Beyond Harsh Justice: A space for institutional reconstruction?

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'There are in our civilization dread moments; these are the times when the ruling of the penal system spells perdition. What a fateful moment it is when society distances itself and irredeemably casts adrift a thinking being.'

Victor Hugo, *Les Misérables* (1862) [1]

Introduction

Victor Hugo's vivid evocation of the cruelty of lifelong penal stigmatisation stands as a literary reminder of the importance of the modernising journey, brilliantly charted by James Whitman in *Harsh Justice*,[2] towards more humane, milder penal practices in continental Europe. Yet, as Whitman argued, as a result of deeply rooted differences in social culture and state authority, 'Harsh Justice' remained the norm in the United States. And that norm seems to have taken yet greater hold over the last half century, with ever

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[1] VICTOR HUGO, LES MISÉRABLES 3276 (Christine Donougher trans., Penguin Classics Kindle ed. 2013 1862).

[2] *See generally* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BEWEEN AMERICA AND EUROPE (Oxford Univ. Press ed. 2003).

more offenders in effect 'dragging the invisible but heavy chain of perpetual infamy'[3] as a result of the impact of a prison sentence and/or increasingly exclusionary post-sentence disqualifications. Indeed, the drift towards greater harshness, though much more marked in the United States (and to a lesser extent, some of the other English-speaking liberal market countries),[4] is now making an appearance in countries whose path to penal modernity was marked by the concern with dignity which Whitman identified as the key driver of penal mildness.[5] The concept of penal harshness is itself multi-dimensional, with some dimensions much more readily assessed empirically than others.[6] But on many of its dimensions – imprisonment rates, the quality of prison regimes, the intensity of forms of non-carceral penal supervision and of post-sentence disqualifications – the broad trend in many countries over recent decades seems to have been toward ever greater penal intensity. Variously rationalised on the basis of the need for deterrence, incapacitation, security, or the imposition of offenders' just deserts, the economic and human costs of this penal intensity are troubling. The trouble stems from the unconvincing

[3] HUGO, *supra* note 1, at 17533.
[4] *See* WHITMAN, *supra* note 2. *See generally*, NICOLA LACEY, THE PRISONER'S DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES (Cambridge ed. 2008); Nicola Lacey, *Populism and the Rule of Law*, 15 ANN. REV. L. & SOC. SCI. 79 (2019); Nicola Lacey, David Soskice, & David Hope, *Understanding the Determinants of Penal Policy: Crime, Culture, and Comparative Political Economy*, 1 ANN. REV. OF CRIMINOLOGY 195 (2018); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (Clarendon ed. 2001).
[5] *See, e.g.*, VANESSA BARKER, NORDIC NATIONALISM AND PENAL ORDER: WALLING THE WELFARE STATE (Routledge ed. 2019); IMPENDING CHALLENGES TO PENAL MODERATION IN FRANCE AND GERMANY (Kirstin Denkhahn, Fabien Jobard, & Tobias Singelnstein eds., London: Routledge ed. 2023).
[6] *See, e.g.*, David Garland, *Penal Power in America: Forms, Functions and Foundations*, 5 J. BRIT. ACAD. 1 (2017); Ben Crewe, Julie Laursen, & Kristian Mjåland, *Comparing Deep-end Confinement in England & Wales and Norway*, 61 CRIMINOLOGY 204 (2023).

evidence that penal intensity results in gains in deterrence or crime reduction;[7] the chimerical and politically manipulable definition of proportional or deserved punishment;[8] and the rapidly accumulating evidence of the damaging and counter-productive effects of punishment on the lives of not only those punished, but also on their families and broader communities.[9] These factors are of particular concern in light of the ethnically, economically and spatially patterned nature of criminalisation and punishment in most jurisdictions.[10]

This widespread critique of contemporary criminal justice has elicited a range of scholarly reactions. On the one hand, there is a substantial literature which seeks to explain both the trend towards punitiveness and the persistence of substantial differences across jurisdictions.[11] This literature, of which Whitman's book is a key example, sheds light on a wide range of structural, institutional and cultural factors within which penal practices are embedded. It is not particularly focused on reform, though it undoubtedly generates

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[7] *See generally*, ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH (Bloomsbury Acad. ed. 1999).

[8] *See generally*, Nicola Lacey and Hanna Pickard, *The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems*, 78 MODERN L. REV. 216 (2015).

[9] AMY E. LERMAN AND VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL (Univ. of Chicago Press ed. 2014).

[10] BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (Russell Sage Found. ed. 2006); Nicola Lacey and David Soskice, *Crime, Punishment and Segregation in the United States: The Paradox of Local Democracy*, 17 PUNISHMENT & SOC. 454 (2015); RUTH PETERSEN AND LAUREN KRIVO, DIVERGENT SOCIAL WORLDS: NEIGHBOURHOOD CRIME AND THE RACIAL/SPATIAL DIVIDE (Russell Sage ed. 2010).

[11] *See supra* notes 4 and 5; MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA (Cambridge Univ. Press ed. 2006); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (Univ. of Chicago Press ed. 2015). Until recently, this literature was largely trained on the global north countries plus Australia and New Zealand, but more recently there has been a welcome upswing of scholarship on the global south, in particular Latin America. *See, e.g.*, Manuel Iturralde, *Neoliberalism and its Impact on Latin American Crime Control Fields*, 23 THEORETICAL CRIMINOLOGY 471 (2018); Maximo Sozzo, *Postneoliberalism and Penality in South America: By Way of Introduction*, 6 INT'L J. CRIME, JUSTICE & SOC. DEMOCRACY 133 (2016).

important insights into the preconditions for projects of effective change which will inevitably have to realise themselves in complex social environments.

On the other hand, there is an equally large literature oriented towards different ways of imagining, designing or implementing a better set of social responses to the undoubted challenge of crime, damaging as it can be, particularly to the less advantaged.[12] In the academy, critical and utopian theories have emerged in philosophy, criminology, and law and sociology. Social movements – notably in recent years the Black Lives Matter movement – have called for radical change, and in some jurisdictions, governmental policy makers and specially appointed commissions have been tasked with framing proposals for institutional change. These normative and critical theories and proposed programmes of reform take a range of forms, from modest incremental change right through to abolitionism, interest in which has seen a decisive revival after a falling back since the 1970s.[13] In both the academy and broader policy circles, debate about criminal justice reform or revolution is a thriving industry. Equally, we have seen a range of practical initiatives, across many jurisdictions, seeking to establish alternative or supplementary practices responding to harmful offending behaviour, restorative justice and various forms of so-called 'therapeutic jurisprudence' among them. Many of these have emerged from the ground up rather than via reform proposals or fiat from above.

[12] Nicola Lacey, *Criminal Justice and Social (In)Justice*, (Int'l Ineq. Ins. Working Papers, Paper No. 84, 2022), <http://eprints.lse.ac.uk/116949/>.

[13] TOMMIE SHELBY, THE IDEA OF PRISON ABOLITION (Princeton Univ. Press 2022); Alan Norrie, *Taking Guilt Seriously: Towards a Mature Retributivism*, *in* ON CRIME, SOCIETY, AND RESPONSIBILITY IN THE WORK OF NICOLA LACEY 119 (Iyiola Solanke eds., Oxford Univ. Press 2021).

Both the intellectual and the practical initiatives are welcome. But – with the partial exception of restorative justice – the links between the two have been tenuous. The result is that even the most promising institutional innovations - like drug courts and restorative conferences – are beset with problems flowing in important part from uncertainties about the principles on which they are founded.[14] Without some sense of how the invariably conflicting values and priorities which any institution must weigh up are to be resolved, it is difficult to develop them to their full potential; to make a convincing case for their implementation; or indeed to assess, empirically, their performance. Even in the case of the arguably most fully developed alternative, restorative justice, fundamental uncertainties remain. For example, the role, meaning and justification of shame as a dynamic in the psychology and penal ethics of restoration[15] and the proper relationship between restorative and conventional criminal justice both remain uncertain. Is restorative justice an alternative to criminal justice, or its complement?

But the specification and ordering of principles and values is, evidently, not the only precondition for change. For actual efforts at reconstruction and reform inevitably collide with the questions raised in the explanatory literatures, and their viability depends on an understanding of the institutional and cultural complementarities and oppositions which these literatures reveal. Whitman's

[14] This has been noted by many scholars. For recent examples, see Nicolas Nayfeld, *Drug Courts and the "Responsibility without Blame" Approach*, 40 J. OF APPLIED PHIL. 488 (2023); Amanda Wilson, *Therapeutic Jurisprudence in Criminal Justice: The Price of Letting One Hundred Flowers Bloom*, 25 EUR. J. CURRENT LEGAL ISSUES 1 (2021); John Braithwaite & Valerie Braithwaite, *The Politics of Legalism: Rules Versus Standards in Nursing-Home Regulation*, 4 SOC. & LEGAL STUDS. 307 (1995).

[15] Amanda Wilson & Henrique Carvalho, *Rethinking the Restorative Dimension of Criminal Justice*, 61 HOW. J. CRIME & JUST. 3 (2022); Wilson, supra note 14; Amanda Wilson, *What a Shame! Restorative Justice's Guilty Secret*, 61 HOW. J. CRIME & JUST. 39 (2022); JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (Cambridge Univ. Press ed. 1989).

compelling historical and comparative evidence illustrates the key role of long run, spatially differentiated structural, institutional and cultural factors in shaping the conditions of particular existing penal arrangements, and it can be easy to feel a sense of pessimism in light of this evidence. Is there any real potential for projects of progressive reconstruction which speak to our normative ideals while learning from our insights as comparativists, historians and social scientists?

In recent years, I have started working in precisely this mode of dialogue between explanatory and reconstructive work, stimulated in part by commentators' resistance to the rather pessimistic upshot of my own work on the comparative political economy of crime and punishment.[16] Can criminal justice reconstruction in particular jurisdictions be informed by the explanatory models underlying other fields of social practice such as clinical work, or by case studies such as Whitman's compelling analysis of the ways in which traditions of state authority and culture of honour and dignity shape punishment?[17] Could such historical and comparative work feed into the development of notions of institutional reform more sophisticated than the traditional notion of crude policy transfer?

In a series of papers over the last decade, philosopher Hanna Pickard and I have tried to make some progress with this broad agenda of comparatively, historically, and otherwise empirically grounded reconstruction by developing

[16] *See* LACEY, *supra* note 4; Lacey & Soskice, *supra* note 10; Nicola Lacey & Hanna Pickard, *Why Standing to Blame May Be Lost but Authority to Hold Accountable Retained: Criminal Law as a Regulative Public Institution*, 104 MONIST 265 (2021); Lacey et al., *supra* note 4.
[17] *See* WHITMAN, *supra* note 2; James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L. J. 1279 (2000).

a revised vision of criminal justice grounded in Pickard's model of responsibility without blame, which emerged from her own experience as a clinician working in group therapy.[18] We argue that responses to crime can and should be grounded in a recognition of the agent's responsibility, but should not involve affective blame. This implies a productive analogy between key aspects of clinical practice and the practices of the criminal court,[19] and it opens up space for a reconception of punishment as oriented to forgiveness.[20] In addition, it implies the need to develop a dedicated institutional track catering to the needs and interests of victims of crime, separate from the criminal process dealing with defendants and offenders.[21] It also has normative and practical implications for the state's standing to call offenders to account.[22] But while we have given a range of examples of existing or possible practices which might be developed along those lines, there is much yet to do in terms of developing a detailed analysis of how our ideas might be institutionalised. [23] I turn to this task in this paper, praying for Whitman's work in aid. In particular, I will argue that the distinctive focus in his scholarship, not only on the big picture and the *longue dureé*, but also on the details and texture of institutions

[18] Hanna Pickard, *Responsibility Without Blame: Philosophical Reflections on Clinical Practice*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY AND PSYCHIATRY (KWM Fulford et al. eds., Oxford Univ. Press 2013).
[19] Nicola Lacey & Hanna Pickard, *From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm*, 33 OXFORD J. LEGAL STUDS. 1 (2013). For other recent work arguing against the equation of moral blame and responsibility, see ERIN I. KELLY, THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY (Harv. Univ. Press ed. 2018).
[20] Nicola Lacey & Hanna Pickard, *To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice*, 35 OXFORD J. LEGAL STUDS. 665 (2015).
[21] Nicola Lacey & Hanna Pickard, *A Dual-Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility without Blame*, 27 J. POL. PHIL. 229 (2019).
[22] *See* Lacey &Pickard, *Why Standing to Blame*, supra note 16.
[23] *See* Nayfeld, *supra* note 14.

and the interactions between them, provides particularly rich resources in the search for models of institutional change.

My paper will proceed as follows. First, I will provide a brief recap on Pickard's and my core position, in particular our defence of a reconceived criminal process oriented to forgiveness. Second, I shall turn to two important conceptual questions about how to institutionalise those ideas: first, the question of whether, and how, it is possible to mobilise ideas like forgiveness which find their origin in moral psychology and interpersonal relations within a very different, institutionalised, universalised, and professionalised world such as criminal justice; second, the more specific question of whether it is possible to borrow or adapt moral ideas and dispositions into legal and (with a small 'p') political institutions without implying a legal moralist position—in other words, the idea that criminal justice is fundamentally concerned with the enforcement of (pre-legal) moral values.[24] Third, drawing on Whitman's historical and comparative analysis, I will consider a range of existing features of criminal justice systems which seem potentially open to reconceptualization and institutional adaptation, so as better to fit with a conception of criminal justice as oriented to forgiveness, as well as a range of existing practices which would need to be abolished. I will also note some cases where even relatively micro-level institutional change seems likely to be ineffective because of its need to be embedded in longer running cultural norms. And in conclusion, I will briefly consider the implications of my argument – both for crime and punishment and for social policy more generally - for institutions beyond the criminal justice system.

[24] R.A. DUFF, THE REALM OF CRIMINAL LAW (Oxford Univ. Press ed. 2018).

From the clinic to the courtroom: towards an institutional disposition to forgive

The terrain for reconstruction of criminal justice in terms of forgiveness is inhospitable. From the 1970s on, a widespread rejection of the rehabilitative ethic in criminal justice, ostensibly sympathetic to forgiveness, was premised in significant part on a critique of penal reformism as shaped by a deterministic view of crime and hence as disrespectful of the agency of offenders. Much of this criticism was justified. But Pickard's explanation of the basis of clinical practice with people who have engaged in a range of seriously harmful behaviours suggests that reformers influenced by critics of rehabilitation have been too hasty, and have thrown out the baby of constructive responses geared to behavioural change with the bathwater of determinism.[25] In fact, Pickard argued, not only is clinical practice compatible with agency, it depends on it: for it is only through the patient's capacity to take responsibility for her actions that the clinician can work with her towards change. But in engaging in this clinical work, it is also important that the patient preserve a belief in her own capacity to change. As criminologist Shadd Maruna has put it, we are all in need of a 'redemption script' – an underlying belief in our own potential goodness and capacity for redemption, alongside a view of an offence in terms of wrong conduct rather than an expression of bad character.[26] If a therapist allows 'affective blame' into her practice – affects such as anger, contempt, hostility, resentment – this fundamentally impedes the clinical process by

[25] *See* Pickard, *supra* note 18.
[26] SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES (Am. Psych. Ass'n ed. 2001).

undermining the patient's ability to believe in their own capacity change and to avoid future harmful behaviours.

While no institution exists in a vacuum, the distinctive protocols and goals of the clinical setting produce a relatively autonomous set of dynamics which might provide a model for rethinking other institutions. By analogy,[27] key aspects of the logic of the clinic can be applied to the criminal courtroom. Drawing on the distinction between detached and affective blame – the judgment, on the basis of the criminal law and the relevant evidence, of blameworthiness in the sense of a proscribed action for which the offender is genuinely responsible, as opposed to the affects of anger, hostility, resentment or contempt often associated with blame – the criminal trial could be redesigned so as to keep affective blame as far as possible at bay. This, admittedly, has become more difficult in the wake of the revival of retributivism in the modernised guise of 'just deserts,' which has arguably fostered a penal discourse which blurs the line between detached or legal and affective or stigmatising blame – as reflected in significant examples of both sentencing rhetoric and political/media debate about crime. It is not that the 'just deserts' movement – much of it motivated by civil libertarian concerns – made this inevitable. Rather, the confluence of concern about rising crime, the electoral salience of criminal justice, and the power of increasingly unconstrained forms of media communication (most recently, social media), interacted with the punitive potential of retributive rhetoric, with baleful effects.

[27] *See* Lacey & Pickard, *From the Consulting Room to the Court Room?*, *supra* note 19.

Pickard's and my initial analysis did not fully articulate a positive vision of the modality and aspiration of punishment, beyond the broad goal of attitudinal and behavioural change. But in our subsequent work, we have developed our model in a more ambitious direction, doing so on the basis not merely of normative aspirations but of evolutionary psychology.[28] The latter, we argued, shows that both forgiveness aimed at reconciliation and anger leading to payback are longstanding human adaptations to the conditions of violation and conflict. If someone wrongs us, we can blame and seek vengeance; or we can forgive and seek to motivate behavioural change and repair relations. Both responses characterise human practice in a range of different societies and circumstances; and while we undoubtedly have a choice between the two, it seems very likely that certain sorts of background social and institutional conditions are more or less favourable to the selection of reconciliatory, reparative strategies as opposed to retributive ones. Psychologists have argued that human beings are more likely to choose reconciliatory strategies in relation to those we regard as having high 'associational value' – in other words, those with whom we expect to have productive future relations. It follows that broad social arrangements which foster high and reasonably evenly distributed associational value – high levels of social trust and trust in institutions; moderated levels of inequality; a range of political and social arrangements oriented to mutual respect and inclusion (prime among them good quality and inclusive education) – will provide a better chance of fostering reconciliatory, relationship-repairing as opposed to vengeful, relationship-fracturing responses.[29] But, other things being equal, there is

[28] *See* Lacey & Pickard, *To Blame or to Forgive?*, *supra* note 20.
[29] *See* Lacey & Pickard, *The Chimera of Proportionality*, *supra* note 8. Note of course that these dynamics of inclusiveness may embrace some parts of the population more

strong reason to prefer reconciliatory to payback modalities, for three reasons: first, they are less costly because they require less infrastructure of enforcement; second, they are likely to be more robust over time because they cut out the risk of cycles of revenge; and hence, third, they are better adapted to foster human capital and peaceable social relations.

This, we argued, gave us strong reason to rethink punishment in terms of an orientation to forgiveness.[30] Furthermore, the choice to orient punishment to forgiveness rather than payback is more consistent with the political values of respect and equality underpinning a broadly liberal society. But how should we conceive of forgiveness in the specific context of a large-scale, impersonal institution such as a criminal justice system? Clearly, not all conceptions of forgiveness in interpersonal contexts - for example, the psychological conception of forgiveness as a subjective state of mind - would be suitable for adaptation in this way. But the specific notion of forgiveness as a commitment to 'wiping the slate clean', developed by philosopher Lucy Allais[31], is both appealing in itself and well suited for these purposes. In the criminal justice context, a judgment of responsibility and hence detached blame would remain a precondition for a justified response to the violation/harmfulness of crime. But that response – both in itself, and in terms of the modalities through which it would be determined and delivered – would embody the commitment to

successfully than others. *Cf*. VANESSA BARKER, NORDIC NATIONALISM AND PENAL ORDER, *supra* note 5. Barker's telling analysis of the penal treatment of migrant 'outsiders' in Sweden's otherwise highly integrative political economy.

[30] Forgiveness was, we argued, more suitable a concept than mercy, both because mercy operates de haut en bas, and because mercy is of narrower scope, becoming irrelevant as soon as any punishment has been imposed. On the distinction between forgiveness and mercy, see JEFFRIE G. MURPHY, PUNISHMENT AND THE MORAL EMOTIONS: ESSAYS IN LAW, MORALITY, AND RELIGION (Oxford Univ. Press ed. 2012); JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (Cambridge Univ. Press ed. 1988).

[31] Lucy Allais, *Wiping the Slate Clean: The Heart of Forgiveness*, 36 PHIL. & PUB. AFF. 33 (2008).

'wipe the slate clean' and, ideally, to motivate behavioural change and rebuild relations between the offender and society. While ideally accompanied by remorse or a desire for reconciliation on the part of the offender, this would not be premised on that change of heart: rather, the very normative appeal and practical potential of punishment oriented to forgiveness is premised on a prior institutional disposition towards wiping the slate clean.

Institutionalising punishment as forgiveness: two conceptual objections.

There are, of course, many questions which can be raised about the approach which I have sketched: about the particular conception of forgiveness to be deployed;[32] about the advisability or feasibility of banishing affective blame from criminal processes; about the upshot for victims and for the criminal justice aspect of the state's role; about the political feasibility of any such rethinking and reworking of criminal justice.[33] But I now want to turn to one particular question touched on only briefly so far. Can it make sense to reconceive a legal and political, institutionalised, largely professionalised, large scale social practice in terms developed in relation to and practised within interpersonal life? Can institutions be designed to plausibly be said to have counterparts of interpersonal moral dispositions, or even intentions, beliefs

[32] For a different, and in some ways more demanding, conception, see Pamela Hieronymi, *Articulating an Uncompromising Forgiveness*, 62 PHIL. & PHENOMENOLOGICAL RSCH. 529, 529 (2001).

[33] *See* Lacey & Pickard, *A Dual-Process Approach to Criminal Law*, *supra* note 21; Lacey & Pickard, *Why Standing to Blame*, *supra* note 16.

and desires?[34] Further, even if it may make sense to develop institutionally specific conceptions of certain concepts put to work in interpersonal ethical life – respect, to take an obvious example[35] - can this be true of a concept such as forgiveness, which is so closely associated with the moral emotions? And, even if it can, might this imply a form of legal moralism which we would want to resist?

In relation to the first question, it is certainly the case that not all concepts developed primarily in relation to interpersonal ethical life could find expression in institutional counterparts. Indeed, as I have already acknowledged, not all conceptions of forgiveness would translate readily into the institutional context. For example, it would be unrealistic to insist that all criminal justice decision-makers and executives had to hold a subjective attitude of forgiveness towards every offender. But it does not follow that the development of institutional counterparts to interpersonal concepts is either unrealistic or inappropriate. Note for a start that even the highly technical discourse of law – including criminal law – has regularly appropriated, adapted and deployed core concepts of interpersonal ethical discourse. Responsibility would be one such concept – and one which illustrates the important distinction between a concept in moral and legal contexts: the role and meaning of responsibility in criminal and other legal contexts is intrinsically shaped by the overall purposes and constraints of the criminal justice system

[34] This latter question has been most thoroughly explored in relation to corporations. *See* CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (Oxford Univ. Press ed. 2011); Gunnar Björnsson & Kendy Hess, *Corporate Crocodile Tears?: On the Reactive Attitudes of Corporations*, 94 PHIL. & PHENOMENOLOGICAL RSCH. 273 (2017) (arguing that while corporations do not exist in the phenomenal world of feeling, they can display cognate motivational and espistemic effects via incorporated processes and policies).

[35] GABRIELLE WATSON, RESPECT AND CRIMINAL JUSTICE (Oxford Univ. Press ed. 2020).

as a whole.[36] Another such concept would be that of a 'person' – with legal personhood indeed sometimes struggling over time to adapt itself to emerging cases relatively distant from the human paradigm central to ethics, such as states or corporations, yet incontrovertibly doing so, with significant practical implications.[37]

In fact, legal scholars are increasingly willing to explore the historical development, conceptual structure and actual or potential place of interpersonal concepts in the legal sphere. One prominent recent example is that of hope, the legal relevance and recommendations of which has been traced both within criminal justice and in a wider range of legal contexts including family law and migration/refugee law.[38] Others, of course, include Whitman's own concerns: respect, civility, dignity, honour and privacy.[39] The (re)design of criminal justice institutions so as to impose consequences oriented towards wiping the slate clean rather than to exacting revenge or imposing retribution belongs squarely within this emerging literature: it both expresses what can appropriately be called a disposition to forgiveness as well as being meaningful and feasible (within certain political conditions). Just as persons can be human or corporate, both institutions and individuals can show

[36] *See* Lacey, *In Search of Criminal Responsibility*, *supra* note 28; LINDSAY FARMER, MAKING THE MODERN CRIMINAL LAW: CRIMINALIZATION AND CIVIL ORDER (Oxford Univ. Press ed. 2016); PETER CANE, RESPONSIBILITY IN LAW AND MORALITY (Hart Publ'g ed. 2002); Nicola Lacey, *Socializing the Subject of Criminal Law? Criminal Responsibility and the Purposes of Criminalization*, 99 MARQUETTE L. REV. 541 (2016).
[37] *See* Nicola Lacey, *Philosophical Foundations of the Common Law: Social Not Metaphysical*, *in* OXFORD ESSAYS IN JURISPRUDENCE (Jeremy Horder ed., Oxford Univ. Press ed. 2000).
[38] Kimberley Brownlee, *Punishment and Precious Emotions: A Hope Standard for Punishment*, 41 OXFORD J. OF LEGAL STUDS. 589 (2021); Sarah Trotter, *Hope's Relations: A Theory of the "Right to Hope" in European Human Rights Law*, 22 HUM. RTS. L. REV. 1 (2022).
[39] *See* Whitman, *supra* note 17; WHITMAN, *supra* note 2, at 41-43, 64-67, 84-92.

a forgiving disposition. Conversely, punishment can (and often does) operate as a system of institutionalised resentment.

Clearly, any institution must be workable within the ineluctable constraints of human psychology. There are, of course, limits to how far we can expect institutions to realise and mobilise all the subtle dynamics of interpersonal life. When we are in institutional contexts – in criminal justice, whether as defendant, prosecutor, judge, defence lawyer witness – we are working within a framework which defines roles, which sets constraints, which underpins the more or less specific meanings of operative concepts. So my claim here is that, in framing institutions, we can, do and should consciously adapt from interpersonal concepts to produce effective institutional counterparts.

I now turn to a second objection, put most forcefully by Antony Duff.[40] In Duff's version of this critique, the argument is that criminal law is inevitably expressing a form of (albeit politically mediated) legal moralism:[41] criminal law by definition announces and proscribes wrongs whose wrongness is defined at least in part by pre-legal, moral criteria. Hence it makes no sense to detach criminal responsibility and (moral) blame. Moreover, the very notion of forgiveness is itself premised on the assumption that there is something – i.e. something blameworthy – to forgive. It follows that the idea of punishment as oriented primarily and definitionally to forgiveness, yet separated from moral blame, makes no sense.

[40] *See* Duff, *supra* note 24. *See also*, Gardner, *supra* note 13, at 75-94. Although Gardner's rejection of 'blame scepticism' draws an important distinction between the judgment and the expression of blame, Pickard and I do not seek to dismiss judgments of blameworthiness – what we called 'detached blame' – from criminal justice.
[41] *See* Duff, *supra* note 24.

While criminal justice is most certainly subject to moral as well as political criticism and evaluation, I reject the idea that one cannot make sense of criminal law as a system of non-moral judgment.[42] I further reject the claim that adapting ideas like forgiveness for the distinctive institutional setting of criminal justice necessarily imports a moral dimension into criminal legal discourse. Rather, criminal law is a distinctive and (with a small 'p') political institution with a range of regulatory tasks, operating within certain practical and normative constraints, the latter themselves distinctively shaped by an underlying interpretation of the role and meaning of criminal justice in a modern democratic society. In such a context, we can think, aspirationally, of criminal justice as a system designed to repair relations and promote mutual respect and behavioural change, premised on a responsibility-based judgement of detached blame and holding to account, accompanied by the imposition of (penal) consequences oriented towards wiping the slate clean. Its capacity to adapt, for the specific institutional context, ideas originating in interpersonal ethical life is perfectly consistent with the conception of criminal justice as a political institution. Moreover, the idea that law and morality are distinct systems is perfectly consistent with a moral critique of law as it exists – including a critique of its unforgiving disposition.

Institutionalising forgiveness in criminal justice: practices to develop; those to reject

[42] *See* Nicola Lacey, *Approaching or Re-thinking the Realm of Criminal Law?*, 14 CRIMINAL L. & PHIL. 307 (2019).

So much for advocacy and critique. It is time to turn to the question of what a criminal justice system oriented to forgiveness in Allais's sense would look like, and of how comparative and historical scholarship might help us to imagine and move towards such a system. In this section, I will first sketch a set of existing or possible practices which either are, or might be, designed and practised so as to maximise the capacity of criminal justice to express a forgiving disposition, before turning, second, to features of criminal justice which would have to be abandoned or radically rethought so as to excise their stigmatising and unforgiving qualities. In *Harsh Justice*, Whitman reminds us that institutional dispositions – including that oriented to forgiving mildness in punishment – develop over centuries and are deeply embedded in ideas of state authority and cultures of honour and dignity.[43] But he also reminds us that they – and their opposites – inhere in small, detailed protocols and arrangements, an insight that also emerges from the work of historians and social theorists like David J. Rothman, Michel Foucault and Pat Carlen.[44] And here, I would like to suggest, lies one important key to mutual learning between explanatory and normative projects.

Institutionalising forgiving criminal justice

In contemplating the possibility of a criminal process oriented to forgiveness, we do not start from a blank sheet. For example, many criminal justice systems

[43] *See* WHITMAN, HARSH JUSTICE, *supra* note 2, at 3-39.

[44] DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (Little, Brown & Co. 1st ed. 1971); MICHEL FOUCAULT & ALAN SHERIDAN, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Penguin Books ed. 1979); PAT CARLEN, WOMEN'S IMPRISONMENT: A STUDY IN SOCIAL CONTROL (Routledge & Kegan Paul ed. 1983).

have long featured the institution of pardon.[45] One might describe pardon as the institutional expression of forgiveness *par excellence*: it is, after all, precisely an institutional mechanism which wipes the slate clean. Of course, things are more complicated than this. Historically, pardons have been used for a variety of purposes, the slate-wiping done with a view to, variously, bolstering the sovereign authority of the monarch through a demonstration of the prerogative of mercy,[46] securing political favour among political allies,[47] or quelling social conflict.[48] Of these, only the last truly bears any relationship to forgiveness in Allais's sense of putting aside resentment in an effort to rebuild and repair relations. But defined and constrained in specific ways, pardons can most certainly function as mechanisms of institutional forgiveness in criminal justice.

A second, more recent and more varied set of institutions which may be designed, executed and understood in terms of forgiveness are those associated with therapeutic jurisprudence, including problem-solving courts, some forms of youth justice, and drug courts.[49] Like the therapeutic clinic,

[45] There is, of course, an enormous literature on pardon and mercy. For some important contributions, see Murphy & Hampton, *supra* note 30; Murphy, *supra* note 30; Giordana Campagna, *The Miracle of Mercy*, 41 OXFORD J. OF LEGAL STUDS. 1096 (2021). Campagna's work persuasively argues that the variety of functions of the pardon implies important conceptual differences between executive pardon and judicial mercy which find their roots in the Roman and early Christian conceptions of clementia and misericordia. Amnesties provide another interesting example here.

[46] Douglas Hay, *Property, Authority and Criminal Law*, *in* ALBION'S FATAL TREE (Douglas Hay et al. eds., Penguin ed. 1975).

[47] Presidential pardons in the United States provide many good illustrations. *See* Brookings, *Presidential Pardons: Settled Law, Unsettled Issues, and a Downside for Trump*, <https://www.brookings.edu/articles/presidential-pardons-settled-law-unsettled-issues-and-a-downside-for-trump/> (accessed Nov. 2, 2023).

[48] David Smith, *US Justice Department Investigates Alleged "Bribery for Pardon" Scheme at White House*, GUARDIAN (Dec. 2, 2020), https://www.theguardian.com/us-news/2020/dec/01/bribery-president-pardon-scheme-allegation-court-filing.

[49] *See* Wilson, *supra* note 14; Nayfeld, *supra* note 14.

these innovations seek to create relatively autonomous institutions which can operate in terms of their own distinctive protocols and culture even against the background of an official, punitive criminal justice system. Here we once again meet the difficulty identified at the outset: that these institutions have grown up from the grass roots and exhibit a great deal of variety and some opacity in terms of principled framework and relationship with the 'normal' criminal justice system. But all share the feature of a future orientation to rehabilitation, to rebuilding relations, to helping those who have violated others, breached social norms, even harmed themselves, to acknowledge responsibility, to change, and to repair their relationship with society. Moreover, they are typically staffed by people committed to a certain underlying philosophy oriented to repair the future rather than to blame the past. The normative frameworks of responsibility without blame and of punishment reconceived as oriented to forgiveness could, I suggest, help us to build a clearer view of the foundations and priorities of these sorts of institutions, just as Whitman's comparative and historical analysis can help is in identifying their preconditions and their limits.

Restorative justice, as I have already mentioned, is perhaps the most fully theorised and commonly practised form of criminal justice institution ostensibly consistent with an orientation to forgiveness. Punishment as forgiveness resonates with the concern of many restorative scholars in how rituals of reconciliation, reintegration and redemption can be made to work.[50] But note that, here too, the responsibility without blame/punishment as forgiveness model has some key implications for how restorative justice should

[50] See Maruna, *supra* note 26; MEREDITH ROSSNER, JUST EMOTIONS: RITUALS OF RESTORATIVE JUSTICE (Oxford Univ. Press ed. 2013); Braithwaite, *supra*, note 15.

be designed. For example, it would dictate protocols designed to exclude the affective blame which can be implied by the notion of 'shaming'. This in turn implies a set of constraints on what can emerge from a restorative conference, healing circle or other such process. And, in particular, it problematises forms of restorative justice which amount to a victim-offender mediation in which the victim, or the victim's representatives, can press for a negotiated outcome which could be stigmatising; or in which an articulate offender can in effect evade responsibility by negotiating an outcome which fails to reflect the harm they have done or the violation they have committed. Indeed, forms of restorative justice that accord a key role to victims in deciding the outcome are incompatible with any view of punishment as the responsibility of the state and as marking a legal wrong to society as a whole. This vindicates, certainly, the victim's right not to be violated or harmed through crime, but it decisively does not express the victim's personal interest in 'their' offender's punishment.[51] Without justice and recognition for victims, the chances of institutionalising and commanding political and popular support for punishment as forgiveness are reduced.[52] Like therapeutic courts, restorative justice processes can be set up as relatively autonomous institutions operating on the basis of distinctive protocols in which values such as mutual respect and an orientation are expressed, though it is undoubtledly true that making such institutions work, and legitimising them in relation to the formal criminal justice system, is most feasible where they can be embedded in a well established social culture. But, as advocates of restorative justice have argued, it is nonetheless possible to find resources – notably through the creation of effective rituals and in the bonds and commitments created by the

[51] *See* Lacey & Pickard, *A Dual-Process Approach to Criminal Law*, *supra* note 21.
[52] *Id*. It is for this reason, as well as because its intrinsic fairness, that Pickard and I advocate a separate track providing support and reparation for victims of crime.

interpersonal relations which subsist even in a relatively individualistic society – which can be drawn on in reshaping this institutional space for responding to crime.[53]

A further, less fully researched or piloted possibility suggested by the idea of punishment oriented to forgiveness would be a move towards a more dialogic practice of sentencing. This follows from the centrality of responsible agency and the orientation to attitudinal and behavioural change originating in the clinical model.[54] A response to crime oriented towards wiping the slate clean has far more chance of achieving its ends where the offender has been brought not only to take responsibility for their offence, but to accept the suitability of the response. Empirical research is needed to validate this, but common sense suggests that a less *de haut en bas* and more dialogic sentencing process could favour this, even though the final decision would remain with the sentencer.

Whitman's work on the history of punishment in France and Germany is a rich source of imaginative resources for those of us most familiar with low-civility, stigmatising criminal justice systems such as those of the USA. It is also a treasure trove of concrete examples of punishment operating within parameters of respect and dignity, which are among the practical foundation stones for any practice of punishment oriented to forgiveness. The wealth of examples in *Harsh Justice*[55] – the insistence on respectful and formal address by name of prisoners; the abolition of prison uniforms; the (re)introduction of

[53] *See* Braithwaite, *supra* note 15; Rossner, *supra* note 50; Maruna, *supra* note 26.
[54] This is reflected, as Nayfield notes, in the practice of drug courts. *See* Nayfeld, *supra* note 14.
[55] *See* WHITMAN, HARSH JUSTICE, *supra* note 2, at 74-95.

the franchise, the design of arrangements within custodial settings allowing for privacy, for the preservation and even improvement of prisoners' skills and education, and for the preservation of their links with family and work – all provide instances of relatively limited but potentially consequential reforms which could be detached from their original historical, institutional and cultural settings. This does not, of course, mean that they would have the same impact or inflection in their new context. Nor does it guarantee that there would not be adverse unintended consequences, such as resentment on the part of prison staff (for whom in many countries, similar institutional reform oriented to improving their standing is certainly also overdue). But these sorts of detailed reforms provide a place to begin. In dialogue with broader debates about culture, values and principles, these reforms are also surely options we should bear in mind in the effort to build support for the change whose urgency is so widely acknowledged. A key task for the future will be to work towards an understanding of how to identify the most promising opportunities to create relatively autonomous spaces, by analogy with the clinic, even within an unsympathetic environment. Here, too, Whitman's framework provides plentiful material for reflection.

I return, finally, to the limits of this model. Though I cannot deal fully with this important point in this paper, I should make it clear that punishment oriented towards forgiveness is not the same as abolition. For those who refuse responsibility or repeatedly reject social reconciliation, it is hard to see how societies and states can entirely dispense with more coercive, less dialogic – at least in the first instance — measures. But these should always be regarded as second best – even imposed with a sense of failure; and through mechanisms that leave the door to forgiveness and reconciliation open. It follows that

where a coercive and constraining sanction is unavoidable, it should nonetheless be designed so as to maximise the chances of change and minimise alienation and degradation.[56] So the quality of prison regimes – education, rehabilitation, living conditions, health services, access to employment and means to maintain extra-carceral relations – are of key importance. This remains true even in relation to the most serious offenders. A vision of what this can look like in practice is given by Jimmy Boyle's eloquent autobiographical account of the Special Unit created at Barlinnie prison in Scotland in the 1970s.[57] A small number of the prison's most violent offenders, who had become virtually impossible to manage within the high security regime, were moved to a small unit in which they were accorded what were in effect powers of self-governance. For those such as Boyle who could handle this responsibility, it turned out to be a life-changing experience. That this reform took place in the most inhospitable setting – a high security prison with a problem of uncontrolled violence, amid a period of high rates of violent crime in the jurisdiction - is an important corrective to the pessimism alluded to earlier on, and a stimulus to a continued effort to build bridges across our explanatory and reconstructive projects.

Deinstitutionalising affective blame and stigma

These, then, are some of the institutions which might be developed in the conceptual and normative terms of the conception of punishment as forgiveness. Yet more obvious and extensive is the list of current criminal

[56] The upshot of the argument for punishment as forgiveness resonates strongly with Brownlee's argument about the implications of 'a hope standard for punishment.' Brownlee, *supra* note 38.

[57] JAMES BOYLE, A SENSE OF FREEDOM (Pan Books ed. 1977).

justice arrangements which call for abolition or radical reform because of their incompatibility with minimising stigma and affective blaming in the courtroom, the prison, the probation office, the community service programme. Starting with the trial process, many criminal justice systems continue to use a dock, which marks out the defendant – still presumed innocent – as a suspect. This, arguably, is unsuitable framing for a trial process oriented to wiping the slate clean even following conviction. Some features of criminal and evidence law, too, are in tension with an orientation to forgiveness; examples include admissibility of character evidence, as well as certain kinds of status offenses. The highly technical quality of criminal procedure in many systems might also be thought unhelpful in eliciting the offender's willingness to acknowledge their responsibility, alienating as it is found by many defendants. This problem is exacerbated in systems with inadequate public legal aid, where legal representation may feel impersonal and formulaic, and the court room a hostile and incomprehensible world in which the defendant cannot engage effectively.[58] And at the sentencing stage, the inclusion of potentially – and understandably - highly emotive victim impact statements, now allowed in many jurisdictions, along with judicial indulgence in moralising rhetoric stigmatising the defendant's character as well as their conduct in handing down sentence, is inimical to criminal justice oriented to forgiveness.

Moving to the execution of sentence, again, Whitman's extensive list of deliberately degrading features of modern US penality are eloquent testimony

[58] STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (Oxford Univ. Press ed. 2012); Nicola Lacey, *Humanizing the Criminal Justice Machine: Re-Animated Justice or Frankenstein's Monster?*, 126 HARV. L. REV. 1299 (2013). This point also applies, perhaps yet more strongly, to victims of crime.

to the need for change.[59] Features of community penalty regimes which seek to stigmatise offenders – such as conspicuous electronic tags or high-visibility uniforms identifying convicts – should be abolished. Penalties that close the door to reconciliation – capital punishment, whole life prison terms – are incompatible with our model. Prison regimes, too, as already mentioned, should reproduce the features of civic respect, decent living conditions and opportunities for work, education, relevant therapies. And equally important, a raft of supplementary measures attendant on conviction call to be reconsidered: the upshot of a criminal record on work and housing opportunities,[60] and the impact of a range of post-sentence disqualifications in employment, licensing and association.[61] Disenfranchisement during and after a prison sentence represents perhaps the supreme example of a penalty incompatible, in its symbolic exclusion from civic membership, with a criminal justice system disposed to wiping the slate clean. In short, even in a criminal justice system not (yet) oriented to forgiveness, a significant amount could be done to reduce counter-productive stigmatisation and to mitigate the disintegrative and human-capital-destroying dynamics of affective blame. An institution can, after all, be more or less forgiving. However, building, with both ideas and small institutional changes, a culture and practice of punishment which makes space for, and ideally comes to prioritise, forgiveness, is, I would argue, an aspiration worth cherishing.

[59] WHITMAN, HARSH JUSTICE, note 2, at 41-67, 151-90.
[60] JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD (Harv. Univ. Press ed. 2015).
[61] JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (Oxford Univ. Press ed. 2006); ZACHARY HOSKINS, BEYOND PUNISHMENT?: A NORMATIVE ACCOUNT OF THE COLLATERAL LEGAL CONSEQUENCES OF CONVICTION (Oxford Univ. Press ed. 2019).

In conclusion: forgiveness beyond criminal justice

James Whitman would doubtless agree with John Braithwaite's recent argument that, while we must recognise crime itself as a freedom-destroying form of domination, we would do well to decentre criminal justice as a response to crime.[62] However successful the effort to reconceive and redesign punishment as forgiveness – and even in the relatively mild penal cultures of northern Europe depicted and explained by Whitman – punishment has high social costs. The chances of human beings and human societies being able to coordinate on a choice to design criminal justice around an orientation to forgiveness are affected by a broad set of social, cultural, political and economic conditions.[63] In a similar way, the design of social institutions well beyond the criminal justice system largely determines a society's capacity to organise itself in ways which prioritise cooperation, repair and reconciliation, as opposed to conflict, revenge, and payback.

The challenges to creating such a society where it does not already exist are intimidating; indeed, they are arguably yet more challenging than when Whitman published *Harsh Justice* two decades ago. To take just one example, a media (including, now, social media) which finds oxygen and hence profit through hate, othering and stigmatisation is an undoubted practical and political barrier to institutional reform of criminal justice – and one which is hard to dismantle in societies committed to freedom of expression. In many countries, protocols of moderation in the reporting of volatile subjects persist, or survived until relatively recently. But the current tide appears to be against

[62] JOHN BRAITHWAITE, MACROCRIMINOLOGY AND FREEDOM (Australian Nat'l Univ. Press ed. 2022).
[63] Lacey & Pickard, *To Blame or to Forgive?*, *supra* note 20.

them. For those of us keen to see reform, but conscious of the obstacles in its way, it can be hard not to feel discouraged. So I would like to conclude with two examples which illustrate the possibility of institutions designed and operating so as to foster, respectively, a forgiving and a caring and respectful disposition in even in a relatively inhospitable environment, very different from those of the French and German systems so brilliantly analysed by Whitman.

The British company Timpsons' shops are a well-known feature of high streets up and down the country, offering key cutting, shoe and watch repair services. What is less well known is the company's Timpson Foundation. Inspired by a prison visit in 2002, CEO James Timpson set up the Foundation to engage in the recruitment of marginalised groups within society.[64] Despite operating in a competitive and relatively unregulated market, this successful company is one of the UK's largest employers of ex-offenders; its website offers encouraging reports on the quality of these employees' contributions and statistics on their re-offending rates, as well as more general advice on employing former offenders. Their philosophy exactly captures the philosophy of forgiveness in Allais's sense:

> We believe in giving people a second chance. We don't judge people on what they have done in the past, preferring instead to focus on what they can do in the future.[65]

[64] *The Timpson Foundation*, <https://www.timpson-group.co.uk/timpson-foundation/ex-offenders/> (accessed Oct. 2, 2023). I am grateful to Bayan Parvizi for alerting me to this example.
[65] *Id*.

But the capacity to design and operate institutions so as to express values that we cherish as means to live together peaceably and well reach beyond anything related to criminal justice. For much of the last year, I have had the privilege each day to visit my elderly mother in a residential care home. Amid frequent press reports of dreadful conditions in such institutions, of abuse and neglect of residents, and of the poor conditions of work for their staff – reports all too familiar to anyone who reads prison research or research on other total institutions - these regular visits have given me the opportunity to think carefully about what makes such an institution function well. Clearly, adequate staffing levels and high staff morale, decent physical conditions, good health care and nutritious and appetising food are key ingredients for residents, most of whom are frail and many of whom are severely affected by dementia. But the single thing which makes this particular home such a pleasure to visit is the quality of relations both between staff and between staff and patients. This is not a particularly opulent home, and while it is clear that the staff feel respected, I would be surprised if they were paid impressive salaries. But it is absolutely clear that their training at the home, and a range of small but nuanced protocols through which they manage their residents when they become anxious, sad, agitated or even aggressive, are central to this success. This is an institution that, from small conventions about modes of address right through to protocols such as knocking on doors, engaging in friendly conversation, organising well thought through activities – conventions and protocols reminiscent of those in French and German criminal justice analysed by Whitman - exudes a disposition of kindliness and respect, and a concern with dignity.

How we organise our social institutions – the smallest rules through which they operate as much as, if not more than, the regulatory institutions through which they are governed – so as to express counterparts of the values to which we are attached in interpersonal life matters. It matters with particular urgency in criminal justice. But the feasibility of improvements in the institutionalisation of criminal justice, and the effects of such improvement, are premised on a much broader challenge of institutional reform. As we attempt to think beyond harsh justice, the distinctive macro- and micro focus of Whitman's book make it a continued inspiration not only for the effort to understand the political and cultural preconditions of such reconstruction, but also for institutional reconstruction itself.