NON-STATE PUNISHMENT

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How should we think about the Jewish community's punishment of Jewish kapos, councilmembers, and police officers after the Holocaust? Or of Americans who fire, divorce, or shun participants in the January 6 attempted auto-coup? In the American context, the invocation of 'cancel culture' or 'wokeness' reflects concern about the defensibility of non-state practices of accountability. Setting aside for our purposes an analysis of the political uses and abuses of these terms, we focus here on a presumption underlying these complaints: actors are impermissibly, illegitimately, and disproportionately being held to account by non-state actors.

Citizens, corporations, and civil society organizations are vocally and visibly taking accountability for wrongdoing into their own hands. Such non-state accountability practices are particularly fraught because they raise fundamental questions about the proper regulatory role of the state and of law with respect to private responses to wrongdoing. Theories of criminal punishment currently explain why the state can and ought to respond to certain categories of criminal wrongdoing and the unique standing of the state to punish in the form of incarceration. However, such theories do not provide straightforward guidance for non-state punishment as regards: who has the standing to engage in punishment; what would constitute adequate due process; and how to assess proportionality.

To begin to address the range of issues non-state punishment raises, we argue it is a mistake to lump into a single normative category all practices of non-state punishment. This paper provides a conceptual map of four categories of punishment: ordinary state punishment, ordinary non-state punishment, transitional state punishment, and transitional non-state punishment. The map distinguishes punishment along two dimensions, which affect the specific questions of standing and justifiability to which a given

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instance of punishment gives rise. The first dimension is the type of justice punishment promotes (ordinary justice or transitional justice). The second dimension is the agent meting out punishment (state actors or non-state actors). Each category of punishment faces distinct questions of standing and justifiability.

Our conceptual map makes four contributions. First, it adds to a burgeoning discussion in legal theory and philosophy grounded in a recognition that the state does not have a monopoly over punishment. Second, it supplements an ongoing discussion in transitional justice literature and practice that emphasizes the problems with placing the state as the focal point of transitional justice. Our third contribution is to provide a framework for understanding and assessing American 'cancel culture.' For the universe of cancel culture cases that count as punishment, some cases are cases of ordinary non-state punishment, while others are cases of non-state transitional punishment. As we discuss, some pushback on so-called American cancel culture is category confusion or contestation about the need for transitional rather than ordinary justice and disagreement about which type of punishment, is in fact, occurring. Our framework also provides resources for the critical evaluation of defenses or critiques advanced of particular cases of non-state punishment. Fourth, our analysis of punishment provides a model that can be used to conceptualize other processes of accountability pursued by state and non-state actors, including reparations and truth-telling.

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I. INTRODUCTION

How should we think about the Jewish community's punishment of Jewish kapos, councilmembers, and police officers after the Holocaust? Or about the French individuals who shaved the hair of Vichy collaborators? Or the South African communities who disciplined Black councilors who worked for the apartheid regime during the transition to multiracial democracy? Or of Americans who fire, divorce, or shun participants in the January 6 attempted auto-coup?[1] Do these cases raise the same questions as the 'amnesty' offered by Elon Musk to Twitter accounts banned for violent threats, harassment, or misinformation? Or decisions to 'Buy Black' in the wake of George Floyd protests? Or the dissolution of Ye's various corporate relationships after a string of anti-Black and antisemitic statements?

Citizens, corporations, and civil society organizations are vocally and visibly taking accountability for wrongdoing into their own hands. While many in the American context believe this is a unique phenomenon, such efforts are not new. Such practices have long existed in contexts of both everyday justice and transitional justice. Transitional justice is the range of efforts undertaken by a society to come to terms with large-scale abuses.[2]

In the American context, the invocation of 'cancel culture' or 'wokeness' reflects concern about the defensibility of non-state practices of accountability. Setting aside for our purposes an analysis of the political uses and abuses of these terms, we focus here on a presumption underlying these complaints: actors are (impermissibly, illegitimately, and disproportionately) being held to account by non-state actors. Think, for example, of claims that it is not the business of private citizens to determine whether someone participated in the January 6 coup

1. *It Was an Attempted Auto-Coup, The Cline Center's Coup d'etat Project Categorizes the January 6, 2001 Assault on the Capitol*, CLINE CTR. FOR ADVANCED SOC. RSCH. (Dec. 15, 2022), https://clinecenter.illinois.edu/coup-detat-project/statement_dec.15.2022 [https://perma.cc/G44S-NXNQ] (concluding the event was an attempted coup because it was "an organized, illegal attempt to intervene in the presidential transition by displacing the power of the Congress to certify the election"). If you find yourself balking at this description, Section V.B may be of particular interest.

2. U.N. Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, 2 U.N. Doc. ST/SG(09)/A652 (Mar. 2010).

attempt, nor is it their business to punish them—that such behavior must be left to criminal courts or the January 6 Committee or other state processes. Or consider criticisms that businesses should stay out of politics—charges that might equally be levied against American corporations firing individuals who participated in the January 6 coup attempt or against French professional organizations that purged Vichy collaborators. Or complaints that mass social punishments weigh too heavily on offenders and are not narrowly tailored to the scale of the actual wrongdoing.

There are no straightforward answers to the issues raised above. Non-state accountability practices are particularly fraught because they raise fundamental questions about the proper regulatory role of the state and of law with respect to private responses to wrongdoing. Theories of criminal punishment currently explain why the state can and ought to respond to certain categories of criminal wrongdoing and the unique standing of the state to punish in the form of incarceration. However, such theories do not provide straightforward guidance on who, if anyone, has the standing to engage in punishment of other kinds, such as social punishment in the form of shunning or professional punishment in the form of firing. While we have settled jurisprudence on what constitutes 'cruel and unusual' punishment by the state, there is no consensus, or even language, for evaluating the effects of doxing as a tactic to publicly call out individuals deemed to have engaged in impermissible conduct. Due process places substantive constraints on criminal punishment, but it is not obvious how, if at all, traditional punishment concerns such as due process and proportionality apply to non-state forms of punishment. Not only are the grounds for the standing to punish non-state actors and the range of permissible forms of non-state punishment unsettled, but so too is the role of the state in regulating non-state efforts.

To begin to address the range of issues non-state punishment raises, it is a mistake to lump into a single normative category all practices of non-state punishment. Or so we argue. Specifically, some cases of non-state punishment are undertaken in pursuit of transitional justice. Other practices of non-state punishment are undertaken in pursuit of ordinary justice. *Ordinary justice* responses to wrongdoing implicitly frame the problem to which responses are a solution as a problem with deviant individuals. Ordinary responses concentrate upon exceptional wrongdoing, that is, a violation to a generally well-followed norm or rule. We call such wrongdoing in what follows *deviant wrongdoing*. *Transitional justice* responses, in contrast, implicitly frame the problem to which responses are a solution as a problem with the basic structure of interaction; put differently, wrongdoing is not simply a product of deviant individuals. Occurring in an empirically regular manner, wrongdoing becomes a basic fact of life around which individuals must orient their conduct. We call such wrongdoing in what follows *normalized wrongdoing*. Ordinary justice and transitional justice can be undertaken in the same society at the same time if both deviant and normalized wrongdoing have been committed.

Distinguishing between deviant wrongdoing and normalized wrongdoing matters. As we show in this paper, punishment of each kind of wrongdoing raises

distinctive normative justificatory questions to which any defense of punishment must be responsive. In addition, the actor undertaking punishment affects the questions of standing to which any justification of punishment must be responsive. *State* responses to wrongdoing involve actors occupying roles in government institutions. *Non-state* responses to wrongdoing involve actors who are not part of the state so defined. As we show, non-state practices of punishment constitute a heterogeneous category. Such practices include formal organizations as well as informal, decentralized responses of multiple, independently acting private citizens. Formal civil society organizations range from religious institutions to advocacy groups and universities to professional organizations. As we also illustrate, in any particular case, non-state responses may have a cooperative, indifferent, or hostile relationship with state responses to wrongdoing.

This paper provides a conceptual map of four categories of punishment: *ordinary state punishment, ordinary non-state punishment, transitional state punishment,* and *transitional non-state punishment.* Our mapping articulates the specific questions of standing and justifiability to which each type of punishment gives rise. When existing literature explicitly takes up these questions, we provide an overview of available answers. We note where gaps in the literature currently exist, and, in some cases, offer guidance on desiderata for adequate answers.

Our conceptual map makes four contributions. First, it adds to a burgeoning discussion in legal theory and philosophy grounded in a recognition that the state does not have a monopoly over punishment. Building on contributions made by scholars like Gabriel Mendlow, Douglas Husak, Linda Radzik, and (now Judge) Stephanos Bibas,[3] we delineate examples of contemporary behavior such as cancel culture, boycotts, and firings and analyze when they ought to count as non-state *punishment* and when they are better characterized as belonging to some other domain, such as *exercising rights not to affiliate*. In so doing, we equip both scholars and interested members of the relevant community with a path to follow in figuring out which sets of questions and concerns are the appropriate ones.

Second, it supplements an ongoing discussion in transitional justice literature and practice that emphasizes the problems with placing the state as the focal point of transitional justice.[4] This literature expands the range of transitional justice processes to include those undertaken by non-state actors, including corporations and grassroots activists.[5] Indeed, the 2020 report of the current UN Special Rapporteur for Truth, Justice, Reparation, and Non-Repetition Fabian

3. *See* Part III.

4. Dustin N. Sharp, *Addressing Dilemmas of the Global and the Local in Transitional Justice*, 29 EMORY INT'L L. REV. 71, 74 (2014).

5. *See* Proceedings of Transitional Justice Beyond the State: Non-State Actors as Object and Agents in Transitional Justice Processes June 14–15, 2023 (forthcoming 2024); Thomas Obel Hansen, *The Time and Space of Transitional Justice*, *in* RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 35–51 (Cheryl Lawther, Luke Moffett & Dov Jacobs eds., 2017).

Salvioli focuses precisely on the role of non-state actors in transitional justice.[6] Despite the many important contributions of the burgeoning literature, which we summarize in Section IV.B, little attention is paid to distinct justificatory questions that processes *being conducted independently* by non-state actors such as individuals and private institutions raise.[7] We think it very important to draw attention to these foundational questions. Thus, we supplement and undergird this ongoing discussion in transitional justice.

Our third contribution is to provide a framework for understanding and assessing American 'cancel culture.' As we discuss, the cases grouped together and labeled 'cancel culture' in popular culture are heterogeneous. Just as we initially help delineate between cases of punishment and non-punishment, here we acknowledge that for the universe of cancel culture cases that count as punishment, some cases are cases of ordinary non-state punishment, while others are cases of non-state transitional punishment. Some critiques of these practices miss the mark by asking or presupposing the wrong justificatory questions;[8] ordinary non-state punishment standards are being used to evaluate what is, in fact, transitional non-state punishment. As we flesh out in Part V with Elon Musk's "amnesty" and Ye's cancellations, some cancel culture debates are simply, or at least partially, instances of people talking past one another; critics invoking ordinary non-state punishment while advocates are invoking transitional non-state punishment or vice versa. In so doing, we contribute to the emerging discussion of the application of transitional justice in the U.S.

Our discussion underscores that it is necessary to first understand what kind of punishment is being attempted in order to be able to evaluate it properly. By delineating the contours of the non-state transitional and non-state ordinary justice and theorizing their distinct parameters of justifiability and legitimacy, we provide the necessary resources for (1) accurately describing and (2) critically evaluating a significant portion of the non-state responses to wrongdoing occurring in both the United States and globally.

Fourth, our analysis of punishment provides a model that can be used to conceptualize other processes of accountability pursued by state and non-state actors, including reparations and truth-telling. We start in this paper with punishment because it is often taken, particularly in the United States, to be the first-best response to perpetrators of wrongdoing. Indeed, justifications for alternative responses to wrongdoing, such as truth-telling, often start from the assumption that the argumentative burden is to show why establishing the truth constitutes an acceptable form of accountability despite not inflicting the hard treatment constitutive of punishment. Moreover, many of the most controversial examples of cancel culture and non-state practices of transitional justice are controversial precisely because they intuitively seem to involve the infliction of the hard

6. *See generally* Fabián Salvioli (Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence), *Role and Responsibilities of Non-State Actors in Transitional Justice Processes*, U.N. Doc. A/HRC/51/34 (July 12, 2022).

7. *See* Sharp, *supra* note 4, at 71.

8. *See id.* at 83.

treatment constitutive of punishment. But in future works, we will turn to conceptualizing non-state actor practices in the transitional justice toolbox, including truth seeking, reparations, and institutional reform.

The structure of the paper is as follows. In Part II, we define punishment as a distinctive kind of response to wrongdoing. We then specify how the core features of punishment can be present in non-state cases. Finally, we consider non-state actions often thought to count as punishment, explaining the conditions under which they do count as punishment and when they count as something else, such as the exercise of rights not to associate.

In Part III, we begin by offering a general characterization of ordinary versus transitional justice. There, we emphasize the difference in the deviant versus normalized character of wrongdoing to which each type of justice is responsive, and the general problem which each kind of wrongdoing poses for communities.

In Part IV, we turn to a detailed analysis of ordinary punishment and transitional punishment, respectively. We first map the distinctive justificatory questions and questions of standing that ordinary state punishment and ordinary non-state punishment raise. We then do the same for transitional state and non-state punishment. Throughout our discussions of both ordinary and transitional punishment, we illustrate using historical and contemporary examples.

Finally, in Part V, we return to the United States. We raise and respond to a worry that we are guilty of a category error in discussing transitional justice in the context of the United States. We then demonstrate some of the payoffs of adopting our framework. We illustrate how it allows us to categorize controversial cases of non-state punishment as ordinary or transitional. The primary purpose in such categorization is not to convince the reader of the specific category into which we put particular examples. Rather, it is to show *how to argue* that an example is one of ordinary as opposed to transitional punishment. As we discuss, some pushback on so-called American cancel culture is category confusion or contestation about the need for transitional rather than ordinary justice and disagreement about which type of punishment is, in fact, occurring. Our framework also provides resources for the critical evaluation of defenses or critiques advanced of particular cases of non-state punishment.

II. DEFINING NON-STATE PUNISHMENT

Part I focused on the kind of wrongdoing of interest to ordinary justice and transitional justice, and the key questions each form of justice focuses on. In this Part, we analyze one tool for dealing with wrongdoing: punishment. While punishment is only one of many tools, it is often the first impulse, particularly for Americans seeking justice. Given its primacy in both discourse and policy, we open our project by analyzing this tool before moving onto other responses in future pieces despite or perhaps because of our concern that it often overshadows or displaces other tools of accountability such as truth-telling or reparations.

Punishment can be generally defined as the (1) intentional infliction of (2) harm, suffering, or sanction on a wrongdoer (3) designed to express

condemnation (4) of wrongful conduct (5) by someone with the standing to inflict it for that reason.[9] Punishment is intentional in the sense that the infliction of harm is a reaction to the violation of a norm by another.[10] Punishment is distinguished by penalties in its expressive, condemnatory function.[11] While penalties may impose a deprivation, such as a monetary fine, such deprivation does not have the expressive component of punishment.[12] Similarly, mental institutionalization involves a liberty deprivation, but is characteristically non-punitive in character.[13] Nor do penalties involve the paradigmatic form of deprivation, punitive incarceration, of punishment following a guilty verdict in a criminal trial.[14]

There are two dimensions of punishment that are particularly controversial when inflicted by non-state actors. First, what kind of harm, suffering or sanction ought to count? Whereas punishment by state actors is generally understood to encompass incarceration, what kinds of hard treatment fall into the category of punishment when inflicted by non-state actors is more controversial.[15] Second, who has standing to engage in non-state punishment? To distinguish punishment from mere mob violence, the infliction of hard treatment or suffering must be done by someone with sufficient standing. Some scholars claim that non-state punishment is incoherent because the authority implicit in the concept of punishment is something only the state enjoys.[16] We reject such an analysis. Intuitively, there is nothing incoherent in discussing the parental punishment of children, for example. We argue similarly that there is nothing incoherent in discussing the Jewish community's punishment of Jewish participants in various Nazi state endeavors. However, recognizing the conceptual possibility that non-state actors could possess the standing to punish does not explain how such standing is acquired. We return to the question of standing in Part IV. Below we concentrate on distinguishing the kinds of hard treatment that could qualify as punishment under certain conditions.

9. Don E. Scheid, *Note on Defining "Punishment,"* 10 CAN. J. PHIL. 453, 453–55 (1980); Zachary Hoskins & Antony Duff, *Legal Punishment*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2022), https://plato.stanford.edu/archives/sum2022/entries/legal-punishment/ [https://perma.cc/QEK3-JN7Z].

10. Hoskins & Duff, *supra* note 9, at 453–55.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Douglas Husak, *Does the State Have a Monopoly to Punish Crime?*, *in* THE NEW PHILOSOPHY OF CRIMINAL LAW 100 (Chad Flanders & Zachary Hoskins eds., 2015); Gabriel S. Mendlow, *On the State's Exclusive Right to Punish*, 41 LAW & PHIL. 243, 244 (2022).

16. *See, e.g.*, Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, 14 LEGAL THEORY 113, 118–19 (2008). For a comprehensive list of such accounts, see chapter one of LEO ZAIBERT, RETHINKING PUNISHMENT 1–31 (2018).

A. Use of Force

Given the above definition, not all use of force counts as punishment. On the one hand, there are some easy, paradigmatic examples, such as when a parent spanks a child to deter them from engaging in similar behavior in the future. A spouse who learns of their partner's infidelity and then slaps them might be motivated by similar reasoning. In contrast, non-state use of force for non-punitive purposes does not count as punishment in our definition. So, for instance, boxing involves the use of force, but is a recreational activity, not punishment. The individual who punched neo-Nazi leader Richard Spencer in the face during an interview during the Trump inauguration or the antifascist milkshaking of European conservatives[17] might be imposing hard treatment, but such behavior is generally defended instead, as we explain below, as protest,[18] or preemptive self-defense, or deplatforming of problematic ideas and speakers[19] rather than as punishment.

B. Firings

Under the right circumstances (namely, when done as a form of sanction intended to communicate condemnation), firings can also be an example of non-state transitional punishment. In the United States, the private sector, subject to employment discrimination laws, union policies, and employment contracts, generally retains significant control over firing.[20] Layoffs due to economic constraints do not count as punishment because of the absence of the expressive component of punishment. By contrast, the private sector does sometimes use firings in ways that are plausibly framed as non-state ordinary or transitional punishment.[21] This is particularly true when the explanation offered for firing is punitive. For instance, a business that vocally and visibly fires an employee for lying in violation of the employee handbook might count as ordinary punishment. The loss of a job is hard treatment imposed, at least in part, to express condemnation of the lying employee's wrongdoing. Similarly, firings for those who participated in the attempted Capitol Hill coup or supported "the big lie" for

17. Ali Breland, *How a Dubious Claim of Cement Milkshakes in Portland Became a Right Wing Meme*, MOTHER JONES (July 2, 2019), https://www.motherjones.com/politics/2019/07/how-a-dubious-claim-of-cement-milkshakes-in-portland-became-a-right-wing-meme/ [https://perma.cc/A7FB-PFVD].

18. This is literally what it sounds like. Antifascists throw milkshakes at politicians. *See* Yasmeen Serhan, *Why Protesters Keep Hurling Milkshakes at British Politicians*, ATLANTIC (May 20, 2019), https://www.theatlantic.com/international/archive/2019/05/milkshaking-britain-political-trend-right-wing/589876/ [https://perma.cc/ZCJ8-B373].

19. Benjy Sarlin, *Antifa Violence is Ethical? This Author Explains Why*, NBC NEWS (Aug. 26, 2017, 5:48 AM) https://www.nbcnews.com/politics/white-house/antifa-violence-ethical-author-explains-why-n796106 [https://perma.cc/CA7A-GU5N].

20. Sachi Clements, *Wrongful Termination: Illegal Reasons for Firing Employees*, NOLO, https://www.nolo.com/legal-encyclopedia/illegal-reasons-firing-employees-30209.html (last visited Jan. 16, 2024) [https://perma.cc/BF56-DFQV].

21. *See, e.g.*, Jaclyn Peiser, *Internet Detectives Are Identifying Scores of Pro-Trump Rioters at the Capitol. Some Have Already Been Fired.*, WASH. POST (Jan. 8, 2021, 6:54 AM), https://www.washingtonpost.com/nation/2021/01/08/capitol-rioters-fired-doxed-online/ [https://perma.cc/7SD7-GL3L].

the electoral process could count as examples of non-state punishment.[22] Some private companies have made public statements announcing firings.[23] Within that group, some have gone further to publicly identify the extraordinary nature of the fired person's conduct. For example, @Properties issued a statement reading:

> @properties has always acknowledged an individual's right to their own beliefs—political and otherwise. The company also respects everyone's right to peaceful protest. However, this agent's personal choice to acknowledge, document, and celebrate in the public forum of social media, her participation in the widely condemned actions of—in her own words—'storming the capital' in Washington DC simply *crossed the line in terms of @properties' standards of conduct*.[24]

C. Shunning

Shunning can be a form of sanction intended to communicate condemnation over a wrong an individual who is the target of shunning committed. In practice, shunning may not be easily distinguishable from the decision by an individual to disassociate; individuals enjoy a right to disassociate and may exercise that right for a range of reasons. In some cases, a relationship may be seen as toxic and so important to end; in others, a relationship may simply have run its course. Disassociating need not entail condemnation of anything the target of disassociation did, nor be intended to constitute a form of hard treatment, though it may be experienced as painful by the individual who is cut off. Think, for example, of the Banshees of Inisherin[25] movie in which Colm attempts to first permanently cut off a friendship with Padraic and then any interaction at all with his former best friend. Colm disassociates not because of Padraic's wrongdoing, but because of Colm's simple desire to be done with the lengthy, boring conversations their friendship entailed. Padraic at first believes he is being punished for some transgression, but Colm makes clear no such wrongdoing has occurred and wishes no ill on the former friend.

D. Protest

Similarly, some responsive communication to wrongdoing might be better characterized as protest rather than punishment. It is true that both punishment and protest are reproving and intentional acts. Yet philosopher Glen Pettigrove describes the difference as punishment is definitionally aimed at a specific individual or institution, whereas protest need "not be reactive to the transgression of someone who is responsible for what is being rejected"[26] and "need not be

22. *Id.*

23. *Id.*

24. A.J. Willingham & Carma Hassan, *People at the US Capitol Riot Are Being Identified and Losing Their Jobs*, CNN, https://www.cnn.com/2021/01/07/us/capitol-riots-people-fired-jobs-trnd/index.html (Jan. 9, 2021, 2:35 PM) [https://perma.cc/JL5Z-VUHU] (emphasis added).

25. THE BANSHEES OF INISHERIN (Searchlight Pictures 2022).

26. LINDA RADZIK, CHRISTOPHER BENNETT, GLEN PETTIGROVE & GEORGE SHER, THE ETHICS OF SOCIAL PUNISHMENT: THE ENFORCEMENT OF MORALITY IN EVERYDAY LIFE 128 (2020).

proportional to the wrong instantiated in the individual action that is its focal point,"[27] but rather "it should not exceed the magnitude of the evil being opposed or the good being defended."[28] In addition, "protest need not be harmful at all to those at whom it is directed"[29] nor "need protest be instrumentally effective."[30] The point of protest can be not only about changing the offender, but also about maintaining self-respect, honor, or integrity, declaring allegiance to the good, or speaking truth to power.[31] Think, for instance, of a vegan protester, known as Vegan Booty, who doused the floor of a Kentucky Fried Chicken with red paint and yelled at diners for participating in the genocide of animals.[32] Such behavior is intentional and reproving, but is not really about imposing hard treatment on specific meat-eaters but rather drawing attention to the cause of veganism.[33]

E. Financial Activity

What about consumers and their purchasing decisions? Or donors and their donating decisions? Or individuals and institutions and their financial decisions? When, if ever, might these constitute non-state transitional punishment? To return to our original definition of punishment, actions only fall in this category when they are: (1) intended to (2) inflict suffering or sanction on a wrongdoer (3) designed to express condemnation (4) of the wrongful conduct on a wrongdoer by (5) someone with the standing or authority to inflict it for that reason.[34] We believe that decisions not to spend may sometimes satisfy these conditions and thus count as punishment. But the punishment rationale certainly does not capture the full universe of boycotts. One might also engage in boycotts to disassociate, to amplify speech, and/or to coerce without satisfying all the conditions of punishment.[35]

We briefly offer three related examples to illustrate how these categories might arise in practice. In the first, numerous consumers decline to use Amazon because they wish to avoid complicity in its tax avoidance practices.[36] In the second, consumers decide to stop buying Goya products after its CEO effusively praised President Trump and made statements that President Biden's election

27. *Id.*
28. *Id.*
29. *Id.* at 129.
30. *Id.*
31. *Id.*
32. Levi Parsons, *Notorious Vegan Activist Storms a KFC Throwing Red Paint Over the Floor and Berating 'Animal Abuser' Customers with a Megaphone—Before Being Shut Down with a Killer Comeback from a Diner*, DAILY MAIL (July 4, 2021), https://www.dailymail.co.uk/news/article-9754227/Vegan-activist-Tash-Peterson-storms-Melbourne-KFC-throwing-red-paint-floor.html [https://perma.cc/U5XF-NMFN].
33. *See id.*
34. *See supra* note 9 and accompanying text.
35. Linda Radzik, *Boycotts and the Social Enforcement of Justice*, 34 SOC. PHIL. & POL'Y FOUND. 102, 103 (2017).
36. *Boycott Amazon*, ETHICAL CONSUMER SINCE 1989 (July 28, 2023), https://www.ethicalconsumer.org/ethicalcampaigns/boycott-amazon [https://perma.cc/V4JP-AGH8].

was "unverified."[37] In the third, major corporations paused or banned contributions to members of Congress who declined to certify the 2020 election.[38] Some justified such behavior as a way to condemn such behavior and provide an incentive for such actors to change their position going forward.

We rely on Linda Radzik's insights here to distinguish among these examples.[39] While, in theory, any boycott could be motivated by the desire to inflict suffering or sanction, we suggest that the question of categorization hinges in part on what decision-makers intend to do as well as their communications (or lack thereof) about what they are doing. Thus, in the first example, the wish of consumers to avoid any association with Amazon and its failure to pay taxes in foreign countries may feel punitive. But drawing on John Stuart Mill, such behavior only constitutes a natural penalty, not punishment.[40] Nothing in the description suggests the boycotters intend to express condemnation of Amazon for its practices; rather, the boycotters intend to avoid engaging in wrongdoing themselves.[41]

When we look at the second example of the Goya boycotters, we would also not categorize this as punishment given the boycotters' stated justification. They have publicly defended their collective decision as "more about taking a stand against the president's bigotry than about punishing a once-beloved brand."[42] Given this rationale, the boycott ought to be categorized primarily as a form of speech and judged in its efforts to amplify supporters' views. While they are conveying a criticism, it is not designed to hold the wrongdoer to account, though it may call for the wrongdoer to change.[43] While behavior like this might have some of the same consequences as punishment, we do not think it appropriate to use the metrics we use to assess punishment.

In contrast, when we look at the third example of donation withdrawals, at least some corporate participants articulated their reasons in punitive rationales.[44] They wished candidates who failed to certify suffer from the lack of

37. Raul A. Reyes, *Latinos Boycotting Goya Say It's Not About Politics*, NBC NEWS (July 18, 2020, 5:25 AM), https://www.nbcnews.com/news/latino/latinos-boycotting-goya-say-it-s-not-about-politics-it-n1234052 [https://perma.cc/KWW7-FEKK].

38. *See* Press Release, Blue Cross Blue Shield, Blue Cross Blue Shield Assoc. Statement on Suspension of Contributions to Lawmakers Voting Against Accepting Electoral Coll. Results (Jan. 8, 2021).

39. Radzik, *supra* note 35, at 103.

40. *See id.* at 109.

41. ETHICAL CONSUMER SINCE 1989, *supra* note 36.

42. Reyes, *supra* note 37.

43. Calling on others to change raises some of the same authority questions as raised in the punishment context. *See* Radzik, *supra* note 35, at 117, 122.

44. *See* Press Release, Blue Cross Blue Shield, *supra* note 38. Blue Cross/Blue Shield's (BCBSA), which states:

> At the Blue Cross Blue Shield Association, we continuously evaluate our political contributions to ensure that those we support share our values and goals. In light of this week's violent, shocking assault on the United States Capitol, and the votes of some members of Congress to subvert the results of November's election by challenging Electoral College results, BCBSA will suspend contributions to those lawmakers who voted to undermine our democracy . . . . While a contrast of ideas, ideological differences and partisanship are all part of our politics, weakening our political system and eroding public confidence in it must never be. We will continue to support lawmakers and candidates in both political parties who will work with us to build a stronger, healthier nation.

financial support and publicly explained that the reason for such suffering was the wrongful undermining of our democracy.[45]

But what of buycotts in which consumers are urged to buy from specified producers—like the newly resurgent "Buy Black" movement?[46] We explain here why such efforts are not punishment.[47] At their core, such buycotts provide positive forward-looking incentives to behave rightfully, but lack any purpose to express condemnation of wrongdoing.[48] Past iterations of Buy Black movements in the United States articulated their purpose as Black consumers engaging in Black purchases as a form of community empowerment often as part of a larger Black nationalism.[49] This sort of initiative requires nothing from the greater American community—no accountability for wrongdoing nor any resource transfer nor recognition of past harm and thus does not seem punitive.

F. Cancel Culture

How does so-called cancel culture fit into this mapping? Is it punishment or something else like disassociation? Answering these questions is tricky given the lack of consensus about which behaviors and purposes fit under cancel culture's umbrella.[50] Are they best conceived of as "a choice to withdraw one's attention from someone or something whose values, (in)action or speech are so offensive, one no longer wishes to grace them with their presence, time, and money"?[51] If so, this bundle of practices sounds disassociative rather than punitive.[52] Contrast that with a view of cancel culture as imposing necessary shame

45. *See id.*

46. Monroe Friedman, *Ethical Dilemmas Associated with Consumer Boycotts*, 32 J. SOC. PHIL. 232, 239 (2001) (noting the ethical dimensions of the carrot rather than punitive stick aspect of boycotts).

47. *See generally* Darrius D. Hills & Tommy J. Curry, *Cries of the Unheard: State Violence, Black Bodies, and Martin Luther King's Black Power*, 3 J. AFRICANA RELIGIONS 453 (2015); Gerald Porter Jr., Jordyn Holman & Deena Shanker, *Buy Black Trend Sees Staying Power with Corporate America Buy-In*, BLOOMBERG (Feb. 26, 2021, 5:00 AM), https://www.bloomberg.com/news/articles/2021-02-26/buy-black-trend-sees-staying-power-with-corporate-america-buy-in#xj4y7vzkg [https://perma.cc/V4A3-TUXY].

48. *Id.*

49. Cassi Pittman Claytor, *What Does It Mean to Buy from Black-Owned Businesses?*, LITERARY HUB (Sept. 23, 2020), https://lithub.com/what-does-it-mean-to-buy-from-black-owned-businesses/ [https://perma.cc/9WGD-5T3F].

50. *Cancel Culture*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/cancel%20culture (last visited Jan. 16, 2024) [https://perma.cc/9PJC-PXMQ] (defining cancel culture as "the practice . . . of engaging in mass canceling as a way of expressing disapproval and exerting social pressure"). Cambridge Dictionary uses cancel culture in a sentence the following way: "In a cancel culture, we appoint ourselves the arbiters of right and wrong and also the judge and jury, because thanks to social media, we get to dole out punishment." *Cancel culture*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/cancel-culture (last visited Jan. 16, 2024) [https://perma.cc/LD73-TXX7].

51. Meredith D. Clark, *DRAG THEM: A Brief Etymology of So-Called 'Cancel Culture'*, 5 COMMC'N & PUB. 88, 88 (2020).

52. Similarly, Professor Hudley describes cancel culture as the refusal to participate in a "pop culture that spreads harmful ideas" and a "way to acknowledge that you don't have the power to change structural inequality. You don't even have the power to change all of public sentiment . . . . I may have no power but the power I have is to [ignore] you." Aja Romero, *Why We Can't Stop Fighting About Cancel Culture*, VOX (Aug. 25, 2020, 12:03 PM), https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate [https://perma.cc/G787-DVEN].

and withdrawal because "a catastrophic outcome must be faced by someone as a result of his/her past mistakes."[53] Under such a definition, cancel culture seems quite punitive as it seeks to hold someone accountable for wrongdoing through expressive public action.

G. Conclusion

The line between punishment and other social practices, such as disassociating, protesting, and self-defense, may not always be clear cut in practice. In cases where what is going on is unclear, the reasons offered by the individual engaging in a certain form of conduct may help distinguish punishment from other related practices such as disassociation. It is important to underscore for our purposes that the difficulty of categorizing different cases does not detract from the analytic value of isolating punishment as a particular kind of social response. What matters in cases of social punishment is the intentional nature of the suffering or hard treatment inflicted and the expressive or communicative aim of suffering, namely, condemnation of wrongful conduct. Because the motivation for actions commonly described as part of cancel culture, like boycotts, is not homogeneous, one must take a close look at both the action and the justifications for it to determine if it counts as punitive.

Take, for instance, the disinvitation or banning of speakers from college campuses. In many such instances, it seems this activity is driven by the wish to disassociate from ideas espoused by the speaker, rather than to hold the speaker to account.[54] For instance, incoming University of Michigan Medical School students petitioned to remove Dr. Collier, a member of the faculty who had publicly made her anti-abortion position known, as the keynote speaker for the white coat ceremony.[55] After the petition was denied, some students chose not to attend or to walk out of the ceremony when she spoke.[56] Such students were not calling for Dr. Collier to be fired and seemed to have no interest in imposing hard treatment on her per se, but rather wished to distance themselves from her anti-abortion position.[57]

In contrast, consider those who called for the firing of Professor Uju Anya for her Twitter post wishing excruciating pain on the Queen of England as the "chief monarch of a thieving raping genocidal empire."[58] Such a call, at least for

53. Alexei Wahyudiputra, Abdika Taslih Amrullah & Diaz Adrian, *The Weinstein Effects: Forecasting the Genesis of Cancel Culture in Hollywood Industry*, 4 ANAPHORA: J. LANGUAGE, LITERARY, & CULTURAL STUD. 39, 39 (2021).

54. *See* Romero, *supra* note 52.

55. Samantha Rich, *UMich Medical Students Walk Out of White Coat Ceremony in Protest of Anti-Abortion Keynote Speaker*, MICH. DAILY (July 26, 2022), https://www.michigandaily.com/news/umich-medical-students-walk-out-of-white-coat-ceremony-in-protest-of-anti-abortion-keynote-speaker [https://perma.cc/6GTQ-PX9C].

56. *Id.*

57. *Id.*

58. Snejana Farberov, *Professor Who Wished Queen 'Excruciating' Death Explains Defiant Stance on Podcast*, N.Y. POST, https://nypost.com/2022/09/15/professor-who-wished-queen-excruciating-death-doubles-down/ (Sept. 15, 2022, 10:02 AM) [https://perma.cc/XT32-XX46].

some, was primarily to impose harsh treatment on her in order to express condemnation for her perceived wrongdoing.[59] The University declined this invitation to impose harsh treatment and chose instead only to distance itself and condemn her words.[60] Had they chosen the alternate path, it seems that it would have been punitive.

So, from our point of view, once an action falling under cancel culture is properly thought of as punitive, then it is subject to our categorization and needs to be further assessed as ordinary or transitional and judged accordingly.

TABLE 1

Punishment	**Not Punishment**
Hard treatment designed to express condemnation of wrongful conduct by wrongdoer	Hard treatment that is not punitive; treatment is not designed to express condemnation of wrongful conduct by wrongdoer
Examples that do count	**Examples that do not count**
• liberty deprivation like imprisonment	• non-punitive liberty deprivation like mental institutionalization
• hard physical treatment like lashings or death penalty or spanking	• hard physical treatment like boxing or milkshaking as protest
• firings for violating rules	• firings like layoffs
• shunning	• disassociation
• boycott as collective punishment & financial withholding	• boycott as protest
	• buycotts as positive affirmation

III. DISTINGUISHING FORMS OF WRONGDOING

In Part II, we distinguished punishment as a particular kind of response to wrongdoing. In this Part, we distinguish two types of wrongdoing to which punishment may be used in response: deviant and normalized. We discuss the features of each kind of wrongdoing, and the problem for communities that each kind generates.

59. *Id.*

60. Uju Anya (@ujuanya), X (Sept. 12, 2022, 6:39 PM CST), https://twitter.com/UjuAnya/status/1569470740285771778 [https://perma.cc/U5RE-TTDQ]:

> From what I've been told, there is no plan to sanction or fire me, and my job is not in jeopardy. My university leadership showed very clearly they did not approve of my speech; however, they stand in firm support of my freedom of expression on my own personal social media.

A. Deviant

To begin, one justice paradigm for responding to wrongdoing is directed towards what we call 'deviant' wrongdoing. Wrongdoing, as we understand it, is defined in terms of norm violations, where norms "are practical prohibitions, permissions, or prescriptions, accepted by individuals belonging to particular groups, organizations, and societies, and capable of guiding the actions of those individuals."[61] To accept a norm is to accept certain practical commitments (e.g., that one's action and similar actions by others should conform to the requirement or prohibitions contained in the norm's content) and normative attitudes (e.g., to have an attitude of disapproval towards those who violate a norm's requirements).

Our definition is capacious enough to capture criminal wrongdoing as well as moral wrongdoing that is not criminalized. By *moral norms*, we refer to practical prescriptions that exist independently from and are not reducible to social practices;[62] rather, they capture standards for conduct that are, in some sense, objectively justified. Fundamental rights claims are one example; individuals enjoy rights to be free from torture and enslavement in fact and irrespective of whether slavery or torture is socially acceptable.[63] *Legal norms* are practical prescriptions that are created, changed, and modified by virtue of procedural processes widely accepted by legal officials.[64] Human rights codified in international treaties or constitutions are examples of legal norms.[65] *Social norms* are standards of conduct that exist in virtue of being accepted by a social group.

The relationship among moral, legal, and social norms is complex. For instance, adultery may be morally wrong, but socially accepted.[66] For most liberal political theorists, adultery is outside the scope of proper criminalization.[67] As the literature in criminal law and liberal political theory recognizes, the scope of wrongdoing that is formally criminalized in law is narrower than moral

61. PAUL MORROW, UNCONSCIONABLE CRIMES: HOW NORMS EXPLAIN AND CONSTRAIN MASS ATROCITIES 2 (2020); Cristina Bicchieri, Ryan Muldoon & Alessandro Sontuoso, *Social Norms*, STANFORD ENCYC. OF PHIL. ARCHIVE, https://plato.stanford.edu/archives/win2018/entries/social-norms/ (last visited Jan. 16, 2024) [https://perma.cc/D6QG-32FN].

62. MORROW, *supra* note 61, at 12–13; Bernard Gert & Joshua Gert, *The Definition of Morality*, STANFORD ENCYC. OF PHIL. ARCHIVE, https://plato.stanford.edu/archives/fall2020/entries/morality-definition/ (last visited Oct. 23, 2023) [https://perma.cc/23XB-P6V4].

63. Morrow, *supra* note 61, at 7.

64. This way of framing legal norms is explicitly positivist. *See id.* at 14; Andrei Marmor & Alexander Sarch, *The Nature of Law*, STANFORD ENCYC. OF PHIL. ARCHIVE, https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/ (last visited Jan. 16, 2024) [https://perma.cc/PPS4-PDPA]; H.L.A. HART, THE CONCEPT OF LAW 169 (1961); JOSEPH RAZ, THE AUTHORITY OF LAW 9 (1979).

65. *See* MORROW, *supra* note 61, at 14.

66. *See, e.g.*, Richard Wike, *French More Accepting of Infidelity than People in Other Countries*, PEW RSCH. CTR. (Jan. 14, 2014), https://www.pewresearch.org/short-reads/2014/01/14/french-more-accepting-of-infidelity-than-people-in-other-countries/ (finding that while 47% of French respondents found infidelity morally objectionable, the majority of respondents said it was either not a moral issue or morally acceptable) [https://perma.cc/M3YZ-AUKU].

67. PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 129 (1965); Jeffrie G. Murphy, *Legal Moralism and Retribution Revisited*, 1 CRIM. L. & PHIL. 5, 8 (2006).

wrongdoing.[68] The precise nature of the relationship between criminal wrongdoing and moral wrongdoing is the subject of ongoing debate. While some scholars hold that the status of an action as morally wrong is necessary and sufficient for it to be criminalized,[69] other scholars reject this necessary connection between law and morality as a general guideline.[70]

As conceptualized in literature in jurisprudence, criminal law, political and legal theory, what we are calling *deviant* wrongdoing (of the legal, social, or moral kind) is exceptional; it is wrongdoing that constitutes a violation of a norm (legal or moral) for conduct that is otherwise generally respected.[71] Because of deviant wrongdoing's exceptional character, it is not conduct that reasonable individuals expect or orient their conduct around to a significant degree.[72] When exceptional, individuals deliberating about whether and when to leave their home do not substantially factor into their decision-making the prospect of being murdered. For example, recognizing that burglars exist could lead an individual to lock their doors when leaving home. However, the possibility of theft is sufficiently remote that it does not lead an individual to install metal bars on their windows or to refrain from purchasing any valuable items though they have the financial means to do so. In the second case, the possibility is sufficiently great to alter courses of action that would otherwise be taken if the possibility were more remote; an individual in this second case does restrain from purchasing items though they have sufficient financial means out of a concern for subsequent theft. As this example illustrates, possibilities may influence action along a spectrum. The way in which the possibility of wrongdoing affects deliberation—in particular, where it figures along a continuum—distinguishes deviant from normalized wrongdoing, which we discuss later in the paper.

The problem deviant wrongdoing generates for communities is how to deal with bad actors that are inevitably present in all legal systems, even legitimate and just ones. Human beings are not angels; compliance with rules for conduct as laid out in criminal law is not perfect. Responses to wrongdoing, such as punishment, provide a solution to the problem of imperfect compliance.[73] All societies have a need for some form of criminal justice system.[74] Implicit in scholarly discussions of criminal punishment as a response to what we are calling deviant wrongdoing is an assumption: that the state has the capacity and political will to deal with deviant wrongdoing when it occurs.[75] The content of criminal laws is

68. DOUG HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 55 (2007); John Stanton-Ife, *The Limits of Law*, STANFORD ENCYC. OF PHIL ARCHIVE, https://plato.stanford.edu/archives/spr2022/entries/law-limits/ (last visited Jan. 16, 2024) [https://perma.cc/5MSN-PHU2].

69. This is the position of legal moralists. *See generally* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (1997).

70. *See generally* HUSAK, *supra* note 68; Joel Feinberg, *Harm to Others*, *in* THE MORAL LIMITS OF THE CRIMINAL LAW (Joel Feinberg ed., 1984); JOHN STUART MILL, ON LIBERTY (1859).

71. *See* COLLEEN MURPHY, THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE 59–60 (2017).

72. *See id.*

73. *See* Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 477 (1968) (U.K.).

74. *See* HART, *supra* note 64, at 209; JOHN RAWLS, A THEORY OF JUSTICE 3–53 (1971).

75. *See generally* ANTHONY DUFF, THE REALM OF CRIMINAL LAW (2018).

implicitly assumed to be morally defensible in many discussions of criminal punishment.[76]

Another corresponding implicit assumption is that non-state responses exist for reasons unrelated to a vacuum created by lack of state capacity or will to deal with wrongdoing that is the state's business to address. Non-state actors punish not because the state fails to address wrongdoing. Instead, non-state punishment is seen as properly addressed within these domains as the offense occurs within these specific relationships and institutions, though some of these offenses might also properly be addressed by the state as well. Within this paradigm, the content of criminal laws is implicitly assumed to be morally defensible in many discussions of criminal punishment. Put differently, the state is not encroaching on areas of conduct that are not its business. Non-state punishment exists as a response to deviant wrongdoing because of limits on the legal or moral authority of the state to deal with certain forms of wrongdoing (only some wrongs are of interest to the state) or because they fall within a domain of legal or moral discretion for non-state actors.[77] Examples include parents responding to a child's violation of house rules, a University responding to a student's violation of school rules, an employer responding to a violation of workplace policies, an individual responding to a friend's violation of social norms, and a lover responding to a partner's violation of the norms of the relationship.

B. Normalized

In the second paradigm, wrongdoing is widespread and normalized. Far from being exceptional, normalized wrongdoing becomes a basic fact of life for members of a targeted group.[78] The *normalization* of wrongdoing occurs in virtue of the large number of actual victims or potential victims. Victims of normalized wrongdoing may number in the thousands, tens of thousands, hundreds of thousands, and, in some cases, millions. Wrongdoing is thus normalized in an empirical sense, a regular occurrence around which members of a targeted group must orient their conduct.[79] The possibility of being subject to certain forms of wrongdoing is a factor that potential targets of such wrongdoing must take into account when determining how to act. The anticipation of being killed or arrested if speaking out against the government or of being killed or subject to harm if pulled over by the police for a routine traffic stop shapes the deliberation and action of members of groups vulnerable to normalized wrongdoing.[80]

Normalized wrongdoing is not viewed by all members of a community in which it occurs in the same way. Some individuals may view wrongdoing as morally acceptable, a result of processes such as moral norm inversion or norm

76. *See id.*

77. *See* RADZIK, *supra* note 26, at 24–46; Hoskins & Duff, *supra* note 9.

78. Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 93.

79. *Id.*

80. *Id.*

breakdown.[81] Other individuals may deny the reality of normalized wrongdoing by redescribing it in ways that downplay its moral significance through a process of interpretive denial;[82] torture that is systematic may be characterized as 'regrettable excesses' of a few.[83] Yet other members of a community may view wrongdoing as wrong but just the way things are or as too entrenched a problem to be solved and, eventually, to be outraged over.

Take gun violence in the United States. The lens of normalized wrongdoing is appropriate even as not all groups within a society are vulnerable to this normalized wrongdoing in the same way. While mass shootings are a normalized occurrence for every person living in the United States, rising homicide rates are most likely in communities with systemic disinvestment, segregation, and economic inequality.[84] Similarly, Black and brown people are disproportionately targeted by and factor into deliberation the possibility of being a victim of police gun violence.[85] When wrongdoing is normalized for some, but not all, groups within a community, another attitude may be present. Limited or absent outrage over normalized wrongdoing may result from individuals distancing themselves from its occurrence because it is not 'their' problem in the sense of not a problem to which they are vulnerable or for which they are responsible.[86]

As the discussion above suggests, wrongdoing is often normalized for particular groups within a community,[87] where groups can be defined in terms of shared identities (e.g., ethnicity, race, gender, religion), common political commitments, and/or geographic area (e.g., rural or urban areas). For members of such groups, the possibility of becoming a victim of certain types of wrongdoing factors into practical deliberation.[88]

Wrongdoing becomes widespread and normalized against a background of *impunity for wrongdoing*. By impunity, we mean the ability to commit criminal wrongdoing without the credible prospect of being held accountable.

The presence of two general conditions generates impunity. First, state institutions or state actors fail to hold accountable perpetrators of wrongdoing. Normalized wrongdoing is political in the sense that the state is implicated in its commission.[89]

81. *See* MORROW, *supra* note 61, at 3.

82. *See* NANCY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH 138 (2007).

83. STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 84 (2001).

84. D.W. Rowlands & Hanna Love, *Mapping Gun Violence: A Closer Look at the Intersection Between Place and Gun Homicides in Four Cities*, BROOKINGS INST. (Apr. 21, 2022), https://www.brookings.edu/2022/04/21/mapping-gun-violence-a-closer-look-at-the-intersection-between-place-and-gun-homicides-in-four-cities/ [https://perma.cc/VKZ5-EBLU].

85. *Id.*

86. *Id.*

87. *See* MURPHY, *supra* note 71, at 47.

88. *See id.*

89. Wrongdoing is often also political in terms of the reasons for the sake of which wrongdoing is done: to defend or to contest a regime in power, to acquire or defend land in a particular region, etc, though the reasons need not be exclusively political. Many grudge informers are opportunistic, using a political opening to settle scores with personal opponents. It is for this reason that many transitional justice processes to date focus on

State actors and institutions become implicated in normalized wrongdoing in a wide range of ways. One way is by denying the existence of wrongdoing that requires action on the part of the state.[90] In some cases, state actors, such as members of the police or military, are the direct perpetrators of wrongdoing.[91] Governments implicated in atrocities typically deny their occurrence, either by flatly rejecting the occurrence of any atrocity or by displacing responsibility for their occurrence away from government policy onto 'bad apples' or away from government officials onto rebel forces in contexts of conflict.[92]

Impunity may be a product of the structure of criminal law and what actions are criminalized.[93] In the context of gun violence in the United States, permissive gun laws and immunity for gun manufacturers limit the ability of criminal punishment to effectively hold to account actors or corporations implicated in its commission.[94]

In other cases, the state is implicated not because it denies the existence of wrongdoing, but because it is unwilling to hold perpetrators accountable for wrongdoing.[95] State actors may be unwilling to hold perpetrators accountable by instead actively facilitating wrongdoing, such as by covering up evidence of its occurrence.[96] This occurs when police cover for one another to avoid accountability for the abuses committed by certain members.[97]

The inability to effectively hold perpetrators accountable even when political will to prosecute exists can stem from other obstacles.[98] Witnesses may distrust the state or police and so are unwilling to testify.[99] Judges and prosecutors may be insufficiently trained.[100] The state may not effectively control parts of territory or cities within a community.[101] Prosecutors may not be able to safely travel to certain areas.[102]

wrongdoing committed with such political motives. *See, e.g.*, SOUTH AFRICAN TRUTH AND RECONCILIATION COMM'N, https://www.justice.gov.za/trc/ (last visited Jan. 16, 2024) [https://perma.cc/W8SS-5V2P]; SPECIAL JURISDICTION FOR PEACE IN COLOMBIA, https://www.jep.gov.co/Paginas/Inicio.aspx (last visited Jan. 16, 2024) [https://perma.cc/BE9S-V72K]. Perpetrators of wrongdoing are often organized and members of or affiliated with groups existing in different degrees of formality. State security forces, rebel groups, terrorist organizations, or militias are some of the groups implicated in wrongdoing.

90. *See* MURPHY, *supra* note 71, at 9–10.

91. *See id.*

92. MARGUERITE FEITLOWITZ, A LEXICON OF TERROR: ARGENTINA AND THE LEGACIES OF TORTURE 13 (rev. ed. 2011) ("As they prepared to leave office, the Argentine junta also spoke of 'excesses' and 'abuses.' But it never mentioned torture, and denied the reality of concentration camps.").

93. *See* MURPHY, *supra* note 71, at 184.

94. Drury D. Stevenson & Jenna R. Shorter, *Revisiting Gun Control and Tort Liability*, 54 IND. L. REV. 365, 375–76 (2021) (noting some pushback on this longstanding impunity).

95. *See id.* at 374.

96. *See id.* at 375.

97. Lindsey M. Cole, *Criminal Juries in the 21st Century*, *in* PSYCHOLOGICAL SILENCE AND THE LAW 121 (C. Najdowski & M. Stevenson eds., 2019).

98. *See* Stevenson & Shorter, *supra* note 94, at 409.

99. MURPHY, *supra* note 71, at 9.

100. *Id.*

101. *See* Stevenson & Shorter, *supra* note 94, at 377.

102. MURPHY, *supra* note 71, at 9.

A second factor that explains impunity is background *structural inequality*.[103] Such inequalities affect and reflect subjective perceptions of what counts as wrongdoing and of the urgency of responding to certain wrongs.[104] After explaining what structural inequality is, we explain how perceptions of wrongdoing and of the urgency of accountability can be shaped by structural inequality.

Structural inequalities take as their subject the implicit and explicit terms structuring general interaction among individuals within a community.[105] Legal rules and norms structure interaction by specifying for a specific category of actor (e.g., legal subjects, officials, homeowners) what actions are permitted, prohibited, and/or required with respect to the objects of actions (e.g., other legal subjects, government officials). So, for example, in the United States, property owners enjoy a claim-right against non-owners, who owe a duty to avoid entering the land of another without permission.[106] To use a different example, legal rules specify who is eligible to serve in political office at the municipal, state, and federal level, and the process by which political offices will be filled (e.g., by appointment or election).[107] Terms for interaction not only specify what interaction should look like, but also the formal and informal consequences for violating such terms.[108] Violators of rules laid down in criminal law may be subject to criminal punishment. Violators of rules structuring transportation may be subject to a penalty. Other penalties are more informal. Individuals who violate social norms regulating dating by dating the "wrong" kind of partner (where wrong may be defined in terms of a range of factors including age, gender, religion, race, ethnicity, or class) may be stigmatized or shunned by members of their social circle or their family, for example.[109]

Structural *inequality* exists when terms for interaction among members of a political community impose differential restrictions or constraints on the effective freedom of different groups a) to do and become things of value, such as being employed, being educated, participating in political processes, and avoiding poverty, and b) to shape the institutional rules and norms themselves.[110]

One form of constraint is up-front obstacles to pursuing courses of action.[111] For example, first-generation college students often overcome disproportionately significant financial constraints and epistemic constraints in knowledge of how to navigate the complicated application process for admission and

103. Some literature refers to this some concept as structural injustice.

104. MURPHY, *supra* note 71, at 55.

105. On the use of structural inequality see *id.* at 38–82. For readers familiar with the literature on structural injustice, normalized wrongdoing roughly conceptually maps on to interpersonal wrongdoing, and structural inequality on to structural injustice.

106. *See id.* at 39.

107. *Id.* at 43.

108. *Id.*

109. *Id.* at 44.

110. Effective freedom is a term employed by Amartya Sen when discussing the idea of capabilities. *See* AMARTYA SEN, COMMODITIES AND CAPABILITIES 5 (1985); Amartya Sen, *Well-being, Agency and Freedom: The Dewey Lectures 1984*, 82 J. PHIL. 169, 208 (1985); AMARTYA SEN, DEVELOPMENT AS FREEDOM 18 (1999).

111. MURPHY, *supra* note 71, at 46.

financial aid.[112] Another type of constraint is predictable negative consequences, such as social isolation, for pursuing courses of action.[113] There is often a mutually reinforcing dynamic among institutional rules and norms and correlative costs for non-compliance, on the one hand, and schemas, on the other.[114]

Structural inequality constrains "life prospects," the range of things an individual can feasibly do or become throughout her lifetime and typically has cumulative, often intergenerational, material consequences.[115] Memoirs like *Black Boy* describe the de facto constraints on movement, discrimination in employment and wages, and reduced educational opportunities available to Black men and women during the period of legal apartheid in the United States known as Jim Crow, and the subsequent material consequences in terms of hunger, poverty, and illness.[116]

Structural inequality may erode recognition of wrongdoing by reducing recognition of rights claims held by members of such groups.[117] Inequality of these kinds is often implicitly and explicitly justified by animating schemas and ideologies.[118] Catherine Lu discusses the role of a racialized theory of white superiority in justifying colonialism.[119] As she writes, "the ideological of civilization was predicated on a racialized hierarchical conception of what qualified as civilized and who was in need of civilization."[120] By linking "civilized" to white and European, the ideology of civilization rationalized the imposition of colonial

112. Ian S. Pratt, Hunter B. Harwood, Jenel T. Cavazos & Christopher P. Ditzfeld, *Should I Stay or Should I Go? Retention in First-Generation College Students*, 21 J. COLL. STUDENT RETENTION: RSCH., THEORY & PRAC. 105, 115 (2019).

113. MURPHY, *supra* note 71, at 46.

114. To illustrate, consider philosopher Gina Shouten's argument for how the breadwinner/specialization model or schema, implicitly presumed by the labor market, perpetuates gender inequality in the labor market. As Schouten characterizes it, the breadwinner/specialization model presumes families consist in two-partner homes in which one member specializes in paid labor while the other specializes in caregiving responsibilities. These roles are gendered. Labor specialization is associated with men and caregiving with women. Three mutually reinforcing factors maintain this gendered model of the division of labor within households. The *labor market* and other social institutions make non-specialization costly. Employment opportunities and income are tethered to a willingness to specialize. *Gender norms* continue to define certain forms of work as particularly suited to particular genders. *Individual choices* reinforce the labor market structure and gender norms because of the costs of non-compliance. When childcare demands make it impossible for two members of a family to continue specialized participation in the labor market, it is women who often scale back their participation because they earn less than their male partners. Women are disproportionately more likely to take career breaks for caregiving related reasons, which produces an ever-widening wage gap. This fact reinforces the often implicit presumption by employers that women will assume caregiving responsibilities that will detract from requisite attention on paid responsibilities that can lead to statistical discrimination. The model also imposes high social costs on men unwilling or unable to perform the role of breadwinning specialize and on single-families for whom there is no partner to assume caregiving responsibilities. *See, e.g.*, GINA SCHOUTEN, LIBERALISM, NEUTRALITY, AND THE GENDERED DIVISION OF LABOR 21 (2019).

115. RAWLS, *supra* note 74, at 64.

116. *See generally* RICHARD WRIGHT, BLACK BOY: A RECORD OF CHILDHOOD AND YOUTH (1945).

117. MURPHY, *supra* note 71, at 61.

118. IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE 45 (2011); Tommie Shelby, *Racism, Moralism, and Social Criticism*, 11 DU BOIS REV. 57, 66 (2014).

119. *See* CATHERINE LU, JUSTICE AND RECONCILIATION IN WORLD POLITICS 114–43 (2017).

120. Colleen Murphy, Book Review, 18 CAMBRIDGE U. PRESS 607 (2020) (reviewing JUSTICE AND RECONCILIATION IN WORLD POLITICS (2017)).

rule on the non-white and non-European subjects and the marginalization and erasure of indigenous sources of knowledge.[121]

Pervasive structural inequality can also undermine political will to hold perpetrators of wrongdoing accountable, out of a perception that certain wrongdoing is not an urgent or serious social problem to address.[122]

To illustrate these points more concretely, consider lynching in the context of the United States. Lynching constitutes a form of extrajudicial punishment carried out by white men and women against Black men and women with impunity,[123] one form of normalized and racialized wrongdoing in our nation's history.[124] Lynching frequently targeted Black men and women who violated norms prohibiting interracial relationships or protesting racial discrimination.[125] Black men lynched were frequently alleged to have raped or otherwise had inappropriate sexual encounters with white women.[126] Protesting wage withholding or working conditions also made Black men and women vulnerable to lynching.[127] Lynching reflected the de facto absence of effective enjoyment of basic rights to liberty, bodily integrity, and due process for Black citizens during the Jim Crow era.[128] White men and women, with the active participation or willing tolerance of the police, could inflict violence with impunity on Black men and women.[129] The lack of effective investigation into and prosecution of lynching is reflected in the fact that the true number of lynching victims remains to this day unknown.[130] Lynching became a basic fact of life around which Black men and women had to orient their conduct.[131] Lynching functioned to entrench and maintain white supremacy and Jim Crow by terrorizing Black men and women into submission rather than contesting the status quo at literally their own peril.[132]

As the discussion so far suggests, in any given community, the explanation for *why normalized wrongdoing occurs*, and even more narrowly why *impunity* exists, will be complicated. Numerous factors will explain why the conditions for effective accountability are absent. For our purposes, what is critical is to recognize that the explanation of why normalized wrongdoing occurs cannot be reduced to appeals to the bad motives of bad actors.

121. *Id.*

122. MURPHY, *supra* note 71, at 43.

123. We are just now unearthing the extent of lynching against other groups such as Latinos. Simon Romero, *Lynch Mobs Killed Latinos Across the West. The Fight to Remember These Atrocities Is Just Starting.*, N.Y. TIMES (Mar. 2, 2019), https://www.nytimes.com/2019/03/02/us/porvenir-massacre-texas-mexicans.html [https://perma.cc/533H-R2RY].

124. *See id.*

125. *See* PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA vii (2003).

126. *Id.* at x.

127. *See id.* at 7.

128. *See id.* at 60.

129. *See id.* at 24.

130. The Equal Justice Initiative has identified more than four thousand lynchings to date. *See, e.g.*, *Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUST. INITIATIVE, https://lynchinginamerica.eji.org/ (last visited Jan. 16, 2024) [https://perma.cc/F42D-Y2CA].

131. *See id.*

132. *Id.*

Normalized wrongdoing points to a systemic problem, for which systemic solutions are needed.[133] Analyses of responses to normalized wrongdoing are *not* predicated on an assumption that the state has the political will or capacity to deal with normalized wrongdoing. There is no presumption that institutions function effectively, nor that they have the capacity to deal with wrongdoing. Furthermore, there is no presumption that political will exists to prosecute perpetrators and deliver justice for victims even when institutions could. After all, the lack of political will and/or institutional capacity to deal with wrongdoing contributes to the problem of *impunity* for wrongdoing that exists.[134]

The problem normalized wrongdoing generates is fundamentally how to deal with bad systems—systems that permit and incentivize wrongdoing by good and bad actors alike.[135] The underlying rationale for responding to normalized wrongdoing is both to deal with individual perpetrators and victims *as well as* alter the background structure of interaction that permits, incentivizes, and/or fails to prevent wrongdoing.

Finally, non-state or non-state responses, insofar as they occur, do so in part or whole because of the vacuum in state responses to wrongdoing;[136] this is the implicit presumption that exists for transitional wrongdoing. The absence of state capacity or political will to comprehensively redress wrongdoing is one factor that leads non-state actors to assume responsibility in the void created by the absence of state action.[137]

133. MURPHY, *supra* note 71, at 191.
134. *See id.* at 9.
135. *See infra* Subsection IV.B.2.
136. *See infra* Subsection IV.B.3.
137. *See infra* Subsection IV.B.3.

TABLE 2

Deviant Wrongdoing	**Normalized Wrongdoing**
• Wrongdoing is exceptional	• Wrongdoing is empirically regular occurrence
• Individuals do not have to orient lives around wrongdoing	• (some) Individuals do have to orient lives around wrongdoing
• Wrongdoing is fundamentally about bad apples and deviance. Wrongdoing does not reflect problems with the broader structural context for interaction	• Wrongdoing is fundamentally about rotten barrels. Wrongdoing reflects structural inequality which often has cumulative, intergenerational, material consequences
• No Impunity— State has capacity and political will to address via responses like punishment	• Impunity exists— State does not have capacity and political will to address via responses like punishment; wrongdoing is political because state directly participates or because of impunity that exists as a function of the lack of state action
• Non-state actor punishes because within their domain of authority	• Non-state actor responds because of vacuum created by the state

IV. DISTINGUISHING THE PURPOSE OF PUNISHMENT

In this Part, we lay out the rationale for 'ordinary' state and non-state forms of punishment, which is in response to 'deviant' wrongdoing. The rationale explains a) why and b) how punishment is taken to solve the problem deviant wrongdoing generates and c) the questions of standing and justifiability that defenses of ordinary punishment must answer. We then turn to the contrasting rationale for both state and non-state 'transitional' punishment in response to 'normalized' wrongdoing. Our discussion in these two Parts underscores the very different standards we should use to evaluate punishment of the ordinary versus transitional kind, and the distinctive questions punishment by non-state actors raises in both cases.

A. Ordinary Punishment

1. State

We begin with some hypothetical examples of punishment. Take, for instance, an adult who hires a hitman to kill his parents because he expects to receive an inheritance. The police investigate and determine he is a suspect. After a trial, he is convicted and incarcerated. Such crimes are aberrational, but they do happen on occasion.[138] Or take a college student who sells marijuana to her classmates. While the state permits marijuana use under an extensive licensing scheme, it criminalizes the sale of marijuana outside that regime. Since the student is a first-time offender, the state agrees to a plea deal in which she admits guilt, and receives community service and six months of probation instead of incarceration.

Criminal punishment, the state version of punishment, is meted out by a government in response to violations of the criminal law by a perpetrator.[139] To explain why punishment is permissible, theories must address four issues.[140] They must show a) *why certain wrongs are the government's business*.[141] Put differently, theories of state punishment must explain what the proper scope of criminalization consists of. Theories must explain b) *why the intentional infliction of suffering constitutes an appropriate method for the state to deal with wrongdoing*.[142] Punishment is prima facie problematic in virtue of the intentional infliction of suffering.[143] This raises skeptical claims that punishment simply involves an infliction of a second wrong, in virtue of the deprivation a perpetrator intentionally experiences.[144] Justifications of criminal punishment must normatively distinguish the suffering constitutive of punishment as permissible from the suffering constitutive of the act that is judged wrongful.[145] Punishment *by the state* is prima facie problematic in virtue of the deprivation it entails.[146] Theories of punishment must explain why the infliction of punishment is compatible with the recognition of the equality of all legal subjects on the part of the state.[147]

Accounts of punishment address the questions bound up in (a) and (b) by appealing to the deterrent, retributive, and rehabilitative functions that punishment can serve, all of which are important goals for governments to pursue.[148]

138. Karen K. Ho, *Jennifer Pan's Revenge: The Inside Story of a Golden Child, the Killers She Hired, and the Parents She Wanted Dead*, TORONTO LIFE (July 22, 2015), https://torontolife.com/city/jennifer-pan-revenge/ [https://perma.cc/9XDP-NX5Q].

139. *See* Hoskins & Duff, *supra* note 9.

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

141. *Id.* at 217.

142. *Id.*

143. *See* Hoskins & Duff, *supra* note 9.

144. *See id.*

145. *See id.*

146. *See id.*

147. Hoskins & Duff, *supra* note 9; Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1698 (1992).

148. *See* Hampton, *supra* note 147, at 1659; Hoskins & Duff, *supra* note 9; MOORE, *supra* note 69, at 104.

Punishment is claimed to fill a wide range of normative goals such as deterrence, retribution, incapacitation, or moral education, which the state is assumed to be well-positioned to promote.[149] Suffering is permissible, it is claimed, because of the way in which wrongdoing itself removes the normal restriction against the intentional deprivation of liberty.[150] The state is often claimed to have standing in virtue of the public nature of the wrongs in question and in virtue of its impartiality and representative character.[151] In theories of criminal punishment, the state is conceived of as a neutral arbiter of disputes, though not neutral with respect to wrongdoing (which is being condemned).[152] By being impartial, the state is best positioned to mete out the amount of punishment retribution demands or deterrence requires.[153] As an authorized representative of the community, the state is best positioned to vindicate and reinforce societal values, including the value of the victim and the respect she is owed, which the commission of wrongdoing challenges and denies.[154]

Justifications of punishment above point to further questions in need of answer, including c) *how much punishment is permissible in any given case*.[155] It is partly by appeal to the purpose(s) of punishment, such as deterrence or retribution, that the amount of justified punishment is determined.[156] Theories also agree that for punishment to be permissible, it must be inflicted on a perpetrator of wrongdoing.[157] Robust discussion of d) *what due process entails* is necessary to ensure that criminal trial and the verdict reached upon its conclusion reasonably track guilt or innocence of the alleged perpetrator.[158]

Objections to theories of punishment challenge answers offered to each or all of the questions above.[159] For example, empirical doubts as to the effectiveness of punishment in achieving its core end (e.g., deterrence) as a general matter or with respect to certain crimes have been raised, highlighting the differences between sentencing and crime rates in the United States and other countries.[160] The United States has the longest sentences relative to other countries, which, according to the deterrence theory, should be more effective in deterring crime.[161] However, crime rates for violent crimes in a number of other countries

149. Hoskins & Duff, *supra* note 9; Hampton, *supra* note 140, at 214; Hampton, *supra* note 147, at 1700; Morris, *supra* note 73, at 477; MOORE, *supra* note 69, at 104; Husak, *supra* note 15, at 103.

150. Hoskins & Duff, *supra* note 9.

151. *See id.*; Hampton, *supra* note 147, at 1692–93.

152. Hampton, *supra* note 147, at 1692–93.

153. *Id.*

154. *Id.* at 1694.

155. *See id.*

156. Hoskins & Duff, *supra* note 9.

157. *See id.*

158. *See id.*

159. Hampton, *supra* note 147, at 1695.

160. Daniel S. Nagin, *Deterrence in the Twenty-First Century*, *in* CRIME AND JUSTICE IN AMERICA, 1975–2025 202 (Michael Tonry ed., 2013).

161. Lila Kazemian, *Long Sentences: An International Perspective*, COUNCIL OF CRIM. JUST. (Dec. 2022), https://councilоncj.foleon.com/tfls/long-sentences-by-the-numbers/an-international-perspective [https://perma.cc/SYK4-4HY3].

are lower than for the United States.[162] Proponents of restorative justice question the necessity of incarceration in dealing with crime, pointing to the effectiveness of restorative practices where victims and perpetrators deliberate over and agree to a form of amends that the perpetrator can engage in to repair the relationship with the victim and community ruptured by crime.[163] Critics of overcriminalization raise concerns about the increasing scope of wrongs that are treated as *criminal* wrongs in the United States.[164] Critiques focusing on the disproportionate use of plea bargaining in the United States and racial discrepancies in sentencing, as well as representation of prosecutors and judges, raise doubts about the defensibility of due process as it exists in practice.[165]

2. Non-state

Non-state ordinary punishment occurs in contexts where someone other than a participant in a state criminal proceeding has the authority or standing to impose sanctions for what we called in Part III deviant wrongdoing. One critical question non-state punishment raises concerns *the basis for claiming authority or standing to punish*.[166] One basis may be that an individual occupies a hierarchical position within an institutionally defined role that is well-defined.[167] Examples include parents with respect to their children and employers with respect to their employees.[168] Take, for instance, a child who sneaks out of the house and, upon returning home, is discovered to have been drinking and driving. Her parents ground her for a month. Standing to punish by the parents seems fairly uncontroversial.[169] Or take an employee who uses foul language in the workplace. After receiving a warning for using language prohibited by company policies, the employee curses again in a company meeting. The company follows disciplinary procedures outlined in the employee handbook and fires the employee. Again, the standing to punish seems obvious.[170]

162. *Id.*

163. Tony F. Marshall, *Out of Court: More or Less Justice?*, *in* INFORMAL JUSTICE? 1, 46 (Roger Matthews ed., 1988); John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 60 (1999); Lode Walgrave, *Imposing Restoration Instead of Inflicting Pain: Reflections on the Judicial Reaction to Crime*, *in* RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS? (Andrew von Hirsch, Julian V. Roberts, Anthony E. Bottoms, Kent Roach & Mara Schiff eds., 2003).

164. HUSAK, *supra* note 68, at 5.

165. SUJA THOMAS, THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES (2016); Shasta N. Inman, *Racial Disparities in Criminal Justice: How Lawyers Can Help*, AM. BAR ASS'N (Sept. 18, 2020), https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/public-service/racial-disparities-criminal-justice-how-lawyers-can-help/ [https://perma.cc/6V9J-PC2B].

166. Linda Radzik, *Practicing Social Punishment*, *in* THE ENFORCEMENT OF MORALITY IN EVERYDAY LIFE 1, 60 (2020).

167. *Id.* at 61.

168. *See id.*

169. *Id.*

170. Radzik, *supra* note 166, at 60.

But many instances of social punishment are not instances in which an individual occupying a hierarchical and well-defined role is inflicting punishment. Friends and spouses may seek to punish each other for wrongful conduct. So too may citizens seek to sanction or punish fellow citizens for perceived egregious conduct. Take, for instance, an individual who received a ride home after a social function from a friend. The individual later learned the friend had been drinking heavily and was in no shape to drive. The individual decides to punish the friend's deception and unsafe behavior by ending the friendship. Or what of the third party who, upon learning of the incident, also chooses to end a friendship with the offender? These sorts of examples require a different basis for explaining the standing of the punisher to punish.[171] Such an explanation may, as in the case of state punishment, appeal to the fact that the punishing person is a representative of values in need of vindication.[172] However, that explanation must further articulate the basis on which the individual can claim to be a representative, the values in question, and how those values are threatened by wrongdoing. The values at play will be relative to the particular sort of institution or relationship in question (e.g., the family or a company) rather than broader societal values in the case of the state.

While analogous questions about the justification of punishment can be asked in the case of both state and non-state punishment, the background concerns generating the need for justification are not identical. For example, a) *which wrongs are the business of particular non-state actors* and related questions of *standing* will need to be answered on a basis different than that provided by for the wrongs of business to the state.

Non-state ordinary punishment generally occurs with respect to wrongs that it is not the business, or at the very least not the exclusive business, of the state to address;[173] such wrongs instead properly fall to non-state actors to deal with.[174] For instance, both parents and the state have interests in the teenager who is drinking and driving, but their interests may not be identical.[175] And only parents have a clear (or obvious) interest in addressing the fact that the child deceived her parents about the incident.

Furthermore, not all non-state actors will have a legitimate interest in the wrongs that fall outside the purview of the state.[176] The actions by a teenage employee that are of concern to an employer are not co-extensive with the actions by that same individual with respect to her parents. Accounts of social punishment must delimit which 'wrongs' are the business of particular non-state actors to address. In ordinary cases, the explanation will not appeal to the public interest

171. RADZIK ET AL., *supra* note 26, at 3.

172. Mendlow, *supra* note 15, at 251.

173. *See* Gabriel S. Mendlow, *The Moral Ambiguity of Public Prosecution*, 130 YALE L.J. 1146, 1151 (2021).

174. *See id.* at 1160.

175. *See id.* at 1171.

176. *See id.* at 1154.

of the wrongs in question, as that rationale is used to explain the cases that fall in state punishment.

Even diffuse individuals who are simply members of a community but do not constitute a hierarchical representative of it or a delegated authority may still have standing to punish. However, the further out we move from cases of hierarchical representation or delegation, the more we worry about standing and justification. For instance, philosopher Gabe Mendlow has recognized the prima facie legitimacy of such removed persons to punish but remains deeply concerned about the empirical consequential consequences.[177] He suggests that conventional norms of interpersonal morality place victims at the center, but he also acknowledges that a third party "without standing or with inferior standing might be justified if the intervention would produce substantial good or avoid substantial harm or injustice."[178] Similarly, Linda Radzik allows for the possibility, but only when individuals doing the punishment have the ability to design a punishment that would allow for the accused to reclaim their role in the moral community.[179]

Settling on the possibility of actors enjoying the standing to engage in nonstate transitional punishment does not answer all justificatory issues. A related but narrower question asks when, if ever, can someone other than the state engage in punishment that specifically involves liberty deprivations? Philosopher Douglas Husak suggests that states might have "sole authority to punish beyond a specified limit of severity"[180] and Gabe Mendlow builds on this intuition by suggesting that "sanctions that constitute prima facie rights violations are the exclusive or near-exclusive province of the state."[181] The exceptions are parents and guardians,[182] and potentially those who exist outside of a functioning society.[183] In other words, individuals or institutions may have the right to punish, but they do not have the right to confine and kill people "solely to inflict stigmatizing deprivations."[184]

The next question, b) *why social punishment is an appropriate response to wrongdoing* may, but need not, track the familiar sorts of rationales for state punishment. Put differently, the function of social punishment may, but need not, overlap with the retributive, deterrent, and rehabilitative goals of public punishment.[185] Social punishment may also include functions not associated with state punishment.[186] For instance, philosopher Linda Radzik emphasizes the role of

177. *Id.* at 1165–71.

178. *Id.* at 1160.

179. *See* RADZIK ET AL., *supra* note 26, at 41–45.

180. Husak, *supra* note 15, at 101.

181. Mendlow, *supra* note 15, at 257.

182. *Id.* at 258.

183. *Id.* at 260.

184. *Id.* at 261.

185. *See* RADZIK ET AL., *supra* note 26, at 56–59 (discussing the form and justifications of social punishment); Radzik, *supra* note 35, at 114–18; Linda Radzik, *Gossip and Social Punishment*, 93 RES PHILOSOPHICA 185, 193 (2016).

186. Radzik, *supra* note 35, at 108.

social punishment in prompting wrongdoers to make amends.[187] Such a goal seems to lie somewhere between traditional public punishment goals of rehabilitation and restitution.

How much punishment arises as an issue for non-state punishment in ways that are especially acute. Even those philosophers that allow for a communicative account of desert acknowledge that a wrongdoer "deserves to be directly addressed with message of condemnation, which is *appropriate* to his degree of culpability."[188] Part of the rationale for state punishment stems from the limited capacity of private actors to adequately determine grounds for guilt absent the due process considerations to which criminal justice systems are to be subject.[189] Similarly, the ability of private actors to inflict proportional punishment is more difficult to establish; state punishment is often defended on the grounds that private justice is likely to be excessive relative to the amount of punishment justified in a particular case.[190]

To argue that a punishment is or is not proportionate requires a standard for what constitutes proportionate punishment.[191] Of course, agreement on what is proportionate plagues even state-based punishment, with the uproar over sentencing guidelines being a good example of how thorny proportionality issues can be.[192] The problem is exacerbated in non-state contexts when even less clarity exists.[193] One dimension may relate to the number of people imposing the punishment and how that relates to the aggregate effect of the sanction.[194] For instance, political scientist Harrison Frye argues that public shaming "tends toward over-punishment" because of its mass nature.[195] The reasons include the failure (or inability) to coordinate, meaning that individuals may not know whether others have already adequately punished in a setting and that no one may have the authority or capability to address over-punishment once it occurs.[196]

Even when punishment does not involve liberty deprivations, it can be deeply harmful to individuals.[197] And given the often-diffuse nature of non-state punishment, the nature of the number of possible punishers increases the risk of disproportionate punishment.[198] Think of the concerns related to cancel culture in an age of social media in which one might be subject to hard treatment by a

187. *Id.* at 108–11.

188. RADZIK ET AL., *supra* note 26, at 30–31 (discussing communicative theorists Andrew von Hirsch & R. A. Duff) (emphasis added).

189. Radzik, *supra* note 185, at 200.

190. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 6–7 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1689).

191. Harrison Frye, *The Problem of Public Shaming*, 30 J. POL. PHIL. 188, 194 (2022).

192. *See* Mendlow, *supra* note 173, at 1184 n.79.

193. Frye, *supra* note 191, at 192 (suggesting that even though clear cases may exist, social norm cases tend toward a lack of clarity).

194. *Id.* at 194.

195. *Id.* at 191.

196. *Id.* at 194–95.

197. JON RONSON, SO YOU'VE BEEN PUBLICLY SHAMED, 25, 29, 31, 34–35, 40, 59, 79–80, 209–213 (2015) (describing the profound personal effects of losing one's reputation and/or a vocation on wrongdoers' publicly shamed).

198. Frye, *supra* note 191, at 191.

vast number of potential employers, friends, and acquaintances.[199] Even if one agrees the wrongdoer deserves significant harsh treatment, the imposition by many can be too much.[200] On these grounds, philosopher Linda Radzik has argued that even if everyone has the entitlement to punish any type of moral wrongdoing, this entitlement can and ought to be limited.[201] In addition to the harms social punishment causes to the intended recipient, the collateral effects can be significant as well.[202] Another is to have a "strong presumption against public shaming in mass contexts" and to "limit representative authority to enforce a norm to a smaller circle around the norm violator."[203]

In terms of *due process*, some degree of procedural fairness seems intuitively appropriate and justified in cases of non-state punishment to ensure that the person being punished merits punishment in virtue of having done wrongdoing without justification or excuse.[204] This intuitive requirement seems specific to punishment but not necessarily other forms of social response. Disassociating, for example, is something to be done by an individual at their discretion without the need to inform the subject of disassociation of the reasons for disassociation; moreover, it need not be done only in cases where the object of disassociation has committed a wrong.[205] Whereas in punishment, establishing guilt of wrongdoing seems important, and given the inherently expressive nature of punishment, communication of what is being done (namely, punishment) and why is essential.

However, what exactly such "due process" requires is far from clear. Given the seriousness of punishment, we ought to want to minimize errors. Of course, no system of justice is perfect, and error costs in both directions are inevitable. However, most democratic systems aim to minimize the error costs of false guilt determinations even as they allow for their existence.[206] In a non-state system, when guilt is determined in the "court of public opinion," or by evidence provided by victims, witnesses, journalists, or other neutral third parties, or even by circumstance, we still want and expect judgment to come only after some level of certainty about the guilt of the accused was reached.[207] In addition, before non-state punishment is imposed, the accused ought to have the opportunity to

199. *Id.* at 188.

200. *See* Pac. Legal Found., *Jonathan Haidt, Nadine Strossen, and Eugene Volokh Discuss Cancel Culture and Free Speech*, YOUTUBE (Jan. 26, 2021), https://www.youtube.com/watch?v=TYVUz4HtqTQ [https://perma.cc/23F9-WMGX] (noting that social death imposed by cancel culture can lead to suicidal ideation).

201. RADZIK ET AL., *supra* note 26, at 63.

202. RONSON, *supra* note 197, at 83 (noting extreme public shaming "destroys souls, brutalizing everyone, the onlookers included, dehumanizing them as much as the person being shamed").

203. Frye, *supra* note 191, at 205.

204. *See* Radzik, *supra* note 35, at 114.

205. *See, e.g.*, Thomas H. Khullar, Miriam H. Kirmayer & Melanie A. Dirks, *Relationship Dissolution in the Friendships of Emerging Adults: How, When, and Why?*, 38 J. SOC. & PERS. RELATIONSHIPS 3243, 3245 (2021) (describing, for instance, friendships as voluntary relationships that may be ended unilaterally).

206. Matteo Rizzolli & Margherita Saraceno, *Better that Ten Guilty Persons Escape: Punishment Costs Explain the Standard of Evidence*, 155 PUB. CHOICE 395, 396 (2013).

207. *See, e.g.*, HARVEY A. SILVERGLATE & JOSH GEWALB, FIRE'S GUIDE TO DUE PROCESS AND CAMPUS JUSTICE 41–53 (2014) (articulating the importance of due process for private institutions' disciplinary processes even when such processes are not mandated by law).

respond. They ought to be able present evidence to dispute the factual claim, such as the action in question did not happen or issues of mistaken identity,[208] as well as the relationship between the action and whether it is being mischaracterized to violate rules and norms when it does not[209] or to introduce excuses or reasons to mitigate punishment.[210]

Second, the method of determination ought to be fair given the circumstances. For instance, when the state explicitly delegates authority to punish, the constraints of due process and impartiality ought to attach, but it would be "intolerably intrusive for the state to hold parents and private institutions answerable to these constraints."[211] But in any event, basic fair treatment ought to apply in non-state transitional punishment, which would include making the target aware of the reasons and evidence for punishment, providing an opportunity to rebut and present excuses or mitigating factors, and offering decision makers willing to consider such evidence.

Given the nature of the sanctions, as they get more significant, so too should the amount of process offered to ensure fairness. One element of fairness might relate to notice. If no agreement exists about whether certain behavior is a violation of a community's rules or norms, we worry about punishment. In settings where a large number of individuals have standing to punish such violations, the "increasing scale introduces the likelihood of being subject to enforcement that one reasonably disagrees with."[212]

One possibility is to have some form of accountability for process defects and errors. This could relate to an ability to appeal the judgment of the community or accountability for enforcers who engage in inappropriate enforcement.[213] Of course, not all such appeals must mimic the full process of a criminal trial. Even in the legal setting, American courts have recognized that the process due under the Fifth Amendment varies based on the nature of the deprivation, and the court of the right is the opportunity to be heard "at a meaningful time and in a meaningful manner."[214] We think the guideposts in *Matthews v. Eldridge* provide helpful insight when adapted to a non-state setting: a consideration of the private interest affected by punishment, "the risk of an erroneous deprivation of such interest through the procedures used," and the value of particular procedural safeguards instead of the individual or the community's interests that additional process would involve.[215]

208. Frye, *supra* note 191, at 196.

209. RONSON, *supra* note 197, at 111–16 (discussing instances of mass social media shaming where shamers misunderstood or mischaracterized the underlying activity).

210. *See* Mendlow, *supra* note 173, at 1166.

211. Helen Brown Coverdale & Bill Wringe, *Non-Paradigmatic Punishments*, 17 PHIL. COMPASS 1, 8 (2022).

212. Frye, *supra* note 191, at 193.

213. *Id.* at 203.

214. Matthews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Marzo, 380 U.S. 545, 552 (1965)).

215. 424 U.S. at 33.

Objections to social punishment in particular cases may concentrate on whether non-state punishment is indeed effective in achieving its goals. Skeptics of parental punishment, for example, may wonder if grounding as a social practice is counterproductive in deterring future wrongdoing.[216] Corporal punishment is widely regarded as disproportionate and cruel.[217] Objections to overreach on the part of particular non-state actors can point to the lack of standing of such actors to deal with certain wrongs; friends may disagree with each other's parenting philosophy, but the attempt to criticize the way another parents is often viewed as morally out of bounds.[218]

In sum, state punishment as a response to ordinary wrongdoing is prima facie concerning because hard treatment seems to be outside the boundaries of what legitimate states may do.[219] Non-state punishment raises puzzles about the basis on which any non-state actor can claim the standing to *punish*,[220] and about the kind of normative restrictions permissible punishment must meet.[221]

B. Transitional Punishment

1. Amnesty

Before analyzing transitional justice-oriented punishment for normalized wrongdoing, it is first necessary to discuss amnesty. Amnesty is the most common transitional justice response to normalized wrongdoing[222] and the reasons that explain why amnesty is so common shape debates over criminal trial and punishment for normalized wrongdoing.[223]

An amnesty is "an extraordinary legal measure whose primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons in respect of designated types of offenses irrespective of whether the persons concerned have been tried for such offenses in a court of law."[224] An amnesty is not a pardon, because it can be issued prior to a conviction.[225] It is not a reduced sentence, since, once granted, it eliminates sentences and precludes sentences from being issued.[226] Amnesties are not statutes of limitations, since they can be issued while criminal trial and punishment

216. *See* Radznik, *supra* note 185, at 194.

217. *See Corporal Punishment and Health*, WORLD HEALTH ORG. (Nov. 23, 2021), https://www.who.int/news-room/fact-sheets/detail/corporal-punishment-and-health [https://perma.cc/7QRV-ZHN5].

218. *See* Frye, *supra* note 191, at 198.

219. HUSAK, *supra* note 68, at 92.

220. *See* Husak, *supra* note 15, at 109–10.

221. *See id.* at 110.

222. MARK FREEMAN, NECESSARY EVILS: AMNESTIES AND THE SEARCH FOR JUSTICE 19 (2009).

223. *See id.*

224. *Id.* at 13.

225. *Id.* at 14.

226. *Id.*

remain legally permissible avenues.[227] Nor is it a status-based immunity, like immunity for heads of states, or a function of prosecutorial immunity.[228]

In her Amnesties, Conflict, and Peace Agreement Database, Louise Mallinder documents 540 amnesties in over 130 countries from 1945–2011; 289 amnesties were introduced from 1990–2016 alone.[229] One familiar example of an amnesty is the South African Truth and Reconciliation Commission's (TRC) amnesty provision.[230] Required as part of the negotiations to end apartheid, the TRC's amnesty provision was open to members of the South African security forces or armed anti-apartheid groups who committed or contributed to killing, abduction, torture, and severe ill-treatment from 1960–1994.[231] Amnesty, including immunity from civil or criminal liability, was granted to those who fully disclosed to the TRC crimes in which they were implicated and could show the commission of crime was for political reasons.[232]

Unsurprisingly, amnesty is controversial.[233] Put bluntly, amnesty seems to reinforce impunity; instead of providing accountability, amnesty seems to preclude it.[234] Lines of criticism articulate what this failure of accountability entails.[235]

One general line of criticism is that amnesty is an impediment to trials and the justice those trials achieve.[236] A common strategy for criticizing amnesties is to point to central normative goals of punishment and explain why amnesty provisions are inimical to those goals.[237] More specifically, critics point out that amnesty is the functional opposite of retribution, avoids opportunities for the rehabilitation punishment provides, risks incentivizing rather than deterring future wrongdoing, and puts societies at risk by failing to protect citizens from offenders who roam free.[238]

A second line of criticism of amnesties claims that amnesties undermine normative goals more specifically associated with transitional justice.[239] The commonly recognized five pillars of transitional justice include establishing the

227. *Id.*

228. *Id.* at 15.

229. Louise Mallinder, *Amnesties, Conflict and Peace Agreement (ACPA) Dataset*, UNIV. OF EDINBURGH PEACE AGREEMENT DATABASE, https://www.peaceagreements.org/amnesties/ (last visited Jan. 16, 2024) [https://perma.cc/H3SD-SBHT].

230. *See* SOUTH AFRICAN TRUTH AND RECONCILIATION COMM'N, *supra* note 89; David Dyzenhaus, *Survey Article: Justifying the Truth and Reconciliation Commission*, 8 J. POL. PHIL. 470, 470 (2000).

231. *The Committees of the TRC*, TRUTH & RECONCILIATION COMM'N, https://www.justice.gov.za/trc/trc-com.html (last visited Jan. 16, 2024) [https://perma.cc/4S6X-SUCK].

232. Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)*, 32 DIACRITICS 33, 38 (2002).

233. Juan Espindola, *The Case for the Moral Permissibility of Amnesties: An Argument from Social Moral Epistemology*, 17 ETHICAL THEORY & MORAL PRAC. 971, 977 (2014).

234. *Id.* at 972.

235. *See id.*

236. FREEMAN, *supra* note 222, at 19–20; LOUISE MALLINDER, AMNESTY, HUMAN RIGHTS AND POLITICAL TRANSITIONS: BRIDGING THE PEACE AND JUSTICE DIVIDE 7 (2008).

237. MALLINDER, *supra* note 236, at 7.

238. FREEMAN, *supra* note 222, at 20; MALLINDER, *supra* note 236, at 7.

239. FREEMAN, *supra* note 222, at 19.

truth about wrongdoing (including identities of perpetrators and victims, causes and consequences of wrongdoing, and recommendations for how to avoid similar wrongdoing in the future); accountability for perpetrators; reparations for victims; conditions for non-recurrence; and memorialization.[240] In particular, amnesty is claimed to undermine the pursuit of the *truth* about wrongdoing by precluding uncovering the truth that criminal trials would otherwise produce.[241] Amnesty can impede *justice for victims*, critics worry, in cases where there is a prohibition on the pursuit of compensation by victims from perpetrators.[242] Finally, amnesty undermines *the rule of law*, often seen as critical for non-recurrence:[243] whereas prosecution can shore up confidence in the state's ability and willingness to prosecute violations of the law, amnesty undermines such confidence.[244]

Defenders of amnesty directly counter these worries. The lines of response offered in defense of amnesty are important not only for understanding the conditions under which amnesty could be justified.[245] Such defenses also underscore factors that shape debates about prosecution and punishment for normalized wrongdoing.[246]

Key to understanding how amnesty is defended is recognizing that the presence of impunity shifts the presumption surrounding the moral defensibility of responses to wrongdoing that do occur either on the part of the state or on the part of non-state actors.[247] Put differently, the orienting presumption among individuals in a community where normalized wrongdoing exists is characteristically that any response to normalized wrongdoing will be morally flawed and ineffective. Responses to normalized wrongdoing are highly political, and efforts to end impunity for normalized wrongdoing are fraught and fragile undertakings.[248] Against a background of diverging understandings of the past (e.g., what wrongs occurred and by whom) and a shift in power, transitional justice processes are often labeled by those opposed to them as political witch hunts or mere political vendettas.[249] It is thus necessary to establish the *justice* of processes that occur, showing that they are not reducible to the exercise of political power

240. Fabián Salvioli (Special Rapporteur on the Promotion of Truth, Just., Reparation and Guarantees of Non-Recurrence), *Memorialization Processes in the Context of Serious Violations of Human Rights and International Humanitarian Law: the Fifth Pillar of Transitional Justice*, U.N. Doc. A/HRC/45/45 (July 9, 2020).

241. FREEMAN, *supra* note 222, at 19.

242. *Id.* at 40.

243. *Id.* at 22.

244. *Id.*

245. *Id.* at 23.

246. *Id.*; MALLINDER, *supra* note 236, at 17; Espindola, *supra* note 233, at 977; Patrick Lenta, *Transitional Justice and the Truth and Reconciliation Commission*, 47 THEORIA: J. SOC. & POL. THEORY 52, 53 (2000); Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, *in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 68, 74 (Robert Rotberg & Dennis Thompson eds., 2000).

247. *See* David A. Crocker, *Truth Commissions, Transitional Justice, and Civil Society*, *in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 99, 112 (Robert Rotberg & Dennis Thompson eds., 2000).

248. *See id.*

249. Nir Eisikovits, *Transitional Justice*, STAN. ENCYC. OF PHIL. ARCHIVE (Apr. 4, 2014), https://plato.stanford.edu/archives/fall2017/entries/justice-transitional/#CriWarCriTri [https://perma.cc/9MAY-A4T2].

against the 'losers,' but are instead concerned with pursuing moral objectives like truth and reparation.[250] Trials must be distinguished from 'victor's justice,' and reparations from 'blood money.'[251] Moreover, the efficacy of processes of transitional justice in achieving any moral objectives is in doubt, given the very limited impact transitional justice processes have had relative to the aspirational rhetoric that accompanies the field and practice.[252] Far from being transformative, skeptics argue that transitional justice processes end up simply reinforcing existing patterns of interaction and power dynamics within communities.

Against this background, one response to the first line of criticism (that amnesty forecloses the normative goals of trial and punishment) is skepticism about the efficacy of trial and punishment.[253] Trials are most effective when needed the least, that is, where the occurrence of wrongdoing is exceptional and not normalized, and the spoiler group is relatively weak.[254] In such conditions, it is plausible to believe that trials may deter the few considering similar conduct.[255]

By contrast, as a response to normalized wrongdoing, the deterrent effect is intuitively weaker and possibly counterproductive.[256] The deterrent effect is arguably weaker because the capacity of any criminal justice system to mete out punishment to a sufficient number of perpetrators to make punishment a credible threat is far outstripped by the possible number of potential perpetrators to prosecute. Normalized wrongdoing occurs against a background of impunity that exists because of the lack of capacity and/or political will to hold wrongdoers accountable.[257] This further weakens the potential deterrent effect of punishment of a few. In cases where the spoiler group is strong, punishment may simply incentivize the continuation of violence to avoid accountability or violence in response to the few held to account.[258]

Another line of response challenges skepticism about the ability of amnesty to promote the values associated with punishment and transitional justice more broadly.[259] Amnesty may require an acceptance of personal responsibility for wrongdoing, if applicants need to individually apply and publicly disclose crimes as conditions for receiving amnesty, and so achieve the kind of accountability retribution seeks.[260] Amnesty can serve as an avenue for the rehabilitation of perpetrators if amnesty is coupled with a requirement of public service.[261] Amnesty conditioned on disarmament, exile, relocation, or state monitoring may

250. FREEMAN, *supra* note 222, at 19.

251. Pablo de Greiff, *Theorizing Transitional Justice*, 51 NOMOS: TRANSITIONAL JUST. 31, 36 (2012).

252. Dustin Sharp, *What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice*, 13 INT'L J. TRANSITIONAL JUST. 570, 571 (2019); PADRAIG MCAULIFFE, TRANSFORMATIVE TRANSITIONAL JUSTICE AND THE MALLEABILITY OF POST-CONFLICT STATES 44 (2017).

253. *See* MCAULIFFE, *supra* note 252, at 44–45.

254. FREEMAN, *supra* note 222, at 24.

255. *Id.*

256. *Id.* at 20–21.

257. *Id.* at 21.

258. *Id.* at 104.

259. *Id.* at 20–23.

260. *See id.* at 22.

261. *Id.* at 21–22.

effectively protect society from perpetrators, thereby achieving to some measure the deterrent goals associated with punishment.[262]

Amnesty can play a critical role in ending conflict and the human rights violations occurring because of conflict.[263] In both South Africa and Uruguay, amnesty was part of the agreement that enabled a transition in the first place.[264] Amnesty may help end terror, which can be especially important to victims who suffer from such terror daily and have non-instrumental value for that reason.[265] Amnesty may also serve as a functional precondition for other processes of transitional justice.[266] While there are cases of efforts at trial and punishment while conflict is ongoing, in contexts such as Ukraine and Syria, it is more common for transitional justice processes to be established when conflict is not ongoing.[267] Insofar as you need to end terror to be able to begin to address its legacy through mechanisms of accountability, amnesty may be a necessary condition for transitional justice.

Beyond its role in ending conflict, amnesty can contribute to truth by removing an incentive to destroy evidence of wrongdoing the threat of prosecution creates.[268] It may not threaten the rule of law if amnesty is seen as an extraordinary measure, and not reflective of how responses to wrongdoing will be generally handled by the state moving forward.[269]

Such defenses of amnesty raise empirical and normative questions. Empirical issues concern how best to describe the incentives of potential perpetrators of specific forms of wrongdoing and how incentives change when amnesty is introduced;[270] how amnesty is perceived in particular contexts (e.g., as extraordinary or not);[271] and how permanent is the cessation of violence that amnesty may enable.[272]

The core normative question amnesties pose is *when and for what reasons it is permissible for a state to intentionally preclude the kind of accountability trial and punishment achieve*? While amnesties are characteristically offered against a background of pervasive impunity for wrongdoing, they are not themselves impunity.[273] Impunity occurs against the backdrop of a lack of state action

262. *Id.* at 22.

263. *Id.* at 75; Louise Mallinder, *The Role of Amnesties in Conflict Transformation*, *in* THE EFFECTIVENESS OF INTERNATIONAL CRIMINAL JUSTICE 1, 2 (Cedric Ryngaert ed., 2009); Max Pensky, *Amnesty on Trial: Impunity, Accountability, and the Norms of International Law*, 1 ETHICS & GLOB. POL. 1, 4, 7 (2008).

264. Mallinder, *supra* note 263, at 15.

265. *Id.* at 16–17.

266. *Id.* at 3.

267. BETH VAN SCHAACK, IMAGINING JUSTICE FOR SYRIA 177, 397 (2020); Louise Mallinder, *The Role of Transitional Justice in Ukraine*, QUEEN'S POL'Y ENGAGEMENT (April 4, 2022, 5:04 PM), http://qpol.qub.ac.uk/the-role-of-transitional-justice-in-ukraine/ [https://perma.cc/4SB7-UHA7]; Kateryna Busol & Rebecca Hamilton, *Transitional Justice in Ukraine: Guidance to Policymakers*, JUST SEC. (June 2, 2022), https://www.justsecurity.org/81719/transitional-justice-in-ukraine-guidance-to-policymakers/ [https://perma.cc/94CY-J2R8].

268. Pensky, *supra* note 263, at 12; FREEMAN, *supra* note 222, at 24.

269. *See* FREEMAN, *supra* note 222, at 22.

270. Pensky, *supra* note 263, at 18.

271. *Id.* at 25–26.

272. *Id.* at 25.

273. *See id.* at 2.

or ineffective state action.[274] By contrast, amnesties involve an explicit choice by a state to forgo certain routes to accountability.[275]

The lines of argument in defense of amnesty provide resources for explaining when it is permissible for states to forgo punishment, but are, as they stand, incomplete in explaining why the state that offers amnesty has the exclusive right to punish. Instead, amnesty's role in ending conflict might point to conditions that must be, but are not yet, in place for the state to enjoy, both as a de jure and as a de facto matter, the exclusive right of force.[276] The capacity of the state to control violence is a condition that must be satisfied for it to enjoy the right of force exclusively.[277] In contexts of ongoing violent conflict, by definition the state does not exercise this control. Thus, amnesty raises the question of which conditions must obtain for a state to enjoy the right to punish exclusively, where conditions implicitly taken for granted as present in accounts of ordinary punishment cannot be assumed to exist in contexts of interest to transitional punishment.

Consider next the claim that amnesty itself can entail a kind of accountability when, for example, it is conditioned upon perpetrators' acknowledgement of their own individual responsibility for wrongdoing.[278] This argument can also be expanded to explain why the state may permissibly forgo the distinctive accountability of punishment. One possible expansion could point to a sense in which amnesty does *not* preclude accountability: as we explain below, amnesty does not preclude non-state forms of accountability.[279] Where formal amnesty at the state level does not prohibit private accountability, amnesty does not foreclose punishment completely.[280]

Other responses to the core normative question of amnesty are no doubt possible. What is important to highlight in the second line of response just sketched is the way it appeals to non-state punishment as filling a gap or void at the level of the state. We return to the question of the relationship between state and non-state responses to normalized wrongdoing below.

2. State

While amnesty is a common response to the normalized wrongdoing of interest to transitional justice, trials and punishment also occur at the international, national, and hybrid levels.

274. *Id.* at 7.

275. *Id.* at 21.

276. Here we mean the right to use force in an armed conflict, rather than in individual self-defense or for non-state punishment such as by a parent to a child.

277. *See* Mallinder, *supra* note 263, at 34.

278. Kent Greenawalt, *Amnesty's Justice*, *in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 189, 189–90 (Robert I. Rotberg & Dennis Thompson eds., 2000).

279. *See* discussion *infra* Subsection IV.B.3.

280. Nir Eisikovits, *Transitional Justice*, STAN. ENCYC. OF PHIL. ARCHIVE, https://plato.stanford.edu/archives/fall2017/entries/justice-transitional/ (Apr. 4, 2014) [https://perma.cc/9MAY-A4T2].

Contemporary discussions of trials in the transitional justice literature often reference the Nuremberg Trials post-World War II.[281] In thirteen trials carried out in Nuremberg, Germany between 1945–1949, defendants—including high-ranking Nazi Party officials and high-ranking military officers along with German industrialists, lawyers, and doctors—were indicted on such charges as crimes against peace and crimes against humanity.[282] The International Military Tribunal for the Far East, commonly referred to as the Tokyo Trials, tried twenty-eight defendants, mostly Imperial military officers and government, between 1946–1948. Seven defendants were sentenced to death by hanging, and sixteen defendants were sentenced to life imprisonment.[283] The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda are more recent examples of ad hoc international tribunals established to deal with international crimes.[284] The International Criminal Court ("ICC") is a permanent body charged with accountability for such wrongs in cases where parties to the Rome Statute are unwilling or unable to prosecute international crimes.[285]

The Trial of the Military Juntas in Argentina is a prominent example of a domestic trial.[286] Nine former military leaders of the junta were convicted in 1985; they were later pardoned by Carlos Menem.[287]

International and criminal trials can work in tandem. After the ICC opened an investigation in Colombia, the Colombian government established the Special Jurisdiction for Peace to deal with war crimes and crimes against humanity, as well as political crimes that did not also constitute international crimes.[288] The ICC closed its investigation in Colombia after determining that the Colombian domestic efforts at accountability satisfied their duties under international law.[289]

State transitional punishment in response to normalized wrongdoing raises similar justificatory questions as punishment for ordinary wrongdoing, but the concerns motivating these general questions are different.

For example, justifications of punishment must explain a) *why certain wrongs are the government's business.* However, unlike for ordinary wrongdoing, this question for normalized wrongdoing is not primarily about the proper scope of criminal law. Instead, the potential for punishment to be effectively ex

281. RUTI TEITEL, TRANSITIONAL JUSTICE 20 (2000); GARY BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 5–6 (2000); Parwez Besmel & Alex Alvarez, *Transitional Justice and the Legacy of Nuremberg: The Promise and Problems of Confronting Atrocity in Post-Conflict Societies*, 11 GENOCIDE STUD. INT'L 182, 183 (2017); Eisikovits, *supra* note 280.

282. Eisikovits, *supra* note 280.

283. *See id.*

284. *See id.*

285. *See id.*

286. *Id.*

287. Jeff Wallenfeldt, *Dirty War*, ENCYC. BRITANNICA, https://www.britannica.com/event/Dirty-War (last visited Jan. 16, 2024) [https://perma.cc/L7HP-QTSC].

288. *See* Press Release, International Criminal Court, Preliminary Examination Colombia (Oct. 28, 2021).

289. *Id.*

post facto is salient.[290] This concern arises when the actions being punished were not always declared illegal or treated as illegal as a matter of practice when the defendant committed the alleged wrongdoing.[291]

Justifications of punishment must also explain b) *why the intentional infliction of suffering constitutes an appropriate method for dealing with wrongdoing by the state*. However, the skepticism motivating this question in the context of normalized wrongdoing stems from concerns about the lack of fit between an individual-oriented response and systemic conditions enabling wrongdoing.[292] As noted in the discussion of amnesty, underpinning worries about punishment as an appropriate method for dealing with normalized wrongdoing is skepticism about the efficacy of punishment.[293] Normalized wrongdoing occurs when there are flawed systems, not simply flawed individuals.[294] While holding the few officials accountable for their role in widespread wrongdoing may be valuable for its own sake, there is no direct line or connection between such accountability and broader systemic change.[295]

In response to these worries, defenses of trials in transitional justice often point to the need to demonstrate that no individual is above the law.[296] Trial and punishment in accordance with international standards are viewed as constituting a break with past practices, in which alleged perpetrators are often disappeared, summarily executed, or otherwise denied effective due process prior to punishment.[297] More fundamentally, trials are used to communicate that certain crimes are impermissible no matter if ordered by an official or 'permitted' by domestic law, thereby helping to draw a line under conduct permitted in the past and permissible in the future, thereby contributing to ensuring 'Never Again.'[298]

However, such defenses of the efficacy of punishment remain controversial. Criminal trials focus on narrow questions concerning the role of alleged perpetrator(s) in a discrete subset of wrongs.[299] This focus does not capture, and indeed can obscure, the broader institutional factors that enabled, incentivized, and/or rewarded wrongdoing committed by many.[300] Individual culpability of perpetrators may contribute to denial among ordinary citizens of their roles in facilitating or benefitting from normalized wrongdoing.[301] The small number of

290. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 619 (1958); Eric Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762, 791 (2004).

291. Posner & Vermeule, *supra* note 290, at 792.

292. *See id*.

293. *See supra* Subsection IV.B.1.

294. *See supra* Section III.B.

295. Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 J.L. & SOC'Y 411, 438 (2007).

296. *See, e.g.*, Richard S. Williamson, *Transitional Justice: The UN and the Sierra Leone Special Court*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 1, 8–9 (2003).

297. IOSIF KOVRAS, GRASSROOT ACTIVISM AND THE EVOLUTION OF TRANSITIONAL JUSTICE: THE FAMILIES OF THE DISAPPEARED 111 (2017).

298. TEITEL, *supra* note 281, at 79–80.

299. *See* Lenta, *supra* note 246, at 65.

300. McEvoy, *supra* note 295, at 438; Alexander Dukalskis, *Interactions in Transition: How Truth Commissions and Trials Complement or Constrain Each Other*, 13 INT'L STUD. REV. 432, 445 (2011).

301. *See* McEvoy, *supra* note 295, at 438.

defendants ever charged or convicted provides dubious grounds for trials serving as a deterrent.[302] The ability of international tribunals to fulfill expressive goals is limited, especially given the distance (geographically, linguistically, and/or culturally) between sites of justice and sites of wrongdoing.[303]

While d) *what due process entails* is generally well understood, satisfying the demands of due process presents distinct challenges for punishment responding to normalized wrongdoing.[304] In fact, due process standards have not always been met in trials responding to normalized wrongdoing; Nuremberg defendants, for example, were denied the possibility of appeal.[305] The existence of a legal basis for linking the actions of defendants to collective crimes has been the subject of ongoing debate, as has worries of a de facto presumption of guilt accompanying trials of the kind listed above.[306] More generally, trials used to pursue transitional justice need to rebut the presumption of 'victor's justice.' This charge gains traction in cases in which only one side is held to account for wrongs committed by both, even if not by both to the same degree. The International Military Tribunal for the Far East in Tokyo tried only Japanese war criminals, who were judged by Allied judges; Allied judges tried only non-Allied officers for crimes in Nuremberg Trials.[307] One-sided justice was the basis of complaint against convictions in the International Criminal Tribunal for Rwanda, when only perpetrators of crimes against Tutsi were prosecuted.[308]

Most fundamentally, the issue of standing to punish normalized wrongdoing is profoundly fraught in ways that standing to punish deviant wrongdoing is not.[309] In the case of domestic trials, standard explanations of why the state has standing to punish do not apply. As noted in Section III.A, a common rationale for the government's standing to address criminal wrongdoing stems from its impartiality and neutrality with respect to the criminal wrongdoing in question. However, this explanation cannot be advanced when the government perpetrated wrongdoing or is otherwise implicated in it, as is the case where normalized wrongdoing takes place.[310]

302. *Id.*

303. PHIL CLARK, DISTANT JUSTICE: THE IMPACT OF THE INTERNATIONAL CRIMINAL COURT ON AFRICAN POLITICS 34 (2018); JELENA SUBOTIĆ, HIJACKED JUSTICE: DEALING WITH THE PAST IN THE BALKANS 132–36 (2009).

304. NANCY ARMOURY COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS 335–39 (2010); NANCY ARMOURY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH 188–91 (2007).

305. Padraig McAuliffe, *Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows?*, 2 HAGUE J. ON RULE L. 127, 144 (2010).

306. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. LAW. REV. 75, 132 (2005).

307. McAuliffe, *supra* note 305, 144–46.

308. Elizabeth Anderson, *Transitional Justice and the Rule of Law: Lessons from the Field*, 47 CASE W. RSRV. J. INT'L L. 305, 311 (2015).

309. *See generally* Stephanos Bibas, *Victims Versus the State's Monopoly on Punishment?*, 130 YALE L.J.F. 857, 857 (2021) (examining the state's monopoly on standing and proposing a role for victims).

310. *See* Camille Lamar Campbell, *Getting at the Root Instead of the Branch: Extinguishing the Stereotype of Black Intellectual Inferiority in American Education, a Long-Ignored Transitional Justice Project*, 38 LAW & INEQ. 1, 22–23 (2020).

International tribunals may be more impartial,[311] and thus meet the conditions laid out in standard accounts of state standing to engage in ordinary punishment.[312] However, international bodies do not obviously have standing to make wrongdoing in particular domestic communities 'their business.'[313]

The ICC's complementarity jurisdiction principle provides a helpful place to look both descriptively and normatively.[314] States founded the ICC with the default that states can and should prosecute war crimes, crimes against humanity, and genocide.[315] States ceded jurisdiction only in those exceptional instances in which the affected states are unwilling or unable to investigate or prosecute.[316]

Multiple overlapping grounds justify the ICC's complementarity principle. First, the understanding that only one body may try a defendant for the same crime protects the accused from double jeopardy problems by limiting prosecutions to either national or international trials, but not allowing both.[317] Multiple trials for the same case in different jurisdictions undermine the finality and conclusiveness of judgments and unjustly subject potential defendants to the "constant threat and anxiety of a renewed prosecution."[318] Second, the ICC's complementarity principle respects the primacy of state sovereignty in the exercise of criminal jurisdiction.[319] While some scholars have begun to question this primacy,[320] most criminal law theorists[321] and the international system still recognize that "[o]ne of the defining notions of sovereign power is the state's monopoly of force, which is epitomized in the power of the police to detain and arrest and of the courts to try and punish."[322] Such a recognition is not merely descriptive, but also normative.[323] Third, in favoring state jurisdiction, complementarity allows states to use national trials to restore civic trust in national institutions and in its commitment to the basic rules of society—something international

311. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003).

312. *See id.*

313. PAUL SEILS, HANDBOOK ON COMPLEMENTARITY: AN INTRODUCTION TO THE ROLE OF NATIONAL COURTS AND THE ICC IN PROSECUTING INTERNATIONAL CRIMES 3 (2016).

314. *See generally id.*

315. *Id.* at 35.

316. *Id.* at 38.

317. Gerard Conway, *Ne Bes In Idem in International Law*, 3 INT'L CRIM. L. REV. 217, 218 (2003). The ICC does, however, allow double jeopardy in the narrow instance when the state conducted the prosecution for the purpose of shielding the person from criminal responsibility. SEILS, *supra* note 313, at 40.

318. Such concerns about double jeopardy are not unique to the Fifth Amendment in the U.S. constitution, but rather, pervasive around the globe in national legal systems. Conway, *supra* note 317, at 222–23 (citing Crist v. Bretz, 437 U.S. 28, 34–42 (1978) (Brennan, J., dissenting)).

319. *See* Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT'L L.J. 85, 125 (2012).

320. Mendlow, *supra* note 173, at 1150 (proposing to give victims greater control of prosecutions, although the state's monopoly might become difficult to morally justify).

321. Bibas, *supra* note 309, at 857 ("Most criminal theorists endorse the state's monopoly, understanding crimes as exclusively public wrongs.").

322. SEILS, *supra* note 313, at 7.

323. *See id.*

proceedings per se cannot do.[324] State prosecutions force the relevant population to acknowledge its past and administer justice.[325]

Given the strong preference for both a single trial for a single defendant for a particular crime and for the state to conduct such a trial, the ICC only allows for international prosecution of war crimes, crimes against humanity, and genocide when the state is "unwilling or unable to genuinely carry out" that prosecution itself.[326] Such determination is highly process bound, with states and defendants holding an opportunity to challenge that finding.[327] While disagreement exists as to what counts as unwilling or unable,[328] in any event, the category is still finite and narrow. For instance, one might read "inability" as limited to situations in which the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings due to a total or substantial collapse or unavailability of its national judicial system.[329] This would provide for "situations where there was a lack of central government, or state of chaos due to the conflict or crisis, or public disorder leading to collapse of national systems",[330] such as lack of personnel, judicial infrastructure, substantive or procedural penal legislation.[331] Notably, amnesties and immunities might also be considered to render a system unavailable.[332] Some scholars also believe that states that lack substantive or procedural law meeting standards of recognized international human rights might also be considered "unavailable." For them, deficiencies of due process,[333] particularly with reference to fair trial guarantees, could trigger the unwilling or unable standard.[334] Even more broadly, ICC jurists have considered the state's inability to act quickly as a factor to be considered in making the jurisdiction determination.[335] Some view state availability

324. *Id*. at 8.

325. Gregory S. McNeal, *ICC Inability Determinations in Light of the Dujail Case*, 39 CASE W. RSRV. J. INT'L L. 325, 327 (2007) ("Removing key elements of the dispute to a distant forum, especially the emotional and contentious issues of war crimes and crimes against humanity, undercuts the very progress that these peoples, victims and perpetrators alike, must make if they are ever to live peacefully together." (quoting John R. Bolton, *Removing Key Elements of the Dispute to a Distant Forum, Especially the Emotional and Contentious Issues of War Crimes and Crimes Against Humanity, Remarks to the Federalist Society*, U.S. Dep't State Archive (Nov. 14, 2002), https://2001-2009.state.gov/t/us/rm/15158.htm [https://perma.cc/TEB2-3W8X])).

326. Rome Statute of the International Criminal Court art.17, July 17, 1998, 2187 U.N.T.S. 90.

327. *Id.* at arts. 18–19.

328. *See infra* notes 330–40 and accompanying text.

329. *See* Rome Statute of International Criminal Court, *supra* note 326.

330. OFF. OF THE PROSECUTOR, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 4 (Sept. 2003), https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf [https://perma.cc/6LKC-F8LM].

331. INT'L CRIM. CT. OFFICE OF THE PROSECUTOR, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 31 (2003), https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2009_02250.PDF [https://perma.cc/NGB4-SGPB].

332. *Id.*

333. Darryl Robinson, *The Rome Statute and Its Impact on National Law*, *in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1849, 1866 (Antonio Cassese et al. eds., 2002).

334. McNeal, *supra* note 325, at 332.

335. *Id.* (citing Int'l Comm'n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, U.N. Doc. S/2005/60, at 574 (Jan. 25, 2005)).

as requiring law that allows for prosecution as a war crime,[336] whereas others look at whether the law treats an atrocity event as a serious offense and governs substantially the same conduct.[337] Others have proposed looking at sentence equivalence rather than whether the crime is tried as a war crime or an ordinary crime.[338] At least one ICC prosecutor has also indicated that punishment needs to be proportionate to the offenses and "any sentence that allowed a complete suspension of punishment would indicate that the proceedings were not genuine."[339]

3. Non-state

We conclude this Part with a discussion of non-state transitional punishment. Unlike the first two categories of amnesty and state transitional punishment which have generated a voluminous literature, we are the first to delineate and discuss non-state transitional punishment, though many in the transitional justice literature have addressed these practices as part of other related concepts.

Given the existence of normalized wrongdoing and the inability/unwillingness of the state to effectively address the vast majority of such wrongdoing, punishment (as well as other processes of accountability) is often undertaken by non-state actors.[340] This fact partly explains the growing interest in the scholarship on transitional justice in grassroots and local transitional justice efforts.[341] The field has interrogated how grassroots transitional justice initiatives use rhetoric to create authority for their project;[342] investigated bottom-up transitional justice and its interactions with the state as oppositional, complementary,[343] independent,[344] or indifferent;[345] questioned the relationship between top-down and bottom-up transitional justice practices; asked how various transitional justice actors inform one another[346] and how that relates to the role of power and

336. SEILS, *supra* note 313, at 35.

337. *See generally* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL (Frédéric Mégret & Philip Alston eds., 2d ed. 2020).

338. *See generally* Heller, *supra* note 319; SEILS, *supra* note 313, at 64.

339. SEILS, *supra* note 313, at 64.

340. Leo Zaibert, *Punishment With and Without the State: Comments on Linda Radzik's* The Ethics of Social Punishment: The Enforcement of Morality in Everyday Life, 17 CRIM. L. & PHIL. 197, 198 (2022).

341. *Id.*

342. JAMES EDWARD BEITLER III, REMAKING TRANSITIONAL JUSTICE IN THE UNITED STATES: THE RHETORICAL AUTHORIZATION OF THE GREENSBORO TRUTH AND RECONCILIATION COMMISSION 38 (2013).

343. Brigitte Herremans & Tine Destrooper, *Stirring the Justice Imagination: Countering the Invisibilization and Erasure of Syrian Victims' Justice Narratives*, 15 INT'L J. TRANSNAT'L JUST. 576, 593 (2021).

344. Everisto Benyera, *Presenting Ngozi as an Important Consideration in Pursuing Transitional Justice for Victims: The Case of Moses Chokuda*, 13 GENDER & BEHAV. 6760, 6761 (2015) (S. Afr.) (discussing the use of the use of traditional mechanisms as transitional justice tools in a setting of legal and political impunity).

345. *See generally* TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE (Kieran McEvoy & Lorna McGregor eds., 2008).

346. *See generally* IOSIF KOVRAS, GRASSROOTS ACTIVISM AND THE EVOLUTION OF TRANSITIONAL JUSTICE: THE FAMILIES OF THE DISAPPEARED (2017).

identity dynamics;[347] asked about the role of civil society in transitional justice[348] and how it compares to the state in performing specific transitional justice functions;[349] and evaluated the particular challenges and opportunities for civil society organizations engaged in transitional justice initiatives.[350]

Another relevant development is the literature on "local transitional justice."[351] Not all local transitional justice is undertaken by non-state actors, and not all non-state transitional justice is local.[352] But non-state actors are a key part of local transitional justice efforts.[353] Literature on local transitional justice asks whether local culture and tradition are incorporated into various processes and mechanisms.[354] It examines the "ability of local people to define local obstacles or problems, conceptualise, initiate, design and implement programmes to address these problems"[355] and displays concern about whether tradition disguises the exercise of state authority.[356] It recognizes the particular importance of incorporating the voices of those affected by violence[357] in ways sensitive to their needs that may depart from formal best practices.[358] They note that local transitional justice might also be more sensitive to the harms that formal transitional justice often fails to address through prosecutions.[359]

Relatedly and most recently, criticisms and concerns about local transitional justice and how local it is have emerged.[360] For instance, does the use of so-called local tradition disguise the exercise of state authority;[361] how should

347. Eilish Rooney & Fionnuala Ní Aoláin, *Transitional Justice from the Margins: Intersections of Identities, Power and Human Rights*, 12 INT'L J. TRANSNAT'L JUST. 1, 3 (2018) (N. Ir.).

348. Jill A. Irvine & Patrice C. McMahon, *From International Courts to Grassroots Organizing: Obstacles to Transitional Justice in the Balkans*, *in* TRANSITIONAL JUSTICE AND CIVIL SOCIETY IN THE BALKANS 217, 221 (Olivera Simić & Zala Volčič eds., 2012).

349. David Backer, *Civil Society and Transitional Justice: Possibilities, Patterns and Prospects*, 2 J. HUM. RTS. 297, 297–313 (2003).

350. Jamie Rowen, *Truth in the Shadow of Justice*, *in* TRANSITIONAL JUSTICE AND CIVIL SOCIETY IN THE BALKANS 123, 123 (Olivera Simič and Zala Volčič eds., 2013).

351. Adam Kochanski, *The "Local Turn" in Transitional Justice: Curb the Enthusiasm*, 22 INT'L STUD. REV. 26, 26–27 (2020).

352. *Id.* at 28.

353. *Id.* at 30.

354. *See, e.g.*, TRANSITIONAL JUSTICE FROM BELOW, *supra* note 345.

355. Patricia Lundy & Mark McGovern, *The Role of Community in Participatory Transitional Justice*, *in* TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE 99, 109 (Kieran McEvoy & Lorna McGregor eds., 2008).

356. Andrew R. Iliff, *Root and Branch: Discourses of 'Tradition' in Grassroots Transitional Justice,* 6 INT'L J. TRANSITIONAL JUST. 253, 253 (2002).

357. Eric Stover & Harvey M. Weinstein, *Conclusion: A Common Objective, A Universe of Alternatives*, *in* MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 323, 335 (Eric Stover & Harvey M. Weinstein eds., 2004).

358. M. Brinton Lykes, *Accompanying Maya Women: Armed Resistance and Transitional Justice Struggles*, 46 SOC. JUST. 49, 56–57 (2019); Everisto Benyera, *Exploring Zimbawbwe's Traditional Transitional Justice Mechanisms*, 41 J. SOC. SCI. 335, 335 (2014).

359. Herremans & Destrooper, *supra* note 343, at 591. For instance, in Syria, formal TJ processes failed to address economic, social, and cultural rights such as the omission of housing, land, and property claims from Syrian justice proceedings.

360. Kochanski, *supra* note 351, at 30.

361. Iliff, *supra* note 356, at 253.

local opposition to the traditional tools of transitional justice inform practice;[362] are legal professionals unduly appropriating the field when legalist approaches may be problematic for many societies;[363] and what of the weak empirical evidence for local transitional justice satisfying its objectives?[364] In addition, the limited transitional justice literature about corporations focuses on whether and how corporations interact with state-based transitional justice.[365]

Complementing these efforts, we seek to provide some preliminary thoughts on philosophers' call for "an account of how punishment by institutions [other than the state] might be justified."[366] We join with those who have emphasized the need to acknowledge not just the existence, but the importance of non-state punishment.[367]

The structure of our discussion of non-state transitional punishment is different than the discussions of punishment so far. Rather than providing an overview of the general theoretical questions first, we begin by offering a variety of historical examples of the practice.[368] This is done to both document the existence of the category, but also to run through the same questions that we ask for other forms of punishment. In response to normalized wrongdoing, non-state responses, insofar as they occur, do so in part or whole because of the vacuum in state responses to wrongdoing; this is the implicit presumption. The absence of state capacity or political will to comprehensively redress wrongdoing is one factor that leads non-state actors to assume responsibility in the void created by the absence of state action.[369] Why are certain normalized wrongs the business of particular non-state actors? Why do they have standing to impose hard treatment? What limitations, if any, exist for such processes, and how do we know how much punishment is permissible? We end the section synthesizing the discussion that emerged from the particular examples.

a. Examples

i. Jewish Honor Courts

Jewish honor courts present an intriguing and lesser-known example of post-World War II trials. After some Jewish partisan groups targeted Jewish

362. Anna Di Lellio & Caitlin McCurn, *Engineering Grassroots Transitional Justice in the Balkans: The Case of Kosovo*, 27 E. EUR. POL. & SOC'YS & CULTURES 129, 130 (2013) (noting local rejection of a bottom-up initiative lobbying for an official truth commission).

363. Kochanski, *supra* note 351, at 29.

364. *Id.* at 42.

365. NELSON CAMILO SANCHEZ, ROLES AND RESPONSIBILITIES OF THE PRIVATE SECTOR IN TRANSITIONAL JUSTICE PROCESSES IN LATIN AMERICA: THE CASES OF COLOMBIA, GUATEMALA, AND ARGENTINA 56–59, 63, 73 (Cath Collins ed., 2021) (exploring the role of the "corporate veto" in limiting accountability during transitional justice processes and efforts to have private corporations held accountable in the mandate of official truth commissions).

366. Coverdale & Wringe, *supra* note 211.

367. Zaibert, *supra* note 340, at 198.

368. *See infra* Subsection IV.B.3.

369. *See infra* Subsection IV.B.3.

collaborators for assassination during the war,[370] Jewish community leaders grew concerned about the spread of vigilantism.[371] Many urged instead an alternate way to heal "spiritual wounds"[372] within the community by creating "courts that could provide punishment as needed."[373] They aimed to achieve retribution and to "respon[d] to a perceived deficit in the community's moral ledger."[374] The trials were also viewed as a mechanism "to further survivors' moral and ethical rehabilitation after years of brutalization and lawlessness. . . . to reeducate the survivor population in 'civilized' forms of conflict resolution."[375]

In addition to preventing violence, many supporters emphasized the importance of purification.[376] Many Jews believed that in order to rebuild their lives and their communities, those with dirty hands must be excluded from leadership roles in this new community.[377] The honor courts provided a mechanism to "start with a clean slate for the reconstruction of the Jewish community."[378]

In addition to the benefits of cleansing their own society, honor courts provided an outlet to contribute to national purification efforts.[379] For instance, in Poland, participants viewed the honor courts as a demonstration of "their commitment to universal justice, thereby reclaiming their mantle to civic virtue and signaling their successful integration into the post-war Polish state."[380] Similarly, in France, the Jewish community conceptualized the honor courts as a way to participate in the national purge project to "purify the social body, to stigmatize, exclude and punish the collaborators."[381]

The honor courts simultaneously allowed the Jewish community a sense of legal sovereignty, which they had been meaningfully denied during the period of

370. Laura Jockusch & Gabriel N. Finder, *Introduction: Revenge, Retribution, and Reconciliation in the Postwar Jewish World*, *in* JEWISH HONOR COURTS: REVENGE, RETRIBUTION, AND RECONCILIATION IN EUROPE AND ISRAEL AFTER THE HOLOCAUST 1, 1 (Laura Jockusch & Gabriel N. Finder eds., 2015).

371. *Id.* at 2.

372. *Id.*

373. *Id.* at 1–2; Gabriel N. Finder, *Judenrat on Trial, Postwar Polish Jewry Sits in Judgment of Its Wartime Leadership*, *in* JEWISH HONOR COURTS: REVENGE, RETRIBUTION, AND RECONCILIATION IN EUROPE AND ISRAEL AFTER THE HOLOCAUST 83, 84 (Laura Jockusch & Gabriel N. Finder eds., 2015).

374. David Engel, *Why Punish Collaborators?*, *in* JEWISH HONOR COURTS: REVENGE, RETRIBUTION, AND RECONCILIATION IN EUROPE AND ISRAEL AFTER THE HOLOCAUST 29, 31 (Laura Jockusch & Gabriel N. Finder eds., 2015).

375. Laura Jockusch, *Rehabilitating the Past? Jewish Honor Courts in Allied-Occupied Germany*, *in* JEWISH HONOR COURTS: REVENGE, RETRIBUTION, AND RECONCILIATION IN EUROPE AND ISRAEL AFTER THE HOLOCAUST 49, 57 (Laura Jockusch & Gabriel N. Finder eds., 2015).

376. Engel, *supra* note 374, at 41.

377. Jockusch & Finder, *supra* note 370, at 6.

378. Ido De Haan, *An Unresolved Controversy: The Jewish Honor Court in the Netherlands, 1946-1950*, *in* JEWISH HONOR COURTS: REVENGE, RETRIBUTION, AND RECONCILIATION IN EUROPE AND ISRAEL AFTER THE HOLOCAUST 107, 118 (Laura Jockusch & Gabriel N. Finder eds., 2015).

379. *Id.*

380. Finder, *supra* note 373, at 83–84.

381. Simon Perego, *Jurys d'honneur: The Stakes and Limits of Purges Among Jews in France After Liberation*, *in* JEWISH HONOR COURTS: REVENGE, RETRIBUTION, AND RECONCILIATION IN EUROPE AND ISRAEL AFTER THE HOLOCAUST 137, 139 (Laura Jockusch & Gabriel N. Finder eds., 2015).

the Holocaust.[382] Survivors created these courts both because they felt "that non-Jewish courts could not be trusted to adjudicate crimes committed by Jews against other Jews"[383] and also that Jews both had the standing and the duty to address the "moral dilemmas of the choiceless choices of the recent past."[384]

Jewish communities across Europe set up such tribunals, known as honor courts.[385] Honor courts assessed collaboration and also had rehabilitation and purge committees.[386] These courts operated independently from state proceedings.[387] Sometimes they emerged because of distrust of state courts, other times because community members felt internal judgment was particularly important, and others out of concern that state courts might not take up these issues.[388] Suspected collaborators submitted to such proceedings because they wanted to clear their names or felt pressured to do so by the community."[389] Some even initiated proceedings themselves to restore or clarify their position in the community.[390] In some countries, honor courts deliberately avoided official recognition as a purge board to avoid turning over incriminating evidence to the state.[391]

Honor courts were intentional in dealing with the questions of justification identified in the previous section.[392] In terms of *the scope of wrongdoing* honor courts concentrated upon, they identified wrongdoing usually by asking the question of whether the defendant acted "how a Jewish citizen was obligated to act under the circumstances."[393] The courts generally did not punish individuals merely for membership on councils,[394] the Jewish police, or acting as a kapo[395]

382. Katarzyna Person, *Jews Accusing Jews: Denunciations of Alleged Collaborators in Jewish Honor Courts*, *in* JEWISH HONOR COURTS: REVENGE, RETRIBUTION, AND RECONCILIATION IN EUROPE AND ISRAEL AFTER THE HOLOCAUST 225, 226 (Laura Jockusch & Gabriel N. Finder eds., 2015).

383. Laura Jockusch, *Rehabilitating the Past? Jewish Honor Courts in Allied-Occupied Germany*, *in* JEWISH HONOR COURTS: REVENGE, RETRIBUTION, AND RECONCILIATION IN EUROPE AND ISRAEL AFTER THE HOLOCAUST (Laura Jockusch & Gabriel N. Finder eds., 2015).

384. Person, *supra* note 382, at 226.

385. Jockusch & Finder, *supra* note 370, at 3.

386. *Id.* at 4.

387. *Id.*

388. *Id.* at 4. Notably such courts did not arise in Israel where the Jewish community was content to let state courts address such issues. While such courts were common, such practice was not uniform across Europe. For example, Belgian Jews left issues of Jewish collaboration and mistreatment to the state courts. Veerle Vanden Daelen & Nico Wouters, *The "Lesser Evil" of Jewish Collaboration? The Absence of a Jewish Honor Court in Postwar Belgium*, *in* JEWISH HONOR COURTS: REVENGE, RETRIBUTION, AND RECONCILIATION IN EUROPE AND ISRAEL AFTER THE HOLOCAUST 197, 218 (Laura Jockusch & Gabriel N. Finder eds., 2015).

389. Jockusch & Finder, *supra* note 370, at 5.

390. Engel, *supra* note 374, at 41.

391. De Haan, *supra* note 378, at 110.

392. Finder, *supra* note 373, at 96.

393. *Id.* When referencing obligations for a Jewish citizen under the circumstances and with particular regard to crimes of Jews against Jews, this is not to suggest that Jews had heightened or distinct obligations to Jews as such, but rather that given the particular context, such obligations would not be properly addressed, if at all, in other fora.

394. *But see id.* at 101 (discussing the difference in early and later prosecutions in Poland).

395. A kapo was a prisoner functionary who carried out tasks for the Nazis in concentration camps. Hanna Yablonka & Moshe Tlalim, *The Development of Holocaust Consciousness in Israel: The Nuremburg, Kapos, Kastner, and Eichmann Trials*, 8 ISR. STUD. 1, 12 (2003).

in the camps.[396] In fact, honor courts frequently acquitted members of the Jewish council, leaders often particularly reviled in the survivor community.[397] For instance, in assessing Jewish council members, the honor courts distinguished between those motivated by good intentions and feelings of responsibilities versus those that "tried to save their own skin through base collaboration," those who avidly cooperated, and those who called for resistance.[398] Honor courts began with a strong retributive approach[399] and, over time, included a more reconciliatory approach.[400] They tended to look at ethical rather than legal questions—making allowance for defenses that might go unrecognized by local courts.[401] So, for instance, the question for a Jewish policeman might not be whether he used force, but rather did he use more force than required by the Nazis. Or whether a council member, rather than simply comply with German requests, used his position to benefit himself or his family.

Honor courts instantiated many aspects of *due process*.[402] Victims, third parties, or alleged perpetrators could all ask honor courts to initiate an investigation.[403] If they decided to proceed, charges had to be made in writing.[404] Courts generally only operated if the accused party agreed.[405] They were not conducted in absentia,[406] though they sometimes met in exile.[407] For many, documentary evidence was unavailable, but the courts did seek out as many witnesses as possible.[408] Courts did sometimes per se reject testimony from prisoners who had held privileged positions during the war.[409] In France "jurors took pains to authenticate the items in the file they assembled: Testimony was sometimes taken under oath . . . the accused were given ample opportunity to defend themselves. They were called to testify in person as a matter of course—and often more than once."[410] Some courts made efforts to diversify their juries to enhance the legitimacy of the decision-making.[411] Many courts had a right of appeal, which sometimes led to a different outcome than at the prior level.[412]

396. Person, *supra* note 382, at 230; Jockusch & Finder, *supra* note 370, at 5.
397. Jockusch & Finder, *supra* note 370, at 17.
398. *Id.* at 5.
399. *Id.*
400. *Id.*
401. Engel, *supra* note 374, at 42.
402. *Id.*
403. *See* Perego, *supra* note 381, at 146.
404. Jockusch, *supra* note 375, at 57.
405. Perego, *supra* note 381, at 149.
406. De Haan, *supra* note 378, at 120.
407. *See* Helga Embacher, *Viennese Jewish Functionaries on Trial: Accusations, Defense Strategies and Hidden Agendas*, *in* JEWISH HONOR COURTS: REVENGE, RETRIBUTION, AND RECONCILIATION IN EUROPE AND ISRAEL AFTER THE HOLOCAUST 165, 170–79 (Laura Jockusch & Gabriel N. Finder eds., 2015).
408. Person, *supra* note 382, at 234–35.
409. *Id.* at 239.
410. Perego, *supra* note 381, at 148.
411. *Id.* at 151.
412. Jockusch, *supra* note 375, at 74.

Compared to other instances of non-state transitional punishment, honor courts were often highly legalized.[413] They embraced legal terminology and legal process, and employed members with legal qualifications.[414] At the same time, honor courts often lacked "formalized procedure, and the legal basis on which they operated was highly improvised and usually limited to the statutes of the tribunals and a vague reliance on general standards of jurisprudence."[415]

How much punishment was meted out was carefully constrained. The honor courts took seriously the limits on their authority and imposed only a limited set of punishments.[416] If a defendant's guilt was established, the punishment scheme began with a moral reprimand.[417] More serious offenses would include both a reprimand as well as cuts in or loss of social welfare benefits distributed by the Jewish community.[418] Even more significant offenses were subject to lustration—"the loss of active and passive voting rights in community elections along with a ban on holding public office in the Jewish community."[419] The ultimate punishment was banishment or exile from the Jewish community.[420]

In terms of *standing*, given the notable lack of Jewish vigilantism against suspected Jewish collaborators in the post-war period, it seems plausible that Jewish communities viewed the honor courts as legitimate, and their general social acceptance supports this.[421] At the very least, most denunciators signed their accusations and were willing to be contacted even when challenging powerful members of the community, suggesting "they viewed courts as just bodies, truly representative of the Jewish community."[422] At least some scholars viewed the denunciations as "a symptom of trust in the newly created Jewish community."[423] Similarly, several potential defendants themselves asked for an inquiry in order to clear their names suggesting that they believed a verdict would satisfy others in the community.[424] That said, many defendants pushed back against the courts' authority[425] and over time, in many countries, the support for the project waned, particularly as the general country sentiment against national purges also solidified.[426]

413. Perego, *supra* note 381, at 145–46.
414. *Id.* at 146–47.
415. Jockusch, *supra* note 375, at 57.
416. *See id.* at 69.
417. *Id.*
418. And in the case of German Jews, "loss of Victims of Fascism status, which entailed social welfare benefits and preferential treatment by city authorities in finding housing and work." *Id.*
419. *Id.*
420. *Id.*
421. *Id.* at 75–76.
422. Person, *supra* note 382, at 241.
423. *Id.*
424. Perego, *supra* note 381, at 149–52.
425. Person, *supra* note 382, at 230.
426. *See, e.g.*, De Haan, *supra* note 378, at 125–30.

ii. Non-state French Purges Post World War II

Jewish honor courts were just one of many examples of non-state transitional punishment coinciding with the operation of the Nuremburg trials. For instance, France was a transitional society facing the widespread atrocities of not only the German invaders, but also the French collaborators that facilitated the Nazis and the Vichy government.[427] The Vichy government "cooperated with—and at times surpassed—Nazi directives, enacting nearly sixty discriminatory laws and interning, torturing, or deporting hundreds of thousands of Jews, Communists, resistance members, Spanish exiles and others."[428] While the French government carried out an extensive purification process, including national purge courts which conducted trials and imposed punishments for collaboration,[429] non-state efforts preceded and accompanied such transitional justice efforts.[430]

Many private actors conducted purges designed to identify and punish collaborators.[431] However, these efforts, by and large, were not coordinated and did not reflect the careful attention to due process, limited punishment, and limited scope found in the Jewish honor courts.[432] These ranged from "underground court martials and ad hoc court systems" to summary executions.[433] For instance, after liberation, resistance fighters in one town "arrested" several women for collaboration and took them to barbershops for head shavings.[434] Others bombed businesses, which the community felt had been treated too leniently by purge courts.[435] Local (and unofficial) committees of the republic made up of local resisters imposed war fines on merchants who were black market profiteers and distributed the funds to "widows and local groups supporting deportees and prisoners of war."[436] Sometimes, the punishments meted out were extremely localized, as when a family effectively imprisoned a woman for forty years after she had been accused of denouncing members of the Resistance.[437] In the immediate aftermath of the liberation, these acts were often, though not always, carried out publicly.[438] The justification for such actions were backward looking to avenge the wrongs perpetrated on the resistance but also forward looking to a new "pure

427. Perego, *supra* note 381, at 137–57.

428. 2 TRANSITIONAL JUSTICE: HOW DEMOCRACIES RECKON WITH FORMER REGIMES 71 (Neil J. Kritz ed., 1995).

429. *See, e.g.*, PETER NOVICK, THE RESISTANCE VERSUS VICHY: THE PURGE OF COLLABORATORS IN LIBERATED FRANCE 51 (1968).

430. HERBERT R. LOTTMAN, THE PURGE 15–17 (1986).

431. Megan Koreman, *The Collaborator's Penance: The Local Purge, 1944-5*, 6 CONTEMP. EUR. HIST. 177, 181 (1997).

432. *See infra* notes 433–38 and accompanying text.

433. TRANSITIONAL JUSTICE: HOW DEMOCRACIES RECKON WITH FORMER REGIMES, *supra* note 428, at 72.

434. Koreman, *supra* note 431, at 181.

435. *Id.* at 183.

436. Kenneth Mouré & Fabrice Grenard, *Traitors, Trafiquants, and the Confiscation of 'Illicit Profits' in France, 1944–1950*, 51 HIST J. 969, 975–76 (2008).

437. Koreman, *supra* note 431, at 180.

438. *Id.* Secret purge commissions also occurred. *Id.* at 188 n.33.

and strong" France.[439] Stronger sentences than those imposed by purge courts were seen as necessary "to assure the community's reconciliation."[440]

iii. The Kastner Assassination in Israel

As our last example of post-Holocaust punishment, we offer the complicated case of Rudolf Kastner.[441] Kastner, the chairman of a committee organized to rescue Jewish refugees in Hungary,[442] negotiated with Eichmann to save a total of 1,684 Hungarian Jews.[443] Competing accounts of the deal exist–Eichmann contends the other side of the deal was a promise to keep other Hungarian Jews from resisting deportation and to keep order in the camps.[444] In contrast, Kastner maintained it was for approximately 1.6 million dollars raised by the Hungarian community.[445] What is uncontested is that the rescue train included almost 400 Jews from his hometown, including several relatives.[446] Many faulted him both for the deal and for failing to warn Hungarian and refugee Jews what was coming from the Germans.[447] Kastner offered to have the matter resolved by a 1946 Zionist Congress committee of inquiry[448] and then again by a Palestinian investigative committee, neither of which made any definitive rulings.[449]

Years later, Malkhiel Gruenvald, a pamphleteer, claimed Kastner (1) collaborated with Nazis in order to save his relatives and other chosen elite Jews and (2) shared the spoils, stolen Jewish property, with Nazis.[450] In so doing, Gruenvald called for his "liquid[ation]."[451] Kastner then sued Gruenvald for defamation.[452] During the trial, it was also revealed that Kastner had testified at Nuremberg on behalf of a high-level SS officer who was acquitted.[453] The Israeli district court judge concluded that Gruenvald had not libeled Kastner on the collaboration issue and that in making the deal, Kastner "sold his soul to the devil."[454] While waiting for the Supreme Court decision that largely exonerated

439. *Id.* at 189.

440. *Id.* at 190.

441. Many thanks to Shoshana Barri for bringing this episode to our attention.

442. Leora Bilsky, *Judging Evil in the Trial of Kastner*, 19 LAW & HIST. REV. 117, 119 (2001).

443. *Id.*

444. *Id.* at 120, 146.

445. *Id.* at 137.

446. Kastner helped compile the list of the Jews used to fill the seats on the train to Switzerland. *See* W.Z. Lacquer, *The Kastner Case: Aftermath of the Catastrophe*, COMMENTARY (Dec. 1955), https://www.commentary.org/articles/w-laqueur/the-kastner-caseaftermath-of-the-catastrophe/ [https://perma.cc/HQT3-Z447].

447. *Id.*

448. The committee inquiry was unable to reach any conclusions. Yablonka & Tlamim, *supra* note 395, at 13.

449. Shoshanna Barri, *The Question of Kastner's Testimonies on Behalf of Nazi War Criminals*, 18 J. ISR. HIST. 139, 148 (1997).

450. *Id.* at 140 (referencing the district court's verdict in *State of Israel vs. Malkhiel Gruenwald*).

451. Yablonka & Tlamim, *supra* note 395, at 13 (citing one of Gruenwald's pamphlets).

452. Bilsky, *supra* note 442, at 118.

453. Yablonka & Tlamim, *supra* note 395, at 13.

454. *Id.* at 14.

Kastner,[455] an underground right-wing group assassinated him for his alleged transgressions.[456]

In many ways, this is an atypical non-state transitional justice,[457] and an atypical case (if it is one at all) of punishment. The state did conduct a trial with the resulting legal protections[458] (though the case was for libel, not for collaboration, and Kastner was the plaintiff, not the defendant[459]), but even so, we ought to be deeply uncomfortable with the resulting execution that was carried out in the name of vigilante justice. Even with the extensive witness questioning and evidence proffered at trial, scholarly opinions on the reprehensibility of Kastner's actions remain deeply divided,[460] to say nothing of the Supreme Court decision concluding Gruenvald had, in fact, libeled Kastner.[461]

455. Judge Arganat concluded that Kastner: "was motivated by the sole motive of saving Hungary's Jews as a whole" and that "one cannot find a moral fault in his behavior, one cannot discover a causal connection between it and the easing of the concentration and deportation, one cannot see it as becoming a collaboration with the Nazis." AKIVA ORR, ISRAEL: POLITICS, MYTHS AND IDENTITY CRISIS 109–10 (1994). Though some other judges disagreed, the court was unanimous in affirming the district court's determination that Kastner has behaved criminally and perjuriously in testifying for a Nazi war criminal.

456. *Israel: Exoneration of Dr. Kastner*, TIME MAG. (Jan. 27, 1958), https://content.time.com/time/magazine/article/0,9171,864174,00.html [https://perma.cc/LWJ2-Y66C] ("[Kratsner] was murdered on his own doorstep by assassins who had accepted Gruenwald's accusations at face value.").

457. As mentioned earlier, it might not even be transitional. Kastner's case symbolized a larger division within Israel which "on the one hand absorbed hundreds of thousands of displaced Jews from Europe, but on the other, was unable to free itself from its own heroic myth which excluded the supposed passivity of European Jews during the war." Yechiam Weitz, *The Herut Movement and the Kasztner Trial*, 8 HOLOCAUST & GENOCIDE STUD. 349, 364–65 (1994). In other words, the Nazi and Nazi Collaborators Punishment Law (and the related allegations against Kastner) was meant to "purge the new and 'pure' state of Jewish shame . . . Jews who had not been in Nazi-occupied Europe brought to justice Jews who had been . . . and conducted trials that, in every sense of the word, were purges." IDITH ZERTAL, ISRAEL'S HOLOCAUST AND THE POLITICS OF NATIONHOOD 65–66 (Chaya Galai trans., 2005).

458. Even at the time, concerns were raised that the time passed presented an insurmountable fairness problem. *See* Lacquer, *supra* note 446 ("Kastner's conduct should have been investigated in 1946; eight years later, many things had been forgotten, many facts could no longer be checked, it was difficult if not impossible to recall the atmosphere of 1944.").

459. Query whether sufficient evidence existed to prosecute Kastner under the Nazi and Nazi Collaborators (Punishment) Law, 5710-1950, LSI 4 154 (1950–1951) (Isr.), https://www.jewishvirtuallibrary.org/nazis-and-nazi-collaborators-punishment-law-1950 [https://perma.cc/9K7U-H767].

460. David Luban, *A Man Lost in the Gray Zone*, 19 LAW & HIST. REV. 161, 162, 174 (2001) (describing for instance, Hannah Arendt's view of Kastner as a "feckless judenrat," Tom Segev's sympathetic view of Kastner as "enmeshed in the same Sophie's Choice-like game that every Israeli rescuer had been playing for years," Leora Bilsky's opinion that Kastner was a "visionary, unconventional 'can-do' Zionist Zorro" and his own view that "the man and the choices he made remain fundamentally opaque and inscrutable."); Shoshana Barri (Ishoni), *The Question of Kastner's Testimonies on Behalf of Nazi War Criminals*, 18 J. ISR. HIST. 139, 159–60 (1997) (concluding that Kastner's unfortunate testimony at the libel trial was "coordinated with the Jewish Agency's efforts to capture Eichmann and the Mufti on the one hand and to reclaim the property of Hungarian Jewry on the other hand").

461. Yablonka & Tlamim, *supra* note 395, at 14.

iv. Post-apartheid Kgotla in South Africa

In South Africa, non-state forms of justice, both ordinary and transitional, emerged as an alternative to the apartheid state.[462] For instance, 1980s township people's courts often dealt with ordinary crime; some were also engaged in policing political crimes such as enforcing boycotts.[463]

At least one community court used the traditional trappings of adjudication and retribution to facilitate transitional justice. Anthropologist Richard Wilson documented a local court in Boipatong whose daily kgotla (court meetings) "protected black councilors who participated in the apartheid local government structure" by providing trials as an alternative to more vigilante justice.[464] A few *due process* mechanisms were established: the local court allowed community participation including cross examination and reaching a sentencing decision by consensus.[465] However, while this kgotla lacked "many of the basic legal principles that safeguard individual rights,"[466] arguably it did not lack *standing*. The kgotla "dr[e]w its legitimacy from its claim to be an expression of traditional authority and customary law."[467] Importantly, those councilors accepted their punishment for having collaborated with the apartheid regime.[468] Equally significant, it was able to deter acts of vengeance.[469] And despite the national TRC, Boipatong was the only Vaal township in which Black "collaborators" were able to remain and live safely.[470] They attribute the lack of verbal or physical assaults to the "neighborhood court which they sa[id was] prepared to act punitively against anyone who threatens them."[471] Like with the Jewish honor courts, *the magnitude of punishment* is restrained. Such sentences include restorative justice such as restitution or free labor as well as public beatings.[472] The kgotla not only operated alongside state accountability efforts, like with the Vichy case, it also had a cooperative relationship with the local government and handed over defendants who did not consent to its punishment regime.[473]

462. George Pavlich, *People's Courts, Postmodern Difference, and Socialist Justice in South Africa*, 19 SOC. JUST. 29, 33–34 (1992).

463. *Id.* at 34.

464. Richard A. Wilson, *Reconciliation and Revenge in Post-Apartheid South Africa: Rethinking Legal Pluralism and Human Rights*, 41 CURRENT ANTHROPOLOGY 75, 84 (2000).

465. *Id.*

466. Gabriel O'Malley, *Respecting Revenge: The Road to Reconciliation*, 3 LAW, DEMOCRACY & DEV. 181, 186 (1999).

467. Wilson, *supra* note 464, at 84.

468. TRUDY GOVIER, FORGIVENESS AND REVENGE 38 (2002).

469. O'Malley, *supra* note 466, at 186.

470. Wilson, *supra* note 464, at 84.

471. *Id.* at 85.

472. *Id.*

473. *Id.*

v. Algiers Motel Incident Tribunal-United States

One prominent potential domestic example of non-state punishment is the Algiers Motel Incident Tribunal. During the July 1967 Detroit Race Riots, the local and state police and the national guard responded to a report of a sniper at the Algiers Motel.[474] During the ensuing entry and interrogation, they killed three Black men and threatened seven Black men and two white women who they stripped and labeled "n*gger lovers."[475] Despite claims of self-defense, the medical examiner found the dead teenagers were in non-aggressive postures, and no gun was found.[476] Despite the arrest of three police officers and a private security guard, none was convicted.[477]

In August 1967, after family members witnessed initial formal criminal proceedings and determined that justice would not be provided, local civil rights activists interviewed family members and began to organize a people's tribunal.[478] One organizer described the purpose as allowing

> the people [to] evaluate the evidence for themselves. The Black community needs to see that the type of justice we receive in Recorder's Courts is the same kind that is meted out in Mississippi. . . . We wanted to show Black people that if this is the law, they had better be proud of their lawlessness because we must not respect a law which does not respect us. . . . We invited the International Press because we wanted people all over the world to see what it means to be a Black so-called American. We wanted to inform Black people that the courts represent another subtle means of genocide that white America practices on us daily.[479]

In other words, the Tribunal was born out of the lack of standing enjoyed by state punishment among members of the community from which the victims came. To bolster the *standing* of the non-state alternative, the Algiers Motel Incident Tribunal was created by a committee composed of several lawyers and various civil society groups and modeled an actual court in many respects, thereby safeguarding *due process*.[480] A prosecutor "charged" four government participants with first-degree murder.[481] The "subpoenaed" defendants unsurprisingly chose not to appear,[482] but were represented by "appointed counsel," attorneys who argued that the "system" had killed the victims thereby absolving the defendants of individual guilt.[483] Three victims present at the Algiers Motel

474. *See* JOHN HERSEY, THE ALGIERS MOTEL INCIDENT 226 (1968).
475. *Id.* at 271.
476. *Id.* at 297–300, 316.
477. *Id.* at 336–37.
478. *Id.* at 348.
479. *Id.*
480. *Id.* at 349.
481. *Id.*
482. Frank H. Joyce, *People's Tribunal Condemns Cops,* 38 FIFTH EST. (Sept. 15-20, 1967), https://www.fifthestate.org/archive/38-september-15-30-1967/peoples-tribunal-condemns-cops/ [https://perma.cc/F9A4-WTTD].
483. *Id.*

testified about what they had seen and experienced.[484] The *scope of wrongdoing* was carefully delimited; the "prosecutor" relied on Michigan's actual felony murder law.[485] The defendants, who although subpoenaed, did not choose to appear at the tribunal were represented by actual practicing attorneys who served as "appointed counsel."[486] In their closing argument, they attempted to argue that the "system" had killed Fred Temple and Aubrey Pollard, thereby absolving the defendants of individual guilt.[487] "The jury agreed that the system was guilty but was emphatic in its judgment that the testimony of the witnesses had established the individual guilt of all four men."[488] The *amount of punishment* was steep but symbolic. The tribunal "convicted" several police officers involved in the Algiers Motel Incident and "sentenced" them to death.[489]

The Algiers Tribunal is a borderline case of *non-state transitional punishment* as it did aspire to impose hard treatment but did not itself seek to impose that treatment. It requires the determination of whether announcement of a sentence absent its implementation still counts as hard treatment. The need for the tribunal was precisely the impunity that paradigmatically generates the need for transitional justice. Moreover, the tribunal was formed against a background assumption informing transitional justice, namely, that the state is unwilling or able to punish wrongdoing.[490] When the state is unwilling or unable to punish serious wrongdoing, then it is permissible for civil society to fill in the accountability vacuum created by lack of state action. This was the central claim in the Algiers Tribunal.[491] Even though the state might have had legal proceedings, the participants in the Algiers Tribunal believed the state had de facto impunity for police officers who killed African Americans.[492] Furthermore, the purpose or goal of the tribunal was transformative in orientation; it was designed to express the need for transformation in the relationship between the police and Black people in the United States and in how police violence against Black men and women is handled.[493]

Before concluding our discussion of examples of non-state transitional punishment, we want to address one objection that could be raised to the example just discussed. Transitional justice in response to normalized wrongdoing is characteristically talked about in the context of armed conflict or authoritarian

484. *Id.*
485. *Id.*
486. *Id.*
487. *Id.*
488. *Id.*
489. Jeanne Theoharis, *The People's Tribunal on the Algiers Motel Killings*, REBELLIOUS LIFE OF MRS. ROSA PARKS, https://rosaparksbiography.org/bio/the-peoples-tribunal-on-the-algiers-motel-killings/ (last visited Jan. 16, 2024) [https://perma.cc/QT83-FQJM].
490. *See id.*
491. *See id.*
492. *See id.*
493. *See id.*

regimes.[494] Thus, the reference to an example drawn from the United States in the context of a discussion of transitional justice might seem a category mistake.

In response, we first note that a similar objection was raised when the discourse of transitional justice was extended from an initial focus on transitions away from authoritarian rule to include transitions away from conflict.[495] Yet the inclusion of both kinds of cases is now widely recognized as appropriate.[496] We anticipate the same will be true over time as the discourse of transitional justice is increasingly extended to consolidated settler colonial democracies such as Canada and the United States.[497]

In both cases, the extensions are justified because the core question of justice salient for communities is the same: how should communities respond to wrongdoing that is widespread, normalized, and a function of background structural inequality? Theories and the practice of transitional justice articulate an answer to this question: communities should respond to wrongdoing in a way that is (1) responsive to the moral claims of victims and moral demands on perpetrators, and also (2) transformative, altering the background terms of interaction that enable wrongdoing to be committed with impunity.

It is the question of transitional justice that the United States faces as we ask how to respond to contemporary police violence committed against a background of deeply entrenched racial injustice. The racial justice protests sparked by the murder of George Floyd in the summer of 2020 had as a central focus challenging the impunity attending the unjustifiable use of force by police.[498] In this, as in the racial wealth gap, history shapes and informs the present.[499]

It is this question the United States House Committee on the January 6 Attack confronted. As we put it elsewhere,

494. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003); Sharp, *supra* note 4, at 76; DUSTIN N. SHARP, RETHINKING TRANSITIONAL JUSTICE FOR THE TWENTY-FIRST CENTURY: BEYOND THE END OF HISTORY 1 (2018); 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 31 (Neil Kritz ed., 1995).

495. SHARP, *supra* note 494, at 19–23.

496. *Id.*

497. Colleen Murphy, *How Nations Heal*, BOS. REV. (Jan. 21, 2021), https://www.bostonreview.net/articles/colleen-murphy-transitional-justice/ [https://perma.cc/8BFH-42X2]; Colleen Murphy, *Transitional Justice in the United States*, JUST SEC. (July 16, 2020), https://www.justsecurity.org/71236/transitional-justice-in-the-united-states/ [https://perma.cc/LHL8-V7G7]; Zinaida Miller, *Transitional Justice, Race, and the United States*, JUST SEC. (June 30, 2020), https://www.justsecurity.org/71040/transitional-justice-race-and-the-united-states [https://perma.cc/J6VP-7BW8]; Yuvraj Joshi, *Racial Transitional Justice in the United States*, *in* RACE & NATIONAL SECURITY 4 (Matiangai Sirleaf ed., 2023); Yuvraj Joshi, *Racial Transition*, 98 WASH. U. L. REV. 1181, 1187 (2021); Yuvraj Joshi, *Affirmative Action as Transitional Justice*, 2020 WIS. L. REV. 1, 7–8 (2020); Colleen Murphy & Kelebogile Zvobgo, *Not a Moment but a Movement: The Case for Transitional Justice in the U.S.*, MS MAG. (Dec. 16, 2020), https://msmagazine.com/2020/12/16/movement-transitional-justice-united-states/ [https://perma.cc/4WHZ-K6YQ]; Noha Aboueldahab, *Why Transitional Justice in the U.S. Must Address Both Domestic and Foreign Policy*, JUSTICEINFO.NET (Oct. 4, 2021), https://www.justiceinfo.net/en/82773-transitional-justice-us-domestic-policy-foreign-policy.html [https://perma.cc/D2D3-GG45] (suggesting the scope of transitional justice must include both domestic and international victims of U.S. foreign policy).

498. *See* Murphy, *supra* note 497.

499. As we have observed in other work, "[i]n the United States today, the racial wealth gap is the same today as it was in 1968." *Id.*

> [t]he Capitol riots were loosely organized by pro-Trump groups, including militias such as the Proud Boys, motivated by President Trump's call to protest. One target was members of Congress, with a particular focus on Democratic politicians, during the process of certifying the presidential electoral results . . . January 6 riots were clearly political, aiming to obstruct the Congressional certification of the electoral victory of President-elect Joseph Biden and, more broadly, to contribute to the effort to have President Trump maintain power in a second presidential term . . . . Violent efforts to disrupt the transition of power from Trump to Biden are not limited to the Capitol attack. The January 6 riot follows an earlier foiled plot to kidnap the governor of Michigan, was concurrent with other attacks on State Capitols, and precedes multiple reported violent plots targeting January 20, Inauguration Day.[500]

Even if one is not convinced by the above, one final response is that accepting the conceptual map we propose for punishment does not require accepting our substantive claims about how to categorize the United States. Put differently, one can accept our conceptual map but reject particular applications of our map that we provide in the paper. For readers unconvinced by the inclusion of the United States in discussions of transitional justice, focus instead on the illustrations of state and non-state punishment drawn from other, paradigmatic countries pursuing transitional justice discussed.

Disagreement over the appropriate categorization of cases underscores the importance of the conceptual map we develop. Such disagreements will inform the appeal to different criteria that the example must meet in order to defend non-state punishment. The unconvinced reader will bring to bear the justificatory questions attending non-state ordinary punishment, where the convinced reader would bring to bear the justificatory standards of non-state transitional punishment. We need the conceptual map to be able to identify and locate where disagreement arises in particular cases.

b. Justifications, Standing, Due Process, and Proportionate Sanctions

Under what conditions would it be legitimate for non-state actors to punish normalized wrongdoing? Here we tentatively suggest a scale of cases of non-state transitional punishment, which vary according to the prima facie obstacles to justifiability that need to be overcome.

As discussed earlier, non-state actors may possess "the right to inflict stigmatizing deprivations on those who commit certain wrongs that constitute violations of the criminal law."[501] The easiest cases of non-state transitional punishment to justify are those in which an actor with (1) hierarchical authority responds to a wrong committed within their domain of authority and (2) uses a form of punishment that does not entail a deprivation of liberty, but rather some

500. Lesley Wexler & Colleen Murphy, *Transitional Justice, Anti-Democratic Riots, and Private Responses*, JUSTIA (Jan. 21, 2021), https://verdict.justia.com/2021/01/14/transitional-justice-anti-democratic-riots-and-private-responses [https://perma.cc/FN87-DYW7].

501. Mendlow, *supra* note 15, at 243–44.

other form of suffering or hard treatment.[502] Hierarchical authority is the most intuitively plausible basis for standing, in part because it is most clearly analogous to the structure of state authority.[503] Responses that avoid liberty deprivations do not raise the specific concerns that such deprivations do.[504] For example, instances of firings, demotions, or removal from an organization by an individual authorized to act on behalf of a family, business, or community. Some of the behavior under non-state French purges would fit under this umbrella.[505]

Non-state transitional punishment is the most fraught response to wrongdoing because, in some cases, punishment is not simply complementing punishment being undertaken by the state, but replacing or substituting for state action and instead responding in a manner more directly analogous to state responses.[506] It is these cases that evoke worries of vigilante justice, a colloquialism understood as taking justice or the law into one's own hands.[507] Skeptics of non-state transitional punishment worry that it is illegitimate for non-state actors to assume for themselves functions of the state.[508] Put simply: *on what basis are non-state actors permitted to make wrongdoing their business and assume the role of judge and punisher typically reserved for states*?

States have legal systems that are exclusively authorized to judge, sentence, and imprison individuals for criminal wrongdoing. Though other non-state actors can judge criminal wrongdoing in other ways, such as penning an op-ed denouncing certain wrongs, the intentional infliction of suffering through liberty deprivations are generally reserved for the state.[509] This is part of a broader monopoly on the use of force legitimate states enjoy.[510] States can, under certain conditions, engage in war.[511] Police may use force legitimately under certain conditions.[512]

Justifications for locating the use of force in the state appeal to 1) *the benefit* that legal subjects benefit from having the threat of use of force in punishment being removed from the realm of authorized private action.[513] The risk of harm present in the state of nature in which private actors are authorized to use force underscores the benefits that accrue to legal subjects from restricting who can

502. *See supra* notes 180–84 and accompanying text.

503. *See supra* note 167 and accompanying text on standing for non-state actors.

504. *See supra* notes 180–84 and accompanying text.

505. *See supra* notes 431–37 and accompanying text.

506. *See, e.g.*, *supra* notes 490–93 and accompanying discussion regarding the Algiers Tribunal, formed as a substitute for and response to state action; Benyera, *supra* note 344, at 6762 (discussing traditional mechanisms for justice that are not recognized by the state and resulting issues).

507. Regina Bateson, *The Politics of Vigilantism*, 54 COMPAR. POL. STUD. 923, 925–26 (2021).

508. *See supra* notes 180–84 and accompanying text; Harel, *supra* note 16, at 115.

509. Exceptions to this general statement include parental rights with respect to their children which include the right to ground them as a response to wrongdoing. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925). Police and shopkeepers enjoy privileges to detain individuals for finite periods when wrongdoing is suspected but not yet proven. Such detention is not punitive. *See* RESTATEMENT (THIRD) OF TORTS § 37 (AM. L. INST. 2012).

510. SEILS, *supra* note 313, at 7.

511. *See Today's Armed Conflicts*, GENEVA ACAD., https://geneva-academy.ch/galleries/today-s-armed-conflicts (last visited Jan. 16, 2024) [https://perma.cc/Z3TS-WAJB]; *see also* U.S. CONST. art. I, § 10.

512. SEILS, *supra* note 313, at 7.

513. *See* Morris, *supra* note 73, at 478.

use force. Justifications also explain 2) the basis for the *state's* authority to pursue this benefit. Explanations of the grounds for this legitimacy appeal to the fact of consent (implicitly or explicitly) on the part of legal subjects.

One reason why non-state actors, in fact, assume roles normally reserved for the state in cases of non-state transitional punishment is the fact that the state is unwilling or unable to exercise the functions reserved for it with regards to accountability.[514] But the risks of punishment by non-state actors for normalized wrongdoing may suggest that sometimes the best course of action is no punishment at all.

In the highly emotionally charged contexts in which transitional justice is pursued, the possibility of vengeance masking itself as punishment is especially acute.[515] The political stakes of ensuring accountability for normalized wrongdoing are high precisely in contexts where satisfying due process norms is especially challenging. A basic difficulty in satisfying due process norms stems from the lack of clarity or consensus on what due process entails for non-state practices and actors.[516] Especially when unconstrained by legal requirements of due process, the ability of non-state actors to meet moral requirements for appropriate processes is in doubt even if such requirements are clarified. As noted in the previous section, the state often has difficulties gathering sufficient evidence;[517] non-state actors have generally even more limited ability of such actors to collect evidence.[518] There are further worries that non-state actors, if given power to judge, are more likely to abuse that power, silencing and punishing unpopular views rather that meting out appropriate accountability for wrongful action.[519] Even when violators of legal or social norms are correctly identified, organizations and institutions or individuals may be ill-suited to meting out sanctions that fit the violations.'[520] Given the diffuse and potentially uncabined nature of much non-state transitional punishment, worries about proportionate punishment also abound. These concerns are especially pronounced in cases where the use of force (or restrictions on liberty) as the form of hard treatment is involved.[521]

In terms of standing, the gap created by the state is not automatically one that (any) non-state actor should fill. State transitional punishment occurs against background challenges to the standing of the state to punish normalized wrongdoing because of the ways state actors are implicated in such wrongdoing.[522] For non-state actors, standing to punish is generally even more fraught; such actors

514. *See supra* notes 95–97 and accompanying text.

515. MIHAELA MIHAI, NEGATIVE EMOTIONS AND TRANSITIONAL JUSTICE 27 (2016).

516. *See supra* notes 155–58 and accompanying text.

517. *See supra* note 330 and accompanying text.

518. This presumption may not hold in situations where rebel governance is well established and functions similar to a state. *See generally* RENÉ PROVOST, REBEL COURTS: THE ADMINISTRATION OF JUSTICE BY ARMED INSURGENTS (2021).

519. *See* Tanya Sweeney, *Cancel Culture is Poisonous and Frightening. It Needs to be Cancelled*, IRISH TIMES (July 11, 2020, 6:00 AM), https://www.irishtimes.com/life-and-style/cancel-culture-is-poisonous-and-frightening-it-needs-to-be-cancelled-1.4297220 [https://perma.cc/6ETA-4CDT].

520. It is these concerns that underlie some of the consternation over "cancel culture." *Id.*

521. *See supra* notes 506–08 and accompanying text.

522. *See supra* notes 309–10 and accompanying text.

are not authorized to act on behalf of a community or represent and protect a community's values in the way that the state is. In cases of normalized wrongdoing, there is the additional challenge that, like state actors, non-state actors are often implicated in normalized wrongdoing.[523] Such wrongdoing occurs only with the complicity of a community.[524]

To rebut the presumption against the normative defensibility of non-state transitional punishment, it is necessary to respond to worries about the risks which ground the exclusive right of states to punish in particular ways, as through liberty deprivations. Here, two strategies might be adopted. The first is to show that the benefit which normally obtains when the state enjoys the exclusive right to punish does not obtain in the transitional context at issue. When the state is unwilling or unable to punish serious wrongdoing, then it is permissible for civil society to fill in the accountability vacuum created by lack of state action. The participants in Jewish honor trials correctly recognized that European states had no appetite to try Jewish collaborators in Nazi wrongdoing.[525] In fact, the participants felt that the Jewish community had better standing to speak to this wrongdoing and that the state should stay out of it as community sanctions were more appropriate than state legal sanctions.[526] Contrast this with the Rudolf Kastner case—Kastner could have been judged and punished by the Israeli state or by various honor courts to which he applied, but instead a right-wing underground group to which he did not belong took it upon themselves to execute him.[527]

A second way to rebut the presumption against non-state transitional justice is to show that the benefit of having the state authorized to punish, which does obtain, is not at risk if non-state actors step in. In this strategy, the goal is to show that the state's authority to punish and the benefits that come from punishment being restricted to state actors can be maintained even if non-state punishment occurs in certain cases. For example, if the reason for non-state punishment is to supplement what the state is doing, when the state is unable to mete out accountability effectively or widely, then there is little reason to worry about the broader usurpation of the state's authority by other non-state actors.[528]

Effective ability to substitute for what the state is normally authorized to do is a necessary but not sufficient condition for justification. It is also necessary to explain why *a particular non-state actor* is authorized to step in to fill the void at the state level. In the case of non-state transitional punishment, there may be no agreement as to the standing of private actors to judge wrongdoing or fill the void of accountability that may exist. In assuming for themselves the role of judge and enforcer of punishment, non-state actors open themselves to

523. *See supra* note 340 and accompanying text.
524. *See supra* Section III.B.
525. *See supra* notes 385–98 and accompanying text.
526. *See supra* notes 385–91 and accompanying text.
527. *See supra* Subsection IV.B.3.
528. *See supra* notes 416–19 and accompanying text.

complaints that it is not their business or role to usurp functions reserved for the state.[529]

Possible grounds for showing that one is able to do this is by being authorized by *consent*–of the community in question or by the victims or by the perpetrators of harm. This seemed to exist for the Jewish honor courts,[530] the Algiers Motel Tribunal, and the kgotlas that dealt with apartheid collaborators, but as mentioned above, not for Kastner's executioners.[531] Sometimes the consent is to membership in the organization or the community itself rather than to the punishment specifically,[532] sometimes not.[533]

Another basis, easier to justify as well, is if the state chooses to *delegate* punishment authority. Such delegation is sometimes explicit, as it was with French purges when the government called on private organizations to act, and sometimes it is implicit, as when the government chooses not to act but allows space for others to as with the Jewish honor courts.[534] In such instances, it is important that those punishing are "acting on behalf of a real or imagined moral community."[535] Of course, delimiting the relevant community whose consent matters can be controversial or fraught.

In thinking through the defensibility of non-state transitional punishment that involves liberty deprivations, it is fruitful to look to the unwilling or unable standard from the ICC to suggest a permissible opening for non-state transitional punishment of atrocity crimes. Of course, many differences exist between an international court created by states and non-state adjudication by private actors. The ICC itself imagines the role for civil society is to document violations, represent victims, as well as engage in advocacy, campaigning, and lobbying[536] rather than acting as adjudicators.[537] Many of the international community's concerns about state prosecutions lacking due process, proportionate sentencing, and otherwise failing to meet international human rights standards apply with equal or greater vigor to non-state transitional processes as we explained above.

But we acknowledge, at least in theory, the possibility of isolated instances in which atrocity crimes have been committed; the transitional government is unable or unwilling; ***and*** international courts such as the ICC or ad hoc international courts are unavailable ***and*** the non-state transitional process is at least minimally compliant with due process, international human rights norms, and proportionate sentencing. Such instances might reflect something akin to John Locke's belief that those in a state of nature possess an individual right to inflict significant sanctions on those who invade others' rights—even when such

529. *See supra* notes 421–26 and accompanying text.
530. *See supra* notes 421–26 and accompanying text.
531. *See supra* Subsection IV.B.3.
532. *See supra* Subsection IV.B.3.
533. *See supra* notes 450–56 and accompanying text.
534. *See supra* Subsection IV.B.3.
535. Coverdale & Wringe, *supra* note 211, at 8.
536. SEILS, *supra* note 313, at 83–85.
537. *Id.*

violations are committed against third parties.[538] Perhaps the existence of Jewish honor courts in internally displaced persons camps is the closest example in which actual liberty deprivations were committed, but even those were a) not necessarily transitional and b) questionable as to compliance with due process and international human rights norms. Such instances under our conceptualization would be legitimate, though likely unlawful under prevailing laws. Think, for example, if rebel courts tried individuals on their own side for conflict-related atrocities.[539]

V. ORDINARY AND TRANSITIONAL NON-STATE PUNISHMENT IN THE UNITED STATES

Using the framework developed in Parts I–IV, we now turn to a more robust discussion of non-state forms of accountability in the United States. The Algiers Motel Incident Tribunal considered in the previous section is, in many respects, a paradigmatic instance of non-state transitional punishment, analogous in structure to efforts like the Jewish honor courts.[540] Here we focus on more contemporary examples that are the subject of ongoing debate. Debates surrounding the examples concern not just the justifiability of certain forms of response.[541] They also, we argue, reflect disagreement about the appropriate way to categorize and understand the example itself. In exploring the contemporary examples below, we first discuss whether the example is of the pursuit of ordinary justice, transitional justice, or neither of these forms of justice. We then make explicit what the salient justificatory questions become if one categorizes the example in the way we identified, and how thinking of categories changes in certain cases how we understand public debate around those cases.

Our purpose in this section is not primarily to convince you of the conclusions we reach regarding particular cases. Rather, it is to illustrate the value of the framework we developed in prior sections. One may reject particular substantive conclusions we reach about the examples that follow, while accepting how our discussion illustrates the value of keeping the distinction between ordinary and transitional justice in mind when engaging in debates about cancel culture or non-state punishment more broadly.

A. Buy Black

In Section II.E we discussed boycotts, but what about the more modern instantiation of "buycotts" in which consumers favor certain products like, for example, the modern version of Buy Black?[542] This collection of activities,

538. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 289–90 (Peter Laslett ed., 1963).

539. *See generally* Cyanne E. Loyle, *Rebel Justice During Armed Conflict*, 65 J. CONFLICT RESOL. 108 (2021) (documenting and discussing variance among rebel criminal judicial processes, but none obviously meet our conditions as transitional justice punishment).

540. *See supra* Subsection IV.B.3.

541. *See infra* Sections V.A–D.

542. *See infra* notes 543–49 and accompanying text.

increasingly popular in the wake of George Floyd protests, includes white ally consumer and corporate retailer support for Black brands.[543] Some view it as an effort to overcome various structural barriers that Black entrepreneurs face and to help achieve "true integration of Black brands."[544] Practitioners often describe it as support for[545] or investment in the Black community,[546] as a way to build generational wealth,[547] or as a form of economic protest[548] or voting with dollars,[549] but we have not found any practitioners who root their justification in the language of reparations or justice-seeking more generally. Even the "Reparations Club," a Black book marketplace in Los Angeles, does not offer justifications for its business model resounding in reparative practices.[550] While this Buy Black movement shares some of the same anti-racist aims as the practitioners of non-state transitional justice, we suggest that standing alone, in the absence of justice-based language, apologies, and acknowledgments, it ought not be assessed as non-state transitional justice, much less non-state transitional punishment. Thus, we leave justifications for such behavior or metrics by which to judge it to others.

B. January 6

The examples considered to this point model state punishment. Firings for those who participated in the attempted Capitol Hill coup or supported the big lie for the electoral process could count as examples of non-state punishment.[551] Some private companies have made public statements announcing firings.[552] Sometimes employers are explicit in the reason for the firing,[553] other times, the reason remains private, but the public learns of the close-in-time firing.[554]

543. Gerald Porter, Jr., Jordyn Holman & Deena Shanker, *Buy Black Trend Sees Staying Power with Corporate America Buy-In*, BLOOMBERG (Feb. 26, 2021, 5:00 AM), https://www.bloomberg.com/news/articles/2021-02-26/buy-black-trend-sees-staying-power-with-corporate-america-buy-in [https://perma.cc/V4A3-TUXY].

544. *Id.*

545. *198 Black-Owned Businesses to Support*, N.Y. MAG.: STRATEGIST , https://nymag.com/strategist/article/black-owned-businesses-support-shop.html (Feb. 11, 2022) [https://perma.cc/725S-US4J].

546. *About Us*, BUY BLACK MOVEMENT, https://www.buyblackmovement.com/About/ (last visited Jan. 14, 2024) [https://perma.cc/74RY-X3EC].

547. *See, e.g.*, Julianne Malveaux, *Why I Go Out of My Way To 'Buy Black'*, EBONY, Aug. 2011, at 96 (economist and president of Bennett College explaining her justification).

548. Kelley D. Evans, *Buy Black Movement Gains International Attention*, ANDSCAPE (Oct. 31, 2016), https://andscape.com/features/buy-black-movement-gains-international-attention/ [https://perma.cc/UEU8-B5L3].

549. Anthonia Akitunde, *Buying Black, Rebooted*, N.Y. TIMES, https://www.nytimes.com/2019/12/25/style/buying-black-rebooted.html (Dec. 26, 2019) [https://perma.cc/7AD8-W9TD].

550. Ashritha Karuturi, *Opening Up with Jazzi McGilbert of Reparations Club*, MORNING BREW: SIDEKICK (Aug. 8, 2021), https://www.morningbrew.com/sidekick/stories/2021/08/09/opening-jazzi-mcgilbert-reparations-club [https://perma.cc/8ASY-TY4X] (advising that "shopping locally is the best way to support the literary community long term and ensure we maintain equity across the board").

551. Peiser, *supra* note 21.

552. *Id.*

553. *Id.*

554. *Id.*

Within that group, some company statements on firing clearly appeal to the kinds of considerations relevant to transitional justice. What makes these firings examples of non-state transitional justice and not non-state ordinary justice is the nature of the wrongdoing being addressed and the goal that firing is taken to have. Participation in the January 6 coup or efforts to delegitimize the presidency of Joe Biden by pushing the big lie is widespread;[555] overwhelmingly, Republicans believe the big lie.[556] This is also explicitly political behavior—perpetrators overwhelmingly stated their reason for participating was "following Trump's orders to keep Congress from certifying Joe Biden as the presidential-election winner."[557]

In terms of the function of punishment, consider a Chicago real estate company that issued a statement reading

> @properties has always acknowledged an individual's right to their own beliefs—political and otherwise. The company also respects everyone's right to peaceful protest. However, this agent's personal choice to acknowledge, document, and celebrate in the public forum of social media, her participation in the widely condemned actions of—in her own words—'storming the capital' in Washington DC simply crossed the line in terms of @properties' standards of conduct.[558]

By providing reasons like @properties "does not condone violence, destruction or illegal activities"[559] and the rioter's actions were "inconsistent with the core values" of the company and "we intend to continue to embrace the values of integrity, diversity and transparency in our business operations, and expect all employees to embrace those values as well," @properties expressed its condemnation of this employee's actions, which it viewed as rejecting the core values structuring interaction not only in its company but also in the United States.[560]

Other possible non-state punishments might include spouses who divorced perpetrators over their participation,[561] members of the public who refused to

555. Lane Cuthbert & Alexander Theodoridis, *Do Republicans Really Believe Trump Won the 2020 Election? Our Research Suggests That They Do*, WASH. POST (Jan. 7, 2022, 7:00 AM), https://www.washingtonpost.com/politics/2022/01/07/republicans-big-lie-trump/ [https://perma.cc/G6NA-ZTBU].

556. *Id.*

557. Robert A. Pape & Kevin Ruby, *The Capitol Rioters Aren't Like Other Extremists*, ATLANTIC (Feb. 2, 2021), https://www.theatlantic.com/ideas/archive/2021/02/the-capitol-rioters-arent-like-other-extremists/617895/ [https://perma.cc/PRA8-H7HA].

558. Willingham & Hassan, *supra* note 24.

559. @Properties, X (Jan 7, 2021, 11:42 AM), https://twitter.com/properties/status/1347237174073241601 [https://perma.cc/28QP-4VST].

560. Press Release, Cogensia, Cogensia Terminates President and CEO Brad Rukstales after Arrest in U.S. Capitol Unrest (Jan. 8, 2021).

561. Sky Palma, *Capitol Rioter Begs to Stay Out of Jail, Says She Has Already Lost Her Job and Marriage*, SALON (Mar. 15, 2022, 9:47 AM), https://www.salon.com/2022/03/15/capitol-rioter-begs-to-stay-out-of-jail-says-she-has-already-lost-her-job-and-marriage_partner/ [https://perma.cc/6C84-8XF2]. In fairness, it is unclear whether the divorce is an example of punishment or disassociation. *Id.*

patronize a perpetrator's store,[562] or individuals who ended their friendships with perpetrators.[563] Whether or not a given case is punishment will require appealing to evidence as to the punitive nature of the treatment and the purpose behind divorce or ending a relationship.

C. Cancel Culture—Ye (the artist formerly known as Kanye West)

Next, we consider the recent "cancellation" of Ye. We consider this example because it is high profile, inviting a lot of cultural commentary, and involves a variety of responses from his then-current business partners and colleagues. It is also interesting as it involves two potential simultaneous sets of comments for possible cancellations. One regards his support for White Lives Matter and his criticisms of George Floyd and Black Lives Matter.[564] Depending on the commenter's perspective, such comments have either been coded as conservative or as anti-Black.[565] The second set of comments involves his invocation of numerous antisemitic tropes.[566] Why has cancellation for the antisemitic comments been relatively uncontroversial, while cancellation for anti-Black comments has been much slower in developing? We believe this is because of the clarity of the violation, the resistance to corrective action prior to cancellation, and the widespread agreement that this is a transitional rather than ordinary case. The willingness to put these comments in the transitional bucket may speak to the significant work that has already been done documenting and explaining the harms perpetuated by Hitler and the Nazis, as well as the sense that the actual atrocities were perpetuated by another government at a time in the past. Contrast that with the disputes we have previously identified with determining whether anti-Black comments ought to be considered as relating to a transitional justice issue. Lastly, we find the Kanye example helpful in the way it so squarely presents open questions within the transitional non-state punishment case—questions of proportionality and legitimacy—while also demonstrating instances in which other questions are largely resolved, such as due process.

In October 2022,[567] Ye West appeared at Fashion Week in Paris with a shirt he designed with the text "White Lives Matter."[568] This prompted a significant backlash from some quarters, but also support from mainstream political actors

562. Jordan Williams, *Lawyer Says Capitol Riot Suspect Is Being 'Shunned' in Home Town*, HILL (Oct. 6, 2021, 3:25 PM EST), https://thehill.com/policy/national-security/575614-lawyer-says-capitol-riot-suspect-is-being-shunned-in-home-town/ [https://perma.cc/5THC-7RK5].

563. Yelena Dzanova, *A Texas Lawyer Says He 'Hit Rock Bottom' After Losing His Fiancée, Friends, and Job Because of His Participation During the Capitol Riot But Has No Regrets*, BUS. INSIDER (Feb. 16, 2022, 4:42 PM), https://www.businessinsider.com/texas-man-capitol-riot-attendee-lost-friends-fiance-job-2022-2 [https://perma.cc/6DJ5-W66K].

564. Tim Dickinson, Nikki McCann Ramirez & Rick Carp, *The GOP Tweeted Its Praise for Kanye 56 Days Ago, Here's Everything that Happened Since*, ROLLING STONE (Dec. 2, 2022), https://www.rollingstone.com/politics/politics-news/kanye-west-antisemitism-tolerated-gop-praised-hitler-1234640466/ [https://perma.cc/4FJ4-98U2].

565. *Id.*

566. *Id.*

567. *Id.*

568. *Id.*

such as Republicans on the House Judiciary Committee.[569] He defended the shirt on conservative Tucker Carlson's show on Fox News.[570] Shortly thereafter, he posted a text exchange on Instagram indicating his belief that he was being controlled by Jewish people.[571] Instagram suspended his account under its Terms of Service.[572] He then tweeted that he was "going death con 3 on Jewish people."[573] On October 11, the host of HBO's "Shop" revealed that it would not air a recent episode with Ye as he made repeated antisemitic comments during filming.[574] That same day, Vice News revealed the Tucker Carlson show had edited out Ye's numerous antisemitic comments from its interview.[575] On October 13, Ye attended the premiere of a movie concluding George Floyd died as a result of a drug overdose rather than police violence.[576] On October 16, he made additional disparaging comments about George Floyd as well as blamed Jewish Zionists for media stories revealing details about his ex-wife's sex life.[577] On October 17, he announced plans to buy the social media site Parler (distinguished as a free speech alternative to Twitter).[578] On October 17, Ye said he did not believe in antisemitism and equated Jewish record labels' ownership of publishing and (Black) culture to modern-day slavery.[579] On October 19, he publicly defended his "death con" tweet.[580] On October 28, Ye apologized to George Floyd's family and, in so doing, said "by what the media is doing, I know how it feels to have a knee on my neck now."[581] On November 2, NBC news reported that Kanye repeatedly praised Hitler and made conspiracy claims about various Jewish individuals.[582] On December 1, Ye went on Alex Jones's Infowars in which he denied the Holocaust and praised Hitler numerous times.[583] On December 2, Ye was again suspended from Twitter for posting a swastika merged with a Star of David as a violation of the rule against incitement to violence.[584]

Numerous high-profile business associates cut ties with Ye. Some examples include previous collaborators Vogue and Balenciaga, as well as his talent agency CAA, and his professional banker, JP Morgan Chase Bank.[585] After

569. *Id.*
570. *Id.*
571. *Id.*
572. *Id.*
573. *Id.*
574. *Id.*
575. *Id.*
576. *Id*.
577. *Id.*
578. *Id.*
579. *Id.*
580. *Id.*
581. *Id.*
582. *Id*.
583. *Id.*
584. Tom Warren, *Kanye West Suspended from Twitter after Posting a Swastika*, VERGE (Dec. 1, 2022, 11:14 PM), https://www.theverge.com/2022/12/2/23489557/kayne-west-twitter-suspended-swastika-elon-musk [https://perma.cc/LPZ8-H58F].
585. Marilyn Moran & Ford Harrison, *Kanye's Getting Cancelled: How to Respond to Employees' Racist Comments*, JD SUPRA (Nov. 2, 2022), https://www.jdsupra.com/legalnews/kanye-s-getting-cancelled-how-to-1133973/ [https://perma.cc/Z892-B43K].

weeks of public agonizing, current business partner Adidas ended production of Yeezy products because of Ye's "unacceptable, hateful, and dangerous" rhetoric, willing to suffer a 250 million euro loss.[586] Apple pulled Ye's playlists from the platform, though it left up his albums and his songs.[587] On October 31, Instagram suspended Kanye for 30 days.[588] Parler and Kanye reached a mutual agreement to end the sale.[589] As a result of these actions, Ye's net worth is believed to have dropped from 2 billion dollars to 400 million.[590]

The first question this example raises is whether these various business actions constituted a punishment. As we discussed in Section IV.A, punishment is the intentional infliction of suffering or sanction designed to express condemnation of the wrongful conduct on a wrongdoer by someone with the standing or authority to inflict it for that reason. In quietly distancing themselves from Kanye, Apple did not punish Kanye. Without a public statement of any kind[591] explaining the reasons for their action, the action does not express condemnation even if it imposes some financial suffering. Similarly, subsequent reporting establishes that JP Morgan Chase concluded its relationship with Kanye for reasons unrelated to his remarks, and the plan was actually underway before the behavior described above.[592] Contrast that with Adidas, who conducted a multi-week investigation into Kanye's behavior and publicly concluded that he "violated the company's values of diversity and inclusion, mutual respect and fairness."[593] We believe that this action constituted punishment as it entails both hard treatment and is designed to express condemnation. Similarly, Vogue's decision to end future relations with Kanye probably constitutes punishment as well.[594] While Vogue initially encouraged Kanye to reconcile with a Vogue Fashion editor who had criticized his White Lives Matter shirts, Anna Wintour cast Ye out of Vogue's "inner circle" after his antisemitic remarks and then "aggressively doubled down on them after he was given the opportunity to apologize."[595] Since this reasoning was provided to Page Six, we think this too satisfies the expression of condemnation requirement as well as imposing suffering and sanction.

586. Dickinson et al., *supra* note 564.

587. *Id.*

588. *Id.*

589. Jessica Guynn, *Kanye West Deal for Parler Canceled Same Day Ye Makes More Antisemitic Remarks on InfoWars*, USA TODAY (Dec. 1, 2022, 6:47 PM), https://www.usatoday.com/story/tech/2022/12/01/kanye-west-parler-deal-canceled-social-media/10813508002/ [https://perma.cc/T6RF-65JL].

590. Lisette Voyko, *Billionaire No More*, FORBES (Oct. 25, 2022, 9:56 AM), https://www.forbes.com/sites/lisettevoytko/2022/10/25/billionaire-no-more-kanye-wests-anti-semitism-obliterates-his-net-worth-as-adidas-cuts-ties/?sh=3f1f912c17e7 [https://perma.cc/QTD2-A8MF].

591. Chance Miller, *Apple Music Pulls Kanye West's 'Essentials' Playlist*, 9TO5MAC.COM (Oct. 28, 2022), https://9to5mac.com/2022/10/28/apple-music-kanye-west/ [https://perma.cc/J8LL-FBEJ].

592. Ken Sweet, *Banking Breakup Between Ye, JPMorgan Planned for Weeks*, APNEWS (Oct. 14, 2022, 8:54 AM), https://apnews.com/article/kanye-west-jpmorgan-banking-fc6abe29e3a0b0e2ee5c28736d6a3774 [https://perma.cc/TZA2-D4UL].

593. Press Release, Adidas, Adidas Terminates Partnership with Ye Immediately (Oct. 25, 2022).

594. Oli Coleman, *Vogue Says It Has 'No Intention' of Working with Kanye West in Future*, PAGE SIX (Oct. 21, 2022, 8:23 PM), https://pagesix.com/2022/10/21/vogue-has-no-intention-of-working-with-kanye-west-again/ [https://perma.cc/WZ2L-WJ8Y].

595. *Id.*

So for those who cut ties as a form of punishment, was it an example of ordinary or transitional justice? Given Kanye's combination of Hitler praise, Holocaust denial, and repeated references to antisemitic tropes, one could comfortably view Kanye as relating to the transitional setting of the Holocaust and its mass atrocities as well as contributing to the increasing climate of hate against Jews in the United States. Since it was a different government and different society that perpetuated the horrors of the Holocaust, we suggest that distance fostered the relatively large consensus about the wrongfulness of his actions. Of course, Adidas itself is a German company[596] but given the work Germany has done in denazification,[597] we are also unsurprised at their willingness to condemn these comments.[598] For what it's worth, one of the few people to publicly push back on Kanye's punishment, comedian Dave Chapelle, suggested that while the Holocaust was real, it might not be appropriate to punish a Black person who clearly had no responsibility for the underlying misdeeds.[599] So even his defenders acknowledge the transitional nature of the underlying speech but suggest that Adidas rather than Ye are the ones who have a responsibility to acknowledge the truth of the underlying wrongdoing.[600]

Another criticism points out the easily agreed upon nature of his antisemitic speech being condemned, but the difficulty in punishing Ye for his anti-Black speech, such as the White Lives Matter and anti-George Floyd. This observation speaks to the large consensus of the Holocaust as an example of a setting appropriate for transitional justice, but the disagreements about whether the current and past conditions in America also give rise to transitional justice.[601]

Ye's speech sidesteps some of the more challenging questions of transitional punishment. Given his repeated comments in public settings, his repeated opportunities to clarify or retract or apologize, significant certainty exists as to both the speech and his underlying position. We do not have a situation where the wrongness of the behavior is seriously in doubt nor a concern about possible due process violations. Ye had ample notice of the "charges" against him as well as the possible sanctions that could be employed.

D. Elon Musk's Twitter Amnesty

Finally, we consider the Twitter "amnesty" enacted by new Twitter owner and billionaire Elon Musk. We consider this example because it explicitly involves the use of a tool paradigmatically adopted in transitional contexts:

596. *About: History*, ADIDAS, https://www.adidas-group.com/en/about/history/ (last visited Jan. 14, 2024) [https://perma.cc/Q6VN-4WS2].

597. *Post War Trials and Denazification*, HOLOCAUST EXPLAINED, https://www.theholocaustexplained.org/survival-and-legacy/postwar-trials-and-denazification/de-nazification/ (last visited Jan. 14, 2024) [https://perma.cc/998A-3Z69].

598. *See* Adidas Terminates Partnership with Ye Immediately, *supra* note 593.

599. Saturday Night Live, *Dave Chapelle Stand-Up Monologue–SNL*, YOUTUBE (Nov. 12, 2022), https://www.youtube.com/watch?v=_m-gO0HSCYk [https://perma.cc/W4W9-596K].

600. *Id.*

601. *See* Part I.

amnesty. Thus, it provides an interesting contemporary example of this tool that has generated significant controversy and debate. Musk's Twitter "amnesty" is also interesting for the questions it generates about what counts as an amnesty and what kind of transformations count as instances of transitional justice.

Musk bought the Twitter social media platform in April 2022.[602] In November of 2022, he announced that he would be pursuing an amnesty policy within Twitter.[603] Specifically, amnesty would entail removal of a suspension for Twitter accounts that had occurred during the reign of the previous Twitter owner, Jack Dorsey.[604] According to Musk in his announcement, any suspended account that had not violated the law or engaged in "egregious spam" would be reinstated.[605]

The first question this example raises is whether what Musk did constitutes an amnesty. Amnesty is generally understood as an extraordinary legal measure that removes the future possibility or eliminates the current infliction of criminal liability for criminal wrongdoing.[606] Taking this definition literally, Twitter did not enact an amnesty. Twitter does not have the capacity to inflict or remove criminal sanctions. However, amnesty can be defined more broadly to refer to actions that remove the prospect of future liability or eliminate ongoing liability—where liability refers to forms of accountability more expansive than simply legal liability.[607] On this definition, we can understand Musk's action as an instance of amnesty. He was eliminating a form of sanction inflicted on Twitter accounts for wrongful action.

Was Musk's amnesty an example of transitional justice? Answering this second question requires looking at the reasons why the amnesty policy was adopted.

Musk's explicit public pronouncement of the amnesty policy appealed to values of democratic decision-making. In the tweet announcing the policy Musk claimed that the policy reflected the will of the people.[608] The policy was adopted after Musk set up a poll to determine whether suspended accounts should be reinstated, and when the results were 72% yes, he made his decision.[609] To the extent that transitional justice is concerned with the promotion of democratic decision-making, this could suggest Musk's actions were oriented toward transitional justice.

602. Max Zahn, *A Timeline of Elon Musk's Tumultuous Twitter Acquisition*, ABC NEWS (Nov. 11, 2022, 2:21 PM), https://abcnews.go.com/Business/timeline-elon-musks-tumultuous-twitter-acquisition-attempt/story?id=86611191[https://perma.cc/49S4-UGKL].

603. *Elon Musk Says Twitter is Granting 'Amnesty' to Suspended Accounts*, CNBC (Nov. 24, 2022, 4:46 PM), https://www.cnbc.com/2022/11/24/elon-musk-says-twitter-is-granting-amnesty-to-suspended-accounts.html [https://perma.cc/HZP7-RLTH].

604. *Id.*

605. *Id.*

606. *See supra* note 224 and accompanying text.

607. *See supra* note 224 and accompanying text.

608. *See Elon Musk Says Twitter Is Granting 'Amnesty' to Suspended Accounts*, *supra* note 603.

609. *Id.*

However, other rationales for the decision and the form and consequences of the implementation of the amnesty policy complicate the picture of Musk's amnesty as an instance of transitional justice. For one thing, Musk has framed himself publicly on Twitter as a "free speech absolutist."[610] Against the background of this proclamation, the amnesty decision could be read as an example of Musk furthering free speech in an absolute way. Rather than silencing accounts on grounds that they promote misinformation or hate, Twitter now would not regulate the content of any speech that occurred on its social media platform. If this is, in fact, the value being pursued through the amnesty policy, it is not a value at the core of transitional justice.[611] While transitional justice is concerned with the promotion of free speech and is often adopted as a reaction to the silencing of speech by critics of governments, it is not a framework committed to the absolute protection of free speech.[612] Importantly, within transitional justice, when speech is used to foster violence and hate, that speech is rightly speech for which individuals can and should be held accountable, even criminally accountable. The use of radio to further hate and foster violence in the Rwandan genocide against the Tutsis is a prominent example where those who spoke in certain ways were held criminally accountable by the International Tribunal for Rwanda.[613]

Critics of Musk's amnesty have expressed skepticism as to whether it is being pursued in an even-handed manner.[614] In particular, concern has been expressed about the fact that Twitter has reinstated far-right, including white nationalist and extreme right-wing accounts, while at the same time enacting new bans and suspensions against left-wing accounts.[615] Indeed, just prior to the announcement of the general amnesty policy, Twitter reinstated the account of former President Donald Trump, whose account had been suspended following the January 6 attempted auto-coup on the grounds that his Twitter account had been used to encourage the insurrection.[616] U.S. Representative Marjorie Taylor Greene also had her account reinstated just prior to the amnesty announcement;[617] her account had been suspended as a response to her efforts to spread COVID misinformation which violated Twitter's policies at the time.[618]

The non-neutrality of the 'amnesty' Twitter is pursuing is not in itself a problem from the perspective of transitional justice. Indeed, such non-neutrality makes what Musk is doing potentially a case of transitional justice. Transitional

610. Elon Musk (@elonmusk), X, (Mar. 4, 2022, 11:15 PM), https://twitter.com/elonmusk/status/1499976967105433600?s=20&t=FqOPurPzMjUtusD8DsrjIg [https://perma.cc/6UET-XTRN].

611. *See supra* note 240 and accompanying text.

612. *Id.*

613. *Three Media Leaders Convicted for Genocide*, UNITED NATIONS INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS (Dec. 3, 2003), https://unictr.irmct.org/en/news/three-media-leaders-convicted-genocide [https://perma.cc/X7T9-TG32].

614. Brandy Zadronzny, *Elon Musk's 'Amnesty' Pledge Brings Back QAnon, Far-right Twitter Accounts*, NBC News (Dec. 2, 2022, 1:07 PM), https://www.nbcnews.com/tech/internet/elon-musks-twitter-beginning-take-shape-rcna58940 [https://perma.cc/Z86A-XB6E].

615. *Id.*

616. *Id.*

617. *See Elon Musk says Twitter is Granting 'Amnesty' to Suspended Accounts*, *supra* note 603.

618. *Id.*

justice does not entail the pursuit of neutral politics.[619] The background impartiality of the state adjudicating disputes or wrongs to which it is not a party and on the basis of rule of law concerns is not present in cases where transitional justice is being pursued. Instead, the state is implicated, and the non-neutral pursuit of certain core values, and rejection of other values, is constitutive of the process of transitional justice.

However, the particular politics Musk is facilitating *are* incompatible with the politics of transitional justice. Transitional justice aims at transformation, but the transformation that counts for purposes of transitional justice is substantive.[620] It is transformation oriented around inclusion, equality, and empowerment of previously marginalized groups and communities coupled with a strong commitment to respect for and protection of human rights.[621] One recurring concern of critics of Musk is that the amnesty he is pursuing will lead to a rise in hate speech, harassment, and misinformation.[622] To the extent that the transformation Musk pursues is politically aligned with the promoting of views expressed by Twitter accounts that challenge the fundamental equality of certain groups, encourages violence and human rights violations, and prioritizes denial and misinformation over truth, Musk's transformative politics does not contribute to transitional justice.

VI. CONCLUSION

Seemingly increasingly and controversially, accountability for wrongdoing is occurring at the non-state level. As we show above, however, not all cases of cancel culture are cases of punishment. Even when dealing specifically with cases of non-state punishment, not all cases are the same. Non-state punishment can be pursued in an effort to achieve ordinary *or* transitional justice. In some instances, non-state punishment can satisfy standards of legitimacy, standing, due process, and proportionality. Importantly, though, the standards of justifiability appropriate for ordinary or transitional justice are not identical. Before critiquing any example of cancel culture, it is necessary first to understand what kind of example it is.

In future work, we hope to look beyond punishment to other processes, as punishment is but one of the many tools in the transitional justice toolbox. And given the many limits we have identified on the legitimate use of non-state punishment, it is particularly important to consider non-state use of other transitional justice tools such as lustration, reparations, truth commissions, and memorials. Like non-state transitional punishment, such processes are increasingly adopted both domestically and abroad for both ordinary and transitional ends. We seek to develop analogous conceptual maps for identifying the kind of justice being pursued and the justificatory questions that form of justice generates.

619. *See supra* note 240 and accompanying text.
620. *See id.*
621. *See id.*
622. *See Elon Musk says Twitter is Granting 'Amnesty' to Suspended Accounts*, *supra* note 603.