaite, "Regulation," 127; Black, "Critical Reflections on Regulation."

21. Nicola Lacey, "Criminalization as Regulation: The Role of Criminal Law," in Braithwaite et al., *Regulating Law*, 144, 148; Christine Parker, Colin Scott, Nicola Lacey, and John Braithwaite, "Introduction," in Braithwaite et al., *Regulating Law*, 1, 11.

22. Parker and Braithwaite, "Regulation," 119.

23. For example, RICO, federal wire fraud; see, generally, Markus D. Dubber, "The New Police Science and the Police Power Model of the Criminal Process," in *The New Police Science: The Police Power in Domestic and International Governance*, ed. Markus D. Dubber and Mariana Valverde (Stanford: Stanford University Press, 2006), 107.

24. See, for example, O. F. Robinson, *The Criminal Law of Ancient Rome* (Baltimore: Johns Hopkins, 1996), 9; David Johnston, "The General Influence of Roman Institutions of State and Public Law," in *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*, ed. D. L. Carey Miller and R. Zimmermann (Berlin: Duncker and Humblot, 1997), 87.

25. Plato, *The Republic*, bk. V, 463; Plato, *Statesman*, 259b–c.

26. William J. Booth, "Politics and the Household: A Commentary on Aristotle's Politics Book One," *History of Political Thought* 2 (1981): 203, 216–20.

27. The story is told in greater detail in Dubber, *The Police Power*.

28. M. I. Finley, *The Ancient Economy* (Berkeley: University of California Press, 1973), 17–20 (discussing Xenophon's *Oikonomikos*).

29. On *felonia* as breach of fealty, see Dubber, *The Police Power*, 19, 24, 39.

30. James I, *The True Law of Free Monarchy, or the reciprocall and mutuall duty betwixt a free King and His naturall Subjects* (1642) (1st ed. 1598), 4–5.

31. On the significance of consent in Rousseau's account of punishment, see Corey Brettschneider, "Rights within the Social Contract: Rousseau on Punishment," in this volume.

32. See Parker and Braithwaite, "Regulation," 121.

33. See, generally, F. M. Dodsworth, "The Idea of Police in Eighteenth-Century England: Discipline, Reformation, Superintendence, c. 1780–1800," *Journal of the History of Ideas* 69 (2008): 583.

34. *Lectures on Justice, Police, Revenue and Arms delivered in the University of Glasgow By Adam Smith Reported by a Student in 1763*, ed. Edwin Cannan (Oxford: Clarendon Press, 1896).

35. Blackstone, *Commentaries*, vol. 4, 176.

36. *A treatise on the police of the metropolis* (1795).

37. *A treatise on the commerce and police of the river Thames* (1798).

38. *A new and appropriate system of education for the labouring people; . . . containing an exposition of the nature and importance of the design, as it respects the general interest of the community: with details, explanatory of the particular economy of the institution, and the methods prescribed for the purpose of securing and preserving a greater degree of moral rectitude, as a means of preventing criminal offences by habits of temperance, industry, subordination, and loyalty, among that useful class of the community, comprising the labouring people of England* (1806).

39. *Useful suggestions favourable to the comfort of the labouring people, and of decent housekeepers explaining how a small income may be made to go far in a family, so as to occasion a considerable saving in the article of bread* (1795).

40. *A treatise on the wealth, power, and resources of the British Empire* (1814).

41. P. A. J. Waddington, *Policing Citizens: Authority and Rights* (London: UCL Press, 1999), 24–26.

42. Peter Cane, "Administrative Law as Regulation," in Braithwaite et al., *Regulating Law*, 207, 209–10; see also Oscar Kraines, *The World and Ideas of Ernst Freund: The Search for General Principles of Legislation and Administrative Law* (1974) (early U.S. administrative law between police power and limits on administrative discretion).

43. See William Novak's comprehensive analysis of the police power's foundational significance in the early American republic, *The People's Welfare: Law and Regulation in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1996).

44. *License Cases*, 46 U.S. 504, 583 (1847).

45. *Slaughter-House Cases*, 83 U.S. 36, 49 (1873).

46. "Constitutional Law," *American Jurisprudence* 2d, vol. 16A, § 317.

47. *Slaughter-House Cases*, 83 U.S. 36, 49–50 (1873).

48. Walton H. Hamilton and Carlton C. Rodee, "Police Power," in *Encyclopedia of the Social Sciences*, vol. 12 (New York: Macmillan, 1933), 190.

49. 198 U.S. 45 (1905).

50. In other cases, Holmes was more explicit in his view that exercises of the police power were beyond constitutional scrutiny. For instance, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), he recognized a category of "regulatory taking" that, as an exercise of the police power, lacked the constitutional constraints of the takings clause. Five years later, in *Buck v. Bell*, 274 U.S. 200 (1927), Holmes upheld a Virginia forced sterilization statute that had been justified as an exercise of the police power, noting that "three generations of imbeciles are enough"; in the words of the Virginia Supreme Court, "The purpose of the legislature was not to punish but to protect the class of socially inadequate citizens named therein from themselves, and to promote the welfare of society by mitigating race degeneracy and raising the average standard of intelligence of the people of the state. . . . The right to enact such laws rests in the police power, . . . and the exercise of that power the Virginia Constitution provides shall never be abridged." *Buck v. Bell*, 143 Va. 310, 318–19 (1925).

51. *The Police Power: Public Policy and Constitutional Rights* (Chicago: Callaghan and Co., 1904).

52. *Legislative Regulation: A Study of the Ways and Means of Written Law* (New York: Commonwealth Fund, 1932).

53. *Administrative Powers over Persons and Property: A Comparative Survey* (Chicago: University of Chicago Press, 1928).

54. On Freund, see Kraines, The World and Ideas of Ernst Freund; Comment, "Ernst Freund: Pioneer of Administrative Law," *U Chi. L. Rev.* 29 (1962): 755.

55. See, for example, *Fachhochschule für Verwaltung und Rechtspflege*, Berlin (FHVR); see, generally, David F. Lindenfeld, "The Decline of Polizeiwissenschaft: Continuity and Change in the Study of Administration in German Universities during the 19th Century," in *Formation und Transformation des Verwaltungswissens in Frankreich und Deutschland* (18./19. Jh.), *Jahrbuch für Europäische Verwaltungsgeschichte* 1 (1989): 141; on the subject of the training of German police officials, see Thomas Weidmann, "Zurück zur Abschottung? Die Zukunft der polizeilichen Fachhochschulausbildung," *Bürgerrechte und Polizei/CILIP* 62 (1999): 52.

56. See, for example, *Niedersächsisches Gesetz über die öffentliche Sicherheit und Ordnung* §§ 1(1), 2(1).

57. See Marc Raeff, *The Well-Ordered Police State: Social and Institutional Change through Law in the Germanies and Russia, 1600–1800* (New Haven: Yale University Press, 1983); see also Pasquale Pasquino, "Spiritual and Earthly Police Theories of the State in Early-Modern Europe," in Dubber and Valverde, *The New Police Science*, 42.

58. See, for example, Jeremy Bentham, "An Introduction to the Principles of Morals

and Legislation," ch. XVI, in *The Works of Jeremy Bentham*, vol. 1, 102, ed. John Bowring (London: William Tait reprinted 1962) (1789); Albert Cremer, "L'administration dans les encyclopédies et dictionnaires français du 17e et du 18e siècle," in *Formation und Transformation des Verwaltungswissens* 1, 1 (quoting 1667 police order by Louis XIV); *Niedersächsisches Gesetz über die öffentliche Sicherheit und Ordnung* §§ 1(1), 2(1) (preventive aim of German police).

59. Noga Morag-Levine, "Common Law, Civil Law and the Administrative State: From Coke to *Lochner*," *Constitutional Commentary* 24 (2008): 601.

60. John Braithwaite and Christine Parker, "Conclusion," in Braithwaite et al., *Regulating Law*, 269, 269.

61. See Fuller on the similarities between the rule of law and guidelines of "managerial direction." Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, rev. ed., 1969), 207–17. Fuller's work on "eunomics"—that is, "the science, theory, or study of good order and workable arrangements," can be seen as an attempt to develop norms of "good" government that transcend the distinction between law and police. See, generally, *The Principles of Social Order: Selected Essays of Lon L Fuller*, ed. Kenneth I. Winston (Oxford: Hart Publishing, rev. ed., 2002).

62. Parker and Braithwaite, "Regulation," 119.

63. Paul Garfinkel, "Conditions of Successful Degradation Ceremonies," *American Journal of Sociology* 61 (1956): 420.

64. See Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008).

65. Lacey, "Criminalization as Regulation," 145; Parker and Braithwaite, "Regulation," 130.

66. Already in Athens, the radical distinction between householder and any household constituent did not imply the imprudence of differentiating among the treatment of different household members according to their particular characteristics.

67. Black, "Critical Reflections on Regulation."

68. Parker and Braithwaite, "Regulation," 131.

69. See Parker et al., "Introduction," 11; Hugh Collins, "Regulating Contracts," in Braithwaite et al., *Regulating Law*, 13.

70. On the offender's right to be punished, see, generally, Markus D. Dubber, "The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought," *Law and Hist. Rev.* 16 (1998): 113; see also Herbert Morris, "Persons and Punishment," *Monist* 52 (1968): 475.

71. On the common irrelevance of victims' and offenders' rights in the police action against criminal offenders (the so-called war on crime) in general and in the so-called victims' rights movement in particular, see Markus D. Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* (New York: NYU Press, 2002).

72. For a discussion of so-called collateral sanctions, including disenfranchisement, from the perspective of police, see Alec Ewald, "Collateral Consequences and the Perils of Categorical Ambiguity," in this volume. The significance of citizenship in contemporary penality, from the perspectives of police and law, is further explored in Markus D. Dubber, "Citizenship and Penal Law," *New Criminal Law Review* 13 (2010): 190 (Special Issue on Citizenship and Criminalization).

73. Cf. Lacey, "Criminalization as Regulation."

74. Dubber, *Criminal Law*.

75. Cf. Markus D. Dubber, "Policing Possession: The War on Crime and the End of Criminal Law," *Journal of Criminal Law and Criminology* 91 (2002): 829.

76. "Defenses" in such a regime operate as opportunities for rebutting the presumption of dangerousness that attaches upon a finding that an offense has been committed. The paradigmatic defense here is renunciation in cases of inchoate offense. See, for example, *Model Penal Code* § 5.01(4); *N.Y. Penal Law* § 40.10.

Rights within the Social Contract: Rousseau on Punishment

COREY BRETTSCHNEIDER

Citizenship is not a license that expires upon misbehavior.
—Earl Warren writing for the Majority in *Trop v. Dulles*

Introduction

In thinking about our own contemporary practices and justifications of punishment we would do well to turn to the history of political theory, in particular to Rousseau's political theory. Such an inquiry will help to frame, in a way that contemporary normative theories of punishment have not, what is significant about the distinctive practice of state punishment. In my view this historical inquiry can help to correct a mistaken emphasis in the dominant approach to the subject in the past half-century.

Specifically, much contemporary work on justifications of punishment has been pursued from the perspective of moral philosophy.[1] Such inquires are concerned with the rightness or wrongness of punishment from the perspective of utilitarian or retributive moral theory considered in isolation from the political question of legitimacy. As I have argued at length in another place, the problem with an exclusively moral as opposed to a distinctly political inquiry about punishment is that it addresses only the punishment deserved by criminals and ignores the particular context involved when the state is doing the punishing.[2] In contrast to a broadly moral theory of punishment, a theory of punishment within the confines of political morality should address not only what is deserved but also which punishments the state rightly metes out. In other words, a political theory of punishment is concerned not only with how and when to punish but also with the question of who is administering a punishment. Such an inquiry would concern not just the issue of desert but, more fundamentally, that of the political legitimacy of state punishment.

I turn to Rousseau in an attempt to contextualize the question of how the

state should punish within a wider conception of political legitimacy. I suggest that we look closely at Rousseau not only because his account of punishment is grounded in what the state can and cannot do, but also because he is arguably the premier theorist of the social contract. In turning to his views on punishment we can thus be guided in thinking about the right role for the state in punishment by a theorist concerned to subsume this question within the more fundamental question of political legitimacy and one who did not view punishment as a moral dilemma isolated from questions of politics.

In particular it is important that Rousseau viewed justifications of punishment as a central issue of political legitimacy. In contrast to questions about rightness or justice, legitimacy concerns the issue of why and when the state rightly can or cannot coerce citizens against their will. Given that punishment is perhaps the most coercive of state actions it is a central issue for theories of legitimacy. But punishment is not just a paradigmatic issue for theories of legitimacy; it is also a hard case. Simply put most criminals do not consent to be punished. Yet the social contract rests on an idea of consent. Indeed, given that many criminals resist punishment, does this suggest that they must be beyond the bounds of state legitimacy and outside the social contract? Hobbes clearly thought the answer to this question was yes.

Rousseau, I will argue, suggests otherwise. He gives us an account not only of why legitimate punishment can be explained within the context of the social contract; he also explains why the notion of political legitimacy limits those punishments that can rightfully be meted out. In doing so he reframes normative questions of punishment from being solely about desert to questions about the state as a legitimate agent of punishment. Controversially, I will assert that he also gives an account not only of limits on state action, but also of the rights of criminals that stem from their membership in the social contract.

Rousseau is, in many ways, an unlikely ally of defenders of the rights of convicted criminals and thus of the notion that an account of political legitimacy might provide for some rights of criminals. Certainly, he seems an even less likely ally of opponents of capital punishment. Rousseau not only defends the death penalty, but he does so by appeal to a theory of punishment that seems hostile to the rights of convicted criminals. He claims not only that capital punishment is justifiable, but that the very criminals who are subject to such a penalty consent to die. He reasons in his "The Social Contract" that:

> The social treaty has as its purpose the conservation of the contracting parties. Whoever wills the end also wills the means, and these means are inseparable from some risks, even from some losses. . . . Whoever wishes to preserve his life at the expense of others should also give it up for them when necessary. For the citizen is no longer judge of the peril to which the law wishes he be exposed, and when the principle has said to him, "[It] is expedient for the state that you should die," he should die. Because it is under this condition alone that he has lived in security up to then, and because his life is not only a kindness of nature, but a conditional gift of the state. . . . The death penalty inflicted on criminals can be viewed from more or less the same point of view. It is in order to avoid being the victim of an assassin that person consents to die, were he to become one.[3]

The problem with Rousseau's view is that actual criminals resist attempts by the state to kill them. They pursue legal appeals and often protest the state's action in their final words. Rousseau attributes a belief to the condemned that they do not actually hold. Rousseau's justification of capital punishment therefore suffers from a flaw of "false attribution." He confuses his view of the justice of capital punishment with the views of the condemned.

Nevertheless, despite Rousseau's reputation as a collectivist hostile to individual rights, and despite his apparent antagonism to the rights of the convicted, I will argue that Rousseau offers an important framework for theorizing about both the rights of accused criminals and the rights of the guilty. Furthermore, I will suggest why this framework offers a distinctive and important argument in defense of the rights of the guilty and against capital punishment. Rousseau offers an account of how the problem of punishment can be rethought from within a legitimate social contract. While liberal individualists, such as Locke, have often grounded rights in an account of morality independent of the social contract, Rousseau demonstrates that such rights are actually required by the social contract. While accounting for these rights within the social contract might posit a legitimate basis for state punishment, it also, as Rousseau suggests, offers a basis for limitations on punishment. Thus, Rousseau's account can be seen both to legitimize state punishment in some cases and also to generate rights for convicted criminals.

The social contract serves as a foundation for rights related to the practice of punishment in two ways. First, Rousseau's understanding of rights suggests, in ways that other rights theories have failed to, why convicted criminals should have rights against the state. His conception of rights contrasts sharply

with the suppositions of theorists such as Hobbes, who viewed rights as inherent in the individual but failed to limit state action against individuals.[4] Second, Rousseau's account positions the rights of the guilty within wider policy considerations, in particular those of individual welfare. Specifically, I argue that for Rousseau, legitimate punishment depends upon the state's guarantee of welfare rights. In the absence of welfare guarantees, there is no legitimate social contract for Rousseau. In such circumstances, the state lacks legitimacy when it punishes. Rousseau thus provides a more nuanced account of punishment that situates the practice within the wider realm of social justice issues.

In some ways my contribution here cuts against the grain of some themes in this volume. As Sarat and Umphrey suggest in their introduction, thinkers such as Foucault have been particularly suspicious of the way punishment and regulation function within the modern sovereign state to minimize the autonomy and integrity of individuals, in particular when the issue is coercive regulation or punishment. Indeed, the social contract tradition as a whole might be though on this line of reasoning to be part of a historical process that results in the justification of the discarding of individual interests and real rights against the state. Certainly such suspicions have been prominent in critiques of Rousseau, notably in Marx's "On the Jewish Question." Moreover, "citizenship" as a concept linked to sovereignty far from preserving the interests of the individual might be thought along these lines another device for regulations that ignore individual rights. Both Marcus Dubber and Alec Ewald, in their contributions to this volume, gesture toward this kind of Marxian critique.

But I believe that Rousseau himself has a powerful normative response to these worries. While Rousseau does not disregard the facts of coercion and regulation in the modern state, I will argue that his account of sovereignty, consent, and the general will offers a way of analyzing and potentially critiquing all state coercion whether under the guise of "regulation" or officially recognized as punishment. His is a standard for legitimate coercion, often failed by contemporary states in a variety of ways. Importantly, I will argue that the civic rights of the citizen are tied to limits on any state coercion regardless of its label. In short, in theorizing about how state coercion can be limited given its historical tendency to disregard the distinct interests of the individual, Rousseau serves as a worthy guide, despite his reputation as a collectivist who ignores the distinct interests of individuals.

I begin by closely examining Rousseau's claim that the criminal consents to punishment, and by suggesting that his seemingly absurd and perverse claims are actually defensible. I go on to clarify two senses in which Rousseau's understanding of consent serves to ground the rights of the guilty. First, I argue that the idea of consent itself legitimizes some punishment but also sets strict limits on when and how the state can punish. Second, I argue that Rousseau's account of welfare rights also sets a limit on when the state may rightfully punish. In the final two sections, I consider the role of punishment outside the social contract in Rousseau's theory and suggest an important contrast between Rousseau's and Hobbes's conceptions of punishment.

The Meaning of Consent

Rousseau's theory of rights, specifically his account of the rights of convicted criminals, is implicit in his conception of consent. For Rousseau, it is necessary that criminals consent to punishment because all coercive acts of the state must be arrived at unanimously, which seemingly grants each citizen a veto over the coercive powers of the state. On Rousseau's account, this need for unanimity is a fundamentally democratic one. If individuals subject to the laws of the state are to be regarded as the authors of that law, it is necessary that they affirm and consent to the law.

This requirement of unanimity appears throughout Rousseau's political philosophy. For example, if property rights are to be justified within the social contract, Rousseau demands that the owner receive the "explicit and unanimous consent from the human race" to that right. The most difficult application of this theory, however, concerns its application to punishment. If sustaining unanimity is a requirement of the social contract, Rousseau must show that even criminals, who are subject most obviously to state coercion, consent to their punishments. But again, it seems that this requirement of unanimous consent in regard to punishment is impossible to satisfy. Specifically, the problem with unanimity is that it gives a veto power to any one individual within society, which is particularly problematic in the case of punishment. As I suggested in the introduction, the condemned, and criminals more generally, do not often willingly agree to their punishment. Therefore, it is unrealistic to think that unanimity could be achieved with respect to individual criminal punishments.

However, I want to suggest that Rousseau's notion of unanimous consent is not subject to the obvious objection that actual criminals do not consent to their own punishments. By consent, Rousseau is not referring to actual empirical consent. Rather, he espouses a hypothetical notion of consent, which seeks to reconcile the individual will of the condemned with what he calls the "general will."

In "The Social Contract," Rousseau argues that in societies with a legitimate social contract, unanimous consent is necessary, "at least on one occasion." In particular, he refers to the founding moment of the social contract to legitimize the authority of the terms of the social contract over every citizen.[5] While it would be impossible to satisfy unanimity on every occasion, citizens could unanimously consent to a set of constitutional principles governing the makeup of the social and political system. Rousseau emphasizes, however, that in the absence of such a social contract, unanimity would be required to justify every act of legislation: "In fact, if there were no prior convention, then, unless the vote were unanimous, what would become of the minority's obligation to submit to the majority's choice, and where do one hundred who want a master get the right to vote for ten who do not?" Here, Rousseau's explanation of unanimity suggests a distinction between the justifications of particular acts of the state within the context of a legitimate social contract and those that fall outside of it. Rousseau's point is that state punishment in a society without a social contract could not be legitimate because unanimity would be impossible to achieve each time an issue of punishment arose. However, there is potential justification for punishment in a society *with* a legitimate social contract. In this type of society, unanimity is not required to implement every social policy or institution; rather, a more general concept of legitimacy is required. On my view, unanimity on this "one occasion" should not be understood to imply that legitimate polities must have the actual assent of all their citizens, even at the moment of founding. Such an understanding of unanimity would be unworkable given the likely scenario in which at least one individual would dissent from the content of the social contract. Thus, a more nuanced interpretation, despite Rousseau's use of the term "explicit" consent, would entail some idea of hypothetical, as opposed to actual, consent.

The issue of whether a criminal consents to punishment depends on whether the punishment adheres to the kind of hypothetical consent necessary in the

formation of a legitimate social contract. Hypothetical unanimous consent is not an account of actual procedure, nor is it reliant on what persons actually say or do. Rather, it is a principled account of which guarantees are necessary to ensure that all citizens could consent to a particular set of constitutional principles. An ideal of hypothetical consent asks us to place ourselves in a contractual situation where we must determine which laws are justifiable provided that we ourselves and our fellow citizens are uniformly free and equal. Although such a contractual situation would never occur, it serves as the thought experiment by which the legitimacy of laws is measured. I am suggesting that modern accounts of the social contract such as those defended by Habermas and Rawls have their antecedents in Rousseau.[6]

The major requirement of the social contract, according to Rousseau, is respect for the "general will." The general will is often confused with a democratic procedure, such as majority rule. However, I believe Rousseau's text suggests that while a majoritarian procedure might be compatible with the general will—because, for instance, it "tends towards the general will"—the general will is rightly understood as an ideal standard of "sovereignty" distinct from any particular procedure.[7] This distinction is evident in Rousseau's contention that while majority will might err, the "general will can never err." The distinction between majoritarian procedure and general will is also evident in the multiple places in the text where Rousseau speaks of the general will as requiring some substantive protections for individual rights, even in the face of popular decisions to violate them. Rather than serving as a particular democratic procedure, the general will aims to protect and preserve each individual's interest within the social contract. Although it does not require actual unanimous consent, it does ask us to consider whether each individual subject to coercion, when placed in a hypothetical initial contract situation, would agree to a particular policy. In this hypothetical situation Rousseau is imagining that the contractors would seek to find terms of the social contract that respected the freedom and equality of each individual citizen.[8] This hypothetical consideration of what individuals would say about any policy in the situation of the original contract is a way of considering the distinct interests of all citizens when making general legislation.

Commentators have generally overlooked the formulation of the general will as a means of preserving individual interests and personal rights. However, Rousseau's very first mention of the general will reveals its importance as a way

of thinking about individual rights. In the "Discourse on Political Economy," Rousseau clearly states that for any policy to be consistent with the general will, it must account for the distinct interests of the individual. While potentially compatible with majoritarian procedures, the general will can never require the sacrifice of the individual for the common good. Rousseau thus rejects any interpretations of the general will in terms of a mere aggregation of preferences. Consider the standard as it is elaborated in the following passage, likely the first in-print exposition of the idea of the general will:

> It is no more believable that the general will would permit a member of the state, whoever he might be, to injure or destroy another member than that the fingers of a man in his right mind would put out his eyes. . . . In effect, is it not the commitment of the body of the nation to provide for the maintenance of the humblest of its members with as much care as for that of all others? And is the welfare of a citizen any less the common cause than the welfare of the entire state? . . . [If] this means that the government is permitted to sacrifice an innocent person for the welfare of the multitude, I hold this maxim to be one of the most despicable that tyranny has ever invented . . . . For far from [its] being the case that one individual should die for all, all have committed their goods and their lives in defense of each of them, so that individual weakness would always be protected by public force, and each member by the entire state.[9]

I take this passage to suggest that, regardless of what is required by hypothetical consent and the general will, policies and institutions must protect individual interests. Importantly, it uses punishment as a paradigmatic example of how the general will places limits on the state. Even when the common good would derive benefit from the punishment of innocents, such an act could never be legitimate, nor could it be consented to wholesale. For instance, utilitarians often face what has become known as the "sheriff problem." They are asked to imagine that a sheriff could save hundreds of lives that would otherwise be lost in an impending riot over the state's failure to catch a criminal if she would only frame an innocent individual, ultimately quelling the disturbance. While utilitarians, for whom the aggregate good is central, often have trouble explaining why such an action would not be justified, Rousseau rules out this kind of sacrifice in his explanation of the general will. For Rousseau, the common good cannot replace or counterbalance the most basic interests and rights of the individual.

In my view, Rousseau's idea of unanimity, and its requirement for individual consent, is best understood as a precursor to modern contractualist political theory. Such accounts posit a need to justify all state actions involving coercion in a manner that respects the distinct interests of all individuals. For instance, Rawls's principle of liberal legitimacy requires that coercion be justifiable to all citizens.[10] In a variation on this theme, Tim Scanlon suggests a right of each citizen to reject any coercive policy.[11] Much has been made of the distinction between this modern contractualism, which heavily weighs the distinct interests of individuals, and the tradition of the social contract. I think, however, that with the understanding of unanimity and the general will that I have laid out in this section, we can come to see a much closer relationship between these modern theories and that of Rousseau.

Specifically, Rousseau's contention that the criminal must consent to his or her own death can be read as a requirement of political morality that any particular punishment be compatible with his or her reasonable interests. The question, therefore, is not whether criminals actually consent to their own deaths, but whether, when they are regarded as ideal free and equal citizens, they would consent to the terms of their punishments. Of course the fact that a criminal has violated the terms of the social contract makes him or her less than an ideal citizen. Rousseau's point, however, is that such people are not exiled from the social contract. Instead, they are entitled to be treated as citizens. In Rousseau's view it is necessary to use hypothetical consent to discern how the state best continue to treat such "bad citizens" in a manner consistent with the requirements of the social contract. Ultimately, consent for Rousseau is the way the state can continue to balance the distinct interests of the criminal against the interests of the aggregate society.

The Rights of the Guilty within the Social Contract

So far, I have suggested why Rousseau's notion of consent is hypothetical as opposed to actual. I have argued, moreover, that this idea of consent seeks to preserve individual interests and rights. We are now in a position to reexamine the notion that guilty criminals consent to be punished through the lens of hypothetical consent. I want to argue that, although this requirement seemed perverse at first glance, it is actually protective of individual rights.

Rousseau's theory is protective of rights because of the very high standard it posits for justifications of legitimate coercion. In accordance with Rousseau's notion that criminals hypothetically consent to die, capital punishment would be illegitimate in situations in which consent was lacking. Hypothetical unanimity provides both a potential justification for punishment as well as a standard for restraint. If the state were to punish in a circumstance in which hypothetical consent could not be given, it would do so merely as a matter of power, not right. Such a state would lack any distinct political authority.

We can begin to see how Rousseau's notion of hypothetical individualized consent gives rise to the rights of the guilty by focusing on his rationale for capital punishment. In Rousseau's view, all citizens must recognize that any social contract will prohibit murder. He proceeds from this recognition to claim that citizens will therefore see a need for punishment in order to deter murder and to restrain individual murderers. Rousseau then suggests that in order to prevent murder we might need the death penalty. He writes:

> The social treaty has as its purpose the conservation of the contracting parties. Whoever wills the end also wills the means, and those means are inseparable from some risks, even some losses. Whoever wishes to preserve his life at the expense of others should also give it up for them when necessary.[12]

No citizens living under the social contract would want to risk that they could be killed by other individuals, so they would demand laws protecting them from such behavior. But this agreement would bind the same citizens who agreed to the social contract (in the hypothetical sense) if they were to violate the basic terms of the contract. It is therefore the "assassin" as a citizen in the contracting situation that agrees to punishment, even if the actual murderer resists punishment.

In my view, the notion that some punishment might be consented to by a criminal in the hypothetical sense potentially gives rise to those rights that correspond to duties of the state to limit punishment. A close examination of Rousseau's thinking about the death penalty near the passage quoted above indicates that Rousseau does not claim that capital punishment is always justified. Rather he limits the death penalty to cases where it is necessary to restrain murderers from killing again. While I think that this standard clearly justifies some restraint of those guilty of murder, it does not justify the death penalty. On this point, Rousseau was simply wrong on empirical grounds. Society can

prevent additional murders without executing convicted felons. Life in prison greatly reduces the chance that another citizen would be victimized. Although Rousseau preserves the option of the death penalty, he seems to realize that the situations in which capital punishment is justified are quite limited. He writes:

> Frequency of physical punishment is always a sign of weakness or of torpor in the government. There is no wicked man who could not be made good for something. One has the right to put to death, even as an example, only someone who cannot be preserved without danger.[13]

Again, read closely, what seems to be a defense of the death penalty actually is an argument for its limits. Rousseau rejects utilitarian arguments that the death penalty may be used for general deterrence. To make someone an "example," or in other words to use capital punishment to deter other murderers, is not sufficient to justify the death penalty. For the death penalty to be justifiable, the person must be deemed incapable of being restrained barring capital punishment. Here much of the work is being done by Rousseau's notion of individualized hypothetical consent. I take his argument to suggest that a citizen in the contractualist position would agree to his or her own death if this were the only means of restraint. But the person would not agree to be killed if his or her death were only justified on the grounds that it would deter others. More generally, this statement highlights why there are many kinds of punishment to which even a guilty criminal cannot be said to consent in the hypothetical sense. In cases in which there could be no hypothetical consent, criminals have rights against the state.

Rousseau's defense of the death penalty, then, is an extremely limited one. Arguably it justifies the possibility of capital punishment only in unusual circumstances. For capital punishment to be permissible, the state must lack all other resources to deter a criminal from future crimes. For instance, we might imagine a fantastic scenario in which a criminal killed everyone in the world but two other people. It would likely be too much of a burden for the survivors to restrain the third throughout his natural life. In such a circumstance, capital punishment might be justified on grounds that there was no other way these individuals could have protected themselves. But this argument turns out to rely on a principle of self-defense that applies only in a rather limited and narrow sense. In stable societies, the necessary resources exist to restrain

criminals without killing them. Namely, life imprisonment detains criminals, thereby preventing future murders without resorting to the severe measure of execution. As I read Rousseau, his argument justifies capital punishment only in societies where alternative ways of punishment do not exist.

An interesting question about the intersection of thinking about Rousseau as a normative theorist for our own time and the historical fact that his time was quite different from our own arises here.[14] Arguably Rousseau could not see why his limiting principle on punishment could not justify capital punishment, because he could not conceive of life imprisonment. Certainly there was not a prison industrial complex, and the task of imprisoning someone for life might have seemed either impossible or extremely onerous. We might think then that while his own conclusions might have been right in justifying the death penalty in his own time, his principle does not justify capital punishment in our time. But even this might let him off his own theoretical hook too easily. The question is not whether Rousseau did see the possibility of life imprisonment as an alternative. The question is whether we could think he reasonably should have seen it. I am not convinced that his own failure was due to a lack of technological ability to imprison people for life. Thinking he should have seen this possibility is not like thinking he should have been able to fly in an airplane. Rather it might have been instead a moral oversight of Rousseau's that he did not see why his principle suggests that resources should have been spent on life-long incarceration. Certainly nothing about this task requires modern technology, and it is plausible to think that it might have been possible even in eighteenth-century France.

I focused on the hard case of capital punishment to demonstrate how Rousseau's seeming hostility to the rights of convicted criminals should, upon close inspection, be replaced with a conception of the social contract as generating rights of the guilty. This framework suggests that, as a result of their membership in the social contract, citizens are entitled to have their interests weighted heavily in determining the kind of punishment that is justified. The general will, I have suggested, offers protection when it comes to the kinds of punishment that can be carried out. Even those guilty of the worst crimes, for Rousseau, are not regarded as exiles from the social contract; rather, they are still considered citizens within the contract.

Although we have focused on the hard case of capital punishment, it is

important to note that there are also easy cases of punishment that are also prohibited by Rousseau's theory of punishment. Most important, criminals must be guilty of crimes in order for punishment to be justified to them. Here Rousseau's theory is compatible with so-called "new abolitionist"" arguments against the death penalty, which emphasize the importance of not executing the innocent. While under utilitarian theories the cost of executing the innocent might be thought to be counterbalanced by the positive effects of deterrence, for Rousseau the very idea of the general will is founded on the notion that the innocent would never consent to their own deaths. What is a hard case for some theories of punishment, therefore, for Rousseau is a paradigmatic example of what must be ruled out by a system of punishment.

In sum, the notion that criminals must consent to be punished includes in it a defense of the rights of convicted criminals. Since the requirements for hypothetical consent are quite burdensome, many punishments will fail to meet its standards. Even capital punishment, which Rousseau explicitly defends, is allowable only in highly exceptional circumstances, which might never exist in well-ordered societies with efficient and expansive resources. In the next section, I turn to another feature of Rousseau's conception of rights as it pertains to the limitations of state punishment.

Punishment and Welfare Rights

I have focused so far on the limits that Rousseau's notion of hypothetical consent places on the kind of punishments that can be meted out to the guilty. In this section, I argue that, apart from these limits, Rousseau's theory offers distinctive protection for criminals.

For Rousseau, limits on punishment are only one element of a legitimate social contract. A number of other requirements must also be met for a legitimate social contract to exist. According to Rousseau, citizens have a fundamental right to social welfare; if the state fails to distribute wealth in an egalitarian manner, then in Rousseau's view there is no legitimate social contract. Although such societies will likely punish in order to enforce their fundamental laws, including laws protecting private property, they do so without legitimate authority. In sum, absent guarantees of social welfare, the state has no distinctive legitimate authority to carry out punishments.

Considerations of social welfare, therefore, give rise to a distinct set of rights against the state. Individuals not guaranteed rights of welfare can claim that their fundamental interests are not included in the general will, and that therefore they do not consent to punishment for breaking the rules that have no legitimacy in the first place. In order to flesh out this argument, I begin by clarifying why Rousseau's notion of the social contract requires rights to welfare. I then proceed to suggest why the state's authority is undermined when it fails to meet its obligation to provide welfare to its citizens.

Rousseau argues that, in the hypothetical contractualist situation, citizens would reject any economic distribution that does not guarantee a decent level of provision. Indeed these rights are so important, he claims, that the denial of a decent level of welfare to any one person could be said to invalidate the social contract. As he states:

> Individual welfare is so closely linked to the public confederation that, were it not for the attention one should pay to human frailty, this convention would be dissolved by right if just one citizen were to perish who could have been saved.[15]

This concern clearly has an implication for guarantees against poverty, and it suggests an obligation for the state to provide at least minimal levels of social welfare. In Rousseau's view, individualized consent and individual interest in the general will lead to the claim that each citizen has a right against poverty. Indeed, this right is so fundamental that, absent a state guarantee for individual rights against poverty, the social contract is dissolved. In Rousseau's words:

> It is one of the most important items of business for the government to prevent extreme inequality of fortunes, not by appropriating treasures from their owners, but by denying everyone the means of acquiring them, and not by building hospitals for the poor but by protecting citizens from becoming poor.[16]

In other words, Rousseau argues that guarantees against poverty are not merely important functions of the state, but rather they are essential to its legitimacy. The state that fails to provide against poverty, therefore, lacks a legitimate social contract.

Before I address the implications of the state's failure to guarantee rights of welfare for its practice of punishment, it is worth considering why Rousseau thinks citizens in a legitimate social contract have a right to welfare in the first place. The right is relevant to punishment not just because it is required to

establish the social contract, but also because it is grounded in the same conception of unanimity that Rousseau applies to punishment and other forms of state coercion. In short, Rousseau suggests that the coercive enforcement of property rights by the state must be justified by reference to the benefits they confer on all citizens. Part Two of Rousseau's *Discourse on the Origin of Inequality* features a hypothetical dialogue in which a representative of the propertyless masses approaches an owner at an imaginary point at the beginning of the history of private property. At this early point, Rousseau suggests, it might have been possible to forcefully challenge the legitimacy of these rights to ownership. What follows is an imagined dialogue in which the non-owner challenges the right of the owner to exclusive control over what she claims as her property. Rousseau believes that the owner could respond to this challenge in Lockean fashion: "I earned this land with my labor." To this, the propertyless interlocutor responds with the following retort:

> Who gave you the boundary lines? By what right do you claim to exact payment at our expense for labor we did not impose upon you? Are you aware that a multitude of your brothers perish or suffer from need of what you have in excess, and that you needed explicit and unanimous consent from the human race for you to help yourself to anything from the common subsistence that went beyond your own?[17]

To return to my earlier discussion about unanimity, we should read Rousseau's challenge to the property owner not as a rhetorical question, but as a demand for a justification of ownership within the context of the social contract. A justification of this type must respect the interests of individual owners and non-owners alike. But is there any justification for private ownership that can satisfy the basic interests of both owners and non-owners?

The first part of this requirement is easy to satisfy. Ownership benefits owners because it gives them the independence to carry out their life projects as they see fit. They are not subject to domination from fellow citizens. In Rousseau's formulation, "[No] citizen should be so rich as to be capable of buying another citizen, and none so poor that he is forced to sell himself."[18] For those who own enough property to avoid this type of servitude, there exists a clear justification for respecting the right to exclude. An owner should respect the land boundaries of other owners because the system of property allows her to benefit from ownership of her own land.

But if ownership is to be justified in a way, consistent with the general will, that takes the interests of all into consideration, the real challenge comes from the person who does not own property. I believe that here, Rousseau's argument in the "Discourse on Political Economy" offers such a justification. In that text, Rousseau suggests that any justification of the right of property depends on a justification of a right to welfare. Nevertheless, he explicitly embraces the right to property. This suggests that he would provide an affirmative answer to the challenge brought against the hypothetical owner presented in the *Discourse on Inequality.* Rousseau writes in his later essay, *Discourse on Political Economy*, "Certainly the right to property is the most sacred of all the citizens' rights."[19] But given the confrontation in the earlier "Discourse on Inequality," how can this be the case?

Rousseau's appeal to basic welfare guarantees for all provides a way of legitimizing some property regimes. For Rousseau, private ownership is justified only if the system of ownership produces wealth not only for private accumulation but also for redistribution. Therefore, taxation, or the redistribution of wealth, is not merely a form of "appropriation" but rather the very basis for private ownership of property. Property, on this account, cannot be owned legitimately outside a system of redistribution that functions to guarantee material welfare for all. In this way, private property appears to deliver material benefits to owners and non-owners alike. With this line of argument in mind, we can now understand how private property might be, for Rousseau, "the most sacred of all the citizens' rights" and "the true foundation of civil society and the true guarantee of citizens' commitments."[20] Rousseau's arguments against "head" taxes and in favor of a progressive tax to a public fund also lead toward this potential justification for private ownership. Private ownership is justified, therefore, only in a system in which wealth is redistributed through taxation and in which all citizens are guaranteed to benefit from the existence of private ownership of property.

Rousseau's right to welfare, however, should not be understood as being limited to merely basic needs. Rather, the right to welfare, for him, must guarantee enough wealth for all to ensure that no citizen is dependent on another—in Rousseau's words, that no citizen can be "bought" by another. The right of welfare must, like the right of property, give its citizens independence. Together, these rights could prevent both "opulence and poverty" and provide for the well-being and independence of all citizens.[21]

Rousseau not only defends welfare rights as a necessary condition for the justification of property, but he also deems them to be an essential part of the social contract itself. Therefore, failure to guarantee rights to welfare could have potentially radical implications for the practice of punishment. Absent a guarantee of welfare rights, state punishment is not grounded in the general will and therefore lacks legitimacy. This raises important questions about the legitimacy of punishment in contemporary society. Given that large numbers of those currently incarcerated in the United States come from the lower end of the economic spectrum, and at least in some cases had backgrounds in which they were arguably denied Rousseau's guarantees of welfare, there is a serious issue as to whether the practice of punishment meets Rousseau's standard of legitimacy. Rousseau's point is not just that welfare rights are necessary to validate welfare policy but that all of the social contract can be invalidated without these guarantees. But in such circumstances, this would mean that the state's authority in general, including matters of punishment, would be open to question.

Rousseau, often in dramatic fashion, suggests that the social contract as a whole could be invalidated by a failure of the state to guarantee provision of basic needs for even one person. In the next section, I consider the role of punishment in a society that lacks a social contract. But before moving to this issue, it is worth pointing out that we might understand the problem of compliance with the social contract in a way that avoids the radical implication that contemporary punishment lacks all legitimacy. Namely, we might be able to see the problem of legitimacy as one of a matter of degree rather than as all-or-nothing. In other words, at times the state might secure some welfare for persons but not enough to meet the full requirements of the right to provision. In such circumstances, we might stop short of saying that the contract as a whole is invalidated. Rather, an alternative would rely on the idea of partial compliance. But how might this affect the state's authority in punishing? One way to consider this problem might be to see the state's authority to punish as being limited by the degree to which it has failed to meet the requirements of welfare provision. Poverty, in other words, might be seen as a mitigating factor in punishment.

In sum, Rousseau offers an argument for rights against punishment from within the social contract that is distinct from those we examined in previous

sections. In his view, when citizens are denied basic welfare rights, the social contract is dissolved. Therefore, a state that aims to punish citizens who live in poverty does so without legitimacy; indeed, those citizens have a right against any claim to legitimate state punishment. For a society in which many of those who are punished live under poverty, the implications of Rousseau's view are severe. Rousseau suggests that because such citizens are not included in the general will, the state detains them (or indeed executes them) by brute force and without any distinctive authority or legitimacy.

Rights outside the Social Contract

So far, I have argued that we can think of rights in matters of criminal justice as arising from within the social contract in two senses. First, the notion of hypothetical consent requires that we recognize that punishment needs to be justifiable to individuals conceived of as free and equal citizens. Second, the authority to punish in the first place depends on the state's guarantees of other rights of the contract. But in instances in which there is no social contract, critics will ask, is Rousseau claiming that there are no rights? His statement for instance that life itself is a conditional "gift" of the state suggests that he might view rights within the social contract as the only kinds of rights.

I believe, however, that this distorts his view. For Rousseau, rights of the social contract establish a distinctive state authority in punishing. But this does not mean that absent a contract there is no right and wrong, and that punishment is therefore never justified. Even in an unjust state that has no legitimate social contract, wanton murder would still clearly be wrong. In other words, we should not understand Rousseau's claim that rights arise within the social contract to imply an exclusive theory of rights. Nothing in Rousseau's account of rights suggests that persons lack the kind of intrinsic dignity that gives rise to rights outside of the social contract. Another way to put the point is to suggest that natural rights are restored when the social contract is dissolved.

I take his point to be that there would be no distinct state authority to punish in a state without a social contract. Punishment might be necessary and just in a state which has failed to uphold the social contract, but there would be nothing about the state as such that would give it a legitimate monopoly on punishment.

In Rousseau's view, one of the most potent dangers in the practice of punishment arises when citizens come to think that illegitimate states have legitimate power to punish. For instance, many illegitimate states which fail to guarantee welfare or to respect basic rights might still have the capacity to carry out what seems to be legitimate punishment in accordance to legal codes. According to Rousseau, such societies lack a legitimate social contract, and while they may have the trappings of law, their actions lack legitimacy. This is because illegitimate social contracts do not reflect the general will.

Rousseau worries about the potential appeal of illegitimate social contracts to societies in which the basic security and welfare functions of the state are carried out without due considerations of the general will. He worries, for instance, that those states that fail to provide welfare provision, but which use coercive powers to enforce massive inequality, will mislead the population into thinking they are legitimate because they have the trappings of a legitimate society. For instance, they might have functioning courts, a police force, and at the very least the rhetoric of the social contract. But for Rousseau, life in such states is in many ways worse than life in a state of war, since the citizens do not even recognize a problem where one in fact exists. In other words, an illegitimate state that carries out punishment might gain the trappings of a legitimate state.

In response to Rousseau's claim that illegitimate states lack a legitimate monopoly on punishment, critics might worry that my view invites a kind of double anarchy; on the one hand, citizens in such a state are subject to the abuses of their government, yet on the other hand, absent a clear authority on punishment, they are subjected to the whims of one another. Moreover, they might claim that it would be better to appeal to the authority of an illegitimate state so long as the rights of the weak are better protected. The problem with this criticism, however, is that it assumes that stability is better than instability. At times, especially under unjust regimes, destabilization might be required in order to correct the illegitimacy of the state and foment the basis for revolt. I take this to be Rousseau's point at the end of his *Discourse on Inequality,* where he claims that docility is the biggest impediment to establishing a just social order. In short, it is because citizens are duped into thinking that the state is legitimate in punishing criminals that they fail to resist its own illegitimate use of coercion.

The view that the state has no authority in punishing outside a social contract, however, does not prohibit private groups and individuals from carrying out punishment. Indeed, decentralizing the state's monopoly on coercion could make it clearer to citizens that they live in a state that should be toppled. Critics of this position will worry that such diversification in punishment will make unstable states even more unstable. It will bring about conflicts between groups because there can be no common judge about what punishments are just. Indeed, these were precisely the kinds of problems that led Locke to theorize about the need for a state in the first place. But it seems that Rousseau would argue that an illegitimate but stable state is worse than one which is unstable and clearly legitimate. The twentieth century has taught harsh lessons about how a monopoly on the use of force by an evil regime can carry out damage much worse than individuals and groups who make up a collective anarchy.

Hobbes contra Rousseau

In a recent discussion of Hobbes's justification of punishment, Alice Ristroph objects to the notion that it is possible to expect criminals to consent to their own punishment.[22] She therefore stands with Hobbes in declaring that punishment should be viewed as an institution which is necessary to the functioning of the state, but which cannot be legitimatized by reference to the interest or consent of the punished. George Kateb echoes these sentiments when he calls Hobbes "a matchless advocate for the right to life."[23] The distinction between the hypothetical ideal of consent and empirical understandings lies at the heart of the difference between Rousseau and Hobbes on punishment. Therefore, it is worth inquiring into Hobbes's view, since it appears to offer an alternative to the one I have sketched out in this essay. I argue, however, that although this account seems at first to be appealing to defenders of the rights of the guilty, upon reflection it is less successful than Rousseau's account.

Hobbes, perhaps more than any other thinker in the history of philosophy, clearly argues that if the state attempts to put an individual to death, then the individual has a moral right to resist. For Hobbes, no matter how heinous the crime one has committed, one has no moral duty to consent to his or her own death.[24] At the same time, the state has no duty to respect the prisoner's right to resist execution. His theory therefore serves as an example of an account that

avoids appeal to the consent of criminals. In examining its failings, however, I believe we can begin to see why Rousseau's account, which requires consent, is a better model for criminal justice rights.

On Hobbes's account, the right to life is rooted in a singular trait as the basis of all people's moral psychology: the desire for self-preservation. In a state of nature, the result of this trait is the well-known war of "all against all." In Hobbes's view, nature has no rules, and individuals retain all rights, including the right to kill others. In short, for Hobbes, the liberty of nature is equivalent to absolute license to do anything one pleases. One retains all rights in nature, including the right to kill another. The result of such a condition, as Hobbes sees it, is a horrible "state of war" where individual lives last a very short period of time. When combined with "science" and "reason" (which for Hobbes entail the ability to use knowledge of consequences to recognize what is in one's own rational long-term self-interest), the desire for self-preservation leads all individuals to recognize that they must give up their rights to everything in return for the protection that will be granted by an absolute sovereign. Reason and science tell individuals that it is in their rational self-interest to alienate their rights in return for security, which will grant them longer lives than they could have in nature.

According to Hobbes, it is rational to give up all rights except for the right of life. In instances in which the individual will surely be killed, Hobbes recognizes that the state is no longer providing that particular individual a benefit. Far from preserving the life of this individual, the state in fact aims to take it. The state therefore no longer serves the most basic self-interest of the individual, and he or she is justified in resisting its coercive power.[25] This individual no longer constitutes a part of the Leviathan and returns to the original state of total freedom.[26] In other words, those whom the state plans to execute enter into war against the state.

For Hobbes, the death penalty is clearly different from other punishments. In situations in which individuals are imprisoned, they remain a part of the Leviathan. They receive the benefits of life and security that they did not enjoy in nature. Hobbes thinks that because subjects being punished for non-capital offenses remain a part of the Leviathan, the state should be limited in the degree and type of punishment it inflicts on them. In these situations, there is some justification available to the individuals being punished.

The same is not true in the case of capital crimes. Traitors, for instance, are seen as returning to the state of war, therefore freeing the state from any limits on their punishment. The traitor "suffers as an enemy" and is akin to an individual who never was a part of the Leviathan in the first place.[27] Indeed, Hobbes suggests that since enemies are in a state of war with the Leviathan and are divided from it, what is done to them is not even to be called punishment. Hobbes explains, "For the punishments set down in the law, are to subjects, not to enemies; such as are they, that having been by their own acts subjects, deliberately revolting, deny the sovereign power." As a result, "all infliction of evil is lawful" in regard to these outsiders.[28] The fact that these enemies are outsiders, however, does not eliminate their right of life. In fact, their very separation from the Leviathan is what grants them this right of nature.

However, although Hobbes argues that the individual retains the moral right to resist the state, he does not suggest that the state must recognize or respect this right. On the contrary, for Hobbes, in circumstances in which the death penalty is necessary to keep society stable, it would be imprudent for the state not to execute individuals despite their right to life.[29] Furthermore, while condemned individuals retain a right of life following their criminal act, these same individuals have, previous to that act, consented to a government that will execute its members when necessary. Hobbes writes, "For though a man may covenant thus, unless I do so, or so, kill me; he cannot covenant thus, unless I do so or so, I will not resist you, when you come to kill me."[30] For Hobbes, it is rational at the moment of contract for individuals to recognize that a heavy-handed sovereign should impose the death penalty if necessary to keep order among naturally and continually self-interested citizens who are often filled with personal and political passion. Nonetheless, because self-interest is the basis of the contract, one retains the right to reject the contract's terms when they lead to one's execution. Capital punishment, after all, does not benefit the actual person who is to be executed.[31] Hobbes reasons that since the primary purpose of the state is to protect life, it follows that:

> there be some rights, which no man can be understood by any words, or other signs, to have abandoned or transferred. As first a man cannot lay down the right of resisting them that assault him by force, to take away his life; because he cannot be understood to aim thereby, at any good to himself.[32]

The implication of Hobbes's view is that while, in certain circumstances, the state might prudentially need to impose the death penalty, the individual can never be said rationally to consent to his or her own death. The condemned could never be obligated to commit suicide or to take a compliant and apologetic walk down death row. As Hobbes puts it, "It is one thing to say, kill me if you please; another thing to say, I will kill myself or my fellow."[33] We are left then with the conclusion that it is right for the condemned to resist the state when it attempts to execute and at the same time right for the state to execute individuals when necessary to keep order.

The image of the resister rather than the contrite and compliant prisoner is attractive to theorists who want to argue against the death penalty. The resister recognizes that he or she should not simply lie down in the face of an injustice. He or she refuses to comply in the face of impending doom. Despite the attractiveness of the image, however, Hobbes's theory fails because it rests on the model of capital punishment as akin to a war between the state and the individual. Although the right of resistance to execution is recognized by the condemned and by the theorist, it has no moral weight on the actions of the state. The state has no duty even to recognize the existence of this right. In fact, the metaphor at work here—namely, that the state and the individual are at war—could even suggest that the state has a duty to ignore the moral right of life in instances in which recognizing it will undermine stability. After all, giving notice that all have the right to resist might undermine the state's ability to dole out executions when it is necessary to do so. But the problem with this account is that it turns rights into only hollow pronouncements with no political implications or payoffs. For Hobbes and his followers, the rights of criminals do not correspond to any duties of the state. The invocation of rights against punishment by criminals is worthless when it comes to any duties the state might have to respect these rights. Therefore, such an account does not generate what defenders of criminal justice rights generally seek out: an account of why state power is rightly limited. However, this is precisely the kind of account that I have argued is well developed in Rousseau's argument about the rights of citizens within the social contract.

The contrast between Hobbes and Rousseau on matters of citizenship is not of mere historical importance. It highlights the importance of Rousseau's theory of the social contract for limiting state coercion, regardless of whether

it is labeled "punishment" or "regulation." In his contribution to this volume Alec Ewald worries about the extent to which the harm imposed by the regulation and even the revocation of citizenship by the contemporary state might be missed and even sanctioned in contemporary jurisprudence. Rousseau, I have suggested, offers a response to these kinds of worries by establishing a framework for justifying all state coercion, regardless of its label, by appeal to the social contract and the "consent" of citizens. Importantly, his framework requires that all punishments be justified by appeal to the sovereign standard of the general will. For the purposes of this volume, however, perhaps even more important is the contrast with Hobbes that I have elaborated on in this section. Citizenship itself is not a status that can be alienated because of the bad actions of some individuals. Rather it is a status that calls for justification to the individual even when he or she is guilty of the worst crimes. Attempting to revoke this status, as Hobbes suggests the state should in the face of serious crime, is not an option on Rousseau's account. Rather, Rousseau writes in the spirit Earl Warren would reflect in the quotation from his majority opinion in *Trop v. Dulles,* a case overturning the decision to strip a soldier of his citizenship to punish the crime of deserting the army: citizenship is a status that does not "expire" with bad behavior.[34] Rousseau teaches us why it is an entitlement of all subject to coercion to be treated as a citizen, with the entailment that all coercion must be justifiable to all.

Conclusion

Rousseau is thought by many to be an opponent of individual rights. In particular, he is often seen as an opponent of the rights of the guilty. This essay, however, has suggested why it is a mistake to see him in that way. Although the idea of a social contract is a collectivist idea, it is conceived in relation to a collectivity of individuals. The idea of a requirement of individualized consent to coercion by those most adversely affected by it, in particular criminals, serves for Rousseau as a way of pointing to why individual interests have to be respected in the social contract. Although many thinkers have overlooked this concept of consent, it forms the foundation of a regime of rights within the social contract.

I have suggested two ways in which these rights manifest themselves in re-

gard to matters of criminal justice. First, the idea of consent itself means that the state has the burden of showing that punishment is justifiable to all individuals. This idea of unanimity takes seriously the idea of limits on how we can treat each citizen considered not only as an equal, but also as having individualized interests. The requirement for unanimity rules out sacrifice of the individual for the general interest, and it mandates a justification of punishment that can appeal to each individual conceived of as a free and equal citizen. Second, Rousseau's view links rights of punishment to other guarantees of the social contract, in particular a right of welfare. As such, he situates punishment within the wider context of political matters pertaining to social justice in political theory.

Notes

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1. Joel Feinberg, "The Classic Debate," in *Philosophy of Law*, 5th ed., ed. Joel Feinberg and Hyman Gross (Belmont, CA: Wadsworth, 1995).

2. The arguments of this introduction about the need for such a historical inquiry share much with my introductory comments about contemporary approaches to the social contract and its relevance for punishment in "The Rights of the Guilty: Punishment and Political Legitimacy," *Political Theory* (April 2007).

3. Jean-Jacques Rousseau, "The Social Contract," in *The Basic Political Writings: Discourse on the Sciences and the Arts, Discourse on the Origin of Inequality, Discourse on Political Economy, On the Social Contract*, trans. Donald A. Cress (Indianapolis, IN: Hackett Publishing Company, 1987), 159.

4. See George Kateb, *The Inner Ocean: Individualism and Democratic Culture* (Ithaca, NY: Cornell University Press, 1992), 4–5, 201. See also George Kateb, *Human Dignity* (Cambridge, MA: Harvard University Press, 2011). For an argument that draws on Hobbes and Kateb, see Alice Ristroph, "Respect and Resistance in Punishment Theory," *California Law Review* 97 (2009) 601–32. For a criticism of the idea of inherent dignity, see Hugo Adam Bedau, "Abolishing the Death Penalty Even for the Worst Murderers," in *The Killing State: Capital Punishment in Law, Politics and Culture*, ed. Austin Sarat (New York: Oxford University Press, 1999).

5. Rousseau, "On the Social Contract," in *The Basic Political Writings*, 147.

6. See, in particular, Habermas, "Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism"; and Rawls, "Reply to Habermas," *Journal of Philosophy* 92 (March 1995).

7. More generally Rousseau distinguishes between "government" and "the sovereign." For a discussion of this distinction, see Tracy B. Strong, *Jean-Jacques Rousseau: The Politics of the Ordinary*, 2nd ed (Lanham, MD: Rowman and Littlefield, 2002).

8. In my *Democratic Rights: The Substance of Self-Government* (Princeton University Press, 2007), I distinguish between what actual "persons" think about politics from what ideal "citizens" should think. This terminology is consistent with Rousseau's. See, in particular, my discussion in chapter 3.

9. Rousseau, "Discourse on Political Economy," in *The Basic Political Writings*, 122.

10. John Rawls, introduction to *Political Liberalism* (New York: Columbia University Press, 1996), xlvi.

11. T. M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1999).

12. Jean-Jacques Rousseau, "On the Social Contract," in *The Basic Political Writings*, 159.

13. Ibid., 160.

14. I am grateful to Martha Umphrey for raising this issue.

15. Jean-Jacques Rousseau, "Discourse on Political Economy," in *The Basic Political Writings*, 122.

16. Ibid., 124.

17. Rousseau, "Discourse on the Origin of Inequality," in *The Basic Political Writings*, 69.

18. Rousseau, "On the Social Contract," in *The Basic Political Writings*, 170.

19. Rousseau, "Discourse on Political Economy," in *The Basic Political Writings*, 127.

20. Ibid.

21. Ibid., 124.

22. Ristroph, "Respect and Resistance in Punishment Theory."

23. Kateb, *The Inner Ocean*, 184.

24. This does not entail that an individual would have an obligation to resist.

25. This does not mean that all people will resist. Hobbes would label those who do not irrational and would claim that they are acting contrary to human nature.

26. On Hobbes's view this means that one is no longer in contract with other subjects. The contract among subjects forms the Leviathan.

27. Thomas Hobbes, *Leviathan* (London: Collier-Macmillan, 1962), 231.

28. Ibid. One complication with this reading does arise from the fact that Hobbes includes capital punishment on his list of punishments. This suggests that capital crime could have some limitation and could be given to subjects. Nowhere does he make the

case for this. I am left to conclude that it is simply an anomaly not resolved by his theory. I would like to thank Glen Newey for helping me to elucidate these points.

29. The obligation of the state to execute is not absolute. It rests on the existence of empirical circumstances that make capital punishment necessary. Through his statements about the need for state execution, it is clear that Hobbes thought these circumstances existed in his time.

30. Hobbes, *Leviathan*, 110.

31. Hobbes's focus on the notion of reason as a forward-looking process by which an individual understands the benefits he or she will receive is important here. For Hobbes, reason causes individuals to contract into the sovereign and in all cases except for death shows individuals that they have good reason to be restrained by the Leviathan. In prison, for instance, one knows that he or she will continue to be kept alive and will receive food. Death is different precisely because one no longer receives these benefits.

32. Hobbes, *Leviathan*, 105.

33. Ibid., 164.

34. 356 U.S. 86 (1958).

Collateral Consequences and the Perils of Categorical Ambiguity

ALEC C. EWALD

The United States is about a generation into an unprecedented experiment in mass incarceration. The pace of change has been remarkable: the U.S. now imprisons its citizens at five times the rate it did as recently as 1970, and at a far higher rate than most democracies. Our dramatically expanded penal system shapes American racial and class inequality, as incarceration percentages for blacks are eight times higher than those for whites, and the typical prisoner has not completed high school. On a human scale, the prison boom has effected "a historically significant transformation of the character of adult life" for millions of Americans.[1] More than 600,000 ex-offenders are released from prisons and jails in a typical year[2]—a figure approaching that of the entire population of the smallest U.S. states.

Policy-makers and academics are only now coming to grips with the distortions wrought upon some of our most fundamental social and political measurements by what Marie Gottschalk calls the new "carceral state."[3] For example, the census counts inmates as residents of the prison town, a practice that appears to skew apportionment and policy-making at the county and state level.[4] Voter turnout figures need adjustment because the voting-age population on which those figures were historically based now includes so many people who are actually *ineligible* to vote under state law because of a criminal conviction.[5] And unemployment rates in the U.S. and Europe cannot be directly compared, because incarceration removes so many people from the American labor pool.[6] All told, our carceral institution now exerts "a salience and reach that are wholly unprecedented in American history as well as unparalleled in any other society."[7]

Much of that reach today comes from a set of penalties rarely formally de-

fined as punishments: "collateral" sanctions, restrictions called "indirect" consequences of a criminal conviction and that "attach to, but are legally separate from, the criminal sentence."[8] As many as 16 million Americans have been convicted of a felony,[9] and thus may have their ability to work, serve on a jury, vote, own a firearm, join the military, seek federal student loans, receive food stamps, and live in public housing curtailed or eliminated altogether. Scattered throughout state and federal law, rarely contained in criminal codes, and flowing from "complicated intersections of state, quasi-state, and private associations,"[10] collateral sanctions expand the penal institution in both place and time—beyond the prison walls (and probation offices) and beyond the sentence as well. Indeed, these restrictions sometimes place heavier, longer-lasting burdens on an offender than does the formal sentence.[11] Some collateral consequences are quite old, but state restrictions increased in number between 1986 and 1996; both the American Bar Association (ABA) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) conclude that federal and state collateral sanctions have expanded in "variety and severity" in the last twenty years.[12]

Yet despite their wide impact and recent growth, collateral consequences remain in a cloudy legal gray area, exerting severe and long-standing punitive effects but not legally defined as punishment and absent from even excellent new texts on sentencing law.[13] A fundamental ambiguity persists within American collateral-consequences policy: whether such sanctions are punitive, regulatory, or some combination of the two. Most restrictions are enforced not by the criminal-justice system proper, but by executive-branch administrative agencies, state and local bureaucracies, or professional boards, often years and sometimes decades after sentencing. Thus, many jurists and some commentators conclude that collateral sanctions are fundamentally regulatory: meant to ration scarce resources or ensure that only certain citizens are eligible for a given profession, for example. In the words of one nineteenth-century commentator, "[P]ublic protection and not individual punishment" is their aim.[14]

The line between criminal punishment and civil regulation has never been sharp or easily drawn. But in the last few decades, "[T]he distinction between criminal and civil law seems to be collapsing across a broad front," as Mary M. Cheh wrote in 1991.[15] Drawing the line has "become impossible," wrote Susan R. Klein in 1999. Governments collect "civil" forfeitures and confiscations freely,

and numerous "punitive civil sanctions" imposed in noncriminal proceedings blur the line between civil remedy and public punishment.[16] What Katherine Beckett and Steve Herbert call "architectural modes of exclusion" spreading through U.S. cities, such as new uses of trespass authority and off-limits orders, also "rest upon a complex mixture of civil, administrative, and criminal legal authority."[17]

Of the many policy arenas now merging punishment and regulation, post-sentence collateral sanctions are among the most consequential. This is not to gainsay the human, social, and philosophical importance of other civil/criminal policies: new forms of "socio-spatial exclusion" represent a troubling modernist recapitulation of banishment,[18] while civil forfeiture and civil confinement (particularly the confinement of sex offenders) impose enormous costs on those affected and raise grave ethical questions. Similarly, the law and practice of deportation (now imposed on nearly 2 million people a year in the U.S.) also blends punitive and regulatory features. But in the number of people it affects, the range of activities it covers, and its complex, fascinating legal structure, the expanding collateral sanctions regime represents a major development in American political life. The late political philosopher Judith Shklar concluded that at the core of American citizenship are the ability to work and the right to vote.[19] Millions of Americans now lack the ability to participate in those activities, and many others live in a darkened status Nora V. Demleitner calls "internal exile."[20] No longer incarcerated, they walk through society free of any formal criminal supervision but deprived by piecemeal state and federal rules of core capacities of citizenship.

This chapter explores collateral sanctions' awkward straddle of punitive and regulatory aims. In showing that these restrictions do not fit clearly into either category, I hope to demonstrate what I believe are the real dangers of that ambiguity. The harmful consequences of our massive, murky, ill-defined collateral-sanctions regime extend well beyond those directly affected, rendering citizens unable to judge the efficacy of such restrictions and undermining core commitments of the American political order. While I do conclude that many such restrictions seem quite unlikely to fulfill their purported objectives, my core claim is not that collateral sanctions are necessarily bad policy—but instead that our confusion over their character and purpose actually keeps us from knowing *how* to judge them in the first place.

To begin, I offer the detailed account of current U.S. collateral-consequence policies necessary to enable close inquiry into the themes most interesting to us here: how collateral sanctions combine punitive and regulatory aspects, feature both centralized and dispersed characteristics, and alter the content of American citizenship. The second section explains the ambiguity surrounding collateral consequences' blend of regulatory and punitive elements. While U.S. courts have defined almost all such restrictions as civil and regulatory, commentators are virtually unanimous in emphasizing their punitive effects. Yet collateral sanctions do not fit comfortably into any of the frameworks by which we understand criminal justice or regulatory policies. Several core concerns of the criminological literature, such as the contemporary desire to denigrate and stigmatize offenders, the move toward "actuarial justice," and the pervasive desire to reduce costs, do capture important elements of American collateral sanctions policy. Similarly, the "new regulatory" account, in particular its emphasis on "de-centered" policy in post–welfare state industrial societies, links up well to some elements of collateral consequences today, but runs afoul of others.

I close the chapter by arguing that collateral consequences represent a damaging new manifestation of a virulent exclusionary tradition in American citizenship law. Denying millions of people full civic standing and autonomy is not new in American political life. What is novel is that collateral sanctions withdraw indefinitely core attributes of citizenship, and do so in a formal but shadowy way through the cumulative effects of scores of scattered, quasi-penal policies whose ambiguous legal status has in effect insulated them from necessary public, legislative, and judicial examination.

The American Collateral Sanctions Regime

We need to look closely at contemporary American collateral consequences in order to appreciate these restrictions' quantity and reach, their diverse, complex legal structures, and their varying mechanisms of implementation.[21] The outline that follows moves from center to periphery, as it were, beginning with those consequences automatically imposed on all offenders by federal law and moving out through greater layers of delegation, discretion, and local authority. Though this tally may appear lengthy, in fact a truly comprehensive assessment

would consume this entire volume: a compilation published in 2009 by the American Bar Association lists over one hundred different federal statutes.[22]

First, a few terminological clarifications. Some authors employ the term "collateral consequences" to capture the effects of incarceration on the life course, employment prospects, and well-being of the offender, as well as on families, communities, and socioeconomic groups.[23] Tonry and Petersilia, for example, identify laws restricting political and economic behavior as only one of six different kinds of "collateral effects of imprisonment."[24] Without minimizing the importance of such familial and social effects, I focus on public policies: ways "government intervenes to perpetuate the second-class citizenship of ex-offenders."[25] (As will become clear, even drawing this line turns out to be difficult.) Meanwhile, despite the common emphasis on felony offenders, several of the most serious collateral consequences—including deportation, eviction, temporary loss of custody of one's children, and job suspension—are routinely imposed not only on misdemeanants but also on people merely arrested or charged. Eviction from private or public housing in New York City, for example, may follow the mere issuance of a search warrant, if the relevant District Attorney believes narcotics activity is present.[26] And while I sometimes refer to "former prisoners," the full slate of collateral sanctions follows anyone convicted of a felony, even those who never see the inside of a cell. Finally, implicit in virtually all areas of collateral-sanctions law is that these restrictions extend after the sentence proper has been completed.

Three important federal collateral sanctions operate automatically and indefinitely on anyone with a felony conviction. By statute, federal grand and petit juries are closed to anyone convicted of a felony in federal or state court, unless and until that person has received a state or presidential pardon.[27] The same is also true of firearms rights—but those convicted of some business-practice felonies are exempted, and the state of the law is quite complicated. For example, the Bureau of Alcohol, Tobacco, and Firearms is authorized by statute to restore federal firearms privileges, but since 1992 it has not been allowed to spend any money on such restorations.[28] A third disqualification operating automatically and indefinitely on all felons is ability to serve in the military, and military pensions may also be forfeited by the incarcerated; however, unlike bans on jury service and firearms ownership, ineligibility for military service may be lifted by the secretary of a given branch of the armed forces.[29] This has

happened with some frequency as the all-volunteer army fights wars in Iraq and Afghanistan.

While about a dozen different statutes disqualify people convicted of *certain* crimes indefinitely and automatically from the right to be elected to federal office, this sanction does not apply to all felons.[30] The same is true of many federal occupational-license statutes, which restrict access to certain professions for people guilty of specified offenses. Webb Hubbell, the former Arkansas Supreme Court Chief Justice convicted of tax and mail fraud after the Whitewater investigation, found that having been convicted of a federal crime (and particularly one involving deception), "almost any job requiring a federal license" was now off-limits, including working in the merchant marine, doing export business, or being a locomotive engineer. Not only was he barred from serving as an administrator of any federally insured bank, but he could not be an employee of such an institution; he could not work in the administration of any labor organization for thirteen years after the conviction. Multiple agencies, including the Commodities Futures Trading Commission, the Securities and Exchange Commission, and Health and Human Services, could refuse to allow him to work in any partly federally funded facility—"I couldn't even sweep the floors of a nursing home," as Hubbell put it.[31]

Such federal occupational and licensing bans vary, coming in at least four varieties of imposition, specificity, and release. First, some operate automatically and exclude from certain jobs—including some government jobs—everyone convicted of certain offenses unless and until pardoned. The professions most explicitly restricted by federal law include finance, insurance, union work, health care, child care, and transportation work.[32] Second, other exclusions are also automatic, but may be lifted by an executive agency even if the person in question has not received a pardon. A third type of disqualification is authorized by federal law, but does not automatically accompany a conviction and must be imposed by the sentencing court. A person convicted of bribing a public official, or the official accepting such a bribe, may be disqualified from federal office by the sentencing court. More generally, a sentencing court may impose occupational restrictions as a condition of probation or other release. Both federal statutory law and sentencing guidelines allow judges considerable discretion to decide which restrictions are "reasonably necessary to protect the public," and how long such restrictions are to last in a given case. Finally, a few

statutes do not *themselves* ban former felons from occupations, but explicitly authorize federal agencies to *consider* such offenses when making licensure decisions. Some disqualifications in each category appear to be indefinite, while others may be for only a set period.[33]

Some peer nations, including Canada, Australia, and the United Kingdom, have incorporated protections for former offenders into antidiscrimination and human-rights laws.[34] For example, under the UK's Rehabilitation of Offenders Act, a conviction is "spent" after a certain period of time, and may no longer be grounds for refusing a person employment.[35] By contrast, the U.S. has no federal statutory prohibition on private-employer discrimination against people with former convictions. The Civil Rights Act of 1964 prohibits hiring discrimination on the basis of race or color, and the Equal Employment Opportunity Commission (EEOC) has issued guidelines stating that where hiring choices shaped by former-offender status disproportionately impact racial minorities, they may violate Title VII of the act. However, this remedy is available only to racial minorities and is difficult to enforce.[36]

Various federal benefits are automatically withdrawn from people with criminal convictions under diverse statutes, most of them enacted since 1988. Even misdemeanor drug offenders lose access to federal student loans, grants, or work assistance (with increasingly lengthy periods of ineligibility for additional offenses). Despite clear evidence that they reduced recidivism, college prison programs were restricted by Congress, in large part by curtailed access to Pell Grants—drug offenders were stripped of eligibility in 1988, those sentenced to life in 1992, and all state and federal prisoners in 1994.[37] Later statutes made drug offenders ineligible to participate in the National Community Service Trust Program or to receive the Hope Scholarship Tax Credit.[38]

One set of federal collateral sanctions is established with unusual clarity in American law. Established under the Anti-Drug Abuse Act of 1988, the Denial of Federal Benefits Program is run by the Bureau of Justice Assistance (BJA) within the Department of Justice. The program empowers state and federal courts to deny selected benefits—including loss of access to grants, contracts, financial aid, and licenses—to people convicted of narcotics possession or more serious drug offenses.[39] Unlike the restrictions summarized above, here disqualification is squarely described as a "sentencing option for federal and state courts." Indeed, the bureau specifically identifies its character and pur-

poses as penal: "The denial of federal benefits is a sentence pronounced by a state or federal judge as a result of a conviction for trafficking or possession of drugs," explains a BJA document. Denial of "most taxpayer-supported economic benefits," the DJA notes, is an "intermediate step" that helps to "enhance a drug conviction's impact" and also "close[s] the gap between incarceration and probation."[40] In addition to its retributive goals, the program aims at *preventing* crime, the DJA explains, particularly because it "alerts casual drug users to the fact that…"

> as students, they can lose their student loans; as broadcasters, they can lose their Federal Communications Commission licenses; as physicians, they can lose their authority to prescribe medicine; as pilots they can lose their Federal Aviation Administration licenses; as business owners, they can lose their Small Business Administration loans or the right to contract with the Federal Government; and as researchers, they can lose medical, engineering, scientific, and academic grants.[41]

Judges do not have unlimited discretion in imposing these restrictions: housing, welfare, Social Security, and veterans' benefits cannot be withdrawn under this statute. Moreover, time limits are placed on disqualifications: one year for a first possession offense, up to five years for second offenses; those convicted of trafficking crimes may be declared ineligible for five- and ten-year periods for first and second convictions but are rendered permanently ineligible by a third conviction.[42]

In addition to its direct statement of penal aims, the program also differs from most other collateral sanctions regimes in that it maintains its own database. Where most such restrictions rely on some combination of disclosure, general-use criminal databases, and ad hoc research, the BJA's "Denial of Federal Benefits Program Clearinghouse" compiles and maintains a list of convicted individuals and which benefits are denied each of them. The database held about seven thousand cases as of 2001.[43] As the BJA explains, not just "federal agencies and lending institutions" but also "nonfederal persons" access the database as needed—indeed, federal agencies as well as organizations in charge of certain federally funded awards or benefits "are required to consult the Debarment List" prior to allocating funds.[44]

A final federal sanction is deportation of noncitizens, a particularly complex and weighty policy—and one whose doctrinal status changed in 2010 due to a landmark Sixth Amendment decision by the U.S. Supreme Court. As the Court

has acknowledged, deportation is "at times the equivalent of banishment or exile."[45] Several federal statutes list crimes that subject aliens and permanent residents to mandatory deportation, including narcotic offenses likely to bring only relatively minor sentences for citizens.[46] Legal permanent residents convicted twice of crimes of "moral turpitude" may be removed from the country regardless of how long they have lived in the U.S., and regardless of whether those offenses are felonies or misdemeanors; the Immigration and Naturalization Service (INS) may deport any alien convicted of an aggravated felony at any time.[47] Remarkably, more than 900,000 people were deported from the U.S. because of their criminal status from 2000 to 2009.[48] Formally, deportation is sometimes imposed at the discretion of the INS, immigration judges, and the Board of Immigration Appeals, rather than automatically. Until the Supreme Court's decision in *Padilla v. Kentucky* (2010), that fact had been key to defining deportation as an "indirect" rather than "direct" sanction.

In *Padilla*, the Court ruled that the Sixth Amendment requires defense counsel to apprise their noncitizen clients of the possible deportation consequences of a conviction. Noting dramatic changes in recent decades to federal immigration law, the Court observed that deportation is now "virtually inevitable" and "nearly an automatic result for a broad class of noncitizen offenders." Those facing deportation once had avenues short of Presidential pardon by which to win relief, but judges, the INS, and the attorney general have seen their relief authority severely restricted by a series of Congressional statutes. Calling deportation a "harsh" consequence and a "drastic measure," the *Padilla* Court found that its automatic nature now gives deportation such a "close connection to the criminal process" that lawyers fail their Sixth Amendment duties if they fail to inform noncitizen clients—particularly those engaging in plea bargaining—of their jeopardy. Notably, the Court added deportation advice to counsel's Sixth Amendment duties while calling this sanction "uniquely difficult to classify as either a direct or a collateral consequence."[49]

Thus, a wide range of rights and benefits are withdrawn under direct authority of national law, some automatically and others at the discretion of judges and bureaucrats. Some explicitly identify regulatory aims and a few openly pursue punitive goals, but most do not articulate their purposes. Many restrictions in national law, meanwhile, operate in a very different way, one mediated by the American federal system.

Federal law grants states a measure of flexibility in how they impose restrictions in at least four major areas: availability of driver's licenses; provision of public assistance and food stamps; access to public housing; and parental rights. Under a 1992 law, states must either remove driver's license privileges for at least six months from a person convicted of any drug offense, *or* enact both legislative and gubernatorial statements opposing this rule. Failure to do one or the other would result in a 10 percent reduction in certain federal highway funds.[50] In essence, here the federal statute erects a default policy, requiring states to actively *refuse* to strip driving privileges from drug offenders. States have responded in varying ways: as of 2003, twenty-seven had opted out of the suspension requirement, seventeen employed a six-month penalty for first offenders, four put in place a restriction lasting longer, and two states employed shorter bans.[51]

A similar structure—federal default policy of exclusion, with an "opt-out" avenue—exists with regard to cash assistance and food stamps. Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, anyone convicted of a drug felony is permanently barred from these benefits. But states are allowed to opt out of that exclusion, either entirely or in part, and in the years since have erected widely varying policies.[52] Twelve states have eliminated the TANF/food stamp ban entirely; twenty-three employ the ban, but limit it in significant ways, imposing it only on more serious offenders or facilitating restoration via treatment, testing, or the passage of time, for example; and fifteen states adopted the federal ban without modification.[53]

Housing policies feature a different mix, with local agencies authorized to wield a good deal of discretion. Federally funded housing authorities are required by federal law to evict and permanently exclude anyone convicted of certain sex offenses and narcotics crimes. Other statutes, however, enable housing authorities to determine not only which crimes bring eviction and exclusion, but for how long, as well as whether arrests not leading to conviction merit exclusion; notably, an offender's family members may also be evicted, even if they commit no crime.[54] Federal law includes classic regulatory language: a public housing agency may "establish standards that prohibit admission" of anyone the owner thinks "may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents."[55]

Parenting rights are also restricted by federal law. The Adoption and Safe

Families Act of 1997 requires states to perform background checks on potential adoptive and foster parents in order to receive Social Security payments, and recommends that states bar certain classes of offenders from being foster or adoptive parents permanently and drug offenders for five years. Until a 2006 statute removed this flexibility, states were allowed to follow those rules or opt out and create their own policies; thirty-five weighed each applicant's offense individually, while fifteen barred all people with felony records from adoptive or foster parenting.[56] (Many states consider a felony conviction evidence of a parent's "unfitness" to supervise or care for their children, with state policies varying both in terms of the length of any such suspension and which offenses it applies to.)[57]

Numerous sanctions exist in national law, then, some implemented with considerable discretion and variation by federal agencies and state governments. But state law proper contains even more restrictions on the rights, benefits, and privileges available to former offenders—hundreds in some states, according to scholars who have sought to tally them.[58] These include core political activities such as jury service. State courts handle the vast majority of American criminal and civil trials, and most states join the federal government in preventing former felons from serving on juries. As of 2003, thirty-one states barred felons from juries.[59] Meanwhile, the policy of barring felons from voting—"felony disenfranchisement"—has received a great deal of attention in recent years, and these laws too vary across state lines. The U.S. Supreme Court has said all state criminal disenfranchisement laws are constitutional, excepting only those explicitly motivated by racial bias.[60] As of 2010, two states allow incarcerated felons to vote; in thirteen, anyone who is not incarcerated may vote, but felons in prison cannot; in twenty-four, anyone incarcerated as well as some people on parole and/or probation may not vote; and in eleven states, at least some people no longer under sentence are barred from voting, either during a waiting period or indefinitely.[61] State notification and restoration rules amplify the variation.

State employment restrictions can be placed into three general categories. First is public employment—six states bar all felons from government jobs permanently, while one does so for a three-year period and six others exclude only those convicted of certain offenses.[62] Second, many states preclude felons from working in specific occupations. Some of these positions involve vulner-

able populations, such as children or the elderly, but most do not. Third, states regulate occupational licensing requirements, and many of these standards either explicitly reject those with previous convictions or require that an applicant possess "good moral character," a standard former offenders are often said to fail. By one tally, something like six *thousand* occupations are licensed in at least one state; jobs closed to a person with a felony conviction typically include pumping septic tanks, tending bar, mending teeth, and cutting hair.[63] The result is that only someone able to hire an attorney or other expert to "guide you through a panoply of bureaucratic hoops" is likely to win a state license.[64]

The legal landscape regarding employment is complex. Rather than a black-or-white world in which former offenders are completely barred from scores or hundreds of professions, the reality is that a given offender *may* face restrictions in a given professional field, which *may* be waivable after a certain period, depending on various discretionary decisions and the details of state law and administrative policies. Fourteen states prohibit employment discrimination against qualified applicants *solely* because of criminal history; two-thirds of states have enacted some legislation requiring that a conviction be "reasonably" or even "directly" related to the work in question—for example, in order to justify termination or refusal to hire. In many states, however, that restriction applies only to public employers and licensing agencies.[65] But the most comprehensive analysis of these laws concludes that while they do "look good on paper," their force is severely limited by the existence of a wide array of separate licensing requirements and employment restrictions and, particularly, by the absence of enforcement mechanisms.[66]

The question of licensure brings us to the expanding use of criminal background checks by employers. Ample evidence shows that a criminal record "presents a major barrier to employment."[67] Private employers' decisions might seem to fall outside the ambit of collateral sanctions proper, if collateral sanctions are defined as consisting only of explicit governmental exclusions.[68] But in fact, consideration of a criminal record by private employers is an activity fully visible to and regulated by public policy. In effect, various state policies either tacitly or explicitly *authorize* the rejection of a job applicant because of past criminal activity.

First, over the last two decades states have increasingly funded and facilitated the on-line availability of criminal history information, either by main-

taining databases themselves or selling data to private companies which charge a fee for searches. States then need to decide how much arrest and conviction information will be available—to whom, for how long, and with what removal or closure options after the sentence, for example. As of 2006, fourteen states allowed unrestricted access to all criminal records, while others limited such access in various ways, such as by only providing records of those currently serving sentences.[69] As many as 71 million Americans have arrest records on file in various state databases.[70] Naturally, many of those arrests never resulted in a conviction. But in thirty-six states, public and private employers and licensing agencies may inquire about and consider arrests that never led to a conviction in making hiring decisions.[71] (In effect, not conviction or even indictment but *arrest* may legally be treated as proof of culpability and bad character.) Other states have put in place several different levels of protection for people with criminal histories, ranging from sealing of arrest records not leading to conviction to clearing and expungement of convictions.[72]

Employer background checks sit at the margin of collateral sanctions as I am defining the term here. Unlike other consequences of felony convictions, private-employer hiring decisions are not themselves state actions, yet they are behaviors regulated by government. As one critic writes, this aspect of the collateral sanctions "rule regime" represents "not merely the government stepping aside to allow private discrimination against ex-offenders, but rather active government construction and maintenance of excessive barriers blocking ex-offenders' re-entry into productive society."[73] Indeed, U.S. courts have agreed that some such barriers are excessive, invalidating them as violations even of the deferential rational-basis standard courts traditionally employ when non-fundamental rights of unprotected classes are limited. In these cases, courts have called for more limited policies that establish a closer connection between the nature of the offense and the public-safety interest in a particular profession.[74] But the strongest such rulings have related to flat bans on *public* employment of all former felons, leaving other restrictions in place.

A similar state of affairs exists with regard to private rental housing. Bars on access to federally funded housing for people with criminal convictions clearly qualify as collateral sanctions. But only about 5 percent of all rental households in the U.S. are in public housing.[75] Meanwhile, private landlords have dramatically expanded the use of criminal background checks to exclude potential ten-

ants—sometimes after having undergone "landlord training programs" run by local police departments, which may grant official certification to property owners completing the training.[76] Thus governments endorse, shape, and support this restriction: a federal program allows local housing authorities to exclude former offenders, and private property owners are sometimes trained by police in how to avoid renting to people with criminal records.

Most collateral sanctions lack an expiration date, making it difficult for a former offender ever to remove the taint of criminal conviction: serve their time, pay their debt, and rejoin society as a citizen in full. States do offer some procedures by which a former offender may petition a court or other office to lift *some* burdens accompanying a state conviction, whether by sealing a record, expunging a conviction, awarding certificates of rehabilitation or certificates of relief, or granting a full pardon. But as former U.S. pardon attorney Margaret Colgate Love shows, each of these procedures offers only limited relief: "[T]here is not a single jurisdiction in the country whose criminal law incorporates a formal mechanism for recognizing rehabilitation that is routinely available to all offenders who can qualify."[77] Differing bureaucratic means of addressing collateral sanctions, and different uses of common terms, can bring serious costs to former prisoners. Despite the common use of the term "ex-felon," for example, there really is no such status: a person must assume she is a "felon" forever. So, for example, someone able to win a business license despite a long-ago conviction is still subject to numerous other restrictions and faces serious criminal charges if she abridges those limits.[78]

A "Potential Hybrid": Collateral Sanctions and the Criminal/Civil Divide

In the 1958 case *Trop v. Dulles*, the U.S. Supreme Court declared that disenfranchisement—an old and archetypal collateral sanction—aims to "designate a reasonable ground of eligibility for voting," and so "is not a punishment but rather a non penal exercise of the power to regulate the franchise."[79] *Trop*'s classification of the sanction has become something of an "interpretive fact," to borrow Ronald Dworkin's term: a conclusion for which judges need no evidence. As David Faigman points out, though, interpretive facts can be dangerous, resisting reexamination and threatening to "petrify" despite new data.[80] In

the half-century since *Trop*, "real-world facts"[81] have transformed the impact of collateral sanctions, but *Trop's* view of collateral consequences remains the consensus among American courts (though not without exception). Because such restrictions are "administered largely outside of the criminal justice system," most courts have treated them as "mere civil regulation."[82]

"[I]ndividuals are hurt," as one nineteenth-century commentator summarized the judicial view, but "such hurting is only an incident to the purpose of the statute and is not, properly speaking, a punishment at all."[83] The tension in that language illustrates the deep uncertainty surrounding collateral-sanctions' straddle of the civil and criminal law. At the most general level, there is wide agreement that these policies combine both penal and regulatory elements, but beneath the surface lies sharp disagreement and a great deal of variation.

Though most doctrine is of newer vintage, the U.S. Supreme Court has wrestled with the regulatory/penal conundrum at least since the Civil War. In the 1866 case *Ex Parte Garland*, for example, a bare majority of the Court rejected a statutory requirement that lawyers admitted to the Supreme Court bar take a loyalty oath excluding former Confederates and their allies. The Court concluded the oath requirement was actually a punishment—and an unconstitutional ex post facto one. "[E]xclusion from any of the professions or any of the ordinary avocations of life for past conduct," wrote Justice Field, "can be regarded in no other light than as punishment for such conduct." Dissenting, Justice Miller argued forcefully that taking an oath was no trial, and restriction of the bar no punishment—no more so than were the requirement that the President be native-born or that the franchise be restricted to whites.[84]

In the century and a half since *Garland*, U.S. courts have erected a "formalistic distinction" dividing direct and collateral sanctions.[85] Despite the *Garland* majority's view, courts now define most collateral consequences as regulatory and preventive: meant "to protect society from the ex-offender's corrupting influence," and to "prevent the commission of future offenses by ex-offenders."[86] Implementation aligns with purpose: when administration of a sanction by nonjudicial actors is required, a consequence is defined as collateral, indirect, and discretionary. "[W]here the consequence is contingent upon action taken by an individual or individuals other than the sentencing court—such as another governmental agency or the defendant himself," as the Ninth Circuit put it in 2000, "the consequence is generally 'collateral.'"[87] Another distinction con-

cerns the difference between a disadvantage based on *conduct* and one following *conviction*, the focus of a prominent 1898 Supreme Court decision relating to New York's policy of stripping the ability to practice medicine from anyone convicted of a felony.[88] Today, sex offender registration and confinement are probably the only commonly imposed sanctions explicitly premised on conduct rather than conviction.[89]

A new federal statute builds into American law sharpened definitions of collateral consequences, employing a distinction first developed by the American Bar Association in 2003. Collateral "sanctions," says the Court Security Act, are restrictions imposed *automatically* upon conviction, while "disqualifications" are those penalties a court, agency, or official is authorized but *not* required to impose.[90] This important distinction (one which, notably, does not resolve the penal/regulatory question) may gain wide currency, but this chapter employs the terms more or less interchangeably, clarifying details of implementation as needed.

Defining these burdens as civil regulations rather than punishments carries significant implications. If defined as punishment, a penalty imposed on people convicted before that restriction was enacted may violate the Ex Post Facto clause (as we saw in *Garland*). Moreover, a defendant must be made aware of all criminal penalties to which he is subject before he can plead guilty—meaning pleas could be invalidated if defendants were not fully informed of collateral sanctions. As a result of the 2010 *Padilla* decision, this is now the law with regard to deportation: if counsel do not inform noncitizens of the deportation consequences of a conviction, any subsequent plea deal can be thrown out. (Notably, however, even as it called deportation "sometimes the most important part" of the penalty levied on noncitizen offenders, the *Padilla* Court avoided an explicit reclassification of deportation as a direct and punitive consequence.) Since the numerous other collateral consequences faced by people with criminal convictions are not punishments, lawyers do not need to apprise defendants of the collateral consequences they face prior to a guilty plea,[91] judges do not need to articulate them at sentencing (with occasional exceptions, as we have seen), and appellate courts need not inquire into their compatibility with core punitive requirements of "proportionality and desert."[92] In light of this, Jenny Roberts concludes that courts' separation of direct and collateral consequences has emerged from judicial perceptions of the needs of

the plea-bargaining process. "By strictly circumscribing the category of direct consequences," Roberts writes,

> courts promote finality and efficiency in the plea bargain process. The fewer consequences that a defendant must be aware of prior to a guilty plea, the simpler and more efficient the plea process and the lesser the chance of a post-conviction attack upon the guilty plea based on a failure to warn.[93]

Despite this judicial consensus, commentators from a variety of perspectives have concluded that collateral sanctions are "a legal burden constituting punishment."[94] One authority concludes that imposing these restrictions "has become an increasingly central purpose of the modern criminal process."[95] The National Conference of Commissioners on Uniform State Laws recently called collateral sanctions "what is really at stake, the real point of achieving a conviction."[96] And the president of the National District Attorneys Association in 2001 described collateral consequences as "simply a new form of mandated sentences."[97] "Virtually every felony conviction carries with it a life sentence,"[98] concludes one critical analysis.

Drug-offender restrictions and disenfranchisement laws both offer a particularly acute kind of ambiguity, in that prominent legal interpreters differ sharply over whether they are civil or criminal in nature. As we have seen, under a federal law in place since 1988, some federal collateral sanctions imposed on drug offenders have been imposed with discretion by sentencing judges, and explicitly identified as punishments by the BJA. U.S. courts conventionally define as "indirect" only those consequences not imposed by a sentencing judge,[99] yet judges have *not* concluded that the restrictions imposed under this statute are "direct" penalties. Moreover, in 2008 the Eighth Circuit interpreted a similar drug-offender statute as imposing a mere "civil remedy," not a "criminal penalty." Rejecting the argument that the removal of access to federal student loans on the basis of a drug conviction was double jeopardy, the panel concluded that Congress intended the measure to be regulatory rather than penal. (Intriguingly, the Eighth Circuit did note the possibility that a statutory scheme might be "so punitive in purpose *or effect* as to transform what was clearly intended as a civil remedy into a criminal penalty.")[100]

Laws stripping offenders of the right to vote, meanwhile, can be seen to pursue punitive ends (affecting the disenfranchised in a retributive, incapacitative,

or rehabilitative way, or deterring other would-be criminals), or as aiming to protect the integrity of the franchise—regardless of any effects it might have on the disenfranchised person. Before surfacing in *Trop*, this latter, regulatory answer appeared in a more metaphorical guise in an often-cited 1884 Alabama Supreme Court ruling. The "manifest purpose" of denying suffrage to ex-convicts is not to punish, that court said, but instead "to preserve the purity of the ballot box, which is the only sure foundation of republican liberty." This restriction, said the Alabama court, is "imposed for protection [of the ballot box], and not for punishment."[101] A Massachusetts U.S. District Court also chose the regulatory path in a 2007 ruling. People convicted and imprisoned before a state constitutional provision disenfranchised them in 2000 argued the restriction constituted an unlawful additional penalty. Citing *Trop*, the judge declared that their disenfranchisement had not actually been a punishment at all: the sanction was "intended to be primarily civil and regulatory, rather than punitive, in nature."[102]

However, numerous authorities have concluded that suffrage restrictions are punitive. In 1995 a federal judge described disenfranchisement as "the harshest civil sanction imposed by a democratic society," an "axe" by which a person is "severed from the body politic and condemned to the lowest form of citizenship."[103] Historian Alexander Keyssar writes of criminal disenfranchisement that "the punitive thrust clearly was present for much of the nineteenth century."[104] Contemporary advocates of the policy routinely describe disenfranchisement as "one form of punishment,"[105] and "part of the sanction for a specified . . . crime."[106] Wrestling with this difficulty, the 2007 Massachusetts court ultimately acknowledged that disenfranchisement is a kind of "potential hybrid."[107] In 2000, a Canadian judge used the same language, calling disenfranchisement "a hybrid which possesses elements of the criminal sanction as well as elements of civil disability based on electoral law."[108]

All this uncertainty contributes to uneven imposition of collateral sanctions, including in the courts. While evidence is still fragmentary, collateral consequences do surface in the criminal-justice process, despite the widespread assumption that such sanctions are silent in the courtroom (setting aside those federally imposed restrictions imposed *only* at judicial discretion). Criminologist Jeremy Travis first used the term "invisible punishments" in 2002, noting that these restrictions "are not considered part of the practice or jurisprudence

of sentencing."[109] Others characterize such sanctions as "a secret sentence."[110] Compared to a formal sentence or a prisoner's jumpsuit, collateral consequences are certainly aptly described as invisible, and their ambiguous criminal/civil character helps obscure them from public view. However, some judges, prosecutors, and defense lawyers do incorporate such sanctions into their routine practice—while sometimes within the same jurisdiction, others do not.[111] A recent survey of state-court judges found that while there is much variation in how collateral sanctions appear in criminal trials, in fact defense attorneys, prosecutors, defendants, and judges do regularly discuss these policies in court.[112]

Are Collateral Consequences "De-centered" Regulation?

As we have seen, many collateral sanctions are said to pursue classic regulatory aims, reducing risk and protecting the public's "health, safety, or right to peaceful enjoyment," as the federal law enabling housing officials to expel offenders puts it. The important stream of scholarly literature exploring the "new regulatory state" provides a measure of leverage toward understanding the growth and character of collateral sanctions. As Julia Black writes, analyses of decentered regulation emphasize that the state no longer holds a monopoly on the ability to regulate our behavior. In this account, the public/private distinction does little to help sort the fragmented regulatory arena, since such authority is now routinely exercised by businesses and a variety of other social actors, each wielding various amounts and types of autonomy and power.

This perspective sheds important light on the collateral consequences regime. First, as a matter of formal law, such restrictions are scattered throughout national and state statute books, rather than in a single chapter of the criminal code. Meanwhile, in a practical sense, most are directly imposed not by a sentencing court but by other governmental and private entities, including many with no direct connection to criminal justice. Collateral sanctions convert punishment to an activity "diffused throughout society," as Black writes of decentered regulation; government disperses a measure of this authority to various social actors.[113] Recall here the language of the Ninth Circuit in *Littlejohn*, defining collateral sanctions as those "where the consequence is contingent upon action taken by an individual or individuals other than the sentencing court."[114] As the National Conference of Commissioners on Uniform State Laws writes

of collateral consequences, "In a high percentage of cases, the real work of the legal system is done not by fine or imprisonment, but by changing the legal status of convicted persons."[115]

Collateral sanctions policy decentralizes and distributes to housing, licensure, welfare, and election-administration officials (among others) the work of punishing offenders, moving much of that activity away from criminal-justice institutions. In this way such restrictions create an "archipelago of governance," in Clifford Shearing's term for post-Keynesian regulatory structures.[116] That dispersal is at least sometimes clearly motivated by the desire to save money. For example, in explaining the Denial of Benefits program, the Bureau of Justice Affairs notes that its restrictions can serve as "alternatives to more traditional and often more expensive forms of punishment."[117] Proposing driver's-license suspensions for drug users, Congressman Gerald Solomon told the U.S. House that "this approach will cost the Government little."[118] Where nongovernmental institutions (including business organizations) become relatively well developed, their "infrastructure and expertise . . . [become] a potential resource the overburdened state can use to help resolve its crises."[119] The costs of some restrictions are decentered all the way down: licensing agencies, for example, sometimes make applicants pay for their own background checks.[120]

There are real limits, though, to how well new regulatory theory captures collateral consequences. Most simply, the core of the decentered approach is that *private* actors, rather than the state, direct policy.[121] By contrast, collateral sanctions are put in place by law, and while housing and employment decisions regarding people with criminal records are primarily made by nongovernmental actors, I have argued that even these restrictions are at least tacitly and in some ways explicitly shaped by public policy.

The BJA's Denial of Federal Benefits Program (and the Anti-Drug Abuse Act of 1988 that set it up) illustrate the regulatory paradox. Here the withdrawal of benefits is quite "centered," in that it is not only defined in federal law but also imposed in court. Moreover, the bureau retains its own database of ineligible offenders, created at government expense. Yet recall that the BJA also *distributes* responsibility for enforcing these bans, requiring "non-federal persons," including lending institutions, universities, contractors, and anyone administering any kind of federal grant, to check that database before distributing money or benefits. Collateral sanctions are decentered in important ways,

and understanding them will help criminological scholars move away from a too-close focus on "the old state institutions of police-courts-prisons," as John Braithwaite has urged.[122] But these policies are too state-directed to qualify as a clear instance of "new regulatory" criminal law.

"Expressive" Punishment?

Ultimately, regulatory analysis alone falls short because so many collateral consequences are indeed punitive in one way or another—purpose, effect, public meaning, or mode of administration. That is, while they may seek to protect the public interest (making housing developments safer, minimizing the number of barbers likely to pull a *Sweeney Todd*), collateral sanctions also manifest important punitive characteristics. Yet many of the central frameworks on offer in the criminological literature do not quite fit collateral consequences. For example, David Garland writes eloquently of the recent decline of rehabilitative ideals and the rise of punitive and "expressive justice" rationales, together with the "language of condemnation and punishment." Public shaming and humiliation, modes of punishment long discarded, have returned, as have "the symbolic, expressive, and communicative aspects of penal sanctioning."[123] Such ideas may well have contributed to the proliferation of collateral penalties. But it is not at all clear that collateral restrictions qualify squarely as "expressive" penalties.

All law "speaks" in various ways to various audiences.[124] Emile Durkheim argued that penal sanctions articulate the *conscience collective,* helping to build social solidarity precisely because they reflect and embody the moral sense of society. Durkheim saw punishment as the "collective expression of shared moral passions," a "voiced" response to crime that provided "reinforcement and reassurance" to those same moral sentiments.[125] Indeed, Durkheim regarded its communicative work as punishment's true purpose: societies should make wrongdoers suffer in order to convey a moral message, not in pursuit of utilitarian goals like shaping criminals or deterring would-be offenders. Though challenging some elements of his approach, leading voices in contemporary criminology share Durkheim's sense that punishment operates as "a communicative and didactic institution."[126] Garland, for example, writes of "penal practices, discourses, and institutions" as part of the "generative process" through which culture is produced and reproduced.[127] Jonathan Simon contends that criminal laws "have

always served as the definitive grammar of American democratic governance," and today hold the power to help define our communities and indeed our very selves.[128] From this vantage, collateral sanctions express a generalized contempt for people with criminal convictions, coupled to a vision of the political and economic arenas as places of acute scarcity and zero-sum competition.

Judicial pronunciation of a sentence may be punishment's core communicative act, and convicted offenders, prisoners, and penal professionals its primary audiences. But punishment produces social meaning "beyond the immediacies of condemnation," as Garland puts it. Modern politicians understand that the ultimate audience for penal symbolism is the public, and they deploy penal language skillfully to manipulate the sentiments of that audience.[129] Though examples are scattered, we can find some communicative performances in legislative enactment of collateral sanctions policies. Congressional discussion of recent crime bills has certainly manifested all kinds of emotion, with legislators describing offenders as "animals," "thugs," "predators," and generally invoking the specter of "non-human forms of danger."[130] Few collateral-sanctions policies have such an extensive explanatory gloss, but we have seen that the Bureau of Justice Assistance explicitly identifies didactic purposes behind the Denial of Federal Benefits Program, with its aim of "alerting" students, entrepreneurs, and pilots about the severe consequences their casual drug use could bring. We have also heard some appellate judges speak of the punitive effects of collateral sanctions such as disenfranchisement.

Collateral consequences, then, convey important truths about the contemporary American political regime, and occasional statements by politicians, judges, and bureaucrats amplify their expressive character. But beyond these relatively macrolevel types of articulation, the expressive approach's applicability to collateral consequences has two serious limitations. The first is a question of practice and audience, the second a matter of fundamental definition. First, Durkheim's account, for example, engages most closely with the symbolic meaning of penal *ritual*, particularly those punitive events with intense, ceremonial character.[131] Garland too emphasizes the "dramatic, performative representation" by which punishment speaks, though he also follows the impact and diffusion of penal vocabularies more generally.[132] And when James Q. Whitman writes of the "degradation" accomplished by modern punishments, he is most concerned with degrading *acts*: sentences that are spoken and punishments that are performed.[133]

For all the contempt they manifest for the convicted, most collateral sanctions are quiet. Joel Feinberg made this point almost forty years ago in a prescient bit of collateral-sanctions analysis in his famed exploration of "the expressive function of punishment."[134] Discussing New York's 1961 law revoking driver's licenses from those convicted of violating the antisubversive Smith Act, Feinberg wrote that this "cruel law" was severe and motivated by punitive intent, but lacked "the reprobative symbolism essential to clear public denunciation." Strictly speaking, Feinberg wrote of the Smith Act ex-convicts, "[T]hey have not been punished; they have been treated much worse."[135]

Second, we must recall the core concern of this chapter, which is that most contemporary American collateral restrictions are not explicitly defined as penal policies in the first place. Authors such as Durkheim, Garland, Simon, and Whitman rightly identify diverse ways the creation, imposition, and rhetoric of criminal law can speak to various audiences. But a common assumption running through these analyses is that the policies in question are indeed understood to be *criminal* laws. As we have seen, some judges, politicians, and bureaucrats describe some collateral-consequences laws that way, but the understanding is far from general.

This highlights an important failing of contemporary collateral sanctions law, one often overlooked in part because virtually all close analysis of collateral consequences is critical of such policies. In fact, *advocates* of such restrictions have a great deal to lose from their murky, ill-defined legal status. Occasional denunciatory statements by politicians and other officials in the context of collateral-consequences policies do, to be sure, convey general truths about the mean status of people with criminal convictions in the U.S. today. But because they are not articulated in the criminal law proper, surface only erratically in court, and are usually imposed in nonpenal institutions and settings, such policies can only feebly fulfill those core expressive functions of punishment concerned with defendants, convicted offenders, and the public.

"Actuarial Justice?"

In a few important ways, collateral sanctions fit the penological theory and pattern of implementation that Feeley and Simon have called "actuarial justice," particularly if we attend to David Thacher's recent interpretation and application of that approach.[136] First, rather than focusing on close and direct

examination of a unique person, actuarial justice tries to reduce risk by classifying people based on "a virtual identity stored in dossiers and databases."[137] As Thacher writes, instead of trying to "create an orderly society by reshaping individual souls, the new penology does so by preemptively excluding those predicted to be disorderly."[138]

Second, actuarial justice *disperses* crime-prevention and punishment work, "extending its reach substantially compared with what would be possible through the criminal justice system alone."[139] Where collateral sanctions policies require those selling guns, handing out driver's licenses, assembling juries, or allocating student loans to deny someone with a criminal record access to a right or privilege, they illustrate that diffusion. Where they do reach nongovernmental actors, collateral sanctions encourage private crime prevention—with governmental support and supervision.

Third, as Thacher's discussion of the use of background checks by landlords illustrates, actuarial justice rests directly on institutional capacity—and particularly on ready access to criminal-records information—at least as much as on moral and cultural attitudes.[140] Of course, the relevant resource here is criminal-records databases; we might also note that state and local elections officials have recently been supported in their policing of the boundaries of the franchise by the 2002 Help America Vote Act, which requires states to create new, computerized statewide voter rolls and to coordinate those lists "with State agency records on felony status."[141]

But actuarial behavior is by definition highly rational, based on a close and careful calculation of risk, benefit, and costs. The term may capture reasonably well the process a landlord engages in when he refuses to rent to a former inmate: even if the landlord does not actually run the numbers, such a refusal is based on a logical analysis of the risk entailed in renting to a specific individual weighed against any loss in competition among buyers. But most collateral sanctions are imposed automatically and broadly. Actuarial justice moves away from a morally driven emphasis on blame and intent to a "utilitarian focus on consequences,"[142] but many collateral sanctions do not even *identify* the specific consequences they aim to prevent, let alone link them with evidence in cost-benefit risk analysis. The formation of these policies appears to be motivated at least as much by moral concerns as by exacting logics of risk.

Collateral Sanctions, Penal Institutions, and the State-Building Puzzle

Several writers conclude that the carceral state has now become "a key governing institution in the United States."[143] As Braithwaite puts it, "[T]he Keynesian punitive state stands alone as the major exception to 'the hollowing out of the state.'"[144] The extensive, often permanent interventions in the life course represented by collateral sanctions seem to further extend that state power. In this vein, Loïc Wacquant writes directly about collateral sanctions as an example of the pernicious kinds of "classificatory activity" in which the contemporary "carceral institution" engages.[145]

But do collateral sanctions really illustrate a robust state? These policies exert massive power—not only changing the lives of the millions of Americans with criminal convictions but also shaping the workplace and the apartment complex, the jury box and the voting booth. It is tempting to draw the conclusion that such penalties thus manifest a strong state. Yet it may tax the term "institution" too far to simply fold collateral sanctions into the "carceral institution." With some exceptions, collateral sanctions are not imposed by criminal-justice institutions proper. Only with a real loss of analytic precision do we define every institution touched by imprisonment (marriage, the family?) as thus *part* of the carceral state. Policy areas affected by collateral sanctions are institutions or formal organizations in their own right: the provision of public housing, administration of elections, awarding of government grants and contracts, and regulation of admission to licensed professions, for example. Indeed, this is precisely the point: these activities are in practical and formal terms *utterly unconnected* to the correctional process—until collateral sanctions come along. Here collateral consequences manifest the development Jonathan Simon describes as "governing through crime," in which technologies and discourses of crime and criminal justice have spread through all parts of society.[146] While collateral sanctions may not fit neatly into the "governing institution" Gottschalk writes of, elsewhere she offers the right metaphor, this time an organic one with toxic connotations: these penalties represent the "metastasizing" of carceral logics throughout American society.[147]

Autonomy, Equality, and American Citizenship

Loosely labeling former offenders as lifelong threats rather than rights-bearing, autonomous persons, many collateral sanctions policies waste resources and may imperil public welfare. They appear motivated by the contemporary urge to degrade and stigmatize offenders (though they fail to express publicly that contempt), and they are decentered in the style of late modern regulation, franchising out a murky kind of authority to various bureaucracies and nongovernmental actors. Here the political pressures driving mass incarceration meet the logic of the shrinking welfare state—the morally fired zeal to disgrace and ostracize of the modern American carceral campaign, joining the zero-sum logic of dwindling social provision.[148] It's a war of all against all for the last job, college loan, or federal dollar, and casting out those who have committed crimes has wide appeal.[149] The result is a substantive change in the content of American citizenship.

In the 1958 case *Trop v. Dulles*, the U.S. Supreme Court called citizenship "the right to have rights" (swiping the phrase from Hannah Arendt, who had written it ten years earlier).[150] Holding that citizenship cannot be withdrawn as punishment for crime, *Trop* stands for a robust understanding of citizenship—though in another case decided that year, the Court *upheld* the revocation of the citizenship of a man who had failed to report for military service and voted in a Mexican election.[151] Both *Trop*'s plenary conception of citizenship and the prohibition on its removal as punishment are called into question by modern collateral sanctions. Millions of Americans not under criminal supervision and nominally full citizens are now legally unable to serve on juries, own firearms, work in scores of occupations, serve in the military, or vote, and may find themselves virtually unemployable thanks to the publicly supported use of background checks.

Trop still matters—for example, Justice Brennan's denunciation of the death penalty in *Furman v. Georgia* relies on *Trop*'s "right to have rights" conception.[152] But its treatment of citizenship as binary category now appears oversimplified. In the years since T. H. Marshall identified civil, political, and social elements of citizenship in his famed analysis of the development of British law,[153] citizenship has become an ever more complicated and contested concept. Recent work on immigration and alienage scrutinizes national membership as a "for-

mal status category,"[154] while other literatures wrestle with the substance of citizenship within borders, puzzling over problems of identity, equality, obligation and virtue.[155] European scholars, meanwhile, have developed a rich literature on limited citizenship, exclusion, and marginality, focusing on immigration, labor, and the impact of declining social provision.[156]

Citizenship prompts an almost limitless set of questions, and many authors have noted the difficulty of building a unifying theory. In different contexts, saying that people live with diminished citizenship could mean their passport has been taken away, that they lack the resources to enjoy the political rights they do hold, or that they are systematically treated with disrespect in social settings. In saying here that contemporary collateral consequences force us to reconsider the nature of American citizenship, I do not pretend to offer a novel definition or standard. Instead, I try to address two straightforward questions prompted by these policies. First, how are we to understand the status of those living with collateral sanctions? And second, what does the widespread imposition of such extensive postsentence restrictions suggest about the nature of the contemporary American political regime?

Incarceration has long been accepted as a way democratic majorities can incapacitate and punish offenders without violating their own core principles. People under criminal supervision, of course, are temporarily stripped of essential attributes of full citizens, in service of various incapacitative, retributive, deterrent, and expressive goals. But that logic fails to capture the condition of those facing our indefinite, ill-defined "piecemeal version of incapacitation."[157] It is hollow indeed to inform a person that his "punishment" has ended and he retains "the right to have rights" when so many of the *actual* rights in question are taken away. Citizenship is a kind of composite, a set or bundle of rights and privileges. When many of those guarantees, protections, and immunities are removed, the thing loses its shape and its core meaning, and a substantive change in citizenship status occurs. Naturally, we will differ over the line-drawing involved. But a person barred by law from serving in the military, sitting on a jury, voting, working in many professions, parenting a foster child, and borrowing public money to go to college, among other limitations, is no longer a full citizen.

It is as if by commission of crime a person surrenders autonomy and returns to the status of a child—deserving only to be disciplined, guided, and

restrained as the state (acting here *in loco parentis*, if you will) sees fit. The analogy draws us again, though, to the crucial, confounding *temporal* element of most collateral consequences. Extending indefinitely after the sentence, they place former offenders into a kind of childhood that never expires: "felon" is a label that doesn't come off. As one particularly insightful analysis concludes, the status of former offenders in the U.S. thus resembles that of a "caste," in that their condition is one of semipermanent exclusion from political, economic, and social spheres.[158]

In some ways the diminished status of former offenders in the U.S. today continues an old tradition, for our legal order has always created and contained "second-class" citizens. The young United States rejected the British model of formally "graded" citizenship, preferring that naturalized newcomers enter a status "uniform and complete."[159] But through most of U.S. history and for many different reasons, *most* of those enjoying that "uniform and complete" status (indigenous peoples, women, African Americans, religious groups, immigrants, homosexuals, the poor) have all lived with serious restrictions on their capacity to exercise core political rights and privileges of U.S. citizenship. Subnational units, particularly states but also localities, have always played key roles in drawing exclusionary lines and defining citizenship's content.[160]

Collateral sanctions thus continue a long-standing pattern and deepen some old fractures, particularly those of race and class. What is different and damaging about these policies is that they *withdraw* core attributes of citizenship indefinitely from individuals who previously held them, and do so in a formal yet murky fashion.[161] The cumulative effect is a qualitative change, a shift in kind rather than degree. This reality is obscured by collateral consequences' dispersed administration and cloudy status in American law. A further complication is that because so many are mediated by our federal structure, and because not all sanctions attach to every offense, the status reductions of the modern collateral-consequences regime are state-contingent, creating what Gottschalk calls "gradations of citizenship" in America today.[162] For ex-offenders, perhaps the question today isn't so much *whether* a person is a citizen as how *much* citizenship they have. Citizenship status should be a marker of common membership in a democratic political order, but former offenders will be forgiven if they understand it as merely another reflection of political power—or, in their case, power's acute absence.[163]

Modern democracies rest on a basic assumption that adult citizens not under criminal supervision possess at least rough formal legal equality and the capacity to engage in political activity as autonomous agents. The legal creation of millions of quasi-citizens lacking those minimal attributes seems to flout that understanding. Instead, innocence—indeed, a *history* of innocence—is now a prerequisite for the possession of American citizenship. The proliferation of these restrictions suggests that instead of conceiving the polity as a community of equals, and seeing its own role as the enhancement of individual autonomy, the modern American state instead regards the polity as a household, the occupants of which must be disciplined and directed.

This metaphor emerges from Markus Dubber's recent exhumation of the concept of "police." "Police," Dubber shows, has for most of Western political history connoted neither law-enforcement officials in uniforms nor even the kind of regulations Americans have in mind when they speak of the "police power." Instead, police is the hierarchical mode of governance in which the *polis* is treated as a household rather than a gathering of autonomous equals, and in which values of justice and clarity are replaced by instrumental goals.[164]

Even severe penalties, as Corey Brettschneider has argued, can satisfy core democratic principles as long as their object is the "criminal qua citizen."[165] By contrast, the police mode sees not persons but "resources to be employed, and often enough threats to be eliminated." "By regarding persons as threats," Dubber writes, "one abstracts from their capacity for self-government, their autonomy."[166] Recall what Joel Feinberg said of the Smith Act ex-offenders barred from driving: "[T]hey have not been punished; they have been treated much worse." In their conversion of former offenders into threats (in the jury box, the voting booth, or the barbershop) and their disregard for the rights at issue (a disregard enabled by their ambiguous character), collateral sanctions are more police measures than legally constrained, rights-respecting penal laws. "While there were other features that distinguished paupers from animals and trees," Dubber writes dryly of early poor laws, "the capacity for autonomy wasn't among them."[167] Like those paupers (animals, trees), former prisoners under the weight of collateral sanctions find that a relationship of basic political equality is replaced by a line dividing full citizens (holding the power to govern) from former offenders (who are merely governed). To the extent that they cannot conduct autonomous economic life and engage in political activi-

ties such as jury deliberation, military service, and voting, it is not hyperbole to say they are converted into objects.

Moreover, many collateral sanctions likely fail to achieve even instrumental goals, because they are too coarse in their targeting and too casual in their assumption of outcomes. As we have seen in considering the actuarial approach, most such policies do not provide any clear means or metric by which the householder-state may evaluate their effectiveness. Classic nineteenth-century American police measures "envisaged a minutely detailed knowledge of the population, its habits and activities, obtained by means of censuses and close inspection, as well as an encyclopædic range of regulatory controls governing everything from foodstuffs to manners and dress."[168] By contrast, modern collateral-sanctions laws exclude vast classes of offenders from scores of activities, often exhibiting a cavalier disregard not only for the rights and autonomy of the offender but also for the substance of the policy realm at issue.

In fact, given that steady good work is one of the best predictors of desistance from crime,[169] keeping ex-felons from productive employment and engagement with other civic and social activities may well be a criminogenic policy. Harsh penalties can thus make specific communities *less* governable.[170] As the National Advisory Commission on Criminal Justice Standards and Goals said in 1973, the existence of postsentence legal restrictions likely "hardens the resentment offenders commonly feel towards society in general."[171] Parental involvement in politics is one of the best predictors of a child's electoral participation, so widespread disenfranchisement may lead to geometric growth in some communities in the number of people who cannot or do not vote, with an accompanying decline in perceived state legitimacy.[172]

Because they are not squarely defined as either civil or criminal penalties, these restrictions deprive citizens, legislators, and judges of basic metrics by which to judge a given restriction's rightness and performance—let alone the ability to subject punishments to the special scrutiny and heavy burden of justification democracy requires.[173] David Garland and Jonathan Simon observe that when crime victims become the model citizen to whom government responds, and when the language of crime and fear of crime come to dominate many different cultural sites, our political institutions suffer.[174] One example of how this occurs is that when crime and security are invoked, certain questions simply do not need to be asked: it is taken as given that a policy pursuing public

safety is proper and just, and no critical examination of means and ends or the distribution of costs and benefits is necessary. Theorizing an absence is always tricky, but this partly answers the riddle of how collateral consequences have expanded without sustained public examination of their nature, purpose, or efficacy.

Collateral sanctions' uncertain position astraddle civil and criminal law has helped protect them from law's scrutiny. What good would it do to shove them one way or the other, if a willing legislature or judicial Hercules could do so? In doctrinal terms, it might not make much difference. Commercial regulation and criminal punishment both function as idioms of "apologetics" in American constitutional law, language that prompts courts to excuse any legislative activity.[175] In equal-protection terms, offenders are generally regarded as "both responsible for their membership in their classification and morally culpable for it,"[176] and so not eligible for heightened judicial protection. The 2010 *Padilla* decision offers an intriguing Sixth Amendment angle from which federal judges may approach collateral sanctions, but that ruling's logic appears limited to deportation.[177]

A practical, promising reform movement effectively sidesteps the core ambiguity this chapter has addressed, focusing on four salutary steps that can be taken absent sweeping legislative or judicial change. First is simply achieving greater visibility for these policies by establishing which sanctions are actually imposed on offenders in a given jurisdiction. Pursuant to federal legislation enacted in 2008, the American Bar Association is now working to compile and publish a list of all federal and state collateral consequences, having received a grant from the National Institutes of Justice to support such research.[178]

Second, and closely related, is the effort to help those involved in the criminal-justice process learn more about collateral consequences. In addition to calling for states to collect all sanctions into a single title of the state code, organizations like the American Bar Association and the National Conference of Commissioners on Uniform State Laws have pushed for defendants and those leaving criminal supervision to be notified of these sanctions.[179] Reformers urge the criminal-defense bar to incorporate collateral sanctions into a more "holistic" understanding of their practice,[180] and advocacy organizations like the Bronx Defenders educate prosecutors and judges about collateral sanctions, sometimes seeing charges and sentences altered.[181]

Third, some states have moved toward reducing the number of restrictions that permanently burden former offenders. One way this occurs is through "re-entry courts," special tribunals with the power to lift some sanctions; the ABA and NCCUSL have called for laws expanding judicial power to relieve collateral restrictions in individual cases. Among specific policies, disenfranchisement laws and employment restrictions have both seen reform in the last decade. Either through statutory change, constitutional amendment, or gubernatorial action, eight states have done away with blanket lifetime felony disenfranchisement, and several more have shortened or eliminated waiting periods or allowed parolees and probationers to vote. Meanwhile, numerous states have eased restoration through procedural changes, such as facilitating access to forms or eliminating documentary requirements altogether.[182] Because some states link eligibility for elective office and jury service with the right to vote, disenfranchisement reform may have a kind of multiplier effect.[183] Yet while voting-rights changes have been significant, they have also been quite moderate: some violent and repeat offenders do remain disenfranchised for life in about a dozen states, and to date no state has restored voting rights to prisoners—the policy most common in Europe.[184]

In the employment realm, we have seen that public and private employers, as well as licensing boards, may refuse to hire or certify people specifically because of their previous engagement with the law. Six states now restrict how public and private employers as well as licensing agencies may consider convictions in making hiring and licensure decisions. For example, state law may stipulate that a person cannot be rejected "solely" for this reason unless the criminal conduct was "substantially related" to the work in question, and require that evidence of rehabilitation be considered.[185] For many former offenders, nothing is more critical to social integration and the achievement of practical personal autonomy than steady employment, making this a particularly important area for reform.

Fourth and finally, there is some evidence that American political discourse may be moving slowly toward seeing people with criminal convictions less as threats, and more as persons. In 2008, President Bush signed into law the Second Chance Act, which provides grants, research funds, and support for new re-entry service programs, alternative drug-offender treatment, and improved education and mentoring in prisons, among other projects. To be sure, a pub-

lic-safety frame pervades the statute—the latter part of its title is "Community Safety Through Recidivism Prevention"—and intense fiscal pressure has contributed to the new push for alternatives to incarceration. But the law places the challenges of re-entry, reintegration, and rehabilitation squarely onto the national policy stage, as the *New York Times* noted in reporting on the bipartisan bill. This represents a "sharp change in attitudes about incarceration," the *Times* commented.[186]

Such a change is necessary to meaningful, lasting reform. The U.S. has finally embarked on a serious examination of what Margaret Love calls "the growing contrary pressures that seem to consign all persons with a criminal record to the margins of society, and to a permanent outcast status in the eyes of the law."[187] But a generation of legislators—along with the many state-court judges who are elected—has learned to fear the "soft on crime" label. As long as American political discourse ostracizes and vilifies all people with criminal convictions, and as long as a narrow, retributive conception of justice dominates our understandings of public safety, all the sunlight in the world may bring about only marginal change in collateral-consequences policies.

Notes

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1. Becky Pettit and Bruce Western, "Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration," *American Sociological Review* 69, no. 2 (April 2004): 152, 154.

2. Brian K. Pinaire, Milton J. Heumann, and Jennifer Lerman, "Barred from the Bar: The Process, Politics, and Policy Implications of Discipline for Attorney Felony Offenders," *Virginia Journal of Social Policy and the Law* 13, no. 2 (2006): 291.

3. Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006).

4. Eric Lotke and Peter Wagner, "Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From," *Pace Law Review* 24 (2004): 587–607.

5. Michael P. McDonald and Samuel L. Popkin, "The Myth of the Vanishing Voter," *American Political Science Review* 95, no. 4 (December 2001): 963–74.

6. Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage, 2006), 105.

7. Loïc Wacquant, "Race as Civic Felony," *International Social Science Journal* 183 (2005): 128.

8. Michael M. Pinard, "Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering," *Fordham Urban Law Journal* 31 (2004): 1074.

9. Christopher Uggen, Jeff Manza, and Melissa Thompson, "Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders," *Annals of the American Academy of Political and Social Science* 605 (May 2006): 290.

10. Milton Heumann, Brian Pinaire, and Jennifer Lerman, "Prescribing Justice: The Law and Politics of Discipline for Physician Felony Offenders," *Boston University Public Interest Law Journal* 17 (2007): 3.

11. One critic writes that today "nonpenal consequences" "may in fact dwarf the criminal sanction" for many offenders. Jenny Roberts, "The Mythical Divide between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of 'Sexually Violent Predators,'" *Minnesota Law Review* 93 (December 2008): 740.

12. American Bar Association, Criminal Justice Standards Committee, "ABA Standards for Criminal Justice, Third Edition: Collateral Sanctions and Discretionary Disqualification of Convicted Persons" (American Bar Association, 2004), 8; National Conference of Commissioners on Uniform State Laws, "Draft, Uniform Collateral Sanctions and Disqualifications Act, with Prefatory Note and Comments" (National Conference of Commissioners on Uniform State Laws, November 2005), 2.

13. Sue Titus Reid, *Criminal Law: The Essentials* (New York: Oxford University Press, 2009); Susan M. Easton, *Sentencing and Punishment: The Quest for Justice*, 2nd ed. (Oxford: Oxford University Press, 2008). Aside from discussions of sex-offender registration and confinement and civil forfeiture laws, I find no references to collateral sanctions in these texts.

14. Morris Putnam Stevens, "State Police Power vs. Federal Constitution: The Distinction between a Legitimate Moral Test Imposed upon Physicians to Protect the Public and Ex Post Facto Punishment," *Univ. L. Review* 3 (1897): 229; Gabriel J. Chin, "Are Collateral Sanctions Premised on Conduct or Conviction? The Case of Abortion Doctors," *Fordham Urban Law Journal* 30 (July 2003): 1691.

15. Mary M. Cheh, "Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction," *Hastings Law Journal* 42 (July 1991): 1325.

16. Susan R. Klein, "Redrawing the Criminal-Civil Boundary," *Buffalo Criminal Law*

Review 2 (1999): 679–84. Maintaining that only sanctions formally defined as "punishment" merit fully protected criminal trials, the Supreme Court until relatively recently "docilely accepted at face value the 'civil' label attached to a proceeding: if the legislature said the sanction had a nonpunitive purpose, the Court agreed." Ibid., 681.

17. Katherine Beckett and Steve Herbert, "Dealing with Disorder: Social Control in the Post-industrial City," *Theoretical Criminology* 12, no. 1 (2008): 6.

18. Katherine Beckett and Steve Herbert, *Banished: The New Social Control in Urban America* (Oxford: Oxford University Press, 2010).

19. Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Harvard University Press, 1998).

20. Nora Demleitner, "Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences," *Stanford Law and Policy Review* 11 (1999): 158–59; Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford: Oxford University Press, 2003), 105.

21. More comprehensive recent tallies from various perspectives include Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* (William S. Hein and Company, 2006); Office of the Pardon Attorney, "Federal Statutes Imposing Collateral Sanctions upon Conviction" (U.S. Department of Justice, Office of the Pardon Attorney, 2001), http://www.usdoj.gov/pardon/collateral_consequences.pdf; Kathleen M. Olivares and Velmer S. Burton, "The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 . . . ," *Federal Probation* 60, no. 3 (1996): 10; Legal Action Center, "After Prison: Roadblocks to Reentry" (Legal Action Center, 2009), http://lac.org/roadblocks-to-entry; Ben Geiger, "The Case for Treating Ex-Offenders as a Suspect Class," *California Law Review* 94 (2006): 1191; American Bar Association Commission on Effective Criminal Sanctions, "Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations" (American Bar Association, 2009).

22. American Bar Association Commission on Effective Criminal Sanctions, "Internal Exile," App. 3, 56–244.

23. Western, *Punishment and Inequality in America*; Megan Comfort, "Punishment beyond the Legal Offender," *Annual Reviews of Law and Social Science* 3, no. 12 (2007): 1–26.

24. Michael Tonry and Joan Petersilia, *Crime and Justice*, Vol. 26: *Prisons*, 2nd ed. (University of Chicago Press Journals, 2000).

25. Geiger, "The Case for Treating Ex-Offenders as a Suspect Class," 1198.

26. Scott Duffield Levy, "The Collateral Consequences of Seeking Order Through Disorder: New York's Narcotics Eviction Program," *Harvard Civil Rights–Civil Liberties Law Review* 43(2) (2008): 539–80.

27. Brian Kalt, "The Exclusion of Felons from Jury Service," *American University*

Law Review 53 (2003): 65–188; Office of the Pardon Attorney, "Federal Statutes Imposing Collateral Sanctions upon Conviction," 1–2.

28. Office of the Pardon Attorney, "Federal Statutes Imposing Collateral Sanctions upon Conviction," 16–17; American Bar Association Commission on Effective Criminal Sanctions, "Internal Exile," 42. The Supreme Court ruled in 1994 that state rights-restoration procedures—that is, judicial or administrative procedures short of a pardon that restore rights lost due to criminal conviction—do not remove the federal ban on firearms ownership by former felons. *Beecham v. U.S.*, 511 U.S. 368 (1994). As of 2001, however, the Office of the Pardon Attorney noted considerable variation and disagreement among lower courts that had considered whether state restoration procedures indeed affect the federal firearms ban. See Office of the Pardon Attorney, "Federal Statutes Imposing Collateral Sanctions upon Conviction," 20.

29. Office of the Pardon Attorney, "Federal Statutes Imposing Collateral Sanctions upon Conviction," 3, 14.

30. Ibid., 2–3.

31. Webb Hubbell, "Without Pardon: Collateral Consequences of a Felony Conviction," *Federal Sentencing Reporter* 13 (December 2000): 223.

32. Roberta Meyers-Peeples, "An Examination of Federal Employment Practices/Policies on Hiring Ex-Offenders " (Testimony presented to the Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia, June 10, 2008), 3–4; American Bar Association Commission on Effective Criminal Sanctions, "Internal Exile," 20–27.

33. Office of the Pardon Attorney, "Federal Statutes Imposing Collateral Sanctions upon Conviction," 4–7.

34. Meyers-Peeples, "An Examination of Federal Employment Practices/Policies on Hiring Ex-Offenders," 8.

35. Margaret Colgate Love, "Relief from the Collateral Consequences of Conviction: Notes from the 'Laboratories of Democracy'" (National HIRE Network); Helen Lam and Mark Harcourt, "The Use of Criminal Record in Employment Decisions: The Rights of Ex-offenders, Employers and the Public," *Journal of Business Ethics* 47, no. 3 (October 1, 2003): 237–52.

36. Legal Action Center, "Enforce Anti-Discrimination Laws" (Legal Action Center, 2009), 2, http://www.lac.org/toolkits/titlevii/title_vii.htm.

37. J. Page, "Eliminating the Enemy: The Import of Denying Prisoners Access to High Education in Clinton's America," *Punishment and Society* 6, no. 3 (2004): 358–78; Wacquant, "Race as Civic Felony."

38. National Conference of Commissioners on Uniform State Laws, "Draft, Uniform Collateral Sanctions and Disqualifications Act," 2.

39. Bureau of Justice Assistance, "Program Brief: Denial of Federal Benefits Pro-

gram and Clearinghouse" (Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, July 2002), 1; Bureau of Justice Assistance, "Information for Sentencing Authorities" (Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice), http://www.ojp.usdoj.gov/BJA/grant/dfbsentencing.html.

40. Bureau of Justice Assistance, "Program Brief," 2.

41. Ibid., 2–3. In 1991, the White House's National Drug Control Strategy noted approvingly that the 1998 act "provides Federal, State, and local courts with an additional and powerful deterrent to drug crime." Office of National Drug Control Policy, Executive Office of the President, National Drug Control Strategy, 24.

42. Ibid., Bureau of Justice Assistance, Program Brief, 3. This statute is discussed in *Littlejohn*, where the Ninth Circuit explained that the law allowed "courts to exercise discretion in deciding whether to impose Federal benefit ineligibility for those individuals convicted once or twice, respectively, of distributing controlled substances. See 21 U.S.C. S 862(a)(1)(A), (B); see also U.S.S.G. S 5F1.6 (background note). On the contrary, subsection 862(a)(1)(C) . . . by its terms allows for no such discretion. Subsection 862(a)(1)(C) is designed so that once a defendant is convicted a third time for a controlled substances distribution offense, the question of ineligibility is no longer in the sentencing judge's hands." *Littlejohn*, at n. 19.

43. Ibid., Bureau of Justice Assistance, "Program Brief," 4.

44. Bureau of Justice Assistance, "Information for Sentencing Authorities," 2.

45. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

46. Guy Cohen, "The Weakness of the Collateral Consequences Doctrine: Counsel's Duty to Inform Aliens of the Deportation Consequences of Guilty Pleas," *Fordham International Law Journal* 16 (1992): 1096, n. 10, n. 11; 1112, n. 119, n. 120; American Bar Association Commission on Effective Criminal Sanctions, "Internal Exile," 43–45.

47. Cohen, "The Weakness of the Collateral Consequences Doctrine," 1112, n. 118.

48. Office of Immigration Statistics, U.S. Department of Homeland Security. *Yearbook of Immigration Statistics: 2009*, pp. 97–103. Available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf.

49. *Padilla v. Kentucky*, 559 U.S. ___ (2010) (slip op.), pp. 2, 8.

50. Geiger, "The Case for Treating Ex-Offenders as a Suspect Class," 1205; American Bar Association Commission on Effective Criminal Sanctions, "Internal Exile," 41.

51. Geiger, "The Case for Treating Ex-Offenders as a Suspect Class," 1205.

52. Ibid.

53. "Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses" (Sentencing Project, April 2006), 2.

54. Debbie Mukamal and Paul Samuels, "Statutory Limitations on Civil Rights of People with Criminal Records," *Fordham Urban Law Journal* 30 (2003): 1503–5; Geiger,

"The Case for Treating Ex-Offenders as a Suspect Class," 1204; American Bar Association Commission on Effective Criminal Sanctions, "Internal Exile," 39–40.

55. 42 U.S.C. § 13661, "Screening of applicants for federally assisted housing" (2003).

56. Child Welfare Information Gateway, "Criminal Background Checks for Prospective Foster and Adoptive Parents: Summary of State Laws" (U.S. Department of Health and Human Services, 2008), 2, http://www.childwelfare.gov/systemwide/laws_policies/statutes/backgroundall.pdf; Legal Action Center, "After Prison." The Adam Walsh Child Protection and Safety Act of 2006, P.L. 109-248, removed the opt-out possibility; its effective date was October 1, 2008.

57. Olivares and Burton, "The Collateral Consequences of a Felony Conviction."

58. National Conference of Commissioners on Uniform State Laws, "Draft, Uniform Collateral Sanctions and Disqualifications Act," 3.

59. Kalt, "The Exclusion of Felons from Jury Service," 67; Olivares and Burton, "The Collateral Consequences of a Felony Conviction."

60. *Richardson v. Ramirez*, 418 U.S. 24 (1974); *Hunter v. Underwood*, 471 U.S. 222 (1985).

61. Sentencing Project, "Felony Disenfranchisement Laws in the United States" (Sentencing Project, 2011), http://www.sentencingproject.org.

62. Karol Lucken and Lucille Ponte, "A Just Measure of Forgiveness: Reforming Occupational Licensing Regulations for Ex-Offenders Using BFOQ Analysis," *Law and Policy* 30, no. 1 (January 2008): 53.

63. As of 1999, all fifty states restricted former felony offenders from working as barbers, beauticians, or nurses. Pinaire et al., "Barred from the Bar," 290.

64. Hubbell, "Without Pardon"; Lucken and Ponte, "A Just Measure of Forgiveness," 53–54.

65. Meyers-Peeples, "An Examination of Federal Employment Practices/Policies on Hiring Ex-Offenders," 3.

66. Love, *Relief from the Collateral Consequences of a Criminal Conviction*, 63–64. See also Geiger, "The Case for Treating Ex-Offenders as a Suspect Class," 1199, 1203.

67. Devah Pager, "The Mark of a Criminal Record," *American Journal of Sociology* 108, no. 5 (March 2003): 937, 962.

68. One authoritative analysis, for example, defined employment discrimination as "dealings among private parties," and so not among the "state-imposed disqualifications" under discussion. Andrew von Hirsch and Martin Wasik, "Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework," *Cambridge Law Journal* 56, no. 3 (November 1997): 600.

69. Geiger, "The Case for Treating Ex-Offenders as a Suspect Class," 1200.

70. Meyers-Peeples, "An Examination of Federal Employment Practices/Policies on

Hiring Ex-Offenders," 2. Another source concludes that more than 59 million Americans had some state criminal history, more than double the number as of 1984. Geiger, "The Case for Treating Ex-Offenders as a Suspect Class," 1198.

71. Legal Action Center, "Prohibit Inquiries about Arrests That Never Led to Conviction" (Legal Action Center, 2009), http://www.lac.org/toolkits/arrests/arrest_inquiries.htm.

72. Geiger, "The Case for Treating Ex-Offenders as a Suspect Class," 1200.

73. Ibid., 1205.

74. Elena Saxonhouse, "Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination," *Stanford Law Review* 56 (May 2004): 1601, 1638.

75. David Thacher, "The Rise of Criminal Background Screening in Rental Housing," *Law and Social Inquiry* 33, no. 1 (Winter 2008): 6.

76. Ibid., 5–30, 15–17.

77. Love, "Relief from the Collateral Consequences of Conviction," 2.

78. See, for example, the story of Michael Mahoney recounted in Gary Fields, "'Career Felons' Feel the Long Arm of Gun Laws—Ashcroft Aims to Step Up Efforts to Curb Illegal-Firearm Possession," *Wall Street Journal*, July 3, 2001, sec. A, 16.

79. *Trop v. Dulles*, 356 U.S. 86, 96-97 (1958).

80. David L. Faigman, "Fact-Finding in Constitutional Cases," in *How Law Knows* (Stanford, CA: Stanford University Press, 2007), 158–60.

81. Ibid., 158.

82. National Conference of Commissioners on Uniform State Laws, "Draft, Uniform Collateral Sanctions and Disqualifications Act," 3.

83. Stevens, "State Police Power vs. Federal Constitution," 229; Chin, "Are Collateral Sanctions Premised on Conduct or Conviction?" 1691.

84. *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 377, 390–96. For a good brief summary, see Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (Yale University Press, 1999), 276–77.

85. Roberts, "The Mythical Divide," 672.

86. Demleitner, "Preventing Internal Exile," 161.

87. *U.S. v. Littlejohn*, 224 F.3d 960 (2000), n. 12.

88. *Hawker v. U.S.*, 170 U.S. 189 (1898).

89. Aliens also may face consequences premised on conduct in the absence of a conviction. Federal immigration law states that "the term 'conviction'" does not mean only actual convictions, but may include some situations in which "adjudication of guilt has been withheld," but where the person has "admitted sufficient facts to warrant a finding of guilt," and "the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." 8 USC 1101 (48) (A) (i). This language seems to suggest

that an alien can be deported for certain conduct without actually being convicted of crime related to that conduct. I am indebted to Margaret Love for bringing this statute to my attention.

90. Court Security Act of 2007, P.L. 110-177, Sec. 510.

91. In almost all cases, courts have refused to reverse convictions when defendants were unaware of "collateral" penalties, including loss of a driver's license, firearms rights, access to civil-service employment, ability to vote, and service in the armed forces. Cohen, "The Weakness of the Collateral Consequences Doctrine," 1109–10, nn. 100, 101. See, generally, *United States v. Littlejohn*, 224 F.3d 960 (2000). Prior to the *Padilla* decision, jurisdictions and courts had been divided over whether counsel had to inform a defendant of the possibility of deportation. Cohen, "The Weakness of the Collateral Consequences Doctrine," 1095–96, nn. 13–16.

92. von Hirsch and Wasik, "Civil Disqualifications Attending Conviction," 600.

93. Roberts, "The Mythical Divide," 672–73. This arrangement, Roberts writes, "completely ignores the defendant."

94. Geiger, "The Case for Treating Ex-Offenders as a Suspect Class," 1192.

95. G. J. Chin and R. W. Holmes, Jr., "Effective Assistance of Counsel and the Consequences of Guilty Pleas," *Cornell Law Review* 87 (2002): 699.

96. National Conference of Commissioners on Uniform State Laws, "Draft, Uniform Collateral Sanctions and Disqualifications Act," 4.

97. Robert M. A. Johnson, "Collateral Consequences," *Criminal Justice* 16 (Fall 2001): 33.

98. Deborah Archer and Kele Williams, "Making America 'The Land of Second Chances': Restoring Socioeconomic Rights for Ex-Offenders," *New York University Review of Law and Social Change* 30 (2006): 527.

99. *Michel v. U.S.*, 507 F.2d 461, 466 (2d Cir. 1974).

100. *Students for Sensible Drug Policy Foundation v. Spellings*, No. 07-1159 (U.S.C.A. 8th Cir.), April 29, 2008, 4 (emphasis added).

101. *Washington v. State*, 75 Ala. 582, 585 (1884).

102. *Simmons et al. v. Galvin*, C.A. No. 01-11040-MLW (U.S.D.C Ma.), August 30, 2007, 12.

103. *McLaughlin v. City of Canton*, 947 F. Supp. 954 (S.D. Miss. 1995), 971.

104. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (Basic Books, 2001), 162–63.

105. Roger Clegg, "Who Should Vote?" *Texas Review of Law and Politics* 6 (2001): 177.

106. Todd Gaziano, "Prepared Testimony, Civic Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 before the Subcommittee on the Constitution of the House Committee on the Judiciary, 106th Cong. 41," 1999.

107. *Simmons et al. v. Galvin*, 37.

108. "Parliament," wrote the judge, "basing itself on electoral policy, is entitled to add civil consequences to the criminal sanction in subtle, multi-dimensional ways." *Sauvé v. Chief Electoral Officer of Canada*, 2 F.C. 117 (Federal Court of Appeal, 2000), paragraph 129.

109. Jeremy Travis, "Invisible Punishment: An Instrument of Social Exclusion," in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (New York: Free Press, 2002), 16–17.

110. Chin and Holmes, "Effective Assistance of Counsel and the Consequences of Guilty Pleas," 700.

111. Margaret Colgate Love and Gabriel J. Chin, "Old Wine in a New Skin: The ABA Standards on Collateral Sanctions and Discretionary Disqualifications of Convicted Persons," *Federal Sentencing Reporter* 16 (February 2004): 232.

112. Alec C. Ewald and Marnie Smith, "Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench," *Justice System Journal* 29, no. 2 (2008): 145–65.

113. Julia Black, "Critical Reflections on Regulation," presented at the ESRC Centre for Analysis of Risk and Regulation, London School of Economics, London, 2002, 1, 4.

114. *U.S. v. Littlejohn*, 224 F.3d 960 (2000), n. 12.

115. National Conference of Commissioners on Uniform State Laws, "Draft, Uniform Collateral Sanctions and Disqualifications Act," 4.

116. Shearing quoted in John Braithwaite, "The New Regulatory State and the Transformation of Criminology," *British Journal of Criminology* 40 (2000): 230. Shearing's choice of words may have been a conscious echo of Foucault's "carceral archipelago." Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Sheridan trans., 1977/1995), 297.

117. Bureau of Justice Assistance, "Program Brief," 4.

118. 136 Congressional Record H4550, daily ed., July 12, 1990 (remarks by Mr. Solomon).

119. Thacher, "The Rise of Criminal Background Screening in Rental Housing," 10.

120. Maine and Michigan (for most licenses), Minnesota (at least for teachers), and Nebraska (at least for realtors) are among the states explicitly requiring applicants to pay for criminal background checks. See http://www.maine.gov/pfr/professionallicensing/index.shtml; http://www.michigan.gov/mgcb/0,1607,7-120-1382_1450-12987—,00.html; http://www.state.mn.us/license/content.do?mode=license&LicenseID=5359; http://www.accesskansas.org/krec/forms/FAQs%20about%20background%20check%20requirements.doc.

121. As John Braithwaite puts it, "[M]ost of the regulation is neither undertaken

nor controlled by the state." See "The New Regulatory State and the Transformation of Criminology," 223.

122. Ibid., 229.

123. David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press, 2002), 8–9. Notably, collateral sanctions are not among the twelve indicators of the "reconfigured field of crime control" Garland offers. Ibid., 6–20.

124. On the expressive function of law, see Elizabeth S. Anderson and Richard H. Pildes, "Expressive Theories of Law: A General Restatement," 148 *U. Pa. L. Rev.* 1503 (2000).

125. David Garland, *Punishment and Modern Society* (University of Chicago Press, 1990), 33. See Emile Durkheim, *The Division of Labor in Society* (1933); I rely here on Garland's interpretation of Durkheim. Elsewhere, Garland (p. 23) writes that for Durkheim, punishment "both expressed and regenerated society's values."

126. David Garland, "Punishment and Culture: The Symbolic Dimensions of Criminal Justice," in *Studies in Law, Politics and Society*, vol. 11 (London: JAI Press, 1991), 194.

127. Garland, *Punishment and Modern Society*, 251.

128. Jonathan Simon, "Megan's Law: Crime and Democracy in Late Modern America," *Law and Social Inquiry* 25, no. 4 (Autumn 2000): 1115, 1143.

129. Garland, "Punishment and Culture," 195, 206, 207; Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics, Studies in Crime and Public Policy* (New York: Oxford University Press, 1997).

130. Simon, "Megan's Law," 1138; Geiger, "The Case for Treating Ex-Offenders as a Suspect Class," 1197; Naomi Murakawa, "The Origins of the Carceral Crisis: Racial Order as 'Law and Order' in Postwar American Politics," in *Race and American Political Development* (New York: Routledge, 2008), 234–55.

131. Indeed, as Garland points out, Durkheim's view of punishment as "a kind of routinized expression of emotion" and "release of psychic energy" rests closely on likening punishment to religious ceremonies. Garland, *Punishment and Modern Society*, 35, 32, 26.

132. Garland, "Punishment and Culture," 208, 218, 200.

133. James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford University Press, 2005), 19.

134. Joel Feinberg, *Doing & Deserving Essays in the Theory of Moral Responsibility* (Princeton University Press, 1970), 95.

135. Ibid., 109–10.

136. Thacher, "The Rise of Criminal Background Screening in Rental Housing."

137. Ibid., 26–27. As Feeley and Simon put it, actuarial justice employs "mechanisms of appraising and arranging groups" instead of "intervening in the lives of individu-

als." Malcolm Feeley and Jonathan Simon, "The New Penology," *Criminology* 30 (1992): 449–74, 459.

138. Thacher, "The Rise of Criminal Background Screening in Rental Housing," 24.

139. Ibid., 25.

140. Thacher focuses on the institutional resources built by landlords in the form of access to criminal histories, the political power to defend that access, and shared legal expertise. Ibid., 23.

141. HAVA, 42 U.S.C., 15483(a)(2)(B).

142. Ibid., 14, quoting Feeley and Simon, 1992: 453.

143. Marie Gottschalk, "Hiding in Plain Sight: American Politics and the Carceral State," *Annual Review of Political Science* 11 (2008): 242.

144. Braithwaite, "The New Regulatory State and the Transformation of Criminology," 227. David Garland has challenged this view. As Garland points out, the late modern crime-control problem "has vividly demonstrated the limits of the sovereign state," which finds itself "seriously limited in its capacity to provide security for its citizens and deliver adequate levels of social control." Issuing commands no longer generates social order: government must "devolve power and share the work of social control with local organizations and communities." Garland, *The Culture of Control*, 205.

145. Wacquant, "Race as Civic Felony," 128.

146. Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford University Press, 2007).

147. Gottschalk, "Hiding in Plain Sight," 237.

148. As Wacquant writes, we can understand "the atrophy of the social state and the hypertrophy of the penal state" as "two correlative and complementary transformations." Loïc Wacquant, *Urban Outcasts: A Comparative Sociology of Advanced Marginality* (Polity, 2007), 277. Elsewhere, Wacquant writes that "activating the fight against crime has been but the pretext and springboard for a broader remaking of the perimeter and functions of the state, which has entailed the concurrent and convergent 'downsizing' of its welfare component and 'upsizing' of its police, courts, and correctional wings." Loïc Wacquant, "The Place of Prison in the New Government of Poverty," in *After the War on Crime* (New York: New York University Press, 2008), 24.

149. This is powerfully on display in congressional denunciations of programs extending Pell educational grants to inmates. Congressmen spoke of "honest and hard-working Americans" who were being "elbowed out" of college by degree-earning inmates—a flat untruth, because the Pell program worked more like an entitlement than a competition. Yet such arguments hold tremendous political power in post–welfare state America, where a college degree is both dramatically more expensive than it was and more essential as a ticket to the middle class. Wacquant, "Race as Civic Felony," 130.

150. Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace and World, 1968), 293, 297; *Trop v. Dulles*, 356 U.S. 86, 102 (1958).

151. *Perez v. Brownell*, U.S., vol. 356, 1958). In *Perez*—this time in dissent—Chief Justice Warren again referred to citizenship as "the right to have rights." *Perez*, 356 U.S., at 64. *Perez* was overturned in *Afroyim v. Rusk*, 387 U.S. 253 (1967).

152. *Furman v. Georgia, U.S.*, vol. 408, 1972, 289.

153. T. H. Marshall, *Class, Citizenship, and Social Development* (Westport, Conn.: Greenwood Press, 1973), 71–74.

154. Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton University Press, 2005), 6; Linda Bosniak, "Universal Citizenship and the Problem of Alienage," *Northwestern University Law Review* 94: 963–82.

155. Will Kymlicka and Wayne Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory," *Ethics* 104 (January 1994): 352–81.

156. European states have historically granted immigrants partial access to political, civil, and social rights, and "outsiders," particularly ethnic minorities, are legally defined in complex ways; noncitizens, including some guest workers, are able to vote, work in restricted professions, and exercise civil rights in many European countries. Yasemin Nuhoğlu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago, 1994), 3125–28; David M. Smith and Enid Wistrich, "Citizenship and Social Exclusion in the European Union," in *European Citizenship and Social Exclusion*, ed. Maurice Roche and Rik Van Berkel (Aldershot, Hants, England, 1997), 245. On declining levels of social provision and its impact on citizenship, see, generally, Colin Crouch, Klaus Eder, and Damian Tambini, *Citizenship, Markets, and the State* (Oxford: Oxford University Press, 2001).

157. Thacher, "The Rise of Criminal Background Screening in Rental Housing," 25.

158. Uggen et al., "Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders," 299–300. Uggen and his colleagues conclude that despite strong similarities, neither caste, class, nor status-group models fully match the particular condition of former offenders (see p. 303). Pinaire and his colleagues write that former offenders live in an "intermediate socio-political space," somewhere between banishment and inclusion. Brian Pinaire et al., "Barred from the Vote: Public Attitudes toward the Disenfranchisement of Felons," *Fordham Urban Law Journal* 30 (2003): 1548.

159. Noah M. J. Pickus, "To Make Natural: Creating Citizens for the Twenty-First Century," in *Immigration and Citizenship in the Twenty-First Century* (New York: Rowman and Littlefield, 1998), 120.

160. Julie Novkov, "Bringing the States Back In: Understanding Legal Subordination and Identity through Political Development," *Studies in American Political Development* 40, no. 1 (2008): 24–48; Smith, *Civic Ideals*; Mark S. Weiner, *Americans without Law: The Racial Boundaries of Citizenship* (New York: New York University Press, 2006).

161. Married women surrendered substantial property rights and legal status under the law of coverture, a concept that wielded great force in nineteenth-century American law and was eliminated only gradually by state laws and federal court rulings through the twentieth century. Moreover, American women who married foreign nationals formally lost their U.S. citizenship altogether until enactment of the 1922 Cable Act and a subsequent 1931 federal statute. Sandra F. VanBurkleo, "*Belonging to the World": Women's Rights and American Constitutional Culture* (New York: Oxford University Press, 2001), 206.

162. Gottschalk, "Hiding in Plain Sight," 245; Wacquant, *Urban Outcasts*, 251, 252; Uggen et al., "Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders," 303.

163. Writing in 1998 of the "new political criminology," Stuart Scheingold observed that "crime control strategies both reflect and influence the distribution of power within the polity." Stuart Scheingold, "Constructing the New Political Criminology: Power, Authority, and the Post-Liberal State," *Law and Social Inquiry* 23 (Fall 1998): 857.

Several authors have noted the political weakness of former offenders today. Elena Saxonhouse writes of the "political powerlessness and unpopularity of ex-felons as a class," or what Alexander Keyssar calls felons' "negative political leverage." Saxonhouse, "Unequal Protection," 1601; Keyssar, *The Right to Vote*, 308. Historically, there is good evidence that efforts to maintain existing distributions of political power, particularly along racial lines, have helped motivate passage of some U.S. disenfranchisement laws. See Angela Behrens, Christopher Uggen, and Jeff Manza, "Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disenfranchisement in the United States, 1850–2002," *American Journal of Sociology* 109 (November 2003): 559. On how contemporary American federalism influences interest-group representation and criminal justice policy-making, see Lisa L. Miller, *The Perils of Federalism: Race, Poverty, and the Politics of Crime Control* (New York: Oxford University Press, 2008).

164. Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005), 213, 3, 51.

165. Corey Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton University Press, 2007), 97; Whitman, Harsh Justice, 41.

166. Dubber, *The Police Power*, 160. As Dubber writes, "[T]hreats don't have rights, and they don't get punished; they get policed."

167. Ibid., 161.

168. David Garland, "'Governmentality' and the Problem of Crime: Foucault, Criminology, Sociology," *Theoretical Criminology* 1, no. 2 (1997): 177.

169. Pager, "The Mark of a Criminal Record," 961.

170. Simon, "Megan's Law," 1123; Petersilia, *When Prisoners Come Home*, 105.

171. Uggen et al., "Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders," 296–97.

172. Robert R. Preuhs, "State Felon Disenfranchisement Policy," *Social Science Quarterly* 82, no. 4 (December 2001): 746.

Many collateral sanctions policies seem to earn Dubber's label "bad police." The primary way to qualify as "bad police" is to fail to achieve the kinds of instrumental objectives a good head of household pursues. The second is to degrade a household member (or resource) out of sheer animus—"bad faith" police. Dubber, *The Police Power*, 183.

173. On justifying punishment, see, generally, Brettschneider, *Democratic Rights*; Tonry and Petersilia, *Crime and Justice*, Vol. 26.

174. Garland, *The Culture of Control*; Simon, *Governing through Crime*.

175. Dubber, *The Police Power*, 147.

176. Geiger, "The Case for Treating Ex-Offenders as a Suspect Class," 1192.

177. The *Padilla* majority repeatedly called deportation "unique" among such restrictions, stressing its harsh, life-altering effects, the degree to which removal is automatic for many offenders and virtually automatic for others, and the fact that more than half of U.S. states already required defense counsel to apprise defendants of the possible deportation consequences of a conviction.

However, the concurring and dissenting Justices argued that the majority had failed to offer logic limited to deportation. For example, Justice Alito contended in a concurring opinion that the loss of professional licenses, suspension of voting rights, and even the reputational harms of a criminal conviction could qualify as the kind of "serious" consequences the *Padilla* majority focused on. Meanwhile, an intriguing passage in the majority opinion actually denies that the Supreme Court itself had ever "applied a distinction between direct and collateral consequences" in the Sixth Amendment setting. These aspects of the decision have led some commentators to speculate that *Padilla* could eventually lead to a dissolution of the direct/collateral divide in American jurisprudence.

178. The statute is the Court Security Improvement Act of 2007, Sec. 510. The ABA has also set up a Re-Entry and Collateral Consequences Committee, devoted to continuing work in this area. The ABA's Re-Entry and Collateral Consequences Committee's website is at http://www.abanet.org/dch/committee.cfm?com=CR206500.

179. National Conference of Commissioners on Uniform State Laws, "Draft, Uniform Collateral Sanctions and Disqualifications Act"; American Bar Association, Criminal Justice Standards Committee, "ABA Standards for Criminal Justice."

180. Pinard, "Broadening the Holistic Mindset."

181. McGregor Smyth, "Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy," *University of Toledo Law Review* 36 (2005): 494.

182. Alec C. Ewald, "Criminal Disenfranchisement and the Challenge of American Federalism," *Publius* 39, no. 3 (2009): 527–56.

183. Love, "Relief from the Collateral Consequences of a Criminal Conviction: A State-By-State Resource Guide" (Sentencing Project, 2009), http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486.

184. Alec Ewald and Brandon Rottinghaus, eds., *Criminal Disenfranchisement in an International Perspective* (New York: Cambridge University Press, 2009).

185. The states are California, Connecticut, Hawaii, New Jersey, New York, and Wisconsin.

186. Erik Eckholm, "U.S. Shifting Prison Focus to Re-Entry into Society," *New York Times*, April 8, 2008.

187. Love, *Relief from the Collateral Consequences of a Criminal Conviction*, 96.

In the Prison of the Mind: Punishment, Social Order, and Self-Regulation

SUSANNA LEE

This paper examines the relationship between punishment and regulation as represented in Richard Price's 1992 novel, *Clockers*. In particular, it considers how obedience to regulation promises avoidance of punishment, even as regulation is often imposed as part and parcel *of* punishment. I explore how that variable relationship acts on individual subjects and consider how it is replicated and elucidated through narrative construction.

A principal definition of regulation is state control or governance or direction by rule(s). Another and broader definition of the word is any mechanism of control or direction. As Julia Black writes, "The main textbooks on regulation identify three definitions. In the first, regulation is the promulgation of rules by government accompanied by mechanisms for monitoring and enforcement, usually assumed to be performed through a specialist public agency. In the second, it is any form of direct state intervention in the economy, whatever form that intervention might take. In the third, regulation is all mechanisms of social control or influence affecting all aspects of behaviour from whatever source, whether they are intentional or not."[1] This third and broader definition is sometimes described in terms of "meta-regulation."[2] The present discussion of the connection between regulation and punishment necessarily examines the connection between the first and third forms of regulation: specifically, the ways in which the third sort of regulation manipulates individual attitudes toward—and thus ensures the social force of—the first sort.

Legal punishment, as Michel Foucault has detailed, is the handmaiden of the first sort of regulation, its "mechanism for monitoring and enforcement," imposed by the police and the courts, the "specialist public agencies." And yet, punishment, that essential social and legal deterrent to the contravention of

rules, is for Foucault not just an unpleasant consequence of disobedience; rather, it precedes disobedience and so acts itself as an instrument of regulation:

> The art of punishing, in the régime of disciplinary power, is aimed neither at expiation, nor even precisely at repression. … The perpetual penalty that traverses all points and supervises every instant in the disciplinary institutions compares, differentiates, hierarchizes, homogenizes, excludes. In short, it *normalizes.* It is opposed, therefore, term by term, to a judicial penalty whose essential function is to refer, not to a set of observable phenomena, but to a corpus of laws and texts that must be remembered; that operates not by differentiating individuals, but by specifying acts according to a number of general categories; not by hierarchizing, but quite simply by bringing into play the binary opposition of the permitted and the forbidden.[3]

With respect to the notion of differentiation and homogenization, which could seem to contradict one another: differentiation as described here acts in the service of homogenization. Individuals are differentiated from one another. Positions within a hierarchical system are differentiated from one another. Hierarchical systems, on the other hand, are meant to be homogenized, meaning that social order must reproduce and remain identical to itself. That reproduction of social order belongs to the third definition of regulation: "mechanisms of social control or influence affecting all aspects of behaviour." And the reproduced social order in question is one in which regulation operates not just to threaten punishment, but to give the subject the impression of being already punished.

On the one hand, since the contravention of rules constitutes a crime, a punishable offense, regulation (in the first sense, as "the promulgation of rules by government accompanied by mechanisms for monitoring and enforcement") is a blueprint for remaining on the right side of the law, and by extension free from punishment. Punishment, then, according to this model, happens to those who violate regulation. On the other hand, when the "specialist public agency" described by Black is correctional, regulation can be part and parcel of punishment. A common element of judicial chastisement is increased or intensified subjection to regulation in the form of parole and probation after the active penalty phase is completed. Sometimes, of course, that increased or intensified subjection substitutes entirely for the active penalty phase; heightened regulation often *is* the penalty for certain crimes. Regulation in this formula, in other

words, happens to those who are already punished, rather than to those who simply wish not to be punished.

On the one hand, then, regulation is the imposition of rules that, when followed, exempt one from punishment. On the other hand, regulation is the imposition of rules as punishment. In a sense, these meanings correspond to two subtly different connotations of the word *regulation*. The first is a rather inanimate noun: *regulation* meaning rules, order, a neutral term for structure. The second has a more active resonance: *regulation* meaning the act of regulating, with emphasis on the transitive verb underneath the noun, and on the force and (punitive) weight of that verb.

Regulation that precedes punishment is in many ways substantially different from regulation that is imposed as punishment. That former is universal, or at least theoretically so; all people must pay taxes, drive a registered car, stop at red lights, refrain from littering, and so forth, to name a couple of the countless rules imposed on every person (this sort of regulation comes under the first definition that Black provides). The second sort of regulation, the sort that *is* punishment, though, is limited to those who have committed some sort of infraction: some crime that leads to probation officer visits, submission to drug tests, and the like. This sort of regulation also comes under the first definition that Black provides; it is simply imposed on a more limited population and for different reasons: to punish rather than merely to standardize or manage. In a sense, these categories of regulation are very different: they play different roles in the social order and assume different legal and social statuses—one assumes prior crime and the other does not. The problem is—and this is the crux of Foucault's notion of punishment that normalizes—that there are all sorts of regulations of the first sort that are not universal at all and that, because of that absence of universality, come closer to being experienced as regulations of the second sort. To use the example of public housing, crucial to the novel at hand: people who live in public housing have to abide by housing rules, including no trespassing, no unauthorized long-term guests, and so forth.[4] This regulation is universal in that everyone who lives in public housing has to abide by it. But of course, not everyone does live in public housing, and therefore not everyone is ordered by the government to wash his dishes or take out the garbage in a timely manner; not everyone has to ask official permission before housing a friend or family member. Those who do live there experience a regulation

that stands astride the first and the second sort—at once neutral (because it is unconnected to a prior crime) and punitive (because it exceeds the universal regulations and demands more obedience and self-restraint from its subjects).

With this duality in mind, we can return to the third definition of regulation given above. "Regulation is all mechanisms of social control or influence affecting all aspects of behaviour from whatever source, whether they are intentional or not."[5] Christine Parker, Colin Scott, Nicola Lacey, and John Braithwaite also present this broader definition in *Regulating Law*, giving it the name of "meta-regulation": "It is useful to think about the relationship of law and society or law and economy in terms of various layers of regulation each doing their own regulating. At the same time, each layer regulates the regulation of each other in various combinations of horizontal and vertical influence. The label 'meta-regulation' has been applied to this concept."[6] As I use it here, meta-regulation refers to the abstract mechanisms (social, cultural, psychological) that determine how individuals see themselves situated with respect to regulation and with respect to punishment. That determination varies according to who the individual is and how—and how much—she is regulated. In *Clockers*, we see the variable relationship of regulation and punishment as an essential component of meta-regulation, and as an essential ingredient in maintaining regulation's effectiveness.[7] *Clockers* depicts how regulation stands astride its meanings, its relationships to punishment, promising a way out of punishment even as it intimates that punishment is already underway. The specter of regulation carries within it the constant promise or threat of punishment, and reminds the subject—in ways subtle and not subtle—of her fundamental and enduring punishability, and even of her status as already punished. Regulation resonates as a morsel or preview and even, paradoxically, as a residue of punishment—even when the punishment is a phantom one, even when no punishment, no contact with the authorities, has occurred, and even when one is following regulation (as one usually does) with the precise intention of avoiding the punitive reach of the law. What Richard Price's novel reveals to us, through its thematic content and through its narrative construction, is the ways in which regulation resonates both as punishment and as a way out of punishment, and as such, how it constrains one's movements and imagination, encouraging one (through what we can call meta-regulation) to assume the contradictory role (with elements of both punisher and punished) of self-regulator.

When I say that regulation connects to punishment, I am not talking about the fact that when police are always present, which they are in very regulated environments, they are relatively likely to find some violation. Nor am I talking about the fact that intense regulation sometimes pushes the regulated person to acts of resistance, which are in turn punishable—though these forces of causation exist. Regulation functions because it encourages people to see themselves not just as punishable, but as already (and already justly) punished, in some sense. This vision entails a provocatively multifaceted consciousness of oneself as a regulated subject. To obey regulation is to be conscious of that regulation. To be conscious of regulation, I propose, is to be conscious of oneself as existing *outside* regulation. To put this another way, to see oneself as regulated (a passive state that assumes an active subject) is to see oneself as inherently, organically unregulated—as needing to be regulated, needing to be brought or nudged into a social order that is fundamentally outside one. For instance: when we see a speed limit sign, we glance down at our speedometer. We notice if we are going faster than the posted limit; that is, faster than regulation dictates. If so, we slow down, aware that we can be ticketed. Significantly, though, even if we notice that we are not going faster than that limit, we are nonetheless conscious of our obedience, our adherence, and conscious of the element of choice present in that adherence: conscious, that is, of the possibility of unregulated conduct. And since unregulated conduct is connected to punishment, there is a sort of subtle reprimand implied in even the least punitive of regulations. A division thus arises in the subject: self-regulating, responsible, conforming to social mores, and at the same time regulated, constrained, punished.[8] I am interested in what that division—or duality—means for the individual as a member of society and for the nature of regulation in the maintenance of social order.

Clockers

Clockers has a number of story lines. I will summarize the central one and then concentrate my readings on those moments that dissect regulation's connection with punishment—that demonstrate the provocative and psychologically untenable combination of passive subjection–punishment and active self-control–personal responsibility. The principal character is Strike Dunham, who sells drugs in a New Jersey housing project under the thumb and the tutelage

of an older dealer. That older dealer, Rodney, tells Strike that there will be opportunity for advancement if a rival dealer is done away with. While pondering this idea, Strike happens to meet his brother Victor in a bar—his hard-working, law-abiding older brother, a family man trying to get his wife and children out of the projects—and slanders the rival dealer to him. Strike tells Victor that the rival dealer (whom he doesn't identify as such, since his brother and he have a sort of "don't ask, don't tell" relationship with respect to Strike's dealing) is a bad man: he beat up a woman, and so on. The rival dealer ends up dead that very night. Soon after that, the older brother, Victor, confesses. He confesses through a minister at his church, produces the murder weapon, and claims that he killed in self-defense. The detective who takes that confession—and that detective is a major character in his own right—does not understand the confession and does not believe it—doesn't believe the claim of self-defense, doesn't believe that Victor even committed the murder. He thinks surely it must be Strike, the bad kid who is always trying to get away with something, and not his upstanding brother, who has everything to lose and no connection whatever with the murdered man or the drug business, who shot the dealer. The novel is about solving that murder, and understanding the characters' motives. Meanwhile, the older dealer under whom Strike was working is arrested, blames Strike for that arrest, destroys his car, and threatens to kill him. The detective ends up driving Strike into New York City, where he boards a bus and heads out of town.[9]

The characters in *Clockers* experience various forms of regulation, some of the first definition (rules promulgated by government) and some of the third definition (mechanisms of social control or influence affecting all aspects of behavior from whatever source, whether they are intentional or not). Strike is regulated in connection with punishment: he goes to his probation officer, he is stopped by police, searched, arrested, drug tested, and the like. Victor's regulation on the other hand is self-generated and functions as a talisman against outside punishment: he does not commit crimes, he does not allow dealers in the restaurant he manages, he works two jobs in order to leave the projects and move to a better place, which would also be—though he does not articulate it as such—a place less regulated. In addition to these regulations, both brothers experience the ambiguous part-standard and part-punitive regulation of government-run public housing.[10] Then, importantly, we see the ways in

which these characters, who are so regulated, regulate themselves. Throughout the novels, internal, figurative forms of detention and punishment accompany outside regulation—detention placed by the characters on their own dreams and desires, their metaphors, their spatial imaginations, as well as their plots, movements, and accomplishments. These detentions can be seen as the fruits of "meta-regulation," or a mechanism of social control that encourages individuals to be complicit and even active in their own policing.

Narrative Regulation

As I bring out the instruments of literary and narrative theory to examine the notion of "self-regulation," I will say a word about examining social phenomena in general and the idea of the self in particular through their representations in a novel. One could ask what could be learned from a piece of fiction that would not be learned, for instance, from a sociological treatise on subjects of regulation. Why not read a few case studies of people who self-limited as a (direct or indirect) result of living in highly regulated or punitive circumstances? There are many such. What the novel form gives us—and what this particular novel gives us, through a third-person omniscient narration—is a multidimensional sense of the reach and power of subjection to regulation—a sense of how people act and are acted upon, see and are seen. This multidimensional sense comes from the fact that when characters regulate "themselves," they are in fact being regulated by their narrator—that there is no "self" to escape or transcend the narrative frame. To put this in terms of the definitions introduced at the start of this paper, the narrative frame represents a solid circle of "meta-regulation": it is the border outside which the character cannot step—a border invisible to the character. To discuss narrative structure within an analysis of regulation, or to discuss narrative *as* regulation, is to use a relatively visible concept (narrative frame) as a window onto its much more abstract real-life equivalent. It is to see the author and the narrative frame as narratological or structural stand-ins—heuristic stand-ins, as it were—for the cultural or psychological phenomena of meta-regulation.

The idea that legal considerations of narrative frame and narrative construction are essential to investigations of responsibility and character is hardly new. Peter Brooks, for one, pointed out that legal questions are fundamentally

narrative, and narratological, in nature: "One needs to recognize… that narrative is inevitable and irreplaceable: it is not an ornament, it is not translatable into something else. The argument for study of narrative and rhetoric in the law must be that they are not reducible to other kinds of speech and argument, and since they are not, they need analytic consideration in their own right."[11] Brooks is talking about trials of real people, about the presentation of evidence and testimony in court. What we have in *Clockers* are not real people, but rather characters. But in a sense, this is Brooks's point, despite his real-world forum—what we have in a narrative (whether in a fictional narrative or in a real testimonial narrative) is precisely characters, and only characters: only through the people *as* characters and through the narrative that houses and forms them can we access—or approach—what we believe to be the real people and their actions.

Fictional characters are not people in the way that you and I are people: they are a creation, a constructed mind placed within a constructed atmosphere and surrounded by constructed events. The characters' words and thoughts, then, are as much the narrator's creation as their surroundings are: there is no real independence, as the frame is always there. Or rather, frames, plural, which is what this fiction provides: a Venn diagram of perceptions and realities, of what is and what seems to be, of what one wants and what one can have, of what one is doing and what is being done to one. The narrator acts as a mediator or manipulator of these Venn circles, even as he occupies one of them, determining what the characters see, what they want to do, and what their (external and internal) limitations are. In analyzing regulation in a novel, and in analyzing narrative as an exercise in regulation even as it is an exercise in creation, I am operating on the idea that subjection to regulation *is* in a very real sense subjection to narrative constraint. Indeed, *Clockers* represents them as analogous states. Furthermore, subjection to regulation can be as subtle and insidious as subjection to narrative constraint. Characters, that is, are not conscious of being characters, are not conscious of the narrative hand that moves them around.[12] And one who is meta-regulated is not always conscious of the meta-regulation that moves him—or at least, not conscious of the nature of that meta-regulation. He knows he is regulated, he knows that the laws exist, he knows that he can be punished if he contravenes them: what he may not know, and what the novel makes clear, is that regulation depends on his seeing himself as wrong, as un-

regulated, as punishable. Regulation depends on a paradoxical combination of active self-policing and passive obedience, both of which are rooted, I propose, in a pervasive sense of punishability and of the justness of that punishability. These pervasions are in turn rooted in the fundamental invisibility of meta-regulation, in the limited perception of the subject, just as the verisimilitude of an omniscient narration depends on the limited perception of the character. A character who stands up and leaps out of the book, for instance, contradicting her narrator and demanding different scenarios, stands to collapse the narrative frame, collapse the entire novel.

Meta-regulation operates because individual subjects can sense its presence, its force, its tone, but not understand the nature of it or the scope of its operation. That limited perception is the very core of Price's novel, and it is also the core, the foundation of regulation. Specifically, I would propose, meta-regulation operates by imparting to the regulated subject a sense, albeit an often false sense, of autonomy and possibility. To be more precise, and to return to the double sense of regulation as escape from punishment versus regulation *as* punishment: in this novel, when regulation is in the air—when policemen are wandering around, or when some encounter with bureaucracy is in process—the characters' sense of constraint (and self-doubt and self-limitation) is at its strongest. That in itself is not surprising. And yet, paradoxically, it is also worth noting that those moments contain an intense sense of personal responsibility—of principle and also of autonomy. This is the striking fact: regulation encourages a sense of personal responsibility. And personal responsibility, which resists and yet must operate within regulation, causes characters to claim and deploy an agency that they do not have, that they cannot have, given the narrative (or regulatory) frame. The regulated individual, then, with a strong sense of responsibility and also of punishability, occupies a circumscribed area of movement, where in the end the authority to self-regulate and self-punish is the strongest authority, in a sense the only authority, one can access.

Probation Office

I begin with the scene near the middle of the novel where Strike visits his probation officer. At this point, the rival dealer has been murdered, Strike's older brother Victor has confessed and been imprisoned, and Strike imagines

that Victor has perhaps hired someone to murder the dealer. He thinks he knows who that someone is, but he is not sure, and wonders if he himself has been implicated somehow. This is the mental landscape as Strike goes to the probation office for a drug offense that happened before the novel began. Once inside the probation officer's cubicle:

> Strike scanned the walls. His eyes stopped at a poster of a skeleton on a pitcher's mound winding up to fire off a hypodermic, with "AIDS" on his baseball cap and "Don't Let Him Strike You Out" in red along the bottom. The only other poster was a poem called "Invictus" written over a picture of a sunrise. Strike had been coming into this cubicle for six months now, had always stared at that poem but had never read it through. He just liked the name, Invictus. Lynch cleared his throat, opened a huge green ledger with MALES written on the front and started right in, not even looking at Strike.[13]

Strike mentions the phenomenon of these posters later on when he visits Victor in prison, saying: "If you were poor, posters followed you everywhere—health clinics, probation offices, housing offices, day care centers, welfare offices—and they were always blasting away at you with warnings to do this, don't do that, be like this, don't be like that, smarten up, control this, stop that."[14]

What I want to focus on here is the sense of being surrounded by walls of stories, stories that encourage one to produce walls of one's own. The posters around him instruct in how to act or not act, what decisions to make in order not to be cast in the scenario depicted. "Do this and don't do that" are at least within the purview of the character. But in this particular case—and this skeleton poster is the only poster whose contents we see—the notion of "control this" is elusive and contradictory. As the definition of "meta-regulation" said: "It can be fruitful to think of regulation occurring in a 'regulatory space' in which the operation and competition of various regulatory regimes influences [*sic*] regulatory impact."[15] This episode contains numerous regulatory regimes or messages that conspire, and some that compete. The probation office, the cubicle, the file that describes Strike, the poster that threatens him, the mandated monthly check-ins, these all embody regulation in the form of detention or containment. The incongruous or competing regime or message, though, is the call to action. "Don't Let Him Strike You Out" encourages prudence and caution, but of course, in actual baseball, the way to avoid striking out is to hit as hard and as precisely as possible: in other words, to go on the offen-

sive rather than on the defensive. With respect to HIV, one side of the message is a pure negative (don't inject) while the other implies active consciousness and protection of the body.[16] But Strike is reading this in the probation office, which underscores the absence of control and decision-making and casts the body as a regulated entity. He is therefore inexorably cast in a double role: of one menaced by HIV, and, at the same time, of one menaced by the state.

This second menace, this second threat, is the one that Strike feels most intensely. It is not HIV that scares him, not that evocative skeleton, but the probation officer. Let us see what happens next. As the visit proceeds, Strike becomes more and more nervous, wondering if Victor has told on him somehow, imagining that he is about to be arrested for something. In connection with his previous drug offense, he is supposed to bring in $50 a month in fines, but he pretends to be short the money, imagining that if he has the entire $50, the probation officer will wonder where he got it, why he isn't more broke. He makes his excuse: "'I'm ha-having trouble this month. It a ha-hard month right now.'… Lynch looked at him for the first time since he'd come into the cubicle, his face all eye slits, boils and wattles. Strike felt a horrible sliding sensation, a sweaty panic, as if he was a little kid whose mother had taken him in for a routine checkup only to have the doctor pull out a harpoon-size hypodermic. 'What do you mean, a *hard* month? How was it hard?'"[17] The visit to the doctor in this metaphor signifies the visit to the probation office, and the harpoon-size hypodermic signifies this moment of interrogation. What I want to point out is that the hypodermic, the precise weapon of the HIV-bearing skeleton, the weapon that Strike was being encouraged to elude, becomes the figurative weapon of the state. And the act of regulation through interrogation becomes tantamount to a predatory act: "harpoon" suggests of course not doctor and patient, but hunter and hunted, and, more, human and animal.

To unpack this metaphor further, the interrogation is set in motion when Strike pretends to be a normal and law-abiding and cash-strapped working-class citizen, when he pretends *not* to be the drug dealer that he is, with thousands of dollars saved in various locations. It is when he comes across as most regular (meaning, most effectively regulated) that the officer decides to inspect him, to look at him, to see him for the first time that visit. And that inspection, compared to the hypodermic, resonates as punishment; punishment for be-

ing too self-regulated, inscribed within the punishment imposed for being not regulated enough.

Stopping in the probation office to read official guidelines on how to regulate oneself and thus avoid the fatal consequences of dangerous behavior is emblematic of numerous strata (or stratified regimes) of regulation, menace, and punishment. It is also emblematic of numerous contradictions. On the one hand, the spaces and places most redolent of regulation—here, in the sense of limitation and in the sense of actual government control—are paradoxically the ones that impute the most narrative authority, the most control. On the other hand, this imputation is incongruous enough to come across as an illusion, and thus as a reminder of the absence of control. Indeed, that contradictory message serves itself as an instrument of meta-regulation: one that detains through confusion, through the absence of a sure and reasonable course of action. In the end, the character is placed in a tight circle of action and decision, for the only sort of individual authority that this meta-regulatory poster encourages is the authority to step into the police role, to regulate oneself.

One more detail that I want to point out is the way the aforementioned metaphor gets articulated: "Strike felt a horrible sliding sensation, a sweaty panic, as if he was a little kid whose mother had taken him in for a routine checkup only to have the doctor pull out a harpoon-size hypodermic." We do not know whether the voice behind this metaphor is that of the narrator or that of Strike. Meaning, we do not know whether Strike comes up with the metaphor, thinking, "This feels like going to the doctor…" or whether it is the narrator who notices, or rather creates, this comparison. I will talk more later about this problem of who sees what, who understands what, because it goes directly to the idea of regulation as dependent on limited perception. If Strike perceives these metaphoric connections within the probation officer's examination, the threat of the hypodermic needle in the poster, and the unpleasantness of the hypodermic needle at the doctor's, then his understanding of regulation is necessarily rather canny and philosophical and his experience of it thus much more mediated by that understanding. If he does not perceive it, if he sits in a pure panic while the narrator perceives it and speaks around him, then the connections are not so much cognitive as viscerally physiological; his understanding is restricted and his subjection to regulation all the more absolute.

Invictus

Nicola Lacey described individual investment in the process of regulation: "As democratization proceeds, with the normative implication that the regulatory subject should be treated not only as a rational chooser but also in some stronger sense as an agent—as someone who not only makes choices but has some deeper form of responsibility for those choices, as a queen and not a pawn—a non-instrumental attachment to the responsibility condition emerges. This, of course, had always had a strong resonance in the retributive philosophical tradition, notably in the famous Kantian maxim of treating persons as ends in themselves rather than as means to ends."[18] In the introduction to *Regulating Law*, the editors had written: "We cannot assess the regulatory significance of criminal law or the law of torts without understanding the indirect, legitimizing effects of doctrines which though not designed for specifically regulatory purposes, may be a condition for such regulatory efficacy as these areas of law have. Our methodological bias is that we see best when our regulatory lens is multifocal, sometimes narrowly focused on intentional rule-making by public actors, sometimes widening its horizon to private, non-rulelike or non-intentional, modalities of control over the flow of events."[19] One such modality of control—one facet of meta-regulation—is precisely the fact that regulation, to use the chess parlance of Lacey's article, imputes to individuals the importance and responsibility and investedness of queens even as it handles them as pawns. Another related modality of control is of course the subtlety, even invisibility of that modality (an invisibility richly discovered and detailed in Marx, Althusser, Foucault, and so forth).[20] Let us turn now to the poster that Strike does not read, but whose title he likes: "The only other poster was a poem called 'Invictus' written over a picture of a sunrise. Strike had been coming into this cubicle for six months now, had always stared at that poem but had never read it through. He just liked the name, Invictus." This poster forms a provocative counterpart to the skeleton poster, or would if Strike read it through. He did not, but we can, and the intertextual juxtaposition is fruitful. The poem reads as follows:

> Out of the night that covers me,
> Black as the Pit from pole to pole,
> I thank whatever gods may be
> For my unconquerable soul.

In the fell clutch of circumstance
I have not winced nor cried aloud.
Under the bludgeonings of chance
My head is bloody, but unbowed.

Beyond this place of wrath and tears
Looms but the Horror of the shade,
And yet the menace of the years
Finds, and shall find, me unafraid.

It matters not how strait the gate,
How charged with punishments the scroll,
I am the master of my fate:
I am the captain of my soul.[21]

This poem, written by William Ernest Henley in 1875, has become notorious since 2001 (*Clockers* was published in 1992) because Timothy McVeigh, the Oklahoma City bomber, quoted it in its entirety in a handwritten note upon his execution. Here, the poem proposes or proclaims a dynamic opposite to that promoted in the first poster and in government office posters in general. Most government posters do not encourage autonomy of mind and soul, do not encourage a "meta-perception" of regulation, but nonetheless paradoxically insist on the viewer's accountability for the course of events. The poem, on the other hand, turns in the other direction: it accentuates subjection to the course of events, but proposes broad freedom of mind and soul.

Remembering the "do this, don't do that" of the government posters, we see that "Invictus" encourages no actual action. In fact, it articulates a preternatural acceptance or dramatic resignation, all the while proposing psychic independence or dissociation from one's surroundings. The government posters, on the other hand, remind the viewer of the inexorably concrete parameters of those surroundings and propose no alternate readings, no way out of that one vision. I am comparing these posters because they present alternative—in a sense dueling—visions of regulation, dueling visions of the relationship between regulation and individual freedom. The first poster does not represent regulation so much as exercise it, insisting on obedience and threatening punishment in the form of HIV infection or of state retribution. The second poster on the other hand reminds the viewer that regulation exists, acknowledges its fundamentally punitive nature, and proposes an alternative mental space—a space free from

punishment, and from regulation itself. The first poster encourages action, while the second encourages passive acceptance: paradoxically, though, despite its exhortation to action, or perhaps through that exhortation, it is the first poster that proposes the most complete subjection of the individual to regulation.

The Power of Narrative Voice

As we talk about Strike's regulation at the hand of the state, I would like to point out his accompanying regulation, his manipulation, as a character at the hand of the (regulating) narrator. Literary criticism has often described narrative—and the novel in particular—as compensating for the absence of a God-centered master narrative.[22] In other words, in the absence of an overweening divine master plot (an absence associated with the nineteenth-century rise of secularism and the decline of religion in the Western world), the novel provides meaning and structure in the form of narrative. Each novelist, each narrator, offers a tableau, a "this is the way the world is" for an audience who wants—at times without even knowing that it wants—such descriptions. Narratology, the study of narrative and narrative structure, examines how these tableaux (which in the modern world come not just from novels but also from movies, television, internet, and the like) act on the reader, what sort of world they describe. And an important element of narratology is the narrator-character relationship, including the narrator's vision of and distance from the characters, the tension between what he or she perceives and what the characters see, and how much freedom the character has. Particularly when we understand the narrator to be a stand-in for God, this narrator-character relationship can serve as a measure of the level and nature of human freedom. There are narrators who dupe or manipulate their characters and thus mock the idea of autonomy; Flaubert's narrators are frequently of this sort. Then, there are narrators who allow their characters space for movement and self-revelation; Dostoevsky's narrators are of this sort, and Richard Price has been compared to a modern-day Dostoevsky.[23] In this scenario, I am reading the narrator as a stand-in not just for a God figure (which in a sense all fiction narrators are, being masters of their discourse and plots) but also as a legislator or a regulator, in senses both human and divine: the determiner of what is and is not possible for the character, and what is and is not comprehensible to the character, as well as of that

character's legal status. Because this novel is so much about actual regulation, the legislation that the narrator brandishes weaves the metaphysical and the perceptual into the judicial. What the character sees and understands is a function, a product, an element of where he stands—meaning where the narrator has placed him—with respect to regulation. And where the character stands with respect to regulation is a function both of how the narrator sees him and of what he himself sees—which, in turn, since the character can never cease being a character, is a function of what the narrator permits him to see, and where he permits him to go.[24] The regulating narrator exercises, then, to use the terms from *Regulating Law*, "non-rulelike or [seemingly] non-intentional, modalities of control over the flow of events."

The novel form, with its innumerable strata of frames and constraints, is well placed to represent the regulated individual—and what is more, to represent the various ways in which regulation constrains or manipulates individual voice and agency. As Robert Jackson wrote of Dostoevsky: "Bakhtin … has drawn an analogy between Dostoevsky the artist and God. In this comparison, simultaneously aesthetic and theological, Dostoevsky emerges in his novelistic activity as God-Creator, but above all as God in His relation to man, a relation allowing man to reveal himself utterly (in his immanent development)."[25] Price also gives us characters' self-revelation, but because the force of regulation is so present, that self-revelation is subsumed within—that is, turned to the service of—the broader frame and function of regulation. To put this another way, even the self, the self that is revealed in self-revelation, is at least in part a function of the meta-regulatory narrative frame, much as the subject, the acting and seemingly autonomous subject, is a function of the meta-regulatory frame that surrounds and determines it.

With this, I return to the metaphor of the hypodermic needle, and to the question of whether it is the narrator or the character who creates that metaphor. What the character cannot put into words is of as much interest to us as what he can, because the inability to put something into words—to understand or to self-reveal—indicates a strong and effective regulation at work. The ambiguity in narrative voice—and thus the uncertainty about the scope of the character's understanding—emphasizes the connection between regulation's effectiveness and the limitations on the character's—or subject's—understanding of regulatory processes.

Free Indirect Discourse

The ambiguity in voice that arises in the metaphor of the hypodermic needle ("as if he was a little kid…") is reminiscent of another narrative device frequently used in the novel, namely free indirect discourse. This style of narration fuses the third-person report with direct speech, and in so doing obscures the line between—and prevents a solid attribution of voice to either—the narrator and the character in third-person narratives. As Brooks writes, "Free indirect discourse or narrated monologue is often a way to avoid responsibility, as Gustave Flaubert most tellingly understood: the story appears to 'tell itself,' more or less in the words and thoughts of the characters, while there are ironies and juxtapositions that suggest a hidden authorial hand."[26] Regulation and meta-regulation, of course, are very much about the authorial hand, hidden or not. And yet, free indirect discourse pushes regulator and regulated toward one another on an asymptotic curve, casting the subject in the role of the (perhaps unwitting) self-regulator. Let us return to the opening of the probation office scene, before Strike enters the cubicle and before he sees the posters discussed above:

> Strike sat in the tiny waiting area of the probation office, choosing one of the two molded plastic chairs over the cotton plaid couch because the fabric could take in stink and crawling things off people's hair and clothes. Besides, the couch was occupied by a light-skinned man with dried blood on his T-shirt and a face so swollen Strike couldn't tell if he was black or Puerto Rican or white. . . . Strike believed in going to see your PO looking a little bummy, so no one would think you were still clocking, but this was going the whole other way around. It was best to dress down—down, but clean. A nice fresh sweatshirt, pressed stone-washed jeans, shoes instead of sneakers in order to suggest that he wasn't the type who ever needed to run anywhere—everything in Strike's PO wardrobe was clean, cheap, respectful.[27]

And then: "He was afraid that sitting with a bottle of anything, even Yoo-Hoo, would be enough to trigger his PO, make him think "attitude," and that's when shit could happen. Even if they didn't throw you in County, they still found some way to make you pay."[28]

Because the discourse in these commentaries alternates between direct and indirect, it is not clear whether the narrator or the character is speaking. Is it in fact, objectively, "best to dress down—down, but clean?" Or does Strike

just imagine it to be so? Coming from the narrator, the phrase accentuates Strike's complete subjection, since it presents even the process of dressing as informed—if indirectly—by the state. Coming from the character, on the other hand, it indicates a cynical or paranoiac code of conduct. Coming from the narrator and the character at once, both arising from Strike's perception and standing based in reality, it accords to Strike a certain philosophical authority, an agency and authorship of principle, and at the same time, paradoxically, a canny sense of his own subjection. A similar ambiguity arises later in the same paragraph: "They always find some way to make you pay." Is it an objective fact that they "find some way to make you pay?" or is this Strike's understanding of the world? If this comment comes from the narrator as a flat description of reality, then Strike is necessarily painted as pitiable or doomed, regulated to the point of no return. If it comes from Strike, then he comes across as angry and resistant—rebellious, even, and thus—here is the irony—in need of regulation. And yet, it is Strike himself who brings himself up short and self-regulates, for he refrains from opening the bottle of Yoo-Hoo, refrains from wearing his usual clothing, refrains from acting so as to bring punishment upon himself.

When individual principle is preceded and surrounded by regulation, and when direct speech is preceded and surrounded by the "hidden authorial hand," then the power and originality of the direct speech—like the power and originality of the principle—is curiously mediated. Consciousness accords Strike a stake in the narrative voice, but that voice nonetheless remains in the service, the perpetual and self-punishing service, of authorial regulation. As represented in these scenes, then, the decision or impulse to self-regulate has dueling resonances: on the one hand, it indicates a desire to remain on the "right" side of regulation (regulation as means to escape punishment), and at the same time indicates a desire to separate from and be free of regulation (regulation as punishment). The character's state of mind and of comprehension as he experiences regulation is contradictory, with a sense of being at once punished and rewarded, and at once responsible and utterly powerless.

Authority, Knowledge, and Self-regulation

In this novel, the moments in which the narrator uses free indirect discourse are precisely those moments that describe—or notice—government regula-

tion and especially punitive regulation in action. The dress code and the fact of being made to pay are elements of punishment-based regulation: punishment through regulation, and regulation enforced through the threat of further punishment. At other moments too, the confusion of the individual voice and the regulatory voice (or the matching or conforming of the individual to the regulatory voice) indicates the totalizing effect of regulation. For instance, again in the probation office, Strike becomes nervous, thinking that Victor has told on him and that he is going to be arrested. "Strike's throat constricted, the stammer uncontrollable now, the truth coming to him in one big picture: Victor had given him up, and this whole visit to the PO was a trap. They knew all about him, about his slick caution, about how he'd never miss a PO appointment. A trap, and he had walked right into it.… Goddamn POs, they were just like cops—kill you with a look, tear out your heart with a mumble."[29] Moments of indirect discourse are, not coincidentally, the moments of intense fear or resentment of regulation—not coincidentally, because in using indirect discourse, the narrator underscores both the regulatory atmosphere and its oppressive effect. Strike thus becomes a prisoner not just of fear but also of the words of others: words that represent not just his restriction but also his inability to do anything but echo the regulatory language that surrounds him.

At other times of intense regulation, the narrator pulls away from the character, creating a distance between what he understands and what the character understands. This distance serves not just to "allow man to reveal himself utterly (in his immanent development)," as Jackson had said of Dostoevsky, but also to undermine his comprehension and saddle him with emotions that he cannot articulate. When speech becomes eloquent, which it often does in Strike's moments of cramped anger and anxiety, it is the narrator, not Strike, who owns that eloquence. For instance: "Bernard's knowing tone made it seem to Strike like the connections were so obvious that nobody on the street needed to think about who did it, or at least who was probably involved, and suddenly the entire city felt cramped and airless, like a gigantic fist from where there was no escape."[30] And then: "Strike smelled Champ on him still, saw Buddha Hat's mope-faced stare, felt the rude poke of the knocko's finger on the back of his head—this city closing in on him again like a bloody-knuckled fist."[31] What I want to underscore here is not just the fact that other people's power and perception translate into restriction for Strike, but also the eloquence associated

with that power—an eloquence that contrasts starkly with Strike's stammer, with his limited vocabulary. Individual constraint generates great metaphor richness for the regulatory voice, and vice versa: authorial swagger does not liberate Strike, but rather saddles him with a series of mental and spatial detentions.

In his seminal study of representation in Western literature, *Mimesis*, Erich Auerbach describes Flaubert's narration of *Madame Bovary*. It is worth citing some of his analysis here, for Flaubert's treatment of Emma Bovary, though significantly more mean-spirited than Price's treatment of Strike, is structurally similar. Auerbach quotes *Madame Bovary*: "But it was above all at mealtimes that she could bear it no longer, in that little room on the ground floor, which the smoking stove, the creaking door, the oozing walls, the damp floor-tiles; all the bitterness of life seemed to be served to her on her plate, and, with the steam from the boiled beef, there rose from the depths of her soul other exhalations as it were of disgust." He then writes of that passage:

> It is not… a simple representation of the content of Emma's consciousness, of what she feels as she feels it. Though the light which illuminates the picture proceeds from her, she is yet herself part of the picture, she is situated within it… . Here it is not Emma who speaks, but the writer. The smoking stove, the creaking door, the oozing walls, the damp floor-tiles—all this, of course, Emma sees and feels, but she would not be able to sum it all up in this way. All the bitterness of life seemed to be served to her on her plate—she doubtless has such a feeling; but if she wanted to express it, it would not come out like that; she has neither the intelligence nor the cold candor of self-accounting necessary for such a formulation. To be sure, there is nothing of Flaubert's life in these words, only Emma's; Flaubert does nothing but bestow the power of mature expression upon the material which she affords, in its complete subjectivity. If Emma could do this herself, she would no longer be what she is; she would have outgrown herself and thereby saved herself.[32]

The same imbalance of consciousness operates in *Clockers*, where the more the character feels of regulation, the less he understands. In a sense, the more eloquent the narrator, the less empowered the character. And when we consider the narrator as a figure of regulation, among so many other figures of regulation, then the lording of eloquence over the character becomes part and parcel of regulatory power. The character, like the regulated subject, like Strike in the probation office waiting area, is constrained from all sides: either he is unable

to understand the extent and substance of regulation, and thus unable to transcend it, or he *is* able to understand regulation, but can in any case do nothing but echo it even as he criticizes it.

Regulation, I am arguing, both triggers and depends on the impulse to self-punishment. With this "modality of control" in mind, let us consider the opening paragraph of the book, the passages in which Strike is introduced. This opening embodies the interdependence of outside government regulation and the impulse to self-regulation, as well as the subject's inclination to see these regulations as separate or separable.

> Strike spotted her [a potential teenage customer]…. He looked away, seeing her two months from now, no more baby fat, stinky, just another pipehead. Her undisguised hunger turned his stomach, but it was a bad day on his stomach all around, starting with the dream about his mother last night, with her standing in the window looking at him, pulling the shades up and down, trying to signal him about something, then on to this morning, being made to wait for an hour in the municipal building before anyone bothered to tell him his probation officer was out sick.[33]

On the following page, the description of the housing buildings: "Strike scanned the canyon walls of the Roosevelt Houses. There were thirteen high rises, twelve hundred families over two square blocks, and the housing office gave the Fury access to any vacant apartment for surveillance, so Strike never knew when or where they might be scoping him out."[34] These opening sentences demonstrate various instances of regulation, some punitive in nature (he has to see a probation officer), some nonpunitive (he resides in government-run housing), some about-to-be-punitive (he is conscious of being watched by the police). There is also the sense, introduced by the narrator, that space and movement and even time are limited: the "canyon walls" imprison him (Paula Massood writes that that architectural setup makes the housing project resemble Foucault's Panopticon), and the sheer number of residents per square block further embodies that limitation.[35] He has an ulcer, which often causes him to double over in pain; he sells drugs, which means that he spends his entire day standing in one spot; he waits in the probation office, immobile, unaware that he is wasting his time. But this opening scene, for all its external and circumstantial and judicial constraints, contains numerous subtle regulations and limitations attributed to Strike's mind. For one, in the opening sentences, Strike envisions the bleak future of the baby-faced girl in his path. Yes, it is re-

alistic to imagine that someone buying rock cocaine in the middle of the day is headed down rather than up, but what is interesting here is that the first dead end we see in the novel is an act of the character's imagination, and it comes in the form of a narrative, a short narrative. The dream about his mother pulling the shades up and down (which implies inconsistent perception) is also born of Strike's mind, and what is more of his unconscious mind—so the dream of intermittent perception comes from a region of the mind that is itself only intermittently perceptible to the character's consciousness. Even the visit to the probation officer does not so much impose outside regulation as it does demonstrate regulation's dependence on individual complicity and passivity. While the probation officer represents regulation (in this case, regulation as a dull residue of punishment), he is actually not in the office that day at all. Strike is therefore sitting in the municipal building on his own, under the direct thumb of no authority other than his own. When we later see Strike return to the probation office, a question arises similar to that of the chicken and the egg: does Strike self-contain and self-regulate as a result of outside regulation? Or does outside regulation depend on the natural, or at least habitual, complicity of human characters who are, in the end, social animals in need of social structure and, as such, complicit in their own regulation and even in their own punishment? In other words, is meta-regulation a neutral descriptive term for the social contract, or is it an actual phenomenon, a force wielded by identifiable agencies, people, or institutions?

Victor

I have tried to articulate the interdependence of regulation as order and regulation as punishment—in particular, the curious combination of self-policing and self-condemnation, the sense of punishment inherent in the pursuit of reward—that regulation encourages and on which it relies. I have also tried to examine how narrative construction replicates that curious combination, and in particular how free indirect discourse represents both the character's complicity with regulation and at the same time his astute—and punishable—dissociation from regulation. When the prospect of meta-understanding is visible, as it is in the "Invictus" poem, then actual freedom of action is discouraged and suppressed. When individual decisions are celebrated, as they are in the

skeleton poem, then a meta-frame that would give such decisions real weight is denied. It is the regulatory equivalent of *Alice in Wonderland*: when the key is available, the door is not, and vice versa.

On our way to a conclusion, let us look at the case of a character who functions as a counterpart to Strike, who obeys regulation but tries at the same time to reconfigure his regulatory space and so to alter his relationship *to* regulation. This is Victor Dunham, Strike's older brother. When Victor confesses to and is arrested for the murder of the drug dealer, he repeats again and again that he shot the dealer in self-defense. The investigating detective then explains to Victor that nothing in his description of the crime sounds remotely like self-defense: the victim was unarmed, surprised, and so forth. In fact, it is this ham-handed nondefense that leads the policeman to think that Victor was not the shooter, that he was covering for his brother. But Victor insists: "I'm just gonna tell you one more time. My brother was not there, *I* was. It was self-defense, OK? It was self-defense. I can *live* with that."[36] Though the detective finds this insistence bizarre and unbelievable, in the end we find out that Victor did in fact commit the murder. This fact does not emerge through a dramatic revelation, but with a subtle turn of the detective's mind: "Self-defense meant different things to different people, and on this one, Rocco decided, he would accept the kid's definition. And if Victor wanted to take that to court, that was all right too. Rocco would let him roll the dice with a jury."[37]

Throughout the book, en route to this decision to "accept the kid's definition," the detective repeatedly encourages Victor to eschew the project of redefinition and come up instead with alternate explanations: could he claim that he was attacked, for instance, or that the dealer had threatened him, or that there was something, anything in the story that could approximate the legal criteria for a "self-defense" defense. The idea is that the term "self-defense" has no resonance, no force, within the regulatory frame (existing criteria for self-defense) and at the regulatory moment in which Victor has positioned himself. The detective pushes Victor toward consciousness of that existing frame, so that he might operate within it. To use the terminology of Strike's visit to the probation officer, the policeman in essence points out that the only autonomy really available to Victor is the autonomy of the skeleton poster, not that of the Invictus poster. That is, the only self Victor is permitted to defend is a self already regulated. Victor's alternate meaning has no currency, because the new conceptual

frame it would demand does not exist. Indeed, the incongruity of these elements causes him to be locked within the ultimate regulatory space, namely prison.

The Punishability of Narrative Voice

Victor is a character who has lived his whole life under regulation: his own and that of others. He works two legitimate but low-paying jobs, he is married to a woman who seems unappealing, and he has two young children whom he barely sees because he works so much. In the course of the investigation, the detective interviews Victor's boss, who reports Victor's style of restaurant management: "You got a job to do, just do it and everything's going to be OK—like controlled freedom. See he taught me that."[38] Later, Rocco (the detective) repeats the phrase to himself, "wondering if that expression was something Hector had come up with spontaneously tonight or a catch phrase that Victor had created as a tag for his managerial philosophy."[39] The uncertainty as to who invented the phrase raises the same question as the use of indirect discourse in Strike's probation officer scenes—namely, the question of whether Victor is conscious of the paradox in the phrase, a paradox he deploys in his management and experiences as a regulated individual. For just as Victor manages his employees with controlled freedom, so he too is managed, regulated, by the state. And so too is he managed, regulated, by himself, by the control that subtends his freedom and ultimately diminishes it.

The narrative style of free indirect discourse is absent from representations of Victor. Of course, it is essential to the mystery of the novel (did Victor commit the murder or did he not?) that the reader not see what Victor sees, not know what he knows. This older brother does not have the narrator on his side, in his pocket, as Strike did; at the same time, because of this, he is not as visibly subject to the narrator's regulation. In other words, the operation of meta-regulation in Victor's life is visible not through his mental processes (which in order to sustain the novel's mystery remain hidden to us), but rather by his actions, his unwavering adherence to regulations both legal (he follows the law), and moral/social (he is married to the mother of his children, he is faithful, he is respectful to others, he goes to church). What the reader does not immediately see is how Victor feels about regulation; we simply see that he has absorbed and perpetuated it. And yet—and here is what would seem to

be one of the more perfidious elements of meta-regulation—even meticulous adherence to regulation does not so much exempt one from punishment as it does encourage one to see oneself as punished, and, what is more, as justly and continually punishable. Without the probation officer and the police department on his back, Victor is not subject to the judicial regulations that plague his brother. And yet, in what seems to be a zero-sum game that inevitably reduces freedom to nothing, Victor becomes his own most effective regulator. "Controlled freedom," if indeed Victor did come up with this term, is his one successful neologism, and this perhaps because the words cancel each other out, so that the net value of his action and creativity is nothing.

Rewriting Rules

Earlier, I drew a comparison between the solidity of the novel's narrative frame and the solidity of meta-regulatory mechanisms. A character who emerges from the narrative frame, wanting to take the narrative reins, is an impossible phenomenon: as impossible, it seems, as a regulated subject who wishes to emerge from the regulatory frame and reformulate it.[40] Victor is no one's idea of a rebel, but his desire to reclaim the concept of self-defense and so rewrite the frame is striking and, not surprisingly, punishable. In one of his ruminations, Strike remembers a former creative interest of his brother's: "Two years earlier, when they had shared a bedroom, Victor jumped out of bed one night and started to write down the rules of a game he had just dreamed about. He called it Aroundball but Strike never really understood how it was played—it seemed to him like a cross between dodgeball and soccer. The game had become an obsession of Victor's; for months he was writing up new bylaws or trying out new names for the franchises."[41] The combination of dodgeball and soccer embodies an interdependence of defense and aggression: in the one game title, the individual is the goal, the target, and in the other, the individual aims at the goal. In this sense, the game of Aroundball is a microcosm of the duality of regulation at work: the activity of participation in social order and the passivity that that participation demands. It also embodies the paradoxical nature of regulation's relationship to punishment, the same paradox as contained in the notion of controlled freedom: obeying regulation (dodging) so as to maintain the freedom to control one's own existence, and vice versa.

Victor is described by the detective as having a "sad sack" face not just because he obeys rules, but because he comes across as hampered and limited. Much is made of the fact that the Aroundball game that Victor invented is limited these days to doodles on a cocktail napkin, and those are made in the bar only once Victor is somewhat tipsy. Indeed, Victor's relationship to regulatory innovation is a curious one, both enthusiastic and ineffective; he has the desire to come up with new games, new ideas, but not the arena within which to activate them. At the end of his meeting in the bar with Strike, for instance, Victor remembers a particular moment of innovation gone wrong. He recounts that while he was working earlier that day—his second job—as a security guard at a store (the oddly named "To Bind an Egg"), a customer asked him his opinion on an outfit. Victor had responded, "Davishing," and remembers this with embarrassed displeasure: "Victor raised his hand in a farewell gesture without turning around, his shoulders bunched higher than his head, still writing out his list of dream teams on a wet cocktail napkins. 'Davishing.' The word was a final disgusted hiss that followed Strike right out into the street."[42] I bring this up because it is another example of an individual idea subsumed to an instinctive self-regulation, as well as an example of a regulated subject's inability to appropriate narrative (read regulatory) control. We do not know how the customer responded to Victor's neologism, but it does seem that Victor remembers it with disgust and some amount of shame—shame being a punishment one imposes on oneself for breaking a self-imposed regulation. Unlike in the case of Aroundball, for which Victor has authored a complete set of rules, "davishing" has no corresponding lexicon or regulatory frame. It does not constitute a new regulatory space and cannot generate a narrative or linguistic frame that supports it; it merely clashed with the space that was already there, with the linguistic system, the only linguistic system, that the customer (and he) already knew. Aroundball, on the other hand, produces a new game and new rules, as well as new teams and new players. To use the terminology presented in *Regulating Law*, Aroundball constitutes a new "'regulatory space' in which the operation and competition of various regulatory regimes influences [*sic*] regulatory impact."[43] Or, to put this in terms of narrative construction, Aroundball constitutes a new narrative frame in which the operation of narrative devices influences narrative representation of the subject. Aroundball could bring great success for Victor, if he could get it off the ground and convince others to play

it and watch it. To craft an entirely new regulatory space, narrative frame, or linguistic system is not an easy task for those always already inscribed within an existing space, frame, or system, however, and so the Aroundball phenomenon is limited to a cocktail napkin and to Victor's imagination.

What makes Victor a "sad sack" (in the words of the detective) is that he never succeeds in regulating anything or anyone but himself, and his self-regulation amounts to self-detention. Keeping in mind this failure to enact an alternative regulatory and narrative space, let us consider his defense against the murder charge. Victor, again, is a character who has lived his whole life under regulation. His murder of the dealer thus reads as an act of the rage of the oppressed; as an assertion of the self—the most basic and existential level of self—through the murder of another. As we learn at the end of the novel, Victor called his mother from the bar's pay phone shortly before the murder, saying, "I can't take it no more."[44] Victor's claim that the shooting was "self-defense" constitutes a redefinition of the term. However, his definition, like his word "davishing," has no surrounding frame to buoy it up. Regulatory language, we learn, is as immutable as regulation itself. If Victor had respected that immutability and invented a narrative within that space, one in which he were provoked by the victim rather than by the system of regulation itself, for instance, he could—paradoxically—have had the opportunity to shorten his punishment and invent another existence. But instead of creating a regulatory system within a regulatory system, as Strike did when he acknowledged that "it was best to dress down" and acted accordingly, Victor endeavored to make an entirely new meta-system, redefining self, and redefining defense.

Let us step back now and consider Victor as a character within the narrative frame of *Clockers*. When he is first introduced, it is through comparison with the very person whom he later murders. In the midst of a description of Strike: "The only other guy who had worked as hard as Strike in here, and who Rodney liked as much as Strike, was a kid named Darryl Adams. Darryl was a lot like Strike's older brother, Victor: heads down, brick-by-brick, never shooting off his mouth but never smiling either. He was quiet, neat, dependable, the sort of person Strike's mother would like."[45] Darryl and Victor are introduced together and compared to each other. Specifically, their strict modes of self-regulation are compared. This first introduction, then, weaves together Victor, Darryl, and Victor's self-regulation.[46] This intertwining connects the intensity of Victor's

self-discipline to the ultimate explosion of his anger. Or, to put it more in terms of the regulation discussion at hand, it connects Victor's intense self-regulation with his eventual and inevitable punishable act. Or, since the punishment arises both from the murderous act and from Victor's insistence on creating an original regulatory term, we could say it connects Victor's intense self-regulation with his eventual and inevitable *self*-punishment. Regulation does not protect from punishment, we see, or not on any permanent basis; rather, it contains at its outset an element of punishability.

The self-discipline or self-regulation that had separated Victor from punishment ends up nudging him toward self-punishment. It is not surprising that this preparation passes through the phenomenon of self-defense, for self (and self-defense)—are two of the most stringently regulated concepts *in* regulation. As the skeleton poster showed, the ability or even the imperative to defend oneself is subsumed to regulation. That is, it is permitted to function only in the service of regulation, only within the parameters, and with the potential or promise of eventual punishment, that regulation has wrought.

Conclusion

When characters in this novel encounter regulatory systems, what they seem to experience is the outsize power of those systems, the looming nature of them. Even when it is internalized, that power, even when it is just the power of meaning, is always felt as an opposing force. Regulation as represented in *Clockers* signifies precisely that inexorably outside nature of power: being on the right side of regulation is in the end as impossible as being on the right side of gravity. Even self-regulation functions in some sense as an opposing force, since it relies on the division of the subject into punisher and punished. To come back around to the variable relationship of regulation to punishment, and to the combination of personal responsibility and obedient passivity that regulation demands: it seems that a sense of personal responsibility, combined with the looming nature of outside power, leads the characters to equate actively participating in society with taking a position on the receiving end of power. Even to self-regulate is to stand on a self-imposed receiving end—which in turn is to be saddled with the perpetual promise, or specter, or residue, of punishment.

Notes

1. Julia Black, "Critical Reflections on Regulation," *Australian Journal of Legal Philosophy* 27 (2002): 11

2. Christine Parker, Colin Scott, Nicola Lacey, John Braithwaite, eds., Introduction, *Regulating Law* (Oxford: Oxford University Press, 2004): 6.

3. Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995): 183.

4. Dempsey, New Jersey, where *Clockers* takes place, is modeled on Jersey City. To cite some examples of residential regulations from the Jersey City Housing Authority's website: "Walls should be clean, free of dirt, grease, holes, cobwebs and fingerprints. Paint should be light-colored. Adhesive materials should not be put on walls. Floors should be clean, clear, dry and free of hazards. Ceilings should be clean and free of cobwebs. The refrigerator should be kept clean. The freezer door should close properly. The door gaskets should be kept clean and free of spills and wiped down at least weekly. The cabinets should be clean and neat. The cabinet surfaces and countertop should be free of grease and spilled food. Cabinets should not be overloaded. Storage under the sink should be limited to small or lightweight items to permit access for repairs. The exhaust fan should be free of grease and dust. The sink should be clean, free of grease and garbage. Dirty dishes should be washed and put away in a timely manner" (http://www.jcha.us/good_housekeeping_standards.htm). "Rigorous enforcement of limiting apartment occupancy to only those family members explicitly approved and formally listed on Residential Leases. (Occupancy will be double checked during semi-annual apartment inspections.) 'Guests' are short term visitors, not permanent boarders. Allowing anyone to 'live' in JCHA apartments who is not formally approved for occupancy by JCHA Management is a serious violation of the Residential Lease and will be pursued accordingly. Adding new adults to household occupancy prior to explicit, formal Management approval is strictly prohibited and a serious violation of the Residential Lease" (http://www.jcha.us/live_here_lease_here.htm).

5. Black, "Critical Reflections on Regulation," 11.

6. Parker et al., Introduction, *Regulating Law*, 6.

7. See also Tom R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990); Robin West, *Narrative, Authority, and Law* (Ann Arbor: University of Michigan Press, 1993).

8. Foucault's *Surveiller et Punir* is translated in English as *Discipline and Punish*. The passive of "discipline" is significantly ambiguous, for while one can be "disciplined" by another, to say that people are "disciplined" usually means that they are "self-disciplined."

9. Those who know the Spike Lee movie of *Clockers*, which reached more people than did the book, saw Strike playing at home with a model train set: he loves trains, he

thinks about trains, and at the end of the movie, when everything is coming down on him, he gives his train set to a young friend and leaves town—on a train—for greener pastures. The novel has none of this departure symbolism; Strike does leave town at the end of the novel, but on the spur of the moment and on a bus.

10. Public housing is not a vehicle of detention or punishment; indeed, given that such housing is closed to felons and often to their families as well, it could be said that punishment comes from denial of access. And yet, it is a very regulated environment.

11. Peter Brooks, "Narrative Transactions: Does the Law Need a Narratology?" *Yale Journal of Law and Humanities* 18, no. 1 (2006).

12. Some literary works, such as Luigi Pirandello's play "Six Characters in Search of an Author," play with this notion of character consciousness, but *Clockers* is not of that sort.

13. Richard Price, *Clockers* (New York: Picador, 1992): 304.

14. Ibid., 403.

15. Parker et al., Introduction, *Regulating Law*, 7.

16. Foucault describes "procedures for the individual and collective coercion of bodies" (169) in the "Docile Bodies" chapter of *Discipline and Punish*.

17. Price, *Clockers*, 305.

18. Nicola Lacey, "Criminalization as Regulation: The Role of Criminal Law," in *Regulating Law*, 158–59.

19. Parker et al., Introduction, *Regulating Law*, 2.

20. Louis Althusser, "Ideology and Ideological State Apparatuses," in his *Lenin and Philosophy and Other Essays*, New York: Monthly Review Press, 2001. Karl Marx, *The German Ideology*, New York: Prometheus Books, 1998.

21. William Ernest Henley, "Invictus," in *Poems* (London: Kessinger Publishing, 2005).

22. Georg Lukács, *The Theory of the Novel*; Peter Brooks, *Reading for the Plot*; James Wood, *The Broken Estate*.

23. Michael Chabon, "Review of Lush Life" in *The New York Review of Books*, May 5, 2008; http:// www.bookreporter.com/reviews2/9780374299255.asp, etc.

24. Gary Morson wrote in *Narrative and Freedom* that narrative problems are theological in nature. It could also be said that narrative problems are regulatory in nature, particularly if we use the broadest definition of regulation. When narrator and character stand in for regulator and individual, respectively—or for law and society, more broadly and generally—it can also be said that regulatory problems are narrative, and narratological, in nature. Morson, *Narrative and Freedom* (New Haven: Yale University Press, 1996): 86.

25. Robert L. Jackson, *Dialogues with Dostoevsky: The Overwhelming Questions* (Stanford: Stanford University Press, 1993): 279.

26. Brooks, "Narrative Transactions?" 12.

27. Price, *Clockers*, 303.

28. Ibid.,

29. Ibid., 306.

30. Ibid., 172.

31. Ibid., 245.

32. Erich Auerbach, *Mimesis: The Representation of Reality in Western Literature*, trans. Willard Trask (Princeton: Princeton University Press, 1953, 2003): 484.

33. Price, *Clockers*, 3.

34. Ibid., 4.

35. Paula Massood, "Which Way to the Promised Land? Spike Lee's *Clockers* and the Legacy of the African American City." *African American Review* 35 (Summer 2001): 263–79.

36. Price, *Clockers*, 525.

37. Ibid., 582.

38. Ibid., 447.

39. Ibid., 451.

40. Meta-regulation in this formulation becomes akin to the linguistic structures that govern the very operation of the unconscious. With respect to Lacan's notion that the unconscious is structured like a language, Malcolm Bowie writes: "Lacan's metaphor and metonymy, together with the lesser figures and tropes that he often enumerates with glee, at once allow connections to be made between the overall structure of the analytic dialogue and the structure of the dream-material on which that dialogue may dwell. And this manner of speaking about analytic speech also serves to demystify the unconscious itself: the unconscious is not an occult quality or a black box but the conjectural sub-text that is required in order to make the text of dreams and conversations intelligible. The unconscious is no longer, in this view, structured "like a language," for it has no existence outside language and no structure other than the one that language affords." Malcolm Bowie, *Lacan* (Cambridge: Harvard University Press, 1993), 71. In *Clockers*, regulation and meta-regulation are as totalizing as language; they are a sort of language, outside of which the subject cannot pass.

41. Price, *Clockers,* 112.

42. Ibid., 116.

43. Parker et al., Introduction, *Regulating Law*, 7.

44. Price, *Clockers*, 581.

45. Ibid., 24.

46. The word that Victor speaks in the store, "davishing," combines "ravishing" with the first letters of Darryl Adams's name; thus the word he regrets pronouncing is connected to the man he shoots that same night.

Stop and Frisk: Sex, Torture, Control

PAUL BUTLER

> The officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and areas about the testicles, and entire surface of the legs down to the feet.[1]
>
> —*Searching and Disarming Criminals*, Priar and Martin

> I don't know if they fags or what / Search a nigga down and grabbin his nuts[2]
>
> —*Fuck tha Police*, NWA

Introduction

The Supreme Court's decision in *Terry v. Ohio*[3] authorizes the police to "stop and frisk." The police can temporarily detain someone they suspect of a crime, and they can pat down suspects they think might be armed. Because the "reasonable suspicion" standard that authorizes stops and frisks is lenient, the police have wide discretion in whom they detain and frisk. *Terry* stops are probably the most common negative interaction that citizens have with the police (many more people get detained than arrested).

In this chapter, I explore the expressive meaning of stops and frisks, paying special attention to frisks—police touching of people who, in the eyes of the "law," are innocent.[4]

My thesis is that stops and frisks can be constructed as a form of torture, the effect of which is the assertion of police dominance of the streets. I do not mean that the police would be formally guilty, in a U.S. court or under international law, for the crime of torture. They would not be. My claim is that stops and frisks cause injuries similar to those of illegal forms of tortures, and have the same kinds of "benefits."

Stops and frisks blur the line between regulation and punishment. They are not supposed to be punishment, but they feel that way to their victims. After the police have detained you, and put their hands all over your body, and then let you go, you are supposed to go about your business as if nothing of

consequence has happened. Most citizens don't take it personally when they are forced to wait at a red light; the *Terry* rule that you submit, often spread-eagle, and almost always in public, while the police do something (the Court never said exactly what) to see if they can arrest you for a crime, is supposedly regulatory in the same sense. Except that the red light does not prefer to stop black men, and the police do. The red light does not stop people as part of a performance that demonstrates its dominance and control, and the police do. The red light derives no pleasure from the public spectacle of submission to its order, and the police do.

To attempt to situate stop and frisk in the *Artway* definition of punishment is to appreciate exactly how much the Supreme Court just doesn't get it, or pretends not to. Its either/or, "punishment or regulation" categorization fails to comprehend that regulation can be a form of punishment, especially when it is selectively applied and perpetrated on the body of an innocent man or woman.

The chapter proceeds as follows: I describe the *Terry* doctrine and its practice in the real world. Then I offer a definition of torture, relying on Foucault's influential construct in *Discipline and Punish*.[5] Next I attempt to prove that stops and frisks are a form of torture. The final part of the chapter considers the purpose that this torture serves.

Stop and Frisk

In *Terry v. Ohio*, the Supreme Court ruled that the police can briefly detain someone when they have "reasonable suspicion" that a crime may be occurring, or is about to occur.[6] Cops can "pat down" the person whom they have stopped if they have reasonable suspicion that the suspect is armed.[7] The "sole justification" of the search is "the protection of the police officer and others nearby, and it must therefore be confined in scope" to discover weapons.[8]

In the *Terry* case, an experienced detective's attention was drawn to two African-American men who were standing on a street corner in downtown Cleveland. The detective didn't know why he had started watching them; he said he was "attracted" because "they didn't look right to me at the time."[9] The detective observed the men to walk up and down the street looking in the same store window several times.[10] He suspected they were "casing" a store with

the intention of robbing it.[11] Next, however, the two men walked away from the store, and were joined by a white man.[12] At that point, the detective approached, asked the men to give their names, and when Mr. Terry "mumbled something" in response, he grabbed Mr. Terry and pushed him against a wall.[13] The detective then patted down Mr. Terry and felt something that might have been a gun in his coat pocket.[14] He ordered all three men inside a store, where he frisked them. Mr. Terry and one of the other men were carrying guns.[15]

The prosecutors argued that the Fourth Amendment, which regulates government searches and seizures, didn't apply because Mr. Terry had not been searched and seized within the meaning of the Amendment. The Supreme Court

> emphatically reject[ed] this notion. . . . It must be recognized that, whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.[16]

Since the Court found that Mr. Terry had been seized and searched, Fourth Amendment precedent required that police have "probable cause."[17] The Court, however, declined to apply this (relatively) high standard, stating that "we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which . . . as a practical matter could not be subjected to the warrant procedure."[18] It held that the Fourth Amendment simply required the police conduct to be reasonable, which could be determined by balancing the government interest (investigating crime and officer safety) against the individual interest (privacy).[19] The Court specifically noted that it was not abandoning the jurisprudence that a search is presumptively unconstitutional if there is no probable cause, but simply creating a limited exception.[20]

Justice Douglas was the lone dissenter.[21] He observed that the probable cause standard was deeply rooted in the country's history, and the Court's precedent.[22] Justice Douglas didn't think the reasonableness balancing test was constitution-

ally sound because he thought the Fourth Amendment itself already balanced the relevant interests.[23] Douglas observed that there was no probable cause to arrest Mr. Terry before the search, because his crime, carrying a concealed weapon, had been discovered during the search.[24] Thus, if before Mr. Terry had been searched, the police had gone to a magistrate and sought a warrant to search him, a judge would have had to deny the warrant.[25] Douglas writes:

> To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment. There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today. Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.[26]

Terry and Race

The National Association for the Advancement of Colored People believed that the *Terry* case had so much racial significance it wanted to participate in the oral argument. The Supreme Court denied this request, and the racial consequences of its decision weren't dwelt upon. In fact, the fact that Mr. Terry was African-American is never mentioned in the opinion. The Court acknowledged, however, that "minority groups, particularly, Negroes, frequently complain" about "wholesale harassment by certain elements of the police community."[27]

Significantly, the Court cited the President's Commission on Law Enforcement and Administration of Justice, which reported that frisking "cannot help but be a severely exacerbating factor in police-community tensions. *This is particularly true in situations where the 'stop and frisk'" of youths or minority group members is "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.*"[28] The Court's opinion does not discount this concern; it merely states that excluding evidence obtained as a result of a frisk would not resolve the problem.[29]

Terry's Progeny

The Supreme Court's post-*Terry* cases grant much power to the police. While the Court has never offered empirical guidance about how much proof "reasonable suspicion" requires, it is clear that the standard is considerably lower than the "probable cause" required for arrests and most other kinds of Fourth Amendment searches and seizures. In a 1972 case, for example, an informant told the police that a man sitting alone in his car at 12:15 a.m. in a high-crime area of Bridgeport, Connecticut, had a gun and drugs; the Court held that those facts created reasonable suspicion for a stop and frisk, even though the informant had no proven track record, and it was legal at the time to carry a gun in Connecticut.[30]

Terry authorizes the traffic stops that most drivers have experienced. In *Pennsylvania v. Mimms*, decided in 1977, the Court increased the discretion that police have during traffic stops, by granting them the power to order drivers to exit the vehicle.[31] *Mimms* represents the first time that the Court allowed a *Terry* procedure without any individualized suspicion: the police can ask any driver to exit—even if they have no particular reason to think that the driver is armed. The Court subsequently extended this police power to passengers.[32]

Several post-*Terry* cases have involved the issue of what constitutes reasonable suspicion. According to the Court, the "totality of the circumstances—the whole picture—must be taken into account."[33] In *Illinois v. Wardlow*, the Supreme Court held that in a high-crime area, running away from the police creates reasonable suspicion for a stop, even if the police otherwise have no reason to suspect one of a crime.[34]

Profiles

Terry's progeny also permit the police to use profiles—indicia of suspicion that, combined with other facts, can create grounds for a stop. Chief Justice Rehnquist noted that "a court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance, as seen by a trained agent."[35] In dissent, Justice Thurgood Marshall worried about "the profile's chameleon-like

way of adapting to any particular set of observations." To support his concern about police power, Marshall listed the factors that various courts had allowed to constitute part of the calculus of reasonable suspicion for drug couriers at airports. Those factors included:

suspect was first to deplane	no luggage
last to deplane	carrying new luggage
deplaned from the middle	gym bag
one way ticket	new suitcases
round trip ticket	traveling alone
non-stop flight	traveling with companion
changed planes	acted nervously
	acting too calmly[36]

One of the most controversial applications of *Terry* has been to racial profiles. The Supreme Court has never directly ruled on the issue, but the majority of federal and state courts have held that while race can't be dispositive, it is one factor that can be taken into account in the "totality of the circumstances" analysis.[37] Thus, one's race, coupled with other facts, can legally make the police more suspicious. The Federal Court of Appeals for the Eighth Circuit, for example, allowed police to consider the fact that suspects were black when deciding whom to investigate for suspicion of carrying drugs on flights from Los Angeles to Kansas City.[38] The court stated that "facts are not to be ignored simply because they may be unpleasant," and it was unpleasant because "young male members of black Los Angeles gangs were flooding the Kansas City areas with cocaine."[39] Since September 11, 2001, law enforcement agents have also relied on the *Terry* doctrine to profile Muslims and Arabs.[40]

Terry on the Street

I am riding in a squad car with Sgt. Brett Parson, of the Washington, DC, Metropolitan Police Department. We are playing a game that Parson invented called "Pick a Car." I select a car—any car—and Sgt. Parson finds a legal reason, pursuant to the *Terry* doctrine, to stop it. It never takes long. There are so many traffic infractions, Sgt. Parson says, he can always find a reason.

Stops and frisks are probably the most common negative interaction that

citizens have with law enforcement officers. Most police departments are not required to keep records of the number of persons subject to *Terry* detentions, but sometimes this information becomes public. The New York City Council, for example, has required the New York Police Department to provide quarterly reports on the race of persons whom officers stop and frisk. The Rand Corporation reviewed all pedestrian stops in New York City in 2006.[41] There were 506,491.[42] Fewer than 10 percent resulted in arrests.[43] Almost 90 percent of people who were both stopped and frisked were members of a minority group, mainly African-American.[44] In two predominantly black neighborhoods, residents had a 30 to 36 percent chance of being stopped in 2006.[45] The overall chance of a New York City resident being stopped was 6 percent.[46]

In summary, the *Terry* doctrine gives the police broad discretion to stop and detain. Stops and frisks are a key part of policing, especially in minority and low-income neighborhoods. *Terry* stops and frisks in general, and racial profiling in specific, have continued to arouse strong resentment in minority communities. In order to investigate whether the practice can fairly be analogized to torture, it will be useful to have a historical account of how torture works. The next section supplies one.

Torture, Defined

In *Discipline and Punish*, Michel Foucault presents and contrasts two theories of punishment: torture and treatment.[47] The book details the historic transition of criminal justice from torture to treatment. In this context, stop and frisk looks remarkably like torture.

Torture was a public, spectacular, corporal, and punitive penalty that asserted the power of the sovereign (the king) and his agent (the torturer). The fact that torture was painful was one of its benefits.[48] Foucault notes that "[t]he very excess of the violence employed is one of the elements of its glory: the fact that the guilty man should moan and cry out under the blows is not a shameful side-effect, it is the very ceremonial of justice being expressed in all its force."[49]

Torture was a public and confrontational spectacle, while treatment is private and restrained.[50] Torture targets repression of the body, while treatment affects the soul.[51] Torture was a reassertion and public declaration of power by the sovereign, while treatment is sympathetic.[52] Torture was often used as

both a punishment and a fact-finding method; treatment, on the other hand, is disciplinary and utilized only after conviction.[53]

Instead of justice, torture was the manifestation of the revenge of the monarchy; the king had to retaliate because the criminal's action was an affront to his power.[54] Torture was an assertion of power, not justice. The goal was to make everyone aware of the unrestrained presence and authority of the sovereign; "The ceremony of the public torture . . . displayed for all to see the power relation that gave his force to the law."[55] Treatment, by contrast, is rehabilitative.

While torture affected the body, treatment affects the soul. The goal of torture was not simply to harm the body, but to mark it.[56] This marking of the body was a public manifestation of the crime; it made the guilty man the herald of his own condemnation by demonstrating it physically on his body.[57]

Significantly, torture served as both a punishment and a fact-finding tool.[58] The basic construct was the "judicial torture" or trial of ordeals. If the defendant could endure torture, it would show his lack of guilt; if he could not, he would confess and affirm the government's suspicion.[59]

In describing torture, Foucault notes, "It was as if investigation and punishment had become mixed."[60] He seems almost to anticipate the *Terry* standard, which allows the police to detain people for conduct that is at once "innocent" and "reasonably suspicious": "How can a penalty be used as a means? . . . The reason is to be found in the way in which criminal justice, in the classical period, operated in the production of truth. The different pieces of evidence did not constitute so many neutral elements . . . . Each piece of evidence aroused a particular degree of abomination. Guilt did not begin when all the evidence was gathered together; piece by piece, it was constituted by each of the elements that made it possible to recognize a guilty person. Thus a semi-proof did not leave the suspect innocent until such time as it was completed; it made him semi-guilty; slight evidence of a serious crime marked someone as slightly criminal. In short, penal demonstration did not obey a dualistic system: true or false; but a principle of continuous gradation; a degree reached in the demonstration already formed a degree of guilt and consequently involved a degree of punishment. The suspect as such always deserved punishment; one could not be the object of suspicion and be completely innocent."[61]

Frisks as Torture

Stops and frisks are not formally torture because they are legal and torture is illegal. Also frisks are not as violent as some forms of police brutality, such as, for example, the atrocities the police perpetrated against Rodney King,[62] Abner Louima,[63] and Amadou Diallo,[64] which many would consider torture. Nobody has ever died from a stop and frisk per se, although police are allowed to use deadly force when the suspect is noncompliant and the officer believes there is a risk to life. Police routinely draw their guns during *Terry* stops in high-crime neighborhoods.[65]

My claim, however, is that stops and frisks are like torture, for three reasons: first, they have such effects on victims; second, they are a form of sexual harassment; and third, they fit Foucault's historical framework of torture.

Effects

One of the contributions of critical race theory to the law has been its emphasis on the effect of law and practice.[66] Professor Mari Matsuda has observed that "the need to attack the effects of racism and patriarchy in order to attack the deep, hidden, tangled roots" characterizes critical race theory.[67]

A predictable response to the claim that stops and frisks are like torture is that the perpetrators—the police—do not intend them that way.[68] One answer is that it does not matter. Numerous legal scholars have catalogued the problems of constructing injustice based on "intent."[69] One concern is that intent may not be conscious, and thus difficult, if not impossible, to prove, because the actor herself may not be aware of her intent. A more pressing objection to an "intent" standard is that, from the standpoint of the victim of an injury, the wrongdoer's intent is irrelevant; the victim's immediate concern is redressing her injury rather than blaming a particular bad actor.

Some scholars have observed that Fourth Amendment analysis has been distorted by a failure to properly weigh effects. Under the Constitution, searches and seizures must be reasonable; to determine whether they are, the Supreme Court has engaged in a cost-benefit analysis, balancing the government interest versus the individual interest. In the context of race-based assessments of suspicion, many scholars have argued that courts discount the effect on victims

(and overstate the value to the government of using race as a cause for suspicion). Professor Jody Armour vividly describes the feeling of being the target of race-based suspicion as having "waves of strangers successively spit in my face."[70]

Likewise, people who have been stopped and frisked use words like "violated," "invaded," and "chumped" to describe how it made them feel.[71] It also may affect their actions: African-American and Latino men, in particular, tell stories about the measures they take to avoid being stopped and frisked; these steps may range from decisions about clothing and hair style to the kinds of cars they drive or the neighborhoods in which they choose to live.

While not overtly brutal, stops and frisks have more consequence than what critical race theorists have defined as "microaggressions."[72] Racial microaggressions are "brief and commonplace daily verbal, behavioral, or environmental indignities whether intentional or unintentional that communicate hostile, derogatory, or negative racial slights and insults toward people of color. Perpetrators of microaggressions are also often unaware that they engage in such communications when they engage with racial/ethnic minorities."[73]

Stops and frisks cause injury more like that of "police brutality" than of an ordinary "racial microaggression." The *Terry* opinion characterized stops and frisks as a "serious intrusion on the sanctity of the person, which may inflict great indignity and arouse strong resentment."[74] The invasive aspect of the frisk—the "feel with sensitive fingers every portion of the prisoner's body [including] the groin and the area about the testicles," in the words of the police manual referenced in *Terry*[75]—makes the injury analogous to sexual harassment or misdemeanor sexual assault. Frisks are frequently experienced as offensive sexual touchings.

Stop and Frisk Sex[76]

The journalist Richard Goldstein, writing about an NYPD officer's infamous sexual assault of Abner Louima with a broken broom handle, observed:

> Several false assumptions shape our obliviousness to the erotic element in police brutality: that men are rarely the victims of sexual assault, that straight men have no homosexual feelings, and that sexuality is limited to what we do in bed. The first perception allows police to force young black men to drop their pants—a common

practice during street frisks—without risking charges of sexual harassment (imagine what would happen if black women were subject to this treatment); the second notion prevents us from imagining that cops who specialize in such tactics might find them exciting; and the third blinds us to the connection between sadism and racism.[77]

Several hip-hop artists have, in their lyrics, depicted frisks as a form of sexual harassment.[78] I should note that hip-hop is notorious for the homophobia of some of its artists, as well as for the distaste with which many members of the hip-hop nation regard the police. These two factors may combine to make the police prime candidates for the ultimate insult—an "accusation" of homosexuality. I use hip-hop lyrics as on-the-ground reporting of lived experiences; they are victim testimony. Indeed, since part of the gratification that some police derive from stops and frisks is sadistic, the fact that a victim might be homophobic enhances the pleasure.

The seminal hip-hop group NWA states, "I don't know if [the police] are fags or what/ search a nigga down and grabbin his nuts."[79] The most interesting aspect of this analysis isn't the homophobia, which, sadly, is a trope in hip-hop culture. Rather, it is the words "or what," which suggest that the male on male sexual harassment is not just for gays. Indeed these lyrics support all three of Goldstein's claims about the eros of police brutality: the NWA character is a male victim of sexual assault—by officers who may or may not be homosexual but regardless are gratified by "grabbin" "a nigga['s]" "nuts."

In fact hip-hop's endemic homophobia makes the absence of antigay epitaphs to describe the sexual component of frisks especially revealing. Lupe Fiasco complains about "crooked police that's stationed at the knees and they do drive-bys like up and down the thighs."[80] Likewise, Webbie raps, "The police pull me over and they raid my cash/ Man they be wishin they could take my ass."[81] For better or worse, most hip-hop doesn't subscribe to a political correctness (or even civility) that prohibits the use of words like "fag"; indeed, rap music seems almost to encourage pejorative terms. Thus their absence, when the artists describe male on male sexual harassment, seems a recognition—from victims of frisks—that its possible for "straight" men to get off by doing sexual things to other men.

I do not want to be too grandiose about hip-hop's analysis. There certainly are artists who view frisks as standard homosexual sexual gratification, and

who don't have a problem using antigay terms to castigate the harassers. Dead Prez, for example, claims, "Every police is a punk ass bitch/ this is for my niggas in the streets getting frisked gun to your head."[82] I simply make two points: first that several hip-hop artists have described frisks as sexual harassment and second, that some of the artists have constructed the meaning of the touching as outside of the usual sexual norms.[83]

African American men other than hip-hop artists have also observed the sexual nature of frisks. In an article for the *Village Voice* titled "The Gropes of Wrath; The NYPD Loves Touching Black Men," the journalist Nicholas Powers wrote that "for black men, being stopped and frisked by the police is a rite of passage. But I've never been touched by a cop. I'm a virgin." Recounting the above-referenced statistics about the number of African-American and Latino men who have been stopped and frisked by the New York Police Department, Powers observed, "The NYPD is fondling our bodies."[84]

The Urban Dictionary, an on-line wiki that defines street slang and provides an example of usage, contains this entry for "frisk": "When cops search you for drugs and guns by feeling you all over from behind. *The big, tall, muscular security guard leaned right down behind me and felt me all over because his orders were to frisk me.*"[85]

As a result of the airport security measures taken after September 11, 2001, many members of the flying public know what it feels like to be frisked. The Transportation Security Agency requires same gender "screeners"; before it implemented this policy there were so many complaints that (male) TSA agents were inappropriately touching (female) passengers that the Association of Flight Attendants posted information about to file a complaint on its website.[86]

The harm that results from frisking has been recognized by a number of courts and in a number of different contexts. Some law enforcement agents have been prosecuted or have faced administrative sanctions for frisks that have crossed the line. Almost all of these cases have involved male officers who have frisked women.[87]

In *Jordan v. Gardner*, the Ninth Circuit Court of Appeals found an Eighth Amendment violation where an all-female jail in Washington state imposed a policy requiring male guards to conduct random, nonemergency, suspicionless clothed body searches on female inmates.[88] Though the jail called such searches

"pat-downs," the court noted that the procedure was more akin to "rubbing," "squeezing," and "kneading" the female inmates.[89] The appellate court affirmed the district court's holding that the policy was an unnecessary and wanton infliction of pain constituting cruel and unusual punishment.[90]

In a concurring opinion, Judge Reinhardt asserted that even "prison inmates have a right of privacy and dignity in their persons," and thus that the policy constituted an unreasonable search violative of the inmates' Fourth Amendment rights.[91] Judge Noonan, also concurring, characterized the pat-downs as "indecency . . . beyond our expectation as a society and beyond what the Constitution countenances."[92] Noonan also compared the searches to rape or sexual assault, describing them as "police operations carried out on persons powerless to object and not only commanded to cooperate by unbuttoning their blouses, removing their belts, taking off their shoes, and raising their legs, but searched and shoved and squeezed in those areas of their bodies that have the closest connection with their sex."[93]

Generally, male inmates' claims of sexual abuse are not recognized as creating a constitutional claim.[94] However, where such treatment is imposed merely to inflict pain and psychological harm upon prisoners, courts have shown some willingness to allow liability. In *Marrie v. Nickels,*[95] the plaintiffs, military prisoners, sued the defendants, prison guards, for sexual assault and constitutional violations. The plaintiffs alleged that, during frisks, one guard would regularly "[place] his hands into [an inmate's] pants, [caress] his buttocks, and [stroke] his genitalia."[96] The plaintiffs also challenged another policy whereby frisks were used as a punishment in which the guards "formed up to create a shakedown gauntlet wherein inmates are frisk searched dozens of times in a mere 150 feet," causing the plaintiffs to suffer "uncountable assaults."[97] Though most claims were barred by the *Feres* doctrine and sovereign immunity, the plaintiffs' sexual assault claim survived a summary judgment motion.[98]

Another context in which frisks come under scrutiny is where such frisks are most visible: during *Terry* stops. Many suspects frisked during a police officer's *Terry* stop have asserted constitutional violations and pursued liability under § 1983 of the Civil Rights Act of 1871. Unsurprisingly, inappropriate cross-gender pat-downs have been subject to particular scrutiny.[99]

Though the sexually abusive nature of an allegedly improper frisk need not be proven to achieve liability under § 1983, some plaintiffs include allegations

suggesting this type of inappropriate contact. In *Njaka v. Wright County*, police officers responded to a call that a black male was behaving suspiciously near a water treatment facility.[100] One officer frisked the suspect and, in so doing, "deliberately pinched his testicle while patting him down."[101] The subject of the frisk sued, alleging that the pat-down was a "homosexual harassing," a "come-on," and a "homosexual fantasy."[102] The court denied the police officers' motion for summary judgment in regard to the excessive force claim, though it opined that the plaintiff's theory that the frisk was an enactment of a homosexual fantasy was "highly implausible particularly in light of the fact that the search was conducted in front of another officer."[103]

A similar § 1983 excessive force claim survived a defendant's summary judgment motion in *Myers v. James*.[104] After midnight, Myers accompanied a female friend to her vehicle, which was parked in an area notorious for burglaries.[105] Mistakenly thinking that the nearby building was a bank, Officer James approached Myers, frisked him, and, in doing so, "grabbed the plaintiff's testicles and asked him if he liked the way that felt."[106] The court recognized the inappropriate sexual nature of the frisk and denied James's summary judgment motion: "In short," the court concluded, "grabbing a citizen's testicles under these circumstances is plainly unconstitutional."[107]

Frisks and Foucault

So far, I have argued that stops and frisks are like torture because that is how victims perceive them, and because they can be sexual harassment. My final point of proof of this proposition is that stops and frisks fall into the same construct of torture that Foucault described.[108] A stop and frisk is a public, spectacular, corporal, and punitive penalty that asserts the power of the sovereign (the king) and his agent (the torturer). Because the police need warrants to enter private areas, and the "probable cause" standard for warrants is significantly higher than the "reasonable suspicion" standard for *Terry* stops, the result is that stops and frisks are usually conducted in public, for all to see. In lower income neighborhoods it is common to see young men spread eagle being patted down by the police.[109] Like torture, stops and frisks have both punitive and investigatory purposes. Indeed the purpose of the detention is for the police to investigate: the problem, however, is that the Court didn't say what the

police are supposed to do beyond not allowing the suspect to leave. They can obviously ask questions, or see if witnesses to a crime can identify the detainees as the culprits; but even if the suspects pass this part of the ordeal by providing nonsuspicious answers to questions, the police remain wary. As Foucault put it, "Guilt did not begin when all the evidence was gathered together; piece by piece it was constituted by each of the elements that made it possible to recognize a guilty person. Thus a semi-proof did not leave the suspect innocent until such time as it was completed; it made him semi-guilty; slight evidence of a serious crime marked someone as slightly criminal."[110] Remembering that *Terry* stops arise only in the context of people who are suspicious for legal conduct (if the conduct is illegal, police have probable cause for arrest), we see Foucault's "continual gradation."[111] Stops and frisks of people engaged in ostensibly lawful activities are justified because "the suspect as such always deserved punishment; one could not be the object of suspicion and be completely innocent."[112]

Torture and Order

What is the expressive meaning of police touching? The Supreme Court got it right in *Terry* when it noted that frisks might be "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets."[113] Police stops and frisks demonstrate the authority of the state in the most visceral way. They signal that the police control the streets, and they signal this in a way that is public, spectacular, corporal, and punitive. When one sees a row of men, often black, spread eagle against a wall, one is witnessing "the very ceremonial of justice being expressed in all its force," as Foucault described torture.[114]

Illinois v. Wardlow is a compelling example of the ceremonial and the punitive.[115] Chicago police were patrolling a high-crime area and noticed Mr. Wardlow standing next to a building. What Mr. Wardlow did to justify his detention and search was stated succinctly by Chief Justice Rehnquist: Mr. Wardlow "looked in the direction of the officers and fled."[116] This was enough of an affront to the power of the officers that they gave chase and "eventually cornered him on the street."[117] The officers then stopped Mr. Wardlow, patted him down, and squeezed the bag that he was carrying; the bag contained a gun, and Mr.

Wardlow was arrested.[118] He moved to suppress the gun, claiming that the police did not have reasonable suspicion for the stop and frisk.[119] Rehnquist, writing for the majority, held that Mr. Wardlow's presence in a high-crime area, combined with his attempt to evade the police, created constitutional grounds for the stop.[120]

The detention that Wardlow authorizes is ceremonial because often it will be useless as a matter of investigation. The Court concedes that suspects who are detained maintain the right to "stay put and remain silent in the face of police questioning."[121] The police purpose then is served not so much by the investigation, but the stop itself, which is a "reassertion and public declaration of power by the sovereign."[122] The goal is to make citizens aware of the presence and authority of the cops. "The ceremony of the public torture . . . displayed for all to see the power relation that gave his force to the law."[123]

The stop seems punitive in part because the police don't have a crime to investigate. After Wardlow, this is now not a barrier to detention; just as with torture, "penal demonstration did not obey a dualistic system, true or false, but a principle of continual gradation."[124] It isn't your suspicious-ness that makes the police interested in you but, rather, because the police are interested in you, you must be suspicious. "The suspect as such always deserved punishment; one could not be the object of suspicion and be completely innocent."[125]

In the *Wardlow* context, the offense is not displaying sufficient deference to the police; this opens one up to detention and search, and, only afterward, "[if] the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way."[126] Thus, Mr. Wardlow was suspicious because he apparently did not want to be around the police. As redress for this affront to the sovereign, the Supreme Court allowed his detention and search, and, sure enough, the police discovered an actual crime for which Mr. Wardlow could formally be punished.

Wardlow tells us that one can be suspicious generally, if the authorities have no specific crime for which to suspect one. It stands for the proposition that when one sees the police in certain neighborhoods, one must communicate deference—otherwise one can be stopped and touched. The effect of the *Wardlow* doctrine in minority communities is hard to overstate. The arbitrary nature of the detention—it is now a de facto offense to demonstrate that you do not like the police—contributes to an atmosphere of fear of the police, which is, no

doubt, the purpose the police had in chasing down Mr. Wardlow. The result is that citizens are more compliant. As Susan Sontag observed about the torture, by American soldiers, of the prisoners at Abu Ghraib, "Remember: we are not talking about that rarest of cases, the 'ticking time bomb' situation, which is sometimes used as a limiting case that justifies torture of prisoners who have knowledge of an imminent attack. This is general or nonspecific information-gathering . . . . All the more justifications for preparing prisoners to talk. Softening them up, stressing them out—these are the euphemisms for the bestial practices."[127]

Recall Justice Douglas's dissent in *Terry*.[128] He warned that giving the police the power to stop and frisk citizens for innocent conduct was a step toward totalitarianism.[129] Justice Douglas was right. If his view of the law had prevailed in Terry, the police would still have plenty of power to enforce the criminal law. The detective in *Terry*, for example, could have observed the three men until they seemed about to commit a crime, and then he would have had probable cause to arrest them. In allowing the police to forcibly detain and search for innocent conduct, the Supreme Court gave the police the kind of power they should not have in a democracy. The progeny of Terry represents further steps down the totalitarian future that Douglas feared. The arbitrary exercise of power by the police takes stops and frisks outside the formal legal categories of "regulation" and "punishment" and makes them more like torture in a Foucaultian sense. Like torture, stops and frisks are punishment that serves a regulatory purpose: the imposition of order in a regime that, if not totalitarian, is on its way. To reverse the path, to take the power to punish away from the police, would not compromise public safety. It would, however, be a step in the direction of restoring democracy to communities that are now marked by fear of state agents with guns and the power to invade the bodies of innocent people.

Notes

1. *Terry v. Ohio*, 392 U.S. 1, n. 13 (1968), quoting L. L. Priar and T. F. Martin, "Searching and Disarming Criminals," *Journal of Criminal Law, Criminology, and Police Science* 45 (1954): 481.

2. NWA, "Fuck tha Police," Straight Outta Compton. Perf. Dr. Dre, Eazy-E, Ice Cube, and MC Ren (Priority/Ruthless, 1988).

3. 392 U.S. 1 (1968).

4. I mean "law" in the formal, abstract sense rather than the colloquial meaning of law as law enforcement agents like the police.

5. Michel Foucault, *Discipline and Punish* (New York: Vintage Books, 1979).

6. 392 U.S. at 27.

7. Ibid.

8. Ibid., 29.

9. Ibid., 5.

10. Ibid., 6.

11. Ibid.

12. Upon first blush, it's strange that the detective approached Mr. Terry while he was walking away from the store that the detective suspected he was casing, but the fact that the two African-American men were joined by a white man probably would have further aroused the officer's suspicion. During this time in Cleveland (although not just Cleveland), police lore was that the presence of black and white men together was a strong indicator of potential criminal activity. John Barrett, "Terry v. Ohio: The Fourth Amendment Reasonableness of Police Stops and Frisks Based on Less than Probable Cause," in *Criminal Procedure Stories*, ed. Carol S. Steilker (New York: Foundation Press, 2006): 295.

13. Ibid., 7.

14. Ibid.

15. Ibid., 6–7.

16. Ibid., 16–17.

17. Ibid., 25–26.

18. Ibid., 20.

19. Ibid., 21.

20. Ibid., 27.

21. Ibid., 35–39.

22. Ibid., 37.

23. Ibid., 38–39.

24. Ibid., 35–36.

25. Ibid.

26. Ibid., 38–39.

27. Ibid., 14.

28. Ibid., 14, n. 11, quoting the U.S. President's Commission on Law Enforcement and Administration of Justice, Task Force on the Police (Washington, DC: 1967).

29. Ibid., 14–15.

30. *Adams v. Williams*, 407 U.S. 143 (1972).

31. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

32. *Maryland v. Wilson*, 519 U.S. 408 (1997).

33. *United States v. Cortez*, 449 U.S. 411 (1981).

34. 528 U.S. 119 (2000).

35. *United States v. Sokolow*, 490 U.S. 1 (1989).

36. Ibid., 13 (Marshall, J., dissenting).

37. See Randall Kennedy, *Race, Crime, and the Law* (New York: Pantheon Books, 1997): 136–67.

38. *United States v. Weaver*, 966 F.2d 391 (8th Cir. 1992).

39. Ibid., 394, n. 2.

40. "Court Says US Border Inspections of Muslims Were Allowed," *International Herald Tribune*, November 26, 2007.

41. Greg Ridgeway, *Analysis of Racial Disparities in the New York Police Department's Stop, Question, and Frisk Practices* (Santa Monica, CA: RAND Corporation, 2007).

42. Ibid., 7.

43. Ibid., 8.

44. Ibid., 13.

45. Ibid., 7.

46. Ibid., 8.

47. Foucault, *Discipline and Punish*, 19–21, n. 5.

48. Ibid., 34.

49. Ibid.

50. Ibid., 49.

51. Ibid., 30.

52. Ibid., 47.

53. Ibid., 32–35.

54. Ibid., 47.

55. Ibid., 50.

56. Ibid., 35.

57. Ibid., 43.

58. Ibid., 40.

59. Ibid., 39–42.

60. Ibid., 41.

61. Ibid., 42.

62. Hector Tobar and Richard Lee Covin, "Witnesses Depict Relentless Beating; Police Accounts of Rodney Glen King's Arrest Describe Repeated Striking and Kicking of the Suspect," *Los Angeles Times*, March 7, 1991: Metro.

63. Robert McFadden and Joseph P. Fried, "The Louima Case: The Overview; In Harsh Testimony's Wake, Officer Accused in Torture of Louima to Plead Guilty," *New York Times*, May 25, 1999.

64. Ginger Thompson and Gary Pierre-Pierre. "Portrait of Slain Immigrant: Big Dreams and a Big Heart," *New York Times*, February 12, 1999.

65. Ridgeway, *Analysis of Racial Disparities*, 37, n. 41.

66. Professor Mari Matsuda offers this definition of critical race theory (which she terms "outsider jurisprudence": "What is it that characterizes the jurisprudence of people of color? First it is a methodology grounded in the particulars of their social reality and experience. This method is consciously both historical and revisionist, attempting to know history from the bottom. From the fear and namelessness of the slave, from the broken treaties of the indigenous Americans, the desire to know history from the bottom has forced these scholars to sources often ignored: journals, poems, oral histories, and stories from their own experiences of life in a hierarchically arranged world. This methodology, which rejects presentist, androcentric, Eurocentric, and false-universalist descriptions of social phenomena, offers a unique description of law. The description is realist, but not necessarily nihilist. It accepts the standard teaching of street wisdom: law is essentially political. It accepts as well the pragmatic use of law as a tool for social change, and the aspirational core of law as the human dream of peaceable existence." Mari Matsuda, "Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story," *Michigan Law Review* 87 (August, 1989): 2320–81, 2323–24.

67. Ibid., 2325.

68. This would also be the "legal" response. The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession." UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York: United Nations, 1984).

69. Charles Lawrence, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," *Stanford Law Review* 39 (1987): 317–88.

70. Jody David Armour, *Negrophobia and Reasonable Racism: The Hidden Costs of Being Black in America* (New York: New York University Press, 1997).

71. See, for example, Nicholas Powers, "The Gropes of Wrath; The NYPD Loves Touching Black Men," *The Village Voice*, March 28, 2007.

72. Peggy Davis, "Law as Microaggression," *Yale Law Journal* 98 (1989): 1559–77.

73. D. W. Sue et al., "Racial Microaggressions in Everyday Life: Implications for Clinical Practice," *American Psychologist* 62, no. 4 (2007): 271–86.

74. *Terry v. Ohio*, 17, n. 1.

75. Ibid., 1, n. 13, quoting Priar and Martin, "Searching and Disarming Criminals," 481, n. 1.

76. My analysis in this section was advanced by two seminal articles that explore

sex, gender, and criminal procedure. Frank Rudy Cooper's "Who's the Man? Masculinities and Police Stops" asserts that police use Terry stops to stage "masculinity contests" with other men. Frank Rudy Cooper, "Who's the Man?: Masculinites and Police Stops," forthcoming; rough draft available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1257183. David A. Sklansky has argued that an unstated animus of the Supreme Court in deciding criminal procedure cases in the 1960s was concern about the anti–civil libertarian methods that police used to investigate homosexual "crimes." David Alan Sklansky, "'One Train May Hide Another': Katz, Stonewall, and the Secret Subtext of Criminal Procedure," *UC Davis Law Review* 41 (2008): 875–934.

77. Richard Goldstein, "What's Sex Got to Do with It? The Assault on Abner Louima May Have Been Attempted Murder, But It Was Also Rape," *The Village Voice*, September 2, 1997.

78. For an analysis of depictions of criminal justice in hip-hop music, see Paul Butler, "Much Respect: Toward a Hip-Hop Theory of Punishment," *Stanford Law Review* 56 (2004): 983–1016.

79. NWA, "Fuck tha Police," Straight Outta Compton, Perf. Dr. Dre, Eazy-E, Ice Cube, and MC Ren (Priority/Ruthless, 1988).

80. Lupe Fiasco, "Daydreamin,'" Food and Liquor, Perf. Lupe Fiasco (Atlantic, 2006).

81. Webbie, "Six 12's," Savage Life 2, Perf. Webbie, Mouse (Atlantic, 2008).

82. Dead Prez, "Cop Shot," Cop Shot (White Label) 12, Perf. M-1, stic-Man (Loud Records, 2008).

83. The U.S. Supreme Court also supports this proposition. Sexual harassment in the workplace is governed by Title VII of the Civil Rights Act of 1964, which provides that "it shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." Circuits developed conflicting perspectives regarding whether Title VII allows such a claim where an employee is sexually harassed by another employee of the same sex. Some circuits held that Title VII plainly does not recognize same-sex sexual harassment claims. See *Goluszek v. H. P. Smith*, 697 F. Supp. 1452 (ND Ill. 1988). Others held that such claims are actionable only if the harassment was motivated by sexual desire (that is, if the harasser was a homosexual). Compare *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996), with *Wrightson v. Pizza Hut of America*, 99 F.3d 138 (4th Cir. 1996). Others took the approach that Title VII protected employees from all types of sexual harassment, regardless of the harasser's gender or sexual preference. See *Doe by Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997). In *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), the Supreme Court weighed in, deciding unanimously that Title VII did include protection from same-sex harassers, even if that discrimination was not sexually motivated.

84. Powers, "The Gropes of Wrath."

85. "Urban Dictionary: frisk," Urban Dictionary, 02 07 2005, May 31, 2009, <http://www.urbandictionary.com/define.php?term=frisk>.

86. Joe Sharkey, "Business Travel: Despite a Longstanding Policy of Same Sex Screenings, Charges of Airport Groping Continues," *New York Times*, March 20, 2002.

87. It is an urban myth that police departments require same-gender frisks; while some departments might have a practice of using officers of the same gender as the suspect, I am unaware of any that require this. Most departments would say that it would be impractical, mainly because the (legal) need for frisks arises when officers perceive a threat to their safety, making it too risky to wait for an officer of the same gender.

88. 986 F.2d 1521 (9th Cir. 1993).

89. Ibid., 1522, n. 1.

90. The policy had been enacted despite the fact that 85 percent of inmates had reported a history of sexual abuse, including rapes, molestations, beatings, and sexual slavery. One inmate had been raped twice by strangers and multiple times by husbands or boyfriends, two of whom had starved her; one had pushed her out of a moving car. The shocking results of the policy were dramatic and immediate: one inmate had to be "pried" from the bars she had grabbed during the search, after which she vomited and collapsed. The prison's psychiatric social worker asserted that the male guards' invasive sexual contact was essentially revictimizing those inmates with a history of sexual abuse, causing "an unendurable psychological threat and stress." Ibid., 1525, 1531, 1540.

91. Ibid., 1534 (Reinhardt, J., concurring).

92. Ibid., 1544 (Noonan, J., concurring).

93. Ibid.

94. See, for example, *Davis v. Castleberry*, 364 F. Supp. 2d 319, 321 (W.D. N.Y. 2005) (granting summary judgment because defendant prison guard "reach[ing] around the front of [plaintiff inmate's] pants zipper area and grabb[ing] [plaintiff's] penis" during an otherwise justified search is not unconstitutional).

95. 70 F. Supp. 2d 1252 (D. Kan. 1999).

96. Ibid., 1257.

97. Ibid., 1256.

98. Ibid., 1264.

99. See, for example, *Cherney v. City of Burnsville*, 2008 U.S. Dist. LEXIS 1345 (D. Minn. 2008) (refusing to grant summary judgment where, as a result of a pat-down by male police officers in which one officer "went down to [her] groin and actually was touching [her] pad," female plaintiff alleged "severe emotional and psychological damage in the form of decreased self-esteem, night terrors, and anxiety," "post traumatic stress disorder," and that "her sexual relationship with her husband [had] changed").

100. 560 F. Supp. 2d 746 (D. Minn. 2008).

101. Ibid., 756.
102. Ibid., n. 12.
103. Ibid.
104. 2004 U.S. Dist. LEXIS 25666 (E.D. La. 2004).
105. Ibid., 4.
106. Ibid., 3.
107. Ibid., 22.
108. Foucault, *Discipline and Punish*, 19–21, n. 5.
109. Ridgeway, *Analysis of Racial Disparities*, 7, n. 41.
110. Foucault, *Discipline and Punish*, 42, n. 5.
111. Ibid., 42.
112. Ibid.
113. Terry, 14, nn. 1, 11.
114. Foucault, *Discipline and Punish*, 49, n. 5.
115. 528 U.S. 119 (2000).
116. Ibid., 122.
117. Ibid.
118. Ibid.
119. Ibid.
120. Ibid., 124–25.
121. Ibid.
122. Foucault, *Discipline and Punish*, 47, n. 5.
123. Ibid., 50.
124. Ibid.
125. Ibid., 42.
126. 528 U.S. at 126.
127. Susan Sontag, "Regarding the Torture of Others," *New York Times Magazine*, May 23, 2004.
128. Terry, 38–39, n. 1.
129. Ibid., 39.

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