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From the Legal Literature

Francesca Laguardia*

DISENTANGLING PRISON AND PUNISHMENT

I. INTRODUCTION

Abolishing prisons once seemed completely impossible, and to many that impression likely remains. But the movement to abolish prisons has experienced a marked increase in traction and legitimacy in academic and activist spheres—although this traction has been limited to non-legal groups, primarily.¹

What does the concept of prison abolition mean to criminal law, in general? And what are its purposes and role? In most quarters, the movement is predicated on the horror of current conditions, collateral consequences, and unjust (heavily racially biased) application of prisons.² It is less often a direct criticism of the concept of expressive criminal law (the use of the criminal law and criminal punishment to express disapproval of certain behavior).³ Yet the language of the movement most often rejects punishment as a goal (referred to in punishment theory as retributivism or “just deserts”) in favor of preventive, restorative, or transformational processes that focus on lessening the occurrence of crime rather than expressing disapproval of it.⁴ Were criminal law to adopt one of these frameworks, it would be a complete reworking of our understanding of the purposes of criminal law in contemporary society.

Is a full reconceptualization of the purpose of criminal law necessary, or even desirable, in order to respond to the contemporary recognition of the evils of incarceration and its collateral consequences? It is this question that Rafi Reznik addresses in his article,

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¹Introduction, in *Developments in the Law—Prison Abolition*, 132 HARV. L. REV. 1568, 1569 (2019) [hereinafter “*Developments in the Law Introduction*”].

²Rafi Reznik, *Retributive Abolitionism* 24 BERKELEY J. CRIM. L. 123, 130–32 (2019); see also Dean Spade, *Their Laws Will Never Make Us Safer*, in *PRISONS WILL NOT PROTECT YOU* (Ryan Conrad ed., 2012).

³Reznik, *supra* note 2, at 138, 144.

⁴Reznik, *supra* note 2, at 145–49.

Retributive Abolitionism.⁵ Reznik argues not only that discarding punishment is unnecessary to respond to the criticisms of prison abolitionists, it is actually counterproductive. In fact, the primary criticisms of the abolitionist movement would be better addressed, Reznik argues, through traditional punitive criminal law—but without prisons as the punishment mechanism.

Reznik argues that, in fact, neither the scholars at *Harvard Law Review's* symposium nor Movement for Black Lives [MBL] activists actually desire to eliminate retribution; to the contrary, their own rhetoric shows they have a strong desire for maintaining retribution in the public sphere, just with a focus on different actors and targets of that retribution.⁶ He argues, further, that this punishment is not only appropriate from the perspective of the individualistic and liberal framework of the United States,⁷ but also that it is morally superior in emphasizing offenders' agency.⁸ Additionally, it reinforces the public nature of certain harms and the unacceptability of those harms, which is necessary in order for the state to acknowledge, express, and reinforce the value of victims' lives and well-being.⁹

Reznik's solutions are still radical and would require a great deal of further thought and development from legal and criminological experts, as well as a massive social movement to reconceptualize punishment. But even without approaching his solutions, his exploration of the motivations for prison abolitionism and its relation to punishment, preventive justice, and transformative justice offer valuable insight into public perceptions of criminal law and its purposes.

II. Rafi Reznik, *Retributive Abolitionism*, 24 BERKELEY J. CRIM. L. 123 (2019).

Reznik begins with an introduction to the push for prison abolition.¹⁰ In order to delineate the problems and desires articulated by the prison abolitionist movement, he relies upon the examples offered by the *Harvard Law Review's* recent symposium on prison abolitionism¹¹ (most primarily the arguments of Allegra McLeod, the only lawyer to be involved in the symposium).¹² Reznik also relies upon

⁵Reznik, *supra* note 2.

⁶Reznik, *supra* note 2, at 126, 128–37, 138–43.

⁷Reznik, *supra* note 2, at 137–45.

⁸Reznik, *supra* note 2, at 155–64.

⁹Reznik, *supra* note 2, at 168–71.

¹⁰Reznik, *supra* note 2, at 127–37.

¹¹*Developments in the Law Introduction*, *supra* note 1, *passim*.

¹²Reznik, *supra* note 2, at 125.

the MBL as representational of prison abolition activists more generally.¹³

Based on these representations, Reznik argues that prison abolitionists do not reject punishment *per se*. Instead, he argues, the complaint of prison abolitionists is that prison is used as a solution to what are really social ills.¹⁴ Underlying this perspective is the notion that people who are insufficiently supported by society are “criminalized.”¹⁵ This may occur purposefully, because the system of creating criminal law allows people with social power to criminalize activities committed by people who are marginalized, which they may do in an effort to maintain control of the population or to protect privileges. But it may also occur because people who have no other options to solve homelessness, addiction, and neglect, may resort to crime, or such social problems may breed the conditions that create crime.¹⁶ Prison abolitionists argue that investing in the social safety net and other social programs would be preferable to spending money on law enforcement and incapacitation.¹⁷ Prison in particular is a problematic response to crime not only because it diverts resources from the social programs that could better prevent crime from occurring, but because it is dehumanizing and violent.¹⁸

But, Reznik points out, these criticisms relate more to the problems of prisons in particular than the problems of retribution in general.¹⁹ MBL’s own existence and rhetoric throw this fact into stark relief (according to Reznik).²⁰ The birth of MBL was a response to the failure to punish law enforcement officers for killing unarmed Black boys, in particular Trayvon Martin and Michael Brown.²¹ This suggests that MBL activists would still desire punitive responses—it’s just that the target of that punishment should include (if not focus on) people in positions of power and authority as well as the marginalized groups on which it currently focuses.²² As Reznik states later on “The abolitionist imagination does not extend to, yet craves, non-carceral punitiveness.”²³

But perhaps more compelling is what this movement shows about

¹³Reznik, *supra* note 2, at 127–28.

¹⁴Reznik, *supra* note 2, at 129–31.

¹⁵Reznik, *supra* note 2, at 130.

¹⁶Reznik, *supra* note 2, at 130, 150–51.

¹⁷Reznik, *supra* note 2, at 130.

¹⁸Reznik, *supra* note 2, at 131.

¹⁹Reznik, *supra* note 2, at 131–33.

²⁰Reznik, *supra* note 2, at 134–37.

²¹Reznik, *supra* note 2, at 134–35.

²²Reznik, *supra* note 2, at 136.

²³Reznik, *supra* note 2, at 153.

the use and meaning of punishment in society. To quote Reznik, “the coercive outcomes of these decisions are part of the measuring tools for the worth of Black lives, in the activists’ eyes too.”²⁴ This underscores the need for punishment in society as a way of publicly highlighting how society views and values its members. The problem is not that punishment itself is counterproductive or morally wrong, it is that punishment has been unequally distributed; it should be redistributed across society—so that the powerful experience it as often, or more often, than the marginalized.²⁵

This argument holds as well from a constitutional or political theory abolitionist perspective. Prison abolitionists complain about overpolicing, particularly in the way it undermines the tenet that “all citizens be equally accountable to one another before the law.”²⁶ MBL demands equal access to education and political representation, as well as community control of law enforcement and criminal law.²⁷ Many foundational scholars argue for more full recognition of traditional civil rights and liberties, suggesting again that the issue is not whether an entirely new governmental structure needs to be created, but whether the idealized rights of the liberal state can be distributed equally among all of the state’s members.²⁸

While the goals of the prison abolition movement do not seem to require eradication of punishment, a good many prison abolitionists have advocated for restorative, transformative, or preventive approaches to justice rather than punitive approaches.²⁹ Preventive justice focuses on reducing crime before it happens, primarily through social supports that eliminate the opportunities and motivations to commit crime.³⁰ Restorative justice attempts to provide accountability while restoring victims, offenders, and the community.³¹ Transformative justice attempts to accomplish all of these goals—providing accountability, restoring victims and offenders, and eradicating the social causes of crime—all together.³² While the accountability portion of transformative justice includes traditional punishment goals of deterrence and incapacitation, it is voluntary and oriented towards goals other than punishment for the sake of

²⁴Reznik, *supra* note 2, at 136.

²⁵Reznik, *supra* note 2, at 138–39.

²⁶Reznik, *supra* note 2, at 138.

²⁷Reznik, *supra* note 2, at 138, 140.

²⁸Reznik, *supra* note 2, at 142–44.

²⁹Reznik, *supra* note 2, at 145; *see also, e.g.*, CRITICAL RESISTANCE COLLECTIVE, ABOLITION NOW! (2009); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003).

³⁰Reznik, *supra* note 2, at 146.

³¹Reznik, *supra* note 2, at 147.

³²Reznik, *supra* note 2, at 147–48.

public satisfaction.³³ Reznik describes transformative justice as forward looking and utilitarian, focusing on reducing future crime and restoring victims (as does tort law).³⁴ It is also community based and community structured, rather than state imposed.³⁵ For several reasons, Reznik finds such a framework wholly unsatisfactory, both to his own mind and with respect to the broader goals of MBL and prison abolitionists more generally.

Reznik's first objection to a non-punitive criminal law framework is the lack of agency and autonomy that would be implied.³⁶ Bad actors *deserve* punishment, Reznik insists.³⁷ Moreover, ignoring this fact and moving all moral responsibility for the offender's actions onto the offender's social conditions or hardships undermines the very human agency and fulfillment that abolitionists seek to protect by eradicating prisons.³⁸ Perpetrators must be respected as "autonomous moral agent[s]," and this respect requires treating them as capable of making decisions about right and wrong.³⁹

The state's emphatic assertion of the value of every individual is equally important, and it disappears if harms to individuals elicit (only) a utilitarian response.⁴⁰ Reznik argues that to focus only on reducing future crime or restoring a victim to their pre-victimization state fails to value the harmed individual, prioritizing instead the broader social interests in a purely cost/benefit, utilitarian analysis.⁴¹ Such an analysis reduces individuals to mere numbers, or tools in a broader social effort for generalized, overall maximized pleasure.⁴² This is insufficient, according to Reznik. Instead, "forceful condemnation" is needed in order to send a message that offensive behavior is unacceptable and reaffirm the individual and deontological value of the victim.⁴³ To Reznick, moral condemnation and a forceful counter message is a vital aspect of criminal justice.⁴⁴ Without punishment,

³³Reznik, *supra* note 2, at 149.

³⁴Reznik, *supra* note 2, at 149, 154.

³⁵Reznik, *supra* note 2, at 149.

³⁶Reznik, *supra* note 2, at 153–60.

³⁷Reznik, *supra* note 2, at 156.

³⁸Reznik, *supra* note 2, at 154, 138.

³⁹Reznik, *supra* note 2, at 160, 163–64.

⁴⁰Reznik, *supra* note 2, at 159.

⁴¹Reznik *supra* note 2, at 156–57.

⁴²Reznik, *supra* note 2, at 156.

⁴³Reznik, *supra* note 2, at 159, 163.

⁴⁴Reznik, *supra* note 2, at 161.

this expressive aspect of the criminal law disappears.⁴⁵ Moreover, such a structure would fail its citizens by ignoring “our human and social needs to assign blame.”⁴⁶

From the perspective of prison abolitionists, Reznick states, the problem in punishment is not assigning blame, it is a lack of trust in the authority that does the punishing.⁴⁷ Given the long history of racism and abuse in the United States, that lack of trust may well be justified. Still, Reznick points out, if political institutions are to be held accountable for their wrongful activities, and if heretofore marginalized communities desire to take hold of democratic authority and power, that must include taking hold of the application of criminal law and punishment.⁴⁸ The issue is not abolishing the former state, it is taking hold of the state. The issue is not abolishing criminal law or punishment, it is controlling and participating in that law and punishment.⁴⁹

Reznick maintains that states can retain punishment while abolishing prisons (which, he states, are devastating, oppressive, “formal facilitators of social death”).⁵⁰ Prisons separate individuals from their communities; they are fundamentally exclusionary.⁵¹ This violates abolitionists’ “underlying conception of personhood . . . that who we are is inseparable from the purposes and functions we undertake as members of intertwined communities.”⁵² It also violates republican principles that “for humans to lead their lives as members of a political community is natural, good, and necessary for the exercise of freedom.”⁵³ Prisons have become a psychic and physical banishment, creating social death.⁵⁴

Reznick’s use of the term social death is interesting, considering his proposed solution. The term “social death” has been used in critiques of contemporary punishment and post-punishment regulation to highlight the post-prison ramifications of conviction.⁵⁵ Collateral consequences can include disenfranchisement, deportation, registration, limitations on family interactions, and limitations on

⁴⁵Reznick, *supra* note 2, at 161.

⁴⁶Reznick, *supra* note 2, at 162.

⁴⁷Reznick, *supra* note 2, at 167.

⁴⁸Reznick, *supra* note 2, at 170–71.

⁴⁹Reznick, *supra* note 2, at 171.

⁵⁰Reznick, *supra* note 2, at 173–74.

⁵¹Reznick, *supra* note 2, at 172.

⁵²Reznick, *supra* note 2, at 172.

⁵³Reznick, *supra* note 2, at 172.

⁵⁴Reznick, *supra* note 2, at 174–75.

⁵⁵See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PENN. L. REV. 1788, 1790–93 (2012) (offering a

places one can live and work, all of which can easily add up to a complete alteration or, arguably, eradication of civil participation as traditionally understood.⁵⁶ Yet here, Reznick appears to argue that it is the banishment *within the confines of the prison* that amounts to social death.⁵⁷ The solution he proposes is to abolish prisons, but also to acknowledge *and specifically rely on* the punishment function of collateral consequences as a replacement to imprisonment.⁵⁸

Reznick acknowledges the severity of collateral consequences, providing examples of “disenfranchisement; exclusion from jury service; prohibitions on holding public office and serving in the military; inability to legally obtain firearm; occupational restrictions; limitations on parental rights; withholding of welfare benefits; mandated regular registration with authorities [and far more].”⁵⁹ He agrees both that they create an “overwhelming infringement on liberties”⁶⁰ and that they “should be understood as punishment.”⁶¹

But, he argues, the fact that they are punishment might actually limit the use of collateral consequences in order to preserve their positive (largely preventive) functions while jettisoning their harms. To Reznick, the primary problem with collateral consequences is that they respond to status (the status of being an offender) rather than acting as an individualized and proportionate response to the specific crime committed.⁶² He focuses on the retributive aspect of punishment as just deserts, and emphasizes that a positive use of collateral consequences would use these punishments only in order to provide “the same satisfaction of desert as serving time.”⁶³ This would require “[e]stablishing rational connections between particular crimes, offenders, and sanctions.”⁶⁴ “[T]aking down the ‘doctrinal wall’ separating [collateral consequences] from punishment” would allow judges to apply them on an individual basis, in contrast to the general and unthinking manner with which they are currently applied.⁶⁵

In this framework, Reznick argues that collateral consequences

broad introduction and overview to collateral consequences of imprisonment and arguing that they amount to social death).

⁵⁶Chin, *supra* note 57, at 1790.

⁵⁷Reznick, *supra* note 2, at 171–75.

⁵⁸Reznick, *supra* note 2, at 181–88.

⁵⁹Reznick, *supra* note 2, at 176–77.

⁶⁰Reznick, *supra* note 2, at 177.

⁶¹Reznick, *supra* note 2, at 177.

⁶²Reznick, *supra* note 2, at 181–82; 184; 189; 191–92.

⁶³Reznick, *supra* note 2, at 184.

⁶⁴Reznick, *supra* note 2, at 184.

⁶⁵Reznick, *supra* note 2, at 185, 193.

could respond more directly to the specific crime committed than prison ever could, and without the banishing effects of incarceration.⁶⁶ He puts forward several examples to clarify what he imagines: tax evasion, he suggests, is a crime against communal efforts, and so a proper punishment might limit communal participation—in such a circumstance he proposes disenfranchisement.⁶⁷ Hate crimes “diminish another individual’s personal identity,” and therefore might be countered with consequences that also relate to personal identity, like prohibitions on name changes.⁶⁸ Burglary “expresses disregard for another individual’s personal space and possessions . . . [and so] could warrant punitive measures . . . such as monitoring and registration.”⁶⁹

Reznick finds these methods superior to incarceration or the current framework of collateral consequences because they directly relate to the crime and so are perfect “just deserts” to immoral behavior.” He states, “The link between the offense and the right deprived of the offender creatively satisfies the retributive demand for a just proportion between guilt and burden, in a manner that responds to the offender’s volitional choice rather than their personhood.”⁷⁰

This analysis begs a great many questions. Reznick acknowledges, but does not explore, the conditions regarding collateral consequences that lead critical scholars to label them a form of social death. Skipping over this analysis is part of what allows him to claim that punishment such as disenfranchisement or limitations on living arrangements could be used as punishment without infringing on fundamental democratic interactions that make up personhood and participation in democratic society. Failure to individualize punishment may be one of the greatest flaws in the use of collateral consequences, as Reznick claims, but it is far from the only flaw. One could easily argue that the greater problem with currently existing collateral consequences is that the nature of these punishments necessarily infringe on democratic participation (much as Reznick argues that prisons are inherently a form of banishment). Reznick borders on acknowledging this fact when he states “some [collateral consequences] must be abolished . . . [specifically those that] impeded[e] the ability of the offender to maintain membership in a

⁶⁶Reznick, *supra* note 2, at 191–92.

⁶⁷Reznick, *supra* note 2, at 191.

⁶⁸Reznick, *supra* note 2, at 191.

⁶⁹Reznick, *supra* note 2, at 191.

⁷⁰Reznick, *supra* note 2, at 191–92.

meaningful community.”⁷¹ He states that “denial of access to medical benefit programs” would be one such consequence, without explaining why this might impede membership in a meaningful community (particularly while disenfranchisement, apparently, does not).⁷²

Moreover, Reznick’s allowances for certain forms of punishment seem to undermine his overall point and his overall acceptance of abolitionism. He is willing to allow that “some form of confinement must remain part of the [punishment] arsenal,” which he states does not conflict with an abolitionist perspective (for the containment of a very few dangerous individuals).⁷³ He does not explore what this confinement could or should look like, but also argues that confinement might be particularly appropriate and just deserts in response to certain crimes (although he does not specify what those crimes might be).⁷⁴

More than anything else, Reznick’s point is that punishment can happen without prisons. His advocacy for use of collateral consequences seems to be largely in order to highlight that punishment already does happen outside of prisons and, as he states, “[Collateral consequences] are the default because they are there.”⁷⁵ He would also allow judges to invent punishment that can occur outside of prisons “as long as they are not inherently degrading.”⁷⁶

III. CONCLUSION

Reznick’s solutions are provocative, and albeit somewhat problematic in their simplified presentation. But his reminder that punishment and prison are not synonymous is worthwhile as the movement to abolish prisons grows. This reminder also highlights a fundamental question that remains about our criminal law—*do* we want to punish? Do abolitionists truly want to move to transformative justice entirely, or is the desire to punish still strong even in these activists, and would abolishing punishment even be a good idea? While Reznick suggests that prison abolitionists are still secretly retributive, his work is hardly a survey of abolitionist perspectives. What Reznick contributes, however, is a strong argument in favor of punishment as an essential aspect of criminal law in a democratic system. His clarification and highlighting of these issues is a valuable addition to the ongoing debate regarding these essential aspects of our criminal law.

⁷¹Reznick, *supra* note 2, at 186–87.

⁷²Reznick, *supra* note 2, at 187.

⁷³Reznick, *supra* note 2, at 185–86.

⁷⁴Reznick, *supra* note 2, at 186.

⁷⁵Reznick, *supra* note 2, at 187.

⁷⁶Reznick, *supra* note 2, at 187.