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Reintegrative Retributivism

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Pessimistic empirical evidence about the reformatory and deterrent effects of punitive treatment poses a challenge for all justificatory theories of punishment. Yet, the dominant progressive view remains that punishment is required for the most serious crimes. This paper outlines an empirically sensitive prospectus for justifying punitive treatment through understanding the importance of reintegration. On this view, punishment can be viewed as a preferred alternative to the rigours of social ostracism, a common way of dealing with offenders in lieu of formal criminal justice. Adopting reintegration as a primary aim encourages taking a longer view which focuses on desistance from criminality rather than only on reform at the point of release from formal punishment. The view outlined in this paper enables a vindication of reintegrative punishment even when it is not the most immediately efficient means of reforming offenders. In making this argument, I develop the modern retributive platform in criminal justice theory, identify various overlooked yet key nuances in the relationship between reintegration and reform, and argue for greater theoretical and practical attention to how the state can make the communities they serve more receptive to reintegrating offenders.

THE EMPIRICAL CHALLENGE FOR PUNITIVE TREATMENT

Despite decades of critique, we continue to live in deeply punitive societies. In the European Union, around one in 1,000 people are jailed.[1] Around two million people in the United States are currently imprisoned.[2] Short-term fluctuations due to the recent pandemic aside, absolute imprisonment numbers are on an upwards trajectory in the United Kingdom, India, and China. These figures are consonant with global trends, with an estimated ~25 per cent increase in the global prison population since 2000, with notable recent annual increases of ~200 per cent in South America, ~80 per cent in Oceania and ~75 per cent in Central America outstripping population growth.[3]

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1 European Union, 'Prison statistics' (Statistics Explained, April 2024) at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Prison_statistics [https://perma.cc/5NCS-EXRX].
2 Wendy Sawyer and Peter Wagner, 'Mass Incarceration: The Whole Pie 2024' (Prison Policy Initiative, Press release, 14 March 2024) at https://www.prisonpolicy.org/reports/pie2024.html [https://perma.cc/46Q9-22RH].
3 Penal Reform International, 'Global Prison Trends 2022' (May 2022) at https://www.penalreform.org/global-prison-trends-2022 [https://perma.cc/R69F-4NDS]. Also see Penal

Notwithstanding these alarming rises, legal scholars, philosophers, criminologists, and an array of other commentators and stakeholders widely agree that many aspects of carceral justice are unjustified and unjustifiable. Modern systems of imprisonment often punish too harshly, disproportionately affect minority and marginalised groups, punish the wrong things such as addiction, and house inmates in conditions that fail to treat them with respect and care. Despite this consensus, abolitionism regarding the *institution* of 'hard treatment' is much less popular. Although non-punitive restorative paradigms are discussed with increasing sympathy for wrongdoing of lesser severity, or as a supplement to traditional punishment, it is common both within and outside academic circles to hold that we must reserve some punitive treatment for the most serious crimes: such as murder, grievous bodily harm, abuse of children, or rape. The dominant 'progressive' view is that the scale and nature of (particularly carceral) punishment ought to change, even while admitting the necessity of punitive treatment for the most serious offenders.[4]

Any non-abolitionist view, if premised on the assumption that punishing the most serious offenders serves some necessary or beneficial function, must confront sceptical empirical research on the effects of punishment. Meta-analyses concerning deterrence and imprisonment make for disconcerting reading.[5] The *general* deterrent effect of prison – the disincentivising effect the threat of prison has on prospective offenders – is not well-supported by influential reviews of empirical research. In matters of *specific* deterrence – the idea that punishment has a future disincentivising effect on persons actually imprisoned – incarceration often has a null or even mildly criminogenic effect. The evidence on the supposedly beneficial consequences of 'incapacitating the dangerous' is equivocal, mildly although not outright pessimistic, partly due to difficulties in measuring the relevant effect.[6] However, it must be admitted that much of any benefit yielded by incapacitation follows simply from segregating offenders until they naturally 'age out' of the disposition to offend, rather than as a fruit of distinctively punitive treatment. And even where a modest benefit of incapacitation is found, this often fails to outweigh the stable costs to society of imprisoning the potential offender.[7] Non-punitive social measures, such as increasing wages

Reform International, 'Global Prison Trends 2023' at https://www.penalreform.org/global-prison-trends-2023/ (June 2023) at [https://perma.cc/TA8N-5PMV].

4 For example, contrast the measured conclusions of recent high-profile work on an abolitionist theme by Tommie Shelby, *The Idea of Prison Abolition* (Princeton, NJ: Princeton University Press, 2022) with the older abolitionist classic by Angela Davis, *Are Prisons Obsolete?* (New York, NY: Seven Stories Press, 2003).

5 Raymond Paternoster, 'How Much Do We Really Know about Criminal Deterrence?' (2010) 100 *Criminal Law & Criminology* 765; Daniel Nagin, 'Deterrence in the Twenty-First Century' (2013) 42 *Crime and Justice* 199; Aaron Chalfin and Justin McCrary, 'Criminal Deterrence: A Review of the Literature' (2017) 55 *Journal of Economic Literature* 5; Travis Pratt and others, 'The Empirical Status of Deterrence Theory: A Meta-Analysis' in Francis Cullen, John Paul Wright and Kristie Blevins (eds), *Taking Stock* (New York, NY: Routledge, 2017) 367; Joel Garner, Christopher Maxwell and Jina Lee, 'The Specific Deterrent Effects of Criminal Sanctions for Intimate Partner Violence: A Meta-Analysis Criminology' (2021) 111 *Journal of Criminal Law and Criminology* 227.

6 See, for discussion, for example Alex Piquero and Alfred Blumstein, 'Does Incapacitation Reduce Crime?' (2007) 23 *Journal of Quantitative Criminology* 267.

7 For one empirical illustration, see Peter Ganong, 'Criminal Rehabilitation, Incapacitation, and Aging' (2012) 14 *American Law and Economics Review* 391.

or employment rates, arguably disincentivise crime as well as, if not better than, punitive policies.[8] Even considering only expenditure earmarked for criminal justice, investing in policing may well dominate carceral policies in reducing crime. For, a widely endorsed criminological view is that criminal tendencies are particularly sensitive to the subjective probability of apprehension (even when official sanctions are modest) rather than the severity of formal punishment.[9] Finally, it is important to be clear-eyed about how formidable the burden of proof is for carceral resources to represent a good use of the public purse. Just consider the opportunity costs. It is striking to note that in the United Kingdom the cost of imprisoning an individual for *one* year can be roughly equivalent to the cost of saving *two* years of life in the wider population through investment in domestic healthcare.[10]

The empirical evidence directly undermines two of the three main justifications of punishment and presents a stark challenge to the third. *Consequentialist theories* appeal to the general social utility of incapacitating the dangerous and deterring wrongdoing.[11] Justification of punishment, on such views, is contingent on confidence this social utility exists. Such confidence is hard to maintain given the foregoing evidence. *Self-defence theories* offer a second perspective on the justification of punitive treatment, tracing the state's right to punish back to the 'natural' or pre-political right individuals possess to defend themselves, their property, and others from harm. On such views, the right of the state to punish is derived from a transfer to the state and amalgamation of these natural individual rights. As is well-recognised, self-defence theories face the immediate question of how to bridge the gap between the plausible idea that we have a right to use force to protect ourselves from immediate harm and the distinct idea that we are justified in *retrospectively* using force to punish (the perhaps now toothless) criminal, along with economic and regulatory crimes. Most sophisticated versions of self-defence theory bridge this gap by appealing to the *defensive value of deterrence*.[12] But the reintroduction of deterrence into the justification of punishment renders such views susceptible to the same empirical scepticism as consequentialist theories.

The third justificatory family are *retributivist theories*. The familiar core retributivist view is that punitive responses can be deserved by the crime itself, rather than being contingently justified by downstream effects punishing may

8 For example see Chalfin and McCrary, n 5 above, 32-37.

9 For example see David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Clarendon, 2001); Chalfin and others, 'Police Force Size and Civilian Race' (2022) 4 *American Economic Review: Insights* 139; Christopher Lewis and Adaner Usmani, 'The Injustice of Under-Policing in America' (2022) 2 *American Journal of Law and Equality* 85.

10 For example the cost of imprisoning a person in England and Wales is estimated at ~£50,000 pa (see Ministry of Justice and HM Prison and Probation Service, 'Prison performance data 2022 to 2023' (Transparency data, 21 March 2024) at https://www.gov.uk/government/publications/prison-performance-data-2022-to-2023 [https://perma.cc/Q42U-Z5U6)] while the National Health Service has estimated ~£25,000 as a target expenditure to save one QALY through medical intervention.

11 For overview, see David Wood, 'Punishment: Consequentialism' (2010) 5 *Philosophy Compass* 455.

12 For sophisticated contemporary developments of this view see for example Michael Otsuka, 'Quinn on Punishment and Using Persons as Means' (1996) 15 *Law and Philosophy* 201; Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: OUP, 2011).

have. Contemporary proponents of retributivism adopt desert-based frameworks far from 'eye-for-an-eye' reasoning. Rather, an influential idea is that punishment can be deserved for the offender as a way of respecting and engaging their moral agency and doing justice to the value of their membership in a particular community.[13] Following Nicola Lacey and Hanna Pickard, we can refer to this view as 'modern retributivism'.[14] This view enjoys wide support among philosophers of punishment and a respected status within legal academia. But modern retributivism is also challenged by pessimistic empirical evidence concerning the inefficacy of punishment. Specifically, if *non*-punitive regimes could be *more* effective at persuading offenders to engage their moral agency and reform, how can it be justified for the state to impose a *suboptimal punitive means* for appealing to an offender's rationality? Retributive theorists have written convincingly on the importance of blame in treating offenders as rational, moral actors. Yet, one might wonder why required blame cannot be conveyed through a condemnatory trial process followed by non-punitive reparatory work – aimed at restitution rather than punishment – if this better cohered with empirical evidence on the rehabilitation of offenders. Must post-trial treatment be specifically punitive, even at the cost of rehabilitative efficacy and alternative use of public resources?[15] Extant discussions contain suggestive thoughts to the effect that non-punitive treatment may lack the right type of symbolic or expressive power. But, in my view, a critic would be reasonable in questioning whether these suggestive ideas really outweigh the supposedly considerable costs and trade-offs suggested by pessimistic empirical research on punishment.

In this article I offer a vindication of punitive treatment derived from the importance of reintegration. This view is rooted within the modern retributive platform, yet novel in providing an extension and refocusing of that influential view. Under my approach, punishment can be framed as a preferred reintegrative alternative to the rigours of extreme ostracism and vigilantism, the latter being common ways of dealing with offenders when formal criminal justice is absent or inefficacious. Focusing on reintegration encourages the adoption of a longer view focusing on diachronic *desistance* from criminality, rather than merely asking whether punishment is the most immediately efficient means of reforming offenders. This allows the proponent of the progressive view on punishment to explain why some formal punitive treatment may be necessary even if not, in the short-term, maximally reformatory. In making this argument, I pursue three other aims. First, I identify various key neglected nuances in the relationship between reintegration and reform. Second, I connect the modern retributive view to a perspective on the sociology and anthropology of punishment. Thirdly, and to close, I set out a theoretical and practical programme of

13 For book-length defences, see Antony Duff, *Punishment, Communication, and Community* (Oxford; New York, NY: OUP, 2001); Christopher Bennett, *The Apology Ritual: A Philosophical Theory of Punishment* (Cambridge; New York, NY: CUP, 2008). I return to the rich body of work developed by these theorists later.

14 Nicola Lacey and Hanna Pickard, 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice' (2015) 35 *Oxford Journal of Legal Studies* 665.

15 It must be noted that enthusiasts about restorative paradigms must also grapple with their often-considerable costs – especially when the hope is for restorative treatment to be tailored to offenders and victims.

work aimed at better understanding how the state can make the communities they serve more receptive to reintegration.

MODERN RETRIBUTIVISM DISSECTED

Modern retributivists characterise criminal justice institutions as custodians of their community's values and as mediators of the relationship between offender and society.[16] Criminal offenders imperil their relationship with the community. Offenders thus require a way to repair their relationship with the community they have wronged through offending, but in such a way as to respect both their *rationality* and the *severity* of the offence. Respecting an offender's rationality requires that they not be medicalised, infantilised, or treated as mere means – rather, they must be called to account for their actions. Due recognition for the severity of an offence requires that crime is not ignored or trivialised by, for instance, being immediately pardoned or dealt with through a low-impact consequence. The unpardonable nature of many serious crimes is also a stable psychological constraint imposed by the other party to the relationship held in trust by the state, namely the community. As has been emphasised by modern retributive theorists, often drawing analogies with interpersonal relationships, some serious offences are of such gravity that mere apology is insufficient to repair a rift.[17] Criminal justice serves the *offender* by treating them as a competent moral agent and providing them with a way to express the extent of their remorse to the community. Criminal justice serves the *community* by expressing its values and reactive attitudes in a rationally structured way.[18] (This bidirectional communicative element explains why modern retributive theories have sometimes been called 'communicative' theories – in contrast with unidirectional expressive theories.) Punishment, in the end, aims to serve *both* parties through two (intended) beneficial results. Firstly, it aims to heal schisms between community-members. Second, punishment seeks – although cannot compel – the reform of offenders, who have been brought to 'see the error of their ways' by reflecting on the rational appeal that punitive treatment is

16 This reconstruction is chiefly informed by developments of the view found in Duff, n 13 above; Duff, 'Punishment, Communication and Community' in Derek Matravers and Jonathan E. Pike (eds), *Debates in Contemporary Political Philosophy* (New York, NY: Routledge, 2002); Antony Duff, 'Penance, Punishment and the Limits of Community' (2003) 5 *Punishment & Society* 295; Antony Duff, 'Restoration and Retribution' in John Kleinig (ed), *Correctional Ethics* (Oxford: Routledge, 2006); Bennett, n 13 above; Bennett, 'Précis of The Apology Ritual' (2012) XXXI *Teorema*. Also see Linda Radzik, 'Making Amends' (2004) 41 *American Philosophical Quarterly* 141 and Ambrose Lee, 'Defending a Communicative Theory of Punishment: The Relationship between Hard Treatment and Amends' (2017) 37 *Oxford Journal of Legal Studies* 217.

17 For instance, Duff, n 13 above, 95 writes about serious offences that: 'To think that [the offender] could just apologise, and then return to her normal life, would be to portray the wrong as a relatively trivial matter that did not seriously damage the victim or their relationship.' See also Bennett, n 13 above, ch 5; Radzik, *ibid* and Lee, *ibid*.

18 Modern retributive views are often endorsed alongside a moralistic theory of criminalisation. While there are long-running debates about the adequacy of 'legal moralism' in accounting for the criminal status of certain offences (for example regulatory offences), this paper focuses only on serious core criminal wrongs and so is not concerned with that debate.

supposed to constitute. Reform has both a cognitive and a conative component. The offender comes to share the belief that their conduct was wrong, accompanied, at least for a time, by psychological feelings of guilt and self-blame that characteristically follow and prompt such beliefs. Hence, although modern retributivism is a fundamentally backwards-looking theory because it examines what is owed to different parties given the nature of an offence, there are forward-looking components to the theory that secure some of its appeal. Modern retributivism would hold little attraction if offenders never reformed nor reconciled with their community. To that extent, modern retributivism has an important outcome-sensitive element, often suppressed by the view being discussed under the rubric of retributivism (and the imperfect theoretical contrasts such categorisations entail). Of course, this does not mean that every single token *instance* of punishment is justified only if, and to the extent that, the offender is reconciled with their community. This is not within the remit of a single decision to punish; a judge cannot know in advance that a specific punishment will indubitably have a reconciliatory effect. But the justification of an *institution* of punishment can depend on the reasonable expectation that such beneficial outcomes will be secured in a suitably large class of cases.[19]

It will be helpful to succinctly lay out this theoretical machinery. Modern retributivism attributes three constitutive functions to justifiable punitive treatment:

F1: Vehicle for conveying community *blame*, considering the severity of offence.
F2: Means of *rational persuasion* of offender.
F3: Vehicle for the offender to communicate their *remorse*.

Punitive treatment has the following intended beneficial outcomes:

O1: *Reintegration* of the offender into society.
O2: *Reform* of the offender through rational appeal.

These functions and outcomes stand in a complex relationship. Clearly F2 (rational persuasion) primarily aims at delivering O2 (offender reform) – persuasion aims to achieve a forward-looking change in the offender by changing their cognitive and conative states. And it is natural to view F1 (expression of community blame) and F3 (expression of offender remorse) as primarily serving O1 (reintegration) – the assignment of blame and expression plus acceptance of remorse is a crucial part of relationship repair. However, there are nuances that complicate this simple schematic. Genuine remorse (although a backwards-looking state) is often an indicator of reform (a forward-looking descriptor). It is also plausible that the disposition of a community to reintegrate will depend partially – but by no means exclusively or even necessarily – on it taking a view about whether the offender has suitably reformed.

19 See Thom Brooks, *Punishment* (London and New York, NY: Routledge, 2012) ch 5 for an interesting discussion of so-called 'hybrid' theories of punishment and their roots in the work of Rawls and Hart. I do not find the criticisms Brooks offers against such theories convincing, but I lack space here to address the debate on the definition and justification of hybrid theory.

The concern raised by the empirical challenge is that punitive treatment is suboptimal in rationally persuading the offender (F2) to reform (O2). Empirical evidence suggestive of any of the following is evidence of this misalignment:

(i) Negligible rehabilitative effect of punitive treatment.
(ii) Negligible specific deterrence from punitive treatment.
(iii) Criminogenic effect of punitive treatment.
(iv) Reform being primarily realised by non-criminal-justice interventions.
(v) Greater effectiveness of non-punitive interventions like restorative justice in reforming offenders.

The question then arises – is there any (empirically) realistic justification of punitive treatment beyond the assignation and expression of blame? To answer this question, I think we need to better understand the relationship between punishment and reintegration – reintegration being the second aim of punishment alongside reform. The conclusion I will draw is that, given the independent normative importance of reintegration, appreciating how reform and reintegration can diverge makes space for accepting suboptimalities in the reformatory power of formal punishment. But, first, we must consider in more detail what reintegration *is*. This topic is somewhat underexplored in discussions of modern retributivism, which tend to focus on how offenders can be primed for reintegration rather than on when it is successfully achieved.

Different conceptualisations of reintegration have been offered by influential modern retributivists. At the 'thin' end of the spectrum, we find what seem like purely legalistic conceptions. For example, Christopher Bennett writes that '[T]he state must regard the offender as being restored simply by virtue of having completed the sentence.'[20] Under one interpretation of what this means, an offender is reintegrated just when the formal rights lost during their punishment are returned to them. There are less austere notions of reintegration available. Take as a cue the following from Antony Duff: '[P]unishment, as a secular penance, is supposed to constitute a mode of moral reparation through which [the offender] is to be reconciled with those he has wronged – through which the bonds of political community are to be repaired and strengthened.'[21] This emphasises *political* reintegration. Political reintegration will surely involve restoring formal political equality to the offender, for example by re-enfranchising them, allowing them to stand for office, providing the person with the same entitlements to state-provisioned goods such as welfare or education as any other citizen, and so forth. These demands are shared with some readings of the legalistic approach. But a focus on political reintegration can go further, ensuring that offenders not only have the formal capacity for political engagement but also realistic and realisable capacities to contribute to the political life of the community of which they are a member. In this sense, one might view the political reintegration of ex-offenders as being judged against a certain republican ideal.

20 Bennett, n 13 above 173.
21 Duff, 'Penance, Punishment and the Limits of Community' n 16 above, 305.

Neither the formal nor political approaches, in my view, constitute sufficiently robust notions of reintegration. Focusing only on formal and political rights omits much of importance in the state's role as a trustee of the relationship between the *community* and the offender. Putting it bluntly, one can return formal and political rights to an offender even while the relationship with their community remains fundamentally damaged. Reintegration, I suggest, must be understood as a thicker notion. Viewed this way, reintegration calls for some degree of (re)acceptance of the offender in the hearts and minds of the community. While the precise boundaries of what this reacceptance demands is open for debate, a refocus away from the merely formal and political is essential. One reason is that there is increasing recognition among political philosophers that conditions under which citizens interpersonally relate to fellow citizens as equals – being able to 'look each other in the eye', as opposed to accepting social classes of inferior status within society – is not just a social aspiration but a positive requirement of justice.[22] More concretely, a satisfactory notion of reintegration requires that the offender, following punishment, is not then subjected to permanent and comprehensive disadvantage by the community. Only by ensuring this can we make good on Duff's evocative idea that we must become 'reconciled' to an offender, placing the relationship between the community and offender – rather than merely the state and offender – front and centre. Any view of reintegration that rejects permanent and pervasive disadvantage for offenders pragmatically *requires* acceptance from individuals in the community itself. This follows from the way that benefits and opportunities are distributed in contemporary societies. Many important and indeed essential goods are distributed according to the discretion of agents who are not state officials. Housing and employment are prime examples – many careers and homes are allocated by the free-market, where applicants are subject to the discretion of those offering the good. *De facto* exclusion from large swathes of housing or employment opportunities is an obvious type of substantial disadvantage, separate from the political ramifications of such exclusion. These are but two examples. Reintegration requires that private individuals be reconciled to offenders at least to the extent that they do not use their discretion to exclude them from these goods. More controversial are the distribution of what we might term personal goods.[23] These include things such as collegial relationships, friendships, or romantic relationships; each are key for flourishing. Plausibly, an offender is not satisfactorily reintegrated if most their avenues for these interpersonal relationships remain closed. Reintegration ought therefore to be understood as a substantive ideal, one that extends beyond the formal and political. Given the driving role of the relationship between the offender and the community in modern retributive theories, successful reintegration requires that the relationship between these parties is in fact substantially repaired – not just 'restored' in a thin, formal, or legalistic sense.

22 See Rekha Nath, 'Relational Egalitarianism' (2020) 15 *Philosophy Compass* e12686 for a summary of work. The reader might return to this point after reading the next section, which outlines the extent to which ex-offenders are ostracised and treated as a distinct social class.

23 For philosophical discussion of the idea of rights against social deprivation, see Kimberley Brownlee, *Being Sure of Each Other: An Essay on Social Rights and Freedoms* (Oxford: OUP, 2020).

This perspective on reintegration reveals it to be a demanding aim. With this in mind, we can turn to consider how reintegrating relates to reform. These two aims are certainly not (to borrow a phrase from Crispin Wright) 'normatively coincident'.[24] It is possible both to aim for, and to achieve, one but not the other. Most importantly for our purposes, there can be reform without effective reintegration. Genuine reform is of course not by itself always sufficient for reintegration. There are many examples of offenders who have to all appearances 'changed their ways' or no longer pose any conceivable threat, but who are still subjected to widespread exclusion from community life. What in fact reintegrates offenders will depend, in part, on the contingent attitudes of people in society. By the same token, reintegration might conceivably occur without substantial offender reform. For example, a given society might care less about whether someone has 'turned over a new leaf' when deciding with whom to reconcile and instead care more about whether someone has 'done their time' or 'paid their dues'. Of course, in most societies, the extent to which someone has been rationally persuaded to reform will be a determinant of whether they are viewed as apt for reintegration. But it will not be the only determinant. Understanding where reform and reintegration diverge requires empirical investigation into the attitudes and dispositions of different societies; the answer is not given to us conceptually or a priori. What all of this means is that there is no guarantee that satisfying the aim of reintegrating through punishment will always fully align with the aim of reforming through the persuasive potential of punishment. Particularly given that both reintegration and reform come in degrees, different mechanisms for the treatment of offenders can realise these aims to different extents – success on one metric will not necessarily march in lockstep with success on the other. To this extent, the two aims of modern retributivism must be regarded as distinct.

Appreciating the noncongruence and indeed possibility of tension between these two goals is vital to understand how defenders of punishment should react to the empirical challenge. If the justification of punishment is predicated on *each* of these outcomes being achieved to *some* acceptable degree, it may be necessary to take measures in service of one goal that is not justified by the value of the other. Such a course of action may nevertheless be justified *overall* from the perspective of what is achieved by criminal justice taken in the round. It may even be necessary to adopt measures in pursuit of one aim that comes *at some cost* to the other aim, while still being justified given a general assessment of the balance in satisfying both. This theoretical ground-clearing enables us to explore a way to justify punitive treatment even if empirical work is correct that such punishment does not always maximise the extent to which offenders are persuaded to reform relative to other forms of treatment.

24 Crispin Wright, *Truth and Objectivity* (Cambridge, MA: Harvard University Press, rev ed, 1994) for example, 18.

WHY REINTEGRATION MATTERS

Our motivating challenge was: can (suitably revised) punitive treatment be justified given empirical evidence suggesting that non-punitive methods might be superior means for persuading offenders to 'see the error of their ways'? The previous section emphasised the overlooked fact that reform through formal punishment and through reintegration are not normatively coincident – interventions can increase the prospect of one without (or even while decreasing) the prospect of the other. Now I argue that not only is there theoretical space to distinguish reintegration from persuading offenders to reform, but that the role and normative importance of punishment as a reintegrative tool is widely underappreciated.

A central distinction to which any theory of punishment must attend is that between reform and *desistance*. Modern retributivists emphasise the hope that formal punishment can cause offenders to feel remorse or guilt about their offence and come to share in the (community) belief that their conduct was wrong – in other words, to undergo the cognitive and conative changes characteristic of reform. This type of reform-through-punishment is something we can take stock of at the point at which someone is released from formal punishment. (Such evaluations are often the business of parole boards.) Reform is obviously a predictor of recidivism. Offenders reformed through punishment are less likely to reoffend, thus securing an important forward-looking benefit of the modern retributivist approach. But reform measured at the time of release from formal punishment is only one component of what brings about desistance from future reoffending. For when we think about tendency to recidivism, we should not make the error of viewing it merely as a static property. If we focus *only* on the extent to which someone is persuaded of their wrongdoing and feels remorse after punishment, it is easy to think about things in a purely synchronic way. A longer view that looks at desistance from offending demands a diachronic perspective, extending beyond the end of formal punishment. Under this view, forbearing from future offending is an ongoing process. Avoiding the temptations of criminality is a state that must be *maintained* when the person returns to 'civilian' life. Discussions of desistance are now ubiquitous in criminology and criminal justice policy, but largely absent from much theorising about punishment by scholars working on a more abstracted plane.

The maintenance of desistance obviously makes demands of the offender. But crucially it also makes demands *of the community*. Many of the determinants of desistance are at some remove from what can be achieved by formal criminal justice, often relying on various types of interpersonal support and integration.[25] Some types of support might be administered by agents of the state, such as parole officers or social workers. But many of the grounds of desistance are

25 For discussion and review of work, see John Laub and Robert Sampson, 'Understanding Desistance from Crime' (2001) 28 *Crime and Justice* 1; Shadd Maruna, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives* (Washington, DC: American Psychological Association, 2001); Elanie Rodermond and others, 'Female Desistance: A Review of the Literature' (2015) 13 *European Journal of Criminology* 3; Beth Weaver, 'Understanding Desistance: A Critical Review of Theories of Desistance' (2019) 25 *Psychology, Crime & Law* 641.

informal and depend on the actions and attitudes of regular members of the community – these grounds include the right distribution of social relationships, employment opportunities, and the sense that ex-offenders have 'standing' to participate in social life as an equal. It is in this crucial sense that reintegration is a prerequisite for maintaining desistance.[26] As one criminologist puts it, 'Societies that do not believe that offenders can change will get offenders who do not believe that they can change.'[27] Importantly, reintegration in the community can supplement, augment, and even dominate the beneficial effects of whatever persuasion-to-reform is secured by the formal punishment itself. A 'reformed' offender can slide into recidivism when disappointed by life after punishment; conversely, an unrepentant offender can maintain desistance when their social opportunities are sufficiently attractive as to render criminality comparatively unappealing. In this sense, the extent to which someone has 'turned over a new leaf' at the time when they leave the (metaphorical or literal) prison gates can pale in significance when set against the power of the community in creating and maintaining aversion to criminal activity.

A second way to underscore the importance of reintegration requires taking a more structural, *longue durée* perspective. One can appreciate this point by considering responses to wrongdoing that contemporary punitive treatment has supplanted.

What do I mean when claiming that formal punitive treatment supplants other ways communities can process wrongdoing? A baseline fact is that it is hard to find examples of stable and enduring societies where serious wrongs do not usually meet with some robust response, whether by private individuals or the community-at-large.[28] One thing that formal criminal law and punishment does – from a normative point of view, but also from the perspective of sociology, history and anthropology – is replace various types of *self-help* concerning offenders.[29] Rather than community members primarily relying on informal and extra-legal ways of responding to crime, the state acts on their behalf, taking ownership of the responsibility to deal with wrongdoing. This is perhaps the

26 Ostracism and stigmatisation have a further deleterious effect, reducing the likelihood of an ex-offender seeking assistance when they are at risk of recidivism.

27 Maruna, n 25 above, 166.

28 It is, of course, difficult to prove a negative. Yet bear in mind, as becomes apparent below, that 'robust response' here includes not just direct and forceful interventions, but also responses that involve desertion, ostracism and exclusion. In addition to the various cases discussed in the rest of this section, further indicative evidence for my claim is found in the accounts and discussion in: Simon Roberts, *Order and Dispute* (New Orleans, LA: Quid Pro Books, 2013); E. Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Cambridge, MA: Harvard University Press, 2006); David Friedman, Peter Leeson and David Skarbek, *Legal Systems Very Different from Ours* (independently published, 2019); Karl Widerquist and Grant McCall, *Prehistoric Myths in Modern Political Philosophy* (Edinburgh: Edinburgh University Press, 2017); Guy Halsall (ed), *Violence and Society in the Early Medieval West* (Woodbridge: Boydell Press, rev ed, 2002); Donald Black, 'Crime as Social Control' (1983) 48 *American Sociological Review* 34, among others. There have of course been societies in which enforcement of penalties for norm-violation is unequal, a different phenomenon entirely.

29 Note the growing trend in philosophy of punishment to focus on sanctions that are meted out informally and in everyday social situations. See for instance Linda Radzik and others, *The Ethics of Social Punishment: The Enforcement of Morality in Everyday Life* (Cambridge: CUP, 2020).

most fundamental way in which the state acts as a trustee for the relationship between community and offender.

In non-state societies, or societies where the state is utterly ineffective, communities self-organise to respond to serious wrongdoing. These responses can be separated into broadly two forms. One is what we might term 'vigilantism': 'the collective use or threat of extra-legal violence in response to an alleged criminal act'.[30] Another is what I term the 'exclusion spectrum'. What do I mean by this? For the least serious types of wrongdoing, limited social criticism and blame can serve to deter and sanction wrongdoing. But, for more serious cases of wrongdoing, the upper reaches of the exclusion spectrum can involve extremely harsh treatment. A key method for response to serious violations in non-state societies, for example, is the use of social ostracism and exile.[31] Those who commit egregious harms are excluded from society, with social and economic relationships withdrawn, which can sometimes result in the offender being forced to exit society entirely.

Ostracism practices are widespread and found in many different types of cultures and groups. Even the threat of social ostracism, in many societies, has performed a significant deterrent and punitive function, serving many of the functions of punitive treatment now ascribed to formal, centralised criminal justice today. It is in fact unsurprising that exclusion could serve this crucial social function, given its highly aversive nature; ostracism can all but eliminate opportunities for friendship, employment, economic security, and social standing. The influential legal anthropologist Simon Roberts writes by way of summary of an extensive evidence-base: 'Of the possible responses to trouble, withdrawal from association and cooperation stands at the opposite end of the spectrum to direct inter-personal violence. For quarrelling individuals or groups to part, either permanently or until the trouble is forgotten, is obviously one of the most effective ways of handing conflict; but it is also potentially the most radical … *In many groups it represents the most dreaded sanction that can be threatened or imposed*.'[32]

One reason that ostracism can be so potent is that ostracising is something that community-members can and often will be induced into participating in, whether by the exertion of direct pressure by other community-members or the indirect operation of powerful social norms. For example, a common device associated with ostracism practices is that those who interact with a persona non grata *themselves* inherit the 'moral pollution' of the initial offender. We do not need to look at the margins of ethnography to find examples of such practices. For example, anthropologists of the Romani people describes their contemporary practice of ostracism – 'marime' – as involving the idea that offenders possess a contagious moral impurity and are treated similarly to those who are physically defiled or polluted. The significance of such an attribution lies in

30 Definition taken from Eduardo Moncada, 'Varieties of Vigilantism: Conceptual Discord, Meaning and Strategies' (2017) 18 *Global Crime* 403 at 403. Although, it may be tendentious to use the term vigilantism when discussing pre-state societies. This depends on whether codes of conduct in such groups qualify as a type of legal order.

31 For a recent collection, see for instance Kipling Williams and Steve Nida (eds), *Ostracism, Exclusion, and Rejection* (London; New York, NY: Routledge, 2017). See also the various works in n 28 above.

32 Roberts, n 28 above, 65 (emphasis added).

the isolation that results for offenders and those who interact with them. One account of this practice again unsurprisingly emphasises the dreaded nature of such ostracism: 'Marime in the sense of "rejected" from social intercourse with other[s] is the ultimate punishment in the society just as death is the ultimate punishment in other societies. For the period it lasts, marime is social death.'[33]

As states have asserted control over the function of punishing, we find that the prevalence of vigilante justice has decreased, that societies resort less to full-blooded ostracism, and notions that offenders and their families possess a contagious 'moral pollution' has lost some of its grip on folk psychology. There is no expectation that serious offenders be lynched, withdraw to live alone or in small groups of rejected persons, or be denied basic necessities. Nor is it common to suppose that merely interacting with serious offenders will mean that you inherit their stigma. Rather, offenders are instead processed by state-led criminal justice in a process that aims – with varying levels of success – to be resolutive. Formal punitive treatment has thus served to replace a variety of socially *disintegrative* practices that were historically central to the management of offenders. Although there are many difficulties in identifying and making precise the causal mechanisms through which this 'replacement' has occurred, it is from one perspective no surprise that criminal justice has fulfilled this role. A central aim of criminal justice is the establishment of civil order.[34] And, on a familiar and orthodox Lockean account, private justice is a threat to this project. The replacement of private justice is a classic aim and justification of state-led criminal justice. To the extent that the disintegrative practices replaced by formal criminal justice are highly, and in many instances excessively, burdensome this reintegrative development is welcome.

Of course, one should not make the error of supposing that the state's appropriation of criminal disputes is by any means necessarily, or historically has always been, reintegrative. One of the object lessons of Foucauldian treatments of criminal justice is the way in which states can endorse, signal, and crucially initiate the ostracism of offenders.[35] The state has also played a key role in creating certain offence-categories, in areas where the criminal law does not reflect pre-legal forms of interpersonal judgment. Yet, even while admitting this, we should reject the pessimism about state-centric criminal justice sometimes implied by such perspectives. Ostracism and stigmatisation, as the anthropological record amply demonstrates, long predate the entrenchment of formal criminal

33 Anne Sutherland, *Gypsies: The Hidden Americans* (New York, NY: The Free Press, 1975) 98.

34 See Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: OUP, 2016). For an extended defence, drawing on the work of Neil MacCormick, of the connection between criminalisation and the establishment of civil order. This work helpfully engages with both legal theory and analytic philosophy of law.

35 Consider the broad continuities that Foucault sees in the management of criminal offenders (for example in Foucault, *Discipline and Punish* (London: Penguin, 1991) with other recipients of social stigma, such as those with mental illnesses (for example in Foucault, *Madness and Civilization* (London: Routledge, 2001). There is much in this approach that is insightful. Yet other aspects of this perspective are more contentious, for example comments in Foucault that imply the artificiality of various offence-categories relating to sexuality. The debate on the case of Charles Jouy between Linda Alcoff, 'Dangerous Pleasures' in Susan Hekman (ed), *Feminist Interpretations of Michel Foucault* (University Park, PA: Pennsylvania State University Press, 1996) and Shelley Tremain, 'Educating Jouy' (2013) 28 *Hypatia* 801 illustrates such controversies.

justice and state power. In many parts of the world, criminal justice has served to supplant and ameliorate these tendencies by providing a publicly acceptable way of managing criminal disputes. There is much that could be said about the sociology underpinning this shift,[36] considering the role of punishment as a cathartic public ritual, the broader social change from the assumption of self-help as a default to reliance on the state, and the increasing influence of ideals of due process and proportionality. For now, though, I simply take at face value this apparent replacement of exclusion and vigilantism by formal punishment.

Despite this progress, vigilantism and exclusion still exist in every society today. Regarding vigilantism, many violent crimes have as their origin some type of grievance between the victim and the aggressor, where the person accused of violent criminality in fact perceives themselves as 'taking matters into their own hands' against the now-victim.[37] Such vigilantism extends to self-help violence against those who have already been formally punished by the state. Regarding exclusion, ostracism and stigma remain pervasive. While offenders may no longer be permanently exiled from society – where would they be sent? – the stigmatisation and exclusion of offenders is commonplace even after they have been released from punishment. The capacity to ostracise, which one might at first blush expect to be reduced in large anonymous societies, is readily maintained by modern methods for transmitting and sharing information, opinion, criticism, and personal data.[38] Perhaps the most vivid way to make the point is with reference to the most stigmatised class of offender: those responsible for sexual criminality. A great deal of research on ostracism has been conducted on sexual offenders.[39] This research provides acute evidence that ostracism is both exceptionally harmful and prevalent in contemporary society, while refuting the objection that the harms of ostracism are only restricted to small-scale societies where 'everybody knows everybody'. To take just some examples of the disadvantages sexual offenders suffer following their release from formal punishment:

36 The perspective on the social role of punishment outlined here is particularly amenable to Emile Durkheim's sociology of punishment, which strikes me as consonant with modern retributivism generally. For succinct discussion, see for example David Garland, 'Sociological Perspectives on Punishment' (1991) 14 *Crime and Justice* 115.

37 For a classic influential work, see Black, n 28 above. For a more recent and specific discussion on vigilantism against sexual offenders, see Michelle Cubellis, Douglas Evans and Adam Fera, 'Sex Offender Stigma: An Exploration of Vigilantism Against Sex Offenders' (2019) 40 *Deviant Behavior* 225.

38 Contemporary society also affords various means of adversely treating (perceived) offenders that falls between physical vigilantism and ostracism, for example the 'online shaming' of wrongdoers. See Paul Billingham and Tom Parr, 'Enforcing Social Norms: The Morality of Public Shaming' (2020) 28 *European Journal of Philosophy* 997 for discussion, including discussion of the disproportionate nature of such interventions.

39 For a general book-length discussion of reintegration of sexual offenders, see Anne-Marie McAlinden, *The Shaming of Sexual Offenders: Risk, Retribution and Reintegration* (Oxford: Hart Publishing, 2007).

- Estimated ~100 times more likely to commit suicide than the general population.[40]
- Difficulty in securing housing.[41]
- Difficulty in securing employment.[42]
- Lower earnings once employed, for example due to only finding unskilled work.
- Lower likelihood of forming valuable personal relationships.[43]

Beyond these measurable penalties, and plausibly underlying them, is the permanent stigma sexual offending engenders. It has been memorably said that a conviction for sexual offending becomes a socially predominant 'master status' that eclipses other categories through which one might consider those convicted of such crimes.[44] This social labelling also leads to internalisation in a process referred to as 'self-labelling' – the offender comes to view themselves through the same stigmatic lens their community adopts. Offender interviews provide illustrative and challenging evidence: 'It's a pretty unique experience. Basically you do something wrong and it becomes your source of identity because I'm no longer a person who has made a mistake. I'm a sex offender who might be a person or a monster, depending on what that person's perception is. So, it redefines the person. *In every aspect of my life, I'm a sex offender first because every decision I make is primarily affected by that.*'[45]

This stigmatisation unsurprisingly manifests in difficulties in forming relationships, a pattern one can easily imagine repeated with prospective employers, housemates, landlords, and indeed any other individual who may have a discretionary opportunity to distribute: 'There was a situation where I had a friend. It wasn't much of a friend a guess. I told him [about my offending], but I didn't tell him details, and once his wife found out [the details] on the computer I told her everything I felt they needed to know … So she finds out and gives him an ultimatum, either you stop talking to this guy or you stop talking to me, so of course he stopped talking to me.[46]

40 Rebecca Key and others, 'Suicidal Behavior in Individuals Accused or Convicted of Child Sex Abuse or Indecent Image Offenses: Systematic Review of Prevalence and Risk Factors' (2021) 51 *Suicide and Life-Threatening Behavior* 715.

41 See literature review and discussion in Jason Rydberg and others, 'Investigating the Effect of Post-Release Housing Mobility on Recidivism: Considering Individuals Convicted of Sexual Offenses' (2023) 35 *Sexual Abuse* 539.

42 See literature review and discussion in Cody Porter, Laura Haggar and Adam Harvey, 'Sexual Offending and Barriers to Employability: Public Perceptions of Who to Hire' (2023) 42 *Current Psychology* 28799.

43 Germane to the earlier discussion of stigma attaching to those who interact with the stigmatised person, some research suggests that those who have romantic relationships with sexual offenders experience what is termed 'courtesy stigma', see Emma Jones and David Giles, 'Women Who Remain in Relationships with Registered Sexual Offenders: Analysis of Forum Discussion' (2022) 32 *Journal of Community & Applied Social Psychology* 109.

44 William Edwards and Christopher Hensley, 'Contextualizing Sex Offender Management Legislation and Policy: Evaluating the Problem of Latent Consequences in Community Notification Laws' (2001) 45 *International Journal of Offender Therapy and Comparative Criminology* 83.

45 Douglas Evans and Michelle Cubellis, 'Coping with Stigma: How Registered Sex Offenders Manage Their Public Identities' (2015) 40 *American Journal of Criminal Justice* 593, 601 (emphasis added).

46 *ibid*, 608.

The effect of such stigma and repeated negative experiences can lead to isolation and indeed self-isolating behaviour on the part of the stigmatised: 'I don't go around nobody. I don't associate with nobody … I don't try to go out and hang out. I don't have friends. I'm serious about that … I try to stay under the radar because you never know how people are … I don't be out there trying to talk to people. I don't try to make friends. The people I grew up with don't even know I'm out [of prison].'[47]

This evidence refutes optimism that formal punishment *currently* reintegrates all offenders in a satisfactory manner, while it also reinforces that reintegration is not secured simply by returning formal and political rights to offenders following their formal punishment. Such findings also evidence something we already derived from abstract analysis, namely that reform and reintegration can readily diverge: there is no suggestion that these ex-offenders were unrepentant or posed a substantial risk.

Another important feature of the exclusion spectrum implied is that the harms of ostracism are to a large degree impervious to direct intervention on the part of the state. Once a group of individuals has the desire to exclude another, the state cannot readily prevent them from so doing. Exclusion is an *emergent* phenomenon – it operates through a patchwork of individual, small-scale choices. Moreover, many of the choices contributing to this emergent pattern are negative: they are choices to snub, to overlook, to refrain from offering some opportunity. The harms of ostracism can largely be secured simply by individuals non-violently choosing to exercise their personal rights not to engage with someone else. And even where states could seek to intervene – for example outlawing discrimination based on criminal history[48] – the efficacy of such interventions will be limited when provision of a good admits of discretionary choice (such as when somebody applies to rent a house, get a job, or enter some social circle) and when social and technological conditions enable sharing of information about personal history. The limited efficacy of state intervention is reinforced by the fact that stated reasons for denying an opportunity can diverge from the true reasons.[49] In these ways, exclusion is rather different from vigilantism. Direct intervention to protect individuals from vigilantes is a reasonable ambition of the state; direct intervention to compel positive engagement with ex-offenders is not realistic. To the extent that the state wants to prevent ostracism it must instead look to *upstream* interventions, tackling the desire to ostracise rather than aiming to prevent the multitude of individual actions that comprise social exclusion.[50]

Let us bring these strands of thought together. Ostracism and stigma – classic *dis*integrative mechanisms for processing wrongdoing – are highly damaging. The growth of state-centric punitive treatment has partially but not fully replaced these disintegrative harms. To some extent, then, punitive treatment *can*

47 *ibid*, 609.

48 Criminal background is not typically regarded as a 'protected characteristic' from the perspective of anti-discrimination law.

49 Indeed, the operation of such biases may in some cases be unconscious or not fully transparent.

50 More broadly, ostracising attitudes in society creates pressure for the state to develop ostracising policy, for example restrictions on housing, employment, or welfare. And, in turn, this creates a vicious circle whereby the ostracism of ex-offenders is legitimated by the existence of such policy.

reintegrate even though the reintegrative promise of punitive treatment has not been fully realised. Many contemporary societies sit in an awkward position where many serious offenders are both formally punished and then subjected to some degree of ostracism. There is what we might call a *remainder* of exclusion, representing the partial and unfulfilled promise of punishment as a means of reintegration. For both society and individual, some time-limited formal punishments are preferable to extended and indefinite ostracism. It is better for the offender given the intense harms of ostracism. And it is better for society given the wasted human potential that ostracising involves. These ideas taken together suggest that a justificatory account of punitive treatment might be found in harnessing and better realising its reintegrative potential. Moreover, reintegration is closely bound up with a longer focus on desistance. Many of the harms inherent in social disintegration are in fact strong predictors of recidivism. Avoiding recidivism depends not only on reform-through-punishment but on the possibility for a productive relationship between the offender and their society. Punitive treatment, I have suggested, has a role to play in creating the conditions for such a relationship, independent from the reformatory effects of punishment. So, to the critic who poses the consequentialist objection 'Why should criminal justice care about anything other than reform?', we can offer the straightforward reminder that reintegration promotes desistance – and desistance, from the perspective of consequences, is of dominating value.

Before closing this section, it is worth noting that a focus on reintegration holds further importance for modern retributive theory by providing a plausible response to what is currently a key lacuna. Modern retributivism portrays punishment as something in the interests of the offender themselves – as a way of treating them as a competent moral agent and providing the opportunity for apologetic communicative exchange with their community. But these views currently struggle to convince when faced with an offender who expresses disinterest in moral repair or does not value their community membership. It is difficult to explain why we would owe it to an offender to force them to continue to *simulate* penance or apology, even when we know that they have a robust lack of interest. Recognising the importance of reintegration provides a justification that fills this lacuna, by emphasising the often-extreme harm that ostracism constitutes (and has constituted in societies lacking formal mechanisms for punitive treatment). Punishment, under this view, is justified for the offender because it is preferable to the alternative of their suffering comprehensive social ostracism. This justification remains relevant even if the offender themselves is disinterested in the intrinsic value of moral repair.

REINTEGRATIVE RETRIBUTIVISM

We are now well-placed to articulate why modern retributivism contains the resources to respond to the empirical challenge with which we began the article. The reintegrative and reformatory potential of formal punishment are distinct. Even when a response to wrongdoing is sufficient to persuade an offender to 'see the error of their ways', it may not be sufficient to reintegrate

the offender into the community. The separable and distinct goal of reintegration could therefore justify punitive measures even when not required to persuade offenders to change their attitudes. This argument is only deepened by appreciating the distinction between reform through punishment and the extended process of cultivating desistance in ex-offenders.

However, although one might derive some philosophical satisfaction from clarifying the capacity for modern retributivism to respond to the empirical challenge, there is little cause for celebration in practice. Reintegration in most contemporary societies is highly imperfect. The reintegrative potential of punitive treatment is often lost either because it is *untapped* (practical strategies for promoting reintegration are not adopted) or because it is *undermined* (the state actively vitiates the reintegrative power of punishing). This should prompt both a theoretical and a practical reaction.

To address these problems, the modern retributive platform needs to undergo a change of emphasis. Influential contributors have been convincing in their arguments that the state – as custodian of the relationship between offender and community – owes to the offender a way to communicate their remorse to the community. But this focus omits the fact that the state can and should *create the conditions for successful uptake* of this communication by the community. This means the state may be required to act to influence the attitudes of community members to ensure that they are well-placed and disposed to reintegrate offenders. The state thus has a role that goes beyond merely giving offenders the opportunity to appeal to their community however they find it – additionally, the state has reason to act to shape the way that the message is received. The plausibility of such a role is heightened when the communication is likely to be fruitless or underpowered without such an intervention. And it is heightened whenever, as critics have argued is sometimes the case, the state has some type of complicity or partial responsibility in creating the conditions that lent themselves to the offending activity in the first place.[51]

The responsibilities of the state to act to steer community attitudes are rarely developed in defences of the modern retributive platform. One reason for this, perhaps, is that a common way to motivate and explain the modern retributive perspective is by gesturing at interpersonal relationships and small, cohesive communities. For example, Christopher Bennett's (2008) book frames a defence of punishment through analogy between punishment and 'the cycle of blame and apology' in a relationship between neighbours. Antony Duff draws analogies between the communicative nature of punishment in the contemporary state and sanctions within a community of scholars.[52] While these analogies are instructive and reveal the reintegrative nature of punitive treatment in familiar domains, they also obscure certain differences with state punishment. Smaller communities are more likely to have shared ideas about the purpose of punitive treatment and stronger interpersonal links with ex-offenders.[53] (Consider that

51 See for example Victor Tadros, 'Poverty and Criminal Responsibility' (2009) 43 *The Journal of Value Inquiry* 391.

52 Duff, n 13 above, 42-46.

53 Incidentally, personal contact with ex-offenders is a predictor of reintegrative attitudes. See Candalyn Rade, Sarah Desmarais and Roger Mitchell, 'A Meta-Analysis of Public Attitudes Toward

another example of a sanction-imposing community featuring in the debate just cited is a monastic order.) Focusing on these examples of smaller and more naturally cohesive groups obscures the idea that the same institution that distributes punishment might also have a constructive hermeneutical duty to ensure that punishment is interpreted in the right way by those for whom it acts as a trustee. Put simply, states can proactively steer the relationship between community and offender in a positive direction, in part by promoting certain views about the purpose and adequacy of punitive treatment.[54] This is an entirely normal role for the trustee of a relationship to fulfil. For example, a democratically appointed manager can serve as a trustee of the relationship between two groups within a shared enterprise. Suppose the groups have a fraught relationship; of course, the manager should act in ways that reflects the shared values of the enterprise as a whole. The manager should provide opportunities for one group to express goodwill to the other. But the manager also has a hermeneutical and practical responsibility to take (permissible) steps to ensure that this expression of goodwill is understood and accepted by the other group. Doing this, ie creating the conditions for successful uptake of communicative attempts, is an integral part of the business of a skilful trustee, in addition to simply providing groups with the bare opportunity to communicate.

In service of this change of focus towards creating the conditions for successful reintegration, I suggest two areas of research: one intellectual, and the other, practical. At the theoretical level, to better promote punishment as a mechanism for reintegration, we require a better understanding of the barriers to reintegration. Why do serious offenders continue to be subjected to stigma and ostracism, even after formal punishment has ended? Only by answering this question can we better design properly reintegrative systems of punitive treatment. There is an extensive criminological literature on the correlates of negative attitudes towards ex-offenders.[55] For example, this literature emphasises correlations between negative attitudes and, firstly, the nature of the offence (sexual offenders

Ex-Offenders' (2016) 43 *Criminal Justice and Behavior* 1260. This has generated a dispute over whether it is objectionably 'illiberal' to ascribe a shared commitment to the values underpinning the core criminal law to diverse national communities. See the debate between Duff and von Hirsch, outlined in Antony Duff, 'Penance, Punishment and the Limits of Community' n 16 above. In my view, writers such as Duff have it right on this question: ascribing to contemporary societies the values underpinning the core criminal law amount to benign minimal assumptions about common values in fact shared by most human beings.

54 This claim, it must be admitted, involves a hopeful empirical hypothesis. What determines public opinion on penal policy is a complex area of study and our efforts in this direction are far from complete. A recent discussion from David Garland summarises recent work as highlighting the role of the state in constructing public attitudes, when he writes that '[i]n recent years the turn to comparative analysis has pointed to institutions that make the emergence of penal populism more likely in some jurisdictions than in others', David Garland, 'What Is Penal Populism? Public Opinion, Expert Knowledge, and Penal Policy-Formation in Democratic Societies' in Alison Liebling and others (eds), *Crime, Justice, and Social Order* (Oxford: OUP, 2022) 262. That discussion focuses on the growth of punitive attitudes. Nevertheless, I take it as plausible that similar will also hold for the growth of non-punitive attitudes.

55 It is also worthwhile to consider empirical work concerning public opinion on offence severity. Some evidence suggests a fair degree of conformity of opinion across demographic and national groups, although there is much room for debate. See for discussion and references, Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* (Oxford: Hart Publishing, 2021) 99-101.

are unsurprisingly especially susceptible to adverse treatment) and, secondly, the political views of citizens (the political right is less amenable to reintegration).[56] But what would be valuable, I suggest, is a more basic typology of what causes the disintegrative attitudes underlying these correlations. Three such drivers of disintegrative treatment suggest themselves.

1) *Disintegration as Pseudo-Punishment*: Unsatisfied punitive attitudes cause adverse social treatment of ex-offenders after their formal punishment has ended.
2) *Disintegration as Phobia*: Adverse social treatment of ex-offenders is caused by a perception of them as morally polluted, unsavoury, or unnatural.[57]
3) *Disintegration as Risk-Aversion*: Adverse social treatment of ex-offenders is motivated by a self-interested fear that the offender will commit further offences.

There are likely substantial psychological overlaps between these attitudes. For example, phobic attitudes are likely to be closely associated with punitive sentiment. An important and necessary project is to untangle these causes of disintegrative treatment, diagnose what interventions they are sensitive to, which attitudes if any are the most psychologically fundamental, and understand the extent to which different punitive and non-punitive treatment ameliorate these drivers of disintegration.

A second project to pursue is the evaluation of various practical strategies for promoting the reintegration of offenders.[58] Earlier I distinguished between two broad ways to view such practical strategies. The first is the removal of ways in which the state *undermines* the reintegrative potential of punishment through policy choice. Certain ways of dealing with offenders can entrench social disintegration. For example, a clear example – happily historical in most but not all jurisdictions – would be the branding of offenders. This serves to permanently mark out offenders and preclude their reintegration as ordinary citizens. Unfortunately, various state actions and criminal justice policies serve a similar branding function today. At the most general level, political rhetoric that exaggerates mistrust and condemnation of ex-offenders magnifies disintegration by signalling to the community that such attitudes are acceptable even

56 Rade, Desmarais and Mitchell, n 53 above.

57 See Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (London: Penguin, 1990), a classic sociological work focussing on this phenomenon. Public attitudes to sexual offences seem to be a particularly good illustration of phobic ostracism, especially given that reoffending rates are not especially high for such offenders and sexual offenders are typically ostracised to greater extents than those responsible for even graver crimes such as homicide.

58 My discussion in this section is in broad agreement with practical proposals set out in Lacey and Pickard, n 14 above. There is also much broader agreement between my overall 'sentiment' and theirs, as their argument is for punishing *with* forgiveness. Where we diverge is in theoretical terms, as I do not view as dichotomous (as they do) the relationship between retributivism and forgiveness. I also think that there are ways of legitimately relinquishing blame – and thus reintegrating – that do not involve forgiveness. For plausible philosophical discussion of this point, see Luke Brunning and Per-Erik Milam, 'Letting Go of Blame' (2023) 106 *Philosophy and Phenomenological Research* 720. It strikes me as reasonable to suppose, although it requires closer attention, that forgiveness may be something that cannot be required or expected from the community-at-large, even when it may be reasonable to expect the relinquishing of blame without forgiveness.

after formal punishment has ended. Replacing such rhetoric with a more nuanced understanding of the social and economic determinants of criminality would go some way to ending the undermining of reintegration. Other examples include specific burdens such as excessive 'reporting requirements' for ex-offenders,[59] overly-liberal approaches to the publication of criminal records,[60] and other instances of what Zachary Hoskins calls the 'collateral consequences' of conviction.[61] A second type of reintegrative strategy is more positive, namely considering ways in which the state can actively promote reintegration. One notable feature of contemporary criminal justice is its highly asymmetrical nature, where much fanfare and symbolism is associated with the attribution of blame and imposition of punishment, but little focus on the termination of formal punishment and reacceptance of the offender. Offenders are found guilty and sentenced in conditions of high ritual then released from prison (or other punishment) without ceremony or attention.[62] Given such an asymmetry, we find inherent in the idea that criminal justice 'must be seen to be done' a tension between current procedure and the reintegrative aims of punishment. If we continue to reject a more anonymous model under which the prosecution and conviction of offenders is obscured from public view, a rebalancing of the asymmetry between the publicity of blame and the neglect of reintegration is required. This observation is hardly new, with some criminologists arguing for the use of 'reintegrative ceremonies' for juvenile offenders.[63] But there has been little progress in this area. There is ample scope to consider ways to remedy the asymmetrical nature of criminal justice to better reflect its reintegrative function as well as its role in assigning blame.[64] Another area in which reintegrative considerations are often left aside is sentencing. There has been progress in some jurisdictions (especially where sentencing remarks are published or recorded) to move towards offence-centred rather than person-centred language.[65] For example, language that attributes global moral badness (for example 'you are evil,

59 As Lacey and Pickard point out to similar purpose, in the UK the most serious criminal convictions are never expunged from a person's record, n 14 above, 678. See the Rehabilitation of Offenders Act 1974. This remains true despite further changes since the publication of their paper. In a more positive vein, it seems to me that small changes to the law might be efficacious in improving outcomes for ex-offenders, for example changing the timing at which a declaration of criminal history must be made or only requiring declaration after determining a top-choice candidate, might reduce rejection on criminal history alone.

60 Striking examples are found in cases where such information is published in a readily accessible form to encourage public access. This has even led, in some cases, to members of the public developing 'apps' for the purpose of tracking ex-offenders.

61 See Zachary Hoskins, *Beyond Punishment?: A Normative Account of the Collateral Legal Consequences of Conviction* (New York, NY: OUP, 2019). for a book-length treatment.

62 Alasdair Cochrane, 'Prison on Appeal: The Idea of Communicative Incarceration' (2017) 11 *Criminal Law and Philosophy* 295 provides useful (sceptical) analysis of whether imprisonment could ever serve the communicative aims of the modern retributive platform.

63 See John Braithwaite and Stephen Mugford, 'Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders' in Kleinig (ed), n 16 above.

64 See Shadd Maruna, 'Reentry as a Rite of Passage' (2011) 13 *Punishment & Society* 3 for a useful discussion, informed by anthropology and sociology, of how public rituals can sensibly be thought to promote reintegration.

65 The importance of the distinction between offence- and person-centred blame has long been appreciated in criminology, see influentially John Braithwaite, *Crime, Shame and Reintegration* (Cambridge: CUP, 1993).

you are a wicked person') should be replaced with attributions relative to the behaviour in the offence, rather than as properties of the offender simpliciter. This shift is one way of discouraging the idea that offenders are irredeemable. However, despite this progress, the moment of sentencing typically contains no mention of the possibility of forgiveness or reintegration of offenders. Blame is attributed, the sentence justified, and the offender removed. It is little surprise the idea that punishment is intended to reintegrate is not fully appreciated by observers or participants to the process. One empirical evaluation of modern retributivism provides an evocative illustration of how condemnation without the promise of reintegration can backfire. Offenders were interviewed about the extent to which they attended to and understood the condemnation offered by the judge. One offender reports that such remarks were simply flung into a mental box, never to be opened:

> *Interviewer*: Did the Judge say anything when he sentenced you?
> *Offender*: Not that I can remember no, it's just like a kinda blank … See if you had a wee box in your heid an it was a box that if you fling somethin' in it never gets opened up again, I have like something like that. I flung it in it and forget/ try and just/never, know what I mean, just kid on it never even existed, it never happened and just get on wi it.
> *Interviewer*: Okay so what kind of things do you put in the box then?
> *Offender*: Just like whatever/like 'aye you've got nine year, you've been a bloody this and a that to society' or whatever. Whatever, it just/you know what I mean, he can say whatever else he wants, because I'm no interested. I'm goin' doon the stair tae get on wi my sentence.[66]

A retributivism that emphasised reintegration would temper the attribution of blame with the promise of reintegration, informing offenders not only that they are condemned by the community but that they could be reaccepted by it after punishment. This is a way of underscoring – for both parties – the reintegrative function of punishment. These remarks are just an indication of strategies the reintegrative retributivist should consider – there are many others.

To close, I want to offer some synoptic comments about the approach to philosophy of punishment taken in this article, particularly with respect to the distinction between 'ideal' and 'non-ideal' theory. In exhorting closer attention to the relationship between punitive treatment and reintegration, the discussion has assumed the presence of various community attitudes that are arguably unsavoury. One may wish that punitive or phobic attitudes were absent wholesale from society and hence irrelevant to legal philosophy. But this is not how we find the world. A non-ideal focus is required for usable prescriptions on how to punish in real societies. It is in any event difficult even to theorise about punishment from a completely ideal-theoretic perspective. Ideally, there would be no offenders – and ideal offenders would need no prompting to reform. The entire question of punishment requires assuming imperfection. And it is artificial to assume imperfection in the offender but not the community. Even allowing for

66 Marguerite Schinkel, 'Punishment as Moral Communication: The Experiences of Long-Term Prisoners' (2014) 16 *Punishment & Society* 578, 586.

the very existence of offenders, themselves members of some community, we are theorising about communities that are imperfect. A basic insight of any perspective on punishment that emphasises the relationship between community and offender is that the latter is a member of the former. This article motivates a project that provides normative guidance for real societies, where we find imperfections both individual and societal. There are two upshots of this non-ideal focus. One is that, given that different communities embody different attitudes, are differentially punitive, and differentially prone to stigmatise offenders, these communities might be justified in punishing in different ways. This is not to say that the state is justified in doling out excessively harsh punishments because it is the trustee for an excessively punitive society; every retributive theory limits the amount of punishment deserved by an offence. But there is a window of permissible punishments. The precise amount and nature of punishment falls to be determined not just by the nature of the offence but also the type of society that the offence occurs within. Sensitivity to the community at hand is necessary to ensure that reintegration is realistic. However, there is a second more optimistic upshot. The other side of the same coin – that punishment must be sensitive to the community at hand – is that as punitive, phobic, or stigmatising attitudes in society decrease, so the state may decrease its reliance on more burdensome forms of punishment. This is another reason why the state ought to take steps to promote reintegrative attitudes. In this sense, we might find that as communities become more forgiving, we might find a 'withering away' of the need for certain (harsher) approaches to punitive treatment. For the retributivist, contra the abolitionist, it will always remain the case that sufficient apology must be accompanied by some burdensome treatment. But theorising with due sensitivity to empirical facts about the communities we discuss means that we are not 'locked in' to judging suboptimal punitive regimes as justified *sub specie aeternitatis*.