IN THE SHADOWS OF SUFFERING

DANIEL S. HARAWA*

ABSTRACT

*Reform. Abolish. Minimize. Criminal law scholars broadly understand that we need to do *something* about our penal system and the problem of mass incarceration. We just can't agree on what that "something" is. The debate about the right path forward raises several existential questions. How can reform be bad if it helps even one person suffer just a little less? Why would abolition not resonate given the sheer volume of suffering our "justice" system exacts? Who wouldn't agree that we must shrink the size of the system to ensure fewer people suffer?*

We are debating in the shadows of suffering. And with suffering as its grounding, this Essay argues that the projects of reform, abolition, and minimalism all have value. Using prisons as an example, this Essay sits in the tension between the projects and suggests that the discordance may be healthy. It embraces the idea that we can work to relieve the suffering of those incarcerated now while also thinking about how to imprison fewer people and even how to turn away from incarceration altogether. When we center suffering, the projects of reform, minimalism and abolition can all do important, indeed, lifesaving, work.

* Professor of Clinical Law, New York University School of Law. Many thanks to the participants in the "Criminal Justice Minimalism" Symposium hosted by the *Washington University Law Review* for their helpful comments and suggestions. I am grateful to the *Law Review* editors for bringing us together and for helping to make this Essay better, with a special thanks to Roger Han. I received invaluable feedback on this Essay at the Criminal Justice Roundtable hosted by Columbia Law School. Thank you to Gregory Antill, Deborah Archer, Rachel Barkow, Jenna Cobb, Andrew Crespo, Michelle Dempsey, Sheldon Evans, Miriam Gohara, Lula Hagos, Randy Hertz, Alexis Hoag-Fordjour, Daniel Fryer, Emma Kaufman, Máximo Langer, Kate Levine, Sandra Mayson, Mara Stith McLeod, Erin Murphy, Ieshaah Murphy, Justine Olderman, Shaun Ossei-Owusu, Lauren Ouziel, Jeff Selbin, Avani Mehta Sood, Vincent Southerland, and Kate Weisburd for feedback on earlier drafts. A special shout out to James Forman not only for his incredible feedback, but also for pushing me to embrace my discomfort. Mistakes are my own.

TABLE OF CONTENTS

INTRODUCTION 1848
I. THE TENSIONS: ACADEMIC DEBATES & HUMAN SUFFERING 1856
II. CASE STUDY: CLOSING RIKERS AND THE FIGHT OVER WHAT COMES NEXT 1861
A. *The Movement to Close Rikers* 1863
B. *What's After Rikers?* 1866
C. *Extrapolating from Rikers* 1868
III. OUT OF THE SHADOWS: STORIES OF SUFFERING 1871
A. *No New Prisons?* 1872
B. *Investing in Prison Programs?* 1876
C. *More Prison Staff?* 1878
CONCLUSION 1882

INTRODUCTION

> *"I believe that the prison system is like a social cancer: we should fight to eradicate it but never stop treating those affected by it."*
>
> Angel E. Sanchez[1]

To understand this Essay, it helps to know a little about my background.[2] I have dedicated my career to representing people who have been convicted of crime. Some of my clients have been sentenced to spend a decade-plus in prison for what one might consider comparatively minor offenses: drug possession, property crime, gun possession. Others have allegedly committed some of the most serious crimes on the books and have been sentenced to die in prison or to be killed by the government for their transgressions. Some clients pleaded guilty. Others were convicted by jury. They all have stories worth listening to.

In representing "guilty people," factual innocence has never been my

1. Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1652 (2019).

2. I draw inspiration from Professor Richard Delgado and his plea for narrative in scholarship. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2411–12 (1989) ("Everyone has been writing stories these days . . . . Many others have been daring to become more personal in their writing, to inject narrative, perspective, and feeling—how it was for me—into their otherwise scholarly, footnoted articles and, in the case of the truly brave, into their teaching." (footnotes omitted)). As Professor Jerome Culp once said, "Because [B]lack professors of law often enter law in order to create and sustain societal change, it should not surprise us that [B]lack professors of law use their autobiographies in a number of ways to illuminate their teaching and scholarship." Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 543 (1991). *See generally* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 3 (1991) ("Since subject position is everything in my analysis of the law, you deserve to know that it's a bad morning.").

motivator.[3] In fact, for me, innocence is irrelevant.[4] Rather, I do what I do out of an unwavering belief in what Bryan Stevenson so eloquently reminded us: "Each of us is more than the worst thing we've ever done."[5] My mother, just as artful in her own way, instilled this lesson in me at a young age. One day long ago, a younger version of myself whined to my mom that my baby sister was "bad" (I was not always happy to be a big brother). My mother turned to me and said somehow both gently and sternly, "There is no such thing as a bad person, sometimes people just do bad things." It's funny what sticks with you. I don't think my mother intended to be profound.[6]

With this lesson seared into my soul, I could not bear vicarious witness[7] to the violence of the penal process and not want to do *something*. So, throughout my career, I have represented "guilty people" because they are *people*—products of their circumstances, capable of redemption, and deserving of grace.[8] I have challenged their convictions on direct appeal and in post-conviction proceedings. I have fought to reduce their sentences. And I have advocated for them to have access to life's most basic needs while incarcerated: health care, security, sanitary living conditions, and religious freedom. I know that, as a lawyer, I have not shaken the system. In fact, if

---

3. *See generally* ABBE SMITH, GUILTY PEOPLE (2020); HOW CAN YOU REPRESENT THOSE PEOPLE? (Abbe Smith & Monroe H. Freedman eds., 2013).

4. *See generally* Barbara Allen Babcock, Commentary, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 177–179 (1983) (categorizing a few answers other than innocence a person might give for defending the guilty).

5. BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 17–18 (2014) (emphasis removed).

6. Professor Abbe Smith has said something similar, commenting that instead of "defending the guilty," she thinks of the job as "defending people who do bad things." Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 492 (2000).

7. The fact that I am only a *vicarious* witness makes clear why we should take seriously Angel Sanchez's call about needing "more, not fewer, voices from 'behind the veil' . . . ." Sanchez, *supra* note 1, at 1655. For more work from voices who have been or are still "behind the veil," see Terrell Carter, Rachel López & Kempis Songster, *Redeeming Justice*, 116 NW. U. L. REV. 315 (2021); Reginald Dwayne Betts, *What Break Do Children Deserve? Juveniles, Crime, and Justice Kennedy's Influence on the Supreme Court's Eighth Amendment Jurisprudence*, 128 YALE L.J.F. 743 (2019); Tarra Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations*, 128 YALE L.J.F. 759 (2019); Andrea James, *Ending the Incarceration of Women and Girls*, 128 YALE L.J.F. 772 (2019); Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791 (2019). For an extremely thoughtful take on prison abolition from someone who is currently incarcerated, see Felix Sitthivong, *Divide and Conquer*, INQUEST (Oct. 12, 2021), https://inquest.org/divide-and-conquer/ [https://perma.cc/E9SY-NFH9].

8. As Abbe Smith said in explaining why she wrote *Guilty People*, "My hope is that in telling some of their stories we might recognize ourselves and see that what separates us from the guilty, more often than not, are luck and circumstance." SMITH, *supra* note 3, at 6. Or as Bryan Stevenson said in *Just Mercy*, "The closer we get to mass incarceration and extreme levels of punishment, the more I believe it's necessary to recognize that we all need mercy, we all need justice, and—perhaps—we all need some measure of unmerited grace." STEVENSON, *supra* note 5, at 18; *see also* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1271–75 (1993) (explaining that empathy can be a sustaining motivation for public defenders).

one were to reflect on my career, they may call me a spoke in a wheel of perpetual pain.[9] They may accuse me of lending legitimacy to a violent and unjust system.[10] I have not broken the wheel.[11] But I guess that has never been my mission. Rather, my goal has been to try to stop the wheel from running over my clients or to mitigate the damage the wheel does as it rolls over them.[12]

As an academic, I often write about ways in which I believe we can tackle the racial biases and racism baked into the "justice" system.[13] The startling statistics about racial disparities and mass incarceration have faces, names, and families. And while each client is unique, the racialized patterns and practices that led to their incarceration are not.[14] Therefore, it has been my goal both to illuminate the ways racial bias manifests throughout the criminal process, and to propose (what some might call) modest interventions to begin to address the problem.

My cards are on the table. That's why I do what I do and write what I write.[15] To be sure, there are many other problems I could write about based on my professional and personal experiences. I could focus on abusive

---

9. *See, e.g.*, Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2197 (2013) (arguing that *Gideon* and the right to a lawyer "makes it more work—and thus more difficult—to make economic and racial critiques of criminal justice"); Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 166 (2021) ("[A]s institutional actors, defenders can also become complicit and play a role in legitimizing the very system they may see as harmful.").

10. *Cf.* Ogletree, Jr., *supra* note 8, at 1239 ("Nearly all lawyers and legal scholars agree that the criminal defense lawyer's role is justified and that public defenders are necessary to the constitutional and moral legitimacy of the criminal justice system.").

11. *Game of Thrones: Hardhome* (HBO television broadcast May 31, 2015). As Daenerys Targaryen pledged to Tyrion Lannister before sailing to Westeros: "I'm not going to stop the wheel. I'm going to break the wheel." *Id.*

12. *See, e.g.*, Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2022–23 (2022) ("Client-centered advocacy is a bedrock principle of modern-day criminal defense. It is also a fundamentally individualistic ethic.").

13. *See, e.g.*, Daniel S. Harawa, *Coloring in the Fourth Amendment*, 137 HARV. L. REV. 1533 (2024); Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 GEO. L.J. 923, 925 & nn.2–5 (2023); Daniel S. Harawa, *The False Promise of* Peña-Rodriguez, 109 CALIF. L. REV. 2121 (2021).

14. I can count the number of white clients I've had on one hand and have fingers left over. And still, racial bias affects the treatment of white defendants too. *See* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 444 (1994).

15. I could be considered what Judge Harry Edwards calls a "practical scholar." Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) ("[A] good 'practical' scholar gives due weight to cases, statutes and other authoritative texts, but also employs theory to criticize doctrine, to resolve problems that doctrine leaves open, and to propose changes in the law or in systems of justice.").

police practices.[16] Prosecutorial discretion and misconduct.[17] Public defense inadequacies.[18] Sentencing issues.[19] Insurmountable procedural hurdles.[20] Doctrinal deficiencies.[21] You get the point. Fortunately, other scholars are doing that work. And in focusing on these issues, many of these scholars not only point out the problems (although identifying problems is an invaluable scholarly project);[22] they also try to provide solutions. Some of these scholars may consider themselves "reformists." But others may consider themselves purveyors of lemonade,[23] trying to make the best of a sour situation. These scholars are clear-eyed about the fact that the system may be irreparably broken, or even, as Professor Paul Butler would tell you, working exactly as it is supposed to.[24] These scholars may see themselves as providing steppingstones towards the abolition horizon. Some scholars may reject labels altogether.

Having seen what I have, I could also write about the urgent need to reconceive our entire system of "justice." The amount of pain and suffering that the government metes out in all our names is unconscionable. There needs to be another, better way to deal with crime and its consequences. Fortunately, here, too, criminal law scholars have stepped into the breach and have started to engage in this reimagining. Over the past decade, a

---

16. *See, e.g.*, Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925 (2021); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017).

17. *See, e.g.*, Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473 (2016).

18. *See, e.g.*, John H. Blume & Sheri Lynn Johnson, Gideon *Exceptionalism?*, 122 YALE L.J. 2126 (2013); Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493 (2021).

19. *See, e.g.*, Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200 (2019); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2 (2013).

20. *See, e.g.*, Leah M. Litman, *The Myth of the Great Writ*, 100 TEX. L. REV. 219 (2021); Brandon Hasbrouck, *Saving Justice: Why Sentencing Errors Fall Within the Savings Clause, 28 U.S.C. § 2255(e)*, 108 GEO. L.J. 287 (2019); Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797 (1992).

21. *See, e.g.*, Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138 (2012).

22. As Professor Robin West argues, "If we want to understand our currently unjust milieu, I believe, we need big, ambitious scholarship that is unabashedly critical and unabashedly non or even anti-normative." Robin West, *The Contested Value of Normative Legal Scholarship*, 66 J. LEGAL EDUC. 6, 17 (2016).

23. Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence*, 110 CALIF. L. REV. 681 (2022).

24. Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016); *see also* Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 42–43 (2019) ("[T]he prison industrial complex works effectively to contain and control [B]lack communities as a result of its structural design.").

burgeoning body of criminal law scholarship has, rather than focusing on remediating discrete issues, demanded that we think bigger. They urge us to envision a world without prisons and give guidance on how to get there.[25] They question the logics underlying penal administration and ask us to think differently.[26] These scholars, often labeled "abolitionists," argue that "we should divest from punitive systems and invest in systems of care and communities."[27]

When thinking about the uniquely American problem of "mass incarceration" and what to do about it,[28] the scholarly projects of reform and abolition are often portrayed as being at war with one another.[29] Abolitionists critique reforms that seek "to address social problems while leaving the prevailing governing system untouched."[30] Those who advocate reform question the practicality of abolition—both in its political palatability and in how the project reckons with harms caused by serious or violent crime.[31] And in more recent U.S. legal scholarship, from this battle the middle ground of "criminal law minimalism" has emerged, where scholars argue that "the penal system still has a role to play in society, but a radically reduced, reimagined, and redesigned role relative to the one it [plays now]."[32]

---

25. *See, e.g.*, Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1619 (2019); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015).

26. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform,* 108 CALIF. L. REV. 1781, 1784–85 (2020).

27. I. India Thusi, *The Racialized History of Vice Policing*, 69 UCLA L. REV. 1576, 1578 (2023).

28. *See, e.g.*, Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 265–66 (2018) (explaining that there is a "consensus that the criminal system (with a few notable exceptions) is too harsh and should be reformed," but there are "deeper disagreements with real consequences for criminal justice reform" (footnote omitted)).

29. *See, e.g.*, Molly Petchenik, *Abolitionist Prison Litigation*, 133 YALE L.J.F. 1, 2 (2023).

30. Amna Akbar, *A Horizon Beyond Legalism: On Non-Reformist Reforms*, LPE PROJECT (Nov. 13, 2023), https://lpeproject.org/blog/a-horizon-beyond-legalism-on-non-reformist-reforms/ [https://perma.cc/RM9Q-7GVJ]. These arguments sound in what Professor Albert Hirschman called "perversity," claiming that reforms "will not only fail, but are counterproductive, entrenching and worsening the existing cruel system." *See* Margo Schlanger, *Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies*, 115 NW. U. L. REV. 273, 277 (2020); *see also* ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY 11–12 (1991) (describing perversity arguments). Professor Margo Schlanger tested whether the perversity argument holds true in the context of studying efforts to abolish solitary confinement in Massachusetts and Indiana by looking at whether more limited reforms had the effect of reifying the use of solitary confinement. She concludes: "Neither of the case studies . . . offers any sign that the litigated amelioration of solitary confinement in Massachusetts and Indiana has been perverse." Schlanger, *supra*, at 307.

31. *See, e.g.*, Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245 (2023); Trevor George Gardner, *The Conflict Among African American Penal Interests: Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. 1699 (2023).

32. Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 44 (2020); *see also* Christopher Slobogin, Essay, *The Minimalist*

This Essay recognizes the tension—in both the literature and on the ground—and sits in it. It acknowledges that there are very real disagreements in both goal and strategy over what to do about mass incarceration. But when we take the debates out of abstraction and to the ground, and think of the human suffering underlying the discourse, this Essay suggests that the tension might be healthy. That, when viewed through the lens of human suffering, the projects of reform, abolition, and minimalism all make perfect sense.

Realizing generalizations elide nuance, reformists often focus on what they see as attainable—how to potentially ease the suffering of those currently in the system.[33] This is not to say, however, that those who advocate reform do not also have a long-term vision. Abolitionists imagine the future—how to dismantle systems and rebuild society such that the suffering does not exist.[34] This is also not to say that abolitionists do not have thoughts about what more immediate steps are necessary to reach the abolition horizon. Minimalists propose a middle ground in which we limit suffering by slashing the number of people in prison, while maintaining a more humane form of imprisonment to remediate some of the suffering caused by crime.[35] Of course it's not that simple, however, as those who advocate reform may also consider themselves minimalists—they may also see themselves working to shrink the footprint of the criminal legal system. And some who consider themselves abolitionists may still see a limited use for prisons, and thus may be better understood as minimalists.[36] This all reveals how porous and unsatisfying labels can be, and that positions and strategies can change given the forum and precise problem being confronted.

When we center the human suffering underlying the debates, the gulf between the projects can be captured in how much suffering we are willing to accept and who will be forced to bear that burden. To think there is only one right answer to these questions, when lives are on the line, seems hubristic. So it might be better to think of the projects as having different levels of risk tolerance. Some reformists seek what they see as immediately achievable—not letting perfect be the enemy of the good. By contrast, some abolitionists embrace some uncertainty, and with it, some suffering, by

---

Alternative to Abolitionism: Focusing on the Non-Dangerous Many, 77 VAND. L. REV. 531, 534 (2024) (adhering to Langer's view of criminal law minimalism).

33. *See, e.g.*, Carol S. Steiker, *Keeping Hope Alive: Criminal Justice Reform During Cycles of Political Retrenchment*, 71 FLA. L. REV. 1363, 1394 (2019) ("[A]n insistence on transformation or nothing seems to me unrealistic and even cruel in its willingness to decline to support real reductions in human misery. After all, first steps . . . are often the only way to get to a second step.").

34. *See, e.g.*, McLeod, *Prison Abolition and Grounded Justice*, *supra* note 25, at 1239.

35. *See, e.g.*, Slobogin, *supra* note 32, at 553–55.

36. *See* Thomas Ward Frampton, Essay, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2019–22 (2022); Langer, *supra* note 32, at 58–59.

daring to envision a world that may take generations to realize.[37] Whose suffering to prioritize, and thus who is worth sacrificing, is a deep, existential question.

Fortunately, this Essay does not try to answer that question. Rather, it embraces the tension.[38] It reflects the struggles that I personally feel working for and alongside those ensnared in the criminal legal system. And what the Essay hopes to suggest is that there may be some productivity in the tension—that when conversations happen in tandem, real change, even radical change, is possible.

In that spirit, this Essay argues that when centering human suffering, all three projects—reform, abolition, and minimalism—have an important role to play when thinking about the real-life consequences of penal administration.[39] As Professor Jamelia Morgan notes, there are "complicated questions regarding how to dismantle systems and structures that cause harm today, while simultaneously working to build systems and structures for the abolitionist horizon."[40] What she calls "abolition in the interstices," Morgan highlights the difficulties in "protecting vulnerable groups now while pushing toward futures where protection from harm is unnecessary, providing for material needs now while working towards a new world where all material needs are met."[41] It may well be impossible for one project to do everything successfully. Perhaps, though, in some sense, that is what the *broader* criminal law scholarly project is trying to achieve. While one can take different views about where to focus their energy, and while we can debate the efficacy of some actions, the suffering frame reveals that each project can have tangible value in real people's lives—both now and in the future.[42] It seems, then, that a great deal of criminal law scholarship is about making a choice of *whose* suffering we prioritize, with tradeoffs to be made depending on what position one takes.

The Essay focuses on what is often the biggest site of contestation in the debate around reform and abolition—both in legal scholarship and on the

37. *See, e.g.*, ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 106–08 (2003).

38. My initial inclination was to try and ease the tension between the projects of reform, abolition, and minimalism. I am grateful to James Forman, Andrew Crespo, and Devon Carbado for urging me to resist that inclination.

39. This Essay focuses on the suffering of those who are imprisoned. While outside the scope of this Essay, it is also important to think about the suffering of crime victims.

40. Jamelia Morgan, *Abolition in the Interstices*, LPE PROJECT (Dec. 14, 2023), https://lpeproject.org/blog/abolition-in-the-interstices/ [https://perma.cc/H95P-N7US].

41. *Id.*

42. *Cf.* Butler, *supra* note 24, at 1425 (acknowledging that "[i]n some cases . . . even short-term limited reform is better than the alternative of not disturbing the status quo" given that reform "can save lives," but also noting that "attempts to reform the system might actually hinder the more substantial transformation American criminal justice needs").

ground—prisons and jails.[43] With suffering front of mind, it is hard to look at the current state of incarceration in the United States and not want immediate relief regardless of its form for the millions of people who are imprisoned or jailed each year.[44] But it's also fully possible, given the state of atrocity, that you look at our system of incarceration and imagine a better world where we don't incarcerate the way we do now, or perhaps, even more radically, do not incarcerate at all.[45] This Essay argues that when one focuses on suffering, there are many good faith choices to be made, as there is unfortunately more than enough suffering to go around. To be sure, making a choice, with its pros and cons, can be uncomfortable given the human consequences at stake (at least it is for me). This Essay meditates on this discomfort.

Part I of the Essay unpacks the tensions between abolition, reform, and minimalism, focusing broadly on how each project relates to real life suffering. Part II explores how these tensions can play out on the ground, looking at the debates around the closure of the Rikers Island penal facilities. Finally, Part III returns to my own experiences and explores how these tensions wash over me. In this Part, I relay stories I have experienced throughout my career not to capitalize on my clients' pain, but as sensitive to the fact that "[a]cademics, judges, and lawyers often juggle concepts and spar with abstractions, without consulting the human concerns actually at issue in their deliberations."[46] Hopefully, by telling these stories, the Essay makes the case for why prison reform, prison reduction, and prison abolition can all have important roles to play in alleviating suffering.

---

43. Orisanmi Burton, *The Long Revolt*, INQUEST (Oct. 31, 2023), https://inquest.org/the-long-revolt/ [https://perma.cc/W9EH-FWPW] ("The tension between the urgent need to secure reforms to enable captives' immediate survival and the equally urgent project of abolishing broader systems of oppression is a central contradiction of the prison movement, and of the broader Black liberation struggle."). While academic debates in this area have had real-life impact over policy positions, this Essay focuses on the scholarly conversation. More work is necessary to unpack how scholarship surrounding abolition and reform has influenced policy.

44. *See* Zhen Zeng, *Jail Report Series*, BUREAU OF JUST. STAT. (Sept. 2023), https://bjs.ojp.gov/preliminary-data-release-jails [https://perma.cc/N8XV-R6FD] (reporting 7.3 million jail admissions in the United States from July 2021 to July 2022); E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2021 – STATISTICAL TABLES (2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf [https://perma.cc/7G28-UGER] (reporting 1,204,300 as being in prison in the United States at the end of 2021). Just look at the number of deaths in New York City jails each year. *See* Jan Ransom & Jonah E. Bromwich, *Tracking Deaths in New York City's Jail System*, N.Y. TIMES (Oct. 19, 2023), https://www.nytimes.com/article/rikers-deaths-jail.html [https://perma.cc/654B-3LDA].

45. *See* Roberts, *supra* note 24, at 43–58.

46. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2105 (1989) ("Stories are one way to bring law down to life, to the people, 'to the ground.'").

I. THE TENSIONS: ACADEMIC DEBATES & HUMAN SUFFERING

America has a problem[47]: mass incarceration. At the turn of the millennium, Professor David Garland helpfully illuminated what he called the United States' "mass imprisonment" problem.[48] Often now called "mass incarceration,"[49] Garland highlighted the fact that since the early 1970s, the United States' prison population exploded in ways that were unprecedented not only "in the history of the USA," but also "in the history of liberal democracy."[50] Garland pointed to two "defining features of mass imprisonment."[51] The first was "sheer numbers"—the U.S. prison population is "markedly above the historical and comparative norm for societies of [its] type."[52] The second was "the social concentration of imprisonment's effects"—meaning the "systematic imprisonment of wholes groups of the population,"—specifically, "young [B]lack males in large urban centres."[53] Corollary concerns that accompany America's mass incarceration phenomenon are the inhumane conditions in which we overly incarcerate,[54] and the fact that we overcriminalize human behavior.[55]

Today, a wealth of scholarship in and outside the legal academy tackles the problem of mass incarceration—exposing the inhumanity, racism, and classism of the system, unpacking the sociopolitical forces responsible for it, and providing solutions to remedy it.[56] Some scholarship is more concerned with the numbers problem—how do we reduce the size of our

---

47. BEYONCÉ, *AMERICA HAS A PROBLEM*, *on* RENAISSANCE (Parkwood Entertainment 2022).

48. *See* David Garland, *Introduction: The Meaning of Mass Imprisonment*, *in* MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1, 1–2 (David Garland ed., 2001).

49. *See* Katherine Beckett & Megan Ming Francis, *The Origins of Mass Incarceration: The Racial Politics of Crime and Punishment in the Post-Civil Rights Era*, 16 ANN. REV. L. & SOC. SCI. 433, 434 (2020).

50. Garland, *supra* note 48, at 1.

51. *Id.*

52. *Id.*

53. *Id.* at 1–2; *see also* Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2007 (2022) ("The American penal system is defined not just by its massive scale, but also by the massively disproportionate harms it inflicts along racial and socioeconomic lines.").

54. *See, e.g.*, Jonathan Simon, Essay, *The New Overcrowding*, 48 CONN. L. REV. 1191, 1208–15 (2016).

55. *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717–18 (2005); Daniel Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ 64, 66 (Michael Klarman, David Skeel & Carol Steiker eds., 2012).

56. *See, e.g.*, JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (2017); TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007); DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007); MICHAEL TONRY, PUNISHING RACE (2011).

prison population (and hopefully not exacerbate the racial disparities)?[57] Some work is more focused on the racial dimension—how do we address the racial disparities in the administration of criminal law (and hopefully reduce the number of people incarcerated)?[58] And as the parenthetical asides show, given the overlap, much criminal law scholarship focuses on both aspects.

But while many criminal law scholars agree that mass incarceration—both its numerical and racial qualities—is *the* defining problem of our discipline,[59] the consensus breaks down when contemplating solutions. Perhaps this is to be expected. After all, if we think of criminal law as the outgrowth of "the community's moral outrage,"[60] then in a pluralistic, multiracial society, members of the community will no doubt have different views of the proper role of criminal law and its administration. If criminal law is supposed to reflect communal judgment, then discord and different viewpoints is a feature, not a bug, of any debate surrounding criminal justice reform.

To be sure, one glaring problem with the collective condemnation theory of criminal law is that certain members of the community have historically been shut out of the collective imagination. Indeed, this is a core complaint of the abolitionist movement: the criminal system in the United States is a top-down enterprise formulated and operated by mostly white technocrats.[61] As such, as abolitionists will tell you, any abolitionist future, or any future

---

57. *See, e.g.*, Ben Grunwald, *Toward an Optimal Decarceration Strategy*, 33 STAN. L. & POL'Y REV. 1 (2022); Raff Donelson, *The Inherent Problem with Mass Incarceration*, 75 OKLA. L. REV. 51 (2022).

58. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

59. *See, e.g.*, Levin, *supra* note 28, at 265–66; Sharon Dolovich & Alexandra Natapoff, *Introduction: Mapping the New Criminal Justice Thinking*, *in* THE NEW CRIMINAL JUSTICE THINKING 1, 1 (Sharon Dolovich & Alexandra Natapoff eds., 2017) ("Mass incarceration, until recently viewed with indifference if it was noticed at all, is now broadly recognized as a national crisis and an expensive mistake.").

60. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 2 (7th ed. 2015). Calling this the "collective-condemnation concept of criminal law," Professor Sandra G. Mayson notes that "[m]ost contemporary criminal law theorists appear to endorse the collective-condemnation concept of criminal law, whether explicitly or implicitly." Sandra G. Mayson, *The Concept of Criminal Law*, 14 CRIM. L. & PHIL. 447, 452, 452 n.36 (2020) (collecting sources).

61. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 586–87 (2001) ("To the extent that criminal law deals with contestable, and contested, moral questions, one might imagine trading a good deal of expertise for a little democracy."). Scholars have questioned whether democratizing criminal justice would lead to positive results. *See, e.g.*, RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 105 (2019); DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 108 (2008); John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 716–17 (2020). For a discussion of the various positions, see Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777 (2022).

that prizes racial equity more broadly, requires shifting power to (or at least more actively considering the views of) those most marginalized and impacted.[62] But even if the "collective" were to broaden and deepen to reflect those historically left out of the conversation, especially those most heavily policed, there will still be discord.[63] And if we think of criminal law and its proper administration as a collective enterprise, then perhaps we should *encourage* varied, thoughtful, even oppositional solutions to well-diagnosed problems.

If we accept variety when thinking about solutions to the problem of mass incarceration, it may help to acknowledge some common ground on what we are hoping to achieve. Taking a step back, if we think of normative criminal law scholarship as asking "what justice requires,"[64] then it seems *one* shared priority (there could be others) must be remediating the violence (used in its most capacious sense) inherent to our penal system. It is therefore worth thinking about how the various projects work towards alleviating the suffering the U.S. penal system exacts.[65]

Start with reform. Reform-based projects are often framed as achievable in the near-to-immediate term. For their audience, these projects may "seek[] to communicate with policymakers, prosecutors, . . judges," and other penal bureaucrats.[66] Given that audience, reformists may pitch their ideas as good governance, legally sound, democratically popular, or morally mainstream.[67] Those advocating reform often frame their ideas "in

---

62. *See, e.g.*, Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 787–91 (2021). *See generally* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 821 (2021) (arguing for a "*movement law* . . . approach to legal scholarship grounded in solidarity, accountability, and engagement with grassroots organizing and left social movements").

63. *See, e.g.*, Gardner, *supra* note 31, at 1725–26 (noting the conflicting African American penal interests); Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1696–97 (2021) ("[R]ecent scholarship demonstrates that disagreement and conflict exist within criminal justice reform proposals that rely on unitary construction of communities.").

64. West, *supra* note 22, at 16; *see* Robin West & Danielle Citron, *On Legal Scholarship*, CURRENT ISSUES IN LEGAL EDUCATION 1 (2014), https://www.aals.org/wp-content/uploads/2014/08/OnLegalScholarship-West-Citron.pdf [https://perma.cc/PLM5-DEVT] (explaining that "normative" scholarship seeks to "state what the law should be, as well as what the law is," and it "seeks to develop a more just world, rather than a more knowledgeable one").

65. *Cf.* Mayson, *supra* note 60, at 455 ("[A] concept of criminal law is necessary to criminal law theory and policy alike. We can argue all day about the justification of punishment or criteria for criminalization, but if we are all operating with different conceptions of the criminal law, we are arguing past each other.").

66. Levin, *supra* note 28, at 309.

67. Professor and former president of the American Civil Liberties Union Susan Herman wrote a helpful article outlining, from her perspective as the leader of a national civil rights organization, what is needed to achieve criminal justice reform. *See* Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 32 (2018); *see also* Miriam S. Gohara, *Keep on Keeping On: Maintaining Momentum for Criminal Justice Reform During the Trump Era*, 14 STAN. J.C.R. & C.L. 1 (2018) (providing strategies for criminal justice reform). For example, reformists may try to build coalitions by appealing to the fiscal concerns attendant to our current system of mass incarceration.

manageable or recognizable terms" that do not depend on reconceiving or reconstituting the whole system of justice, and in fact, may signal the opposite—that this reform is a necessary tweak to make the system more just.[68] These types of reform proposals can include legislation,[69] training and regulation,[70] and resource investment,[71] with one idea being that they can immediately make a difference.

Turn to abolition. By advocating for the abolition of prisons, abolitionists seek to dismantle an *entire system* of suffering, believing it is "futile to expend additional resources reforming institutions that have proven resistant to change."[72] They are focused less on the legal elites and more on giving voice to and working with people on the ground.[73] Abolitionists understand that they are playing the long game, hoping to build a better, more just society.[74] And because abolition is a gradual project, abolitionists also recognize the need for intermediate steps along the way.[75] When thinking about these intermediate steps, abolitionists differentiate between "reformist-reforms" and "non-reformist-reforms."[76] And while the line

68. Levin, *supra* note 28, at 310.

69. *See, e.g.*, Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 101, 125 (2019).

70. *See, e.g.*, Trevor George Gardner & Esam Al-Shareffi, *Regulating Police Chokeholds*, 112 J. CRIM. L. & CRIMINOLOGY 111 (2022) (reviewing various efforts of police departments after George Floyd's murder to regulate chokeholds).

71. *See, e.g.*, Andrea Craig Armstrong, *The Missing Link: Jail and Prison Conditions in Criminal Justice Reform*, 80 LA. L. REV. 1 (2019).

72. Thusi, *supra* note 27, at 1589. *Cf.* Levin, *supra* note 28, at 310 ("Foregrounding questions of political economy, race, class, and power, the *mass* frame (at least potentially) raises questions about all aspects of the criminal system and the political economy in which it is embedded. It sounds not in the language of small-bore solutions or narrow, pragmatic fixes, but in terms of sweeping systemic critique. Rather than telling a judge that she should rethink some sentencing determinations or telling a legislator that she should resist the impulse to draft another criminal statute, the *mass* scholar speaks a radical language of deep social ills and social injury.").

73. *See* Brandon Hasbrouck, *Unshielded: How the Police Can Become Touchable*, 137 HARV. L. REV. 895, 919–20 (2024) (reviewing JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE (2023)) ("Nonreformist reforms begin from an assumption that power should be allocated more democratically to allow ordinary people to develop the tools to improve their own lives and those of people in their communities.").

74. *See* McLeod, *Prison Abolition and Grounded Justice*, *supra* note 25, at 1161 ("If prison abolition is conceptualized as an immediate and indiscriminate opening of prison doors—that is, the imminent physical elimination of all structures of incarceration—rejection of abolition is perhaps warranted. But abolition may be understood instead as a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement.").

75. Marina Bell, *Abolition: A New Paradigm for Reform*, 46 LAW & SOC. INQUIRY 32, 45 (2021) ("By and large, the most common abolitionist position" adopts "the attrition model—a gradual process of decarceration through the development and use of alternatives to punitive and carceral systems and institutions, which aim to eventually render these systems and institutions obsolete.").

76. *See generally* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2568 (2023) (providing a comprehensive framework for reconceiving reform, including thinking beyond formal legal processes) ("Strategies and tactics require ongoing assessment.").

between the two may be hard to draw,[77] the ultimate question abolitionists ask is: "Which reforms don't make it harder for us to dismantle the systems we are trying to abolish?"[78] Reformist reforms are "palliative," making improvements within the current system.[79] "[N]on-reformist reforms have as their end goal the eventual dismantling of that system and are understood to be individual elements or steps in a larger strategy of structural transformation."[80]

With this distinction in mind, Critical Resistance, "a leading abolitionist organization,"[81] has given examples of what constitutes "reformist reforms" in the prison context. Examples include building "closer to home" or "modern" "rehabilitative" jails or prisons; building jails or prisons that focus on "providing services;" and legislative efforts to carve out some crimes from punishment by imprisonment, as that sends the message that those who commit the crimes *not* carved out *should* be imprisoned.[82] By contrast, non-reformists reforms include decarceration, closing existing jails and prisons without replacing them, and rejecting government spending for jails and prisons.[83] From a suffering standpoint, the differentiating point between reformist reforms and non-reformist reforms is clear: it is not worth pursuing a reform for the immediate alleviation of suffering if it could then work to reify an entire system of suffering.

Finally, minimalists believe that we need to engage in a project of radical decarceration while also believing prison plays a valid role in society.[84] But perhaps because of the nascency (or indeterminacy)[85] of the minimalist

---

77. *See, e.g.*, Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1208 (2022) (reviewing MARIAME KABA, WE DO THIS 'TIL WE FREE US (2021)) ("But clear lines between reformist and nonreformist reforms are often hard to find."); Amna A. Akbar, Response, *Demands for A Democratic Political Economy*, 134 HARV. L. REV. F. 90, 103 (2020) (noting that the line between reformist and non-reformist reforms is "undoubtably murky in practice").

78. MARIAME KABA, WE DO THIS 'TIL WE FREE US 66 (Tamara K. Nopper ed., 2021). Professor Amna Akbar outlined three "hallmarks of non-reformist reforms." Akbar, *supra* note 77, at 103. Hallmark one: "non-reformist reforms advance a radical critique and radical imagination" with the end goal being "transformation." *Id.* Hallmark two: nonreformist reforms "shift power away from elites and toward the masses of people." *Id.* at 104–05. Hallmark three: "non-reformist reforms are about the dialectic between radical ideation and power building." *Id.* at 106.

79. Bell, *supra* note 75, at 45. Many of these interventions sound in harm reduction, a concept that's popular in public health literature. *See, e.g.*, Madalyn K. Wasilczuk, *Developing Police*, 70 BUFF. L. REV. 271, 292–98 (2022) (explaining the concept of harm reduction and describing various harm reduction strategies). Jamelia Morgan also urges abolitionists to "[a]dopt[] a harm-reduction approach . . . to ensure that abolitionists do not end up so concerned with the *theory* of abolition that they fail to consider the *practice* of abolition." Morgan, *supra* note 77, at 1215.

80. Bell, *supra* note 75, at 45.

81. Morgan, *supra* note 77, at 1208.

82. CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS TO END IMPRISONMENT (2021), https://criticalresistance.org/wp-content/uploads/2021/08/CR_abolitionisteps_antiexpansion_2021_eng.pdf [https://perma.cc/L98X-9TXT].

83. *Id.*

84. Langer, *supra* note 32, at 44.

85. *See* Benjamin Levin, *Criminal Law Minimalisms*, 101 WASH. U. L. REV. 1771 (2024).

label, the criminal law minimalism literature has not taken a hard stance on what to do about the current state of American prisons and jails. While the literature nods to the idea that incarceration needs to be humane,[86] it has not explained which reforms fit its minimalist goals versus which do not. One could easily imagine that, if rapid decarceration is the goal, then perhaps minimalists might align themselves with abolitionists and resist building more, or investing in, prisons and jails. On the other hand, because minimalists recognize that there is *some* level of optimal incarceration, perhaps they see investment in prisons and jails as important under the recognition that, even if we need to incarcerate some people, our current mode of incarceration is inhumane and isn't working.[87] Indeed, investing in more humane incarceration may be valuable to the minimalist agenda of demonstrating there is some legitimacy to a system of incarceration. When centering suffering, the minimalists seem to have three express goals: limiting the number of people suffering in prison, alleviating the suffering of those whom they believe should be imprisoned, and redressing the suffering of those who have been victimized through retribution and by preventing future victimization.

When thinking about suffering, the projects of reform, abolition, and minimalism make sense. And while they focus on different aspects and degrees of suffering, it's not at all clear (at least to me) that one project is more righteous than the other. Each is valuable in its own way. And perhaps, from the tension that the projects generate, they are more valuable when viewed together. The next Part explores this idea by examining the complicated debates surrounding the closure of Rikers Island.

II. CASE STUDY: CLOSING RIKERS AND THE FIGHT OVER WHAT COMES NEXT

In the late 19th century, New York City bought Rikers Island to build a new jail "as the modern alternative to the city's overcrowded and dilapidated facilities."[88] The planners intended Rikers to be "the most

86. *See* Slobogin, *supra* note 32, at 553 (briefly referencing "a more humane incarcerative environment" without providing any detail); Langer, *supra* note 32, at 63 (arguing that prisons in the United States should be "radically different and more humane" without going into detail as to what that entails); TOMMIE SHELBY, THE IDEA OF PRISON ABOLITION 16 (2022) ("In saying that incarceration has legitimate uses, I am *not* defending U.S. federal, state, or municipal prison systems. These facilities are often grossly unjust and inhumane.").

87. *See, e.g.*, SHELBY, *supra* note 86 at 113–14 ("Although I would be against expanding the prison system or increasing the prison population in the United States, I would not necessarily oppose building a new prison if it replaced one that was inhumane or unhabitable.").

88. Anakwa Dwamena, *Closing Rikers: Competing Visions for the Future of New York City's Jails*, N.Y REV. (Oct. 4, 2019), https://www.nybooks.com/online/2019/10/04/closing-rikers-competing-visions-for-the-future-of-new-york-citys-jails/ [https://perma.cc/9254-DY2B].

perfect prison in the world."[89] The 1950s saw a sprawling complex constructed on the island, with "social workers, clinicians, and educators" being brought in to "augment the cadre of traditional correctional officers" in service of a more humane model of incarceration.[90] As Rikers grew, the local borough jails shuttered.[91] With that, Rikers quickly became one the largest jails in the country.[92] And as a reminder, most of Rikers's residents are there pretrial and are thus presumed innocent.[93]

Closing Rikers is now a priority.[94] As it turns out, the humane, rehabilitative jail proved more a "torture chamber."[95] Things got so bad that in 2012, a group of currently and formerly incarcerated individuals filed a class-action lawsuit alleging there was a pattern and practice of Rikers staff physically abusing those in their care.[96] Three years later, after the Department of Justice intervened on the side of the plaintiffs, New York City entered into a consent decree.[97] Labeled "historic" and "sweeping,"[98] the consent decree was supposed to bring about "enforceable and enduring reform."[99] Truth be told, the consent decree would bring little change.[100] In fact, a recent study found that "compared to the year when the consent decree went into effect to *reduce* the unconstitutional conditions of violence, almost every measure of violence" had *increased*.[101]

---

89. *See id.* (quoting *To Build a Bigger Jail: Some New Great Works of the Charities Commission. A Model Penitentiary, Farms for the Insane, Bellevue's Ventilation, and the Training School*, N.Y. TIMES, Sept. 20, 1886, at 7).

90. Nicholas Barber, *Opinion: The History of Rikers Island Proves That Reform Isn't Possible*, CITY LIMITS (Oct. 12, 2021), https://citylimits.org/2021/10/12/opinion-the-history-of-rikers-island-proves-that-reform-isnt-possible/ [https://perma.cc/PQ37-4F9Y].

91. *See id.*

92. *See* Dwamena, *supra* note 88. At one point, Rikers was *the* largest jail in the country. *Id.*

93. THE STATE OF NEW YORK CITY JAILS, OFF. OF N.Y.C. COMPTROLLER BRAD LANDER 2 (2023), https://comptroller.nyc.gov/wp-content/uploads/documents/The-State-of-New-York-City-Jails.pdf [https://perma.cc/KC4Q-4BWP] (noting 87% of those incarcerated on Rikers are being held pretrial).

94. *We Are Closing Rikers Island.*, NYC: A ROADMAP TO CLOSING RIKERS (2022), https://rikers.cityofnewyork.us/ [https://perma.cc/Z6YY-P6HQ].

95. Erica Bryant, *[It's] a Torture Chamber: Stories from Rikers Island*, VERA (Feb. 2022), https://www.vera.org/its-a-torture-chamber [https://perma.cc/K8RE-4RUH].

96. Derek Gilna, *New York City's Rikers Island Jail Agrees to Federal Consent Decree, Reforms*, PRISON LEGAL NEWS (Sept. 2, 2016), https://www.prisonlegalnews.org/news/2016/sep/2/new-york-citys-rikers-island-jail-agrees-federal-consent-decree-reforms/ [https://perma.cc/BZ2B-THZL].

97. Benjamin Weiser, *New York City Settles Suit Over Abuses at Rikers Island*, N.Y. TIMES (June 22, 2015), https://www.nytimes.com/2015/06/23/nyregion/new-york-city-settles-suit-over-abuses-at-rikers-island.html [https://perma.cc/426H-2XQS].

98. *See* Gilna, *supra* note 96.

99. Weiser, *supra* note 97. The reforms included new policies restricting the use of force, and the ending of punitive segregation for detainees under the age of 18. *Id.*

100. *See* Elizabeth Glazer, *The Rule of Law Applies on Rikers, Too*, VITAL CITY (June 12, 2023), https://www.vitalcitynyc.org/articles/rikers-hearing-june-2023 [https://perma.cc/4NJQ-T9A2].

101. *Id.* Things are so bad that in 2023, the U.S. Attorney for the Southern District of New York announced an intent to move to hold the City in contempt and to call for a court-appointed receivership.

But it's not just the sheer physical violence that makes Rikers inhumane. In 2021, when local lawmakers took a private tour of the complex—a time when you'd think the jail would put its best foot forward—they left Rikers condemning it as a "humanitarian crisis."[102] During their short visit, they "observed [a] . . . suicide attempt. [They] described seeing shower stalls being used as jail cells, fecal matter and urine lining the floors, and dead cockroaches next to spoiled food in the jail's hallways . . . ."[103]

That's what Rikers was like when officials were expecting high-powered company. As one person who was jailed at Rikers described the day-to-day:

> There's no COs, they're not feeding people, there's no water, no showers, no phone calls. There's people there that haven't took showers in two weeks or longer. You barely eat; they don't care. There were people in cells having seizures, and they just left them there. I was in a cell with about 30 other people. You could be sleeping, and they'd spray mace or come banging on the cells for no reason, just to wake you up. You've got COs talking about how they own us and can do whatever they want to us.[104]

A. The Movement to Close Rikers

In a tragic coincidence, the same month New York City agreed to the consent decree and vowed to reform Rikers, Kalief Browder died by suicide.[105] His story brought Rikers's inhumanity into even sharper relief.

In 2010, Kalief, who was only sixteen, was arrested on accusations of stealing a backpack.[106] He maintained his innocence and refused to plead guilty to something he didn't do.[107] A judge set his bail at $3,000, which he

---

See Benjamin Weiser & Jonah E. Bromwich, *Federal Prosecutor Urges Takeover of Rikers Island*, N.Y. TIMES (July 17, 2023), https://www.nytimes.com/2023/07/17/nyregion/rikers-island-federal-takeover.html [https://perma.cc/NR7Y-5MTG].

102. Marquise Francis, *Rikers Island, One of America's Most Notorious Jails, Is Now One of Its Deadliest*, YAHOO NEWS (Nov. 6, 2021), https://news.yahoo.com/rikers-island-one-of-americas-most-notorious-jails-is-now-one-of-its-deadliest-090043078.html [https://perma.cc/U6JM-EFW8].

103. *Id.*

104. Rebecca McCray, *What It's Like at Rikers, According to People Who Just Got Out*, N.Y. MAG.: CURBED (Sept. 23, 2021), https://www.curbed.com/2021/09/rikers-jail-conditions.html [https://perma.cc/L8MX-W7G5].

105. Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015 [https://perma.cc/B5HK-7G3C].

106. David K. Li, *Family of Kalief Browder, Young Man Who Killed Himself After Jail, Gets $3.3M from New York*, NBC NEWS (Jan. 24, 2019, 4:32 PM), https://www.nbcnews.com/news/us-news/family-kalief-browder-young-man-who-killed-himself-after-jail-n962466 [https://perma.cc/Z6L6-VMYR].

107. *"A School for Suicide": How Kalief Browder Learned to Kill Himself During 3 Years at Rikers Jail*, DEMOCRACY NOW! (June 3, 2016), https://www.democracynow.org/2016/6/3/a_school_for_suicide_how_kalief [https://perma.cc/66M3-55WS].

couldn't afford to pay.[108] As a result, Kalief spent the next *three years* at Rikers before the charges against him were dropped.[109] Kalief, still *a child*, spent nearly two of those years in solitary confinement.[110] During his time at Rikers, Kalief was beaten both by guards and people incarcerated with him, and attempted suicide at least six times.[111] Kalief described it as "hell on earth."[112] He was physically released in May 2013, but as his mother would say, "the ghost of Rikers came with him."[113] Living with the mental anguish and suffering from his time in jail, Kalief's mental health deteriorated.[114] On Saturday, June 6, 2015, Kalief Browder, only twenty-two, hanged himself.[115]

Kalief Browder's tragic story, which garnered national attention,[116] sparked concrete change. His story helped inspire the push to end (or limit the use of) cash bail.[117] His story led to New York City and other jurisdictions agreeing to ban (or limit the use of) juvenile solitary confinement.[118] But most importantly for purposes of this Essay, Kalief Browder's death flamed a more revolutionary call: close Rikers

---

108. Vanessa Romo, *New York City Reaches $3.3 Million Settlement with Kalief Browder's Family*, NPR (Jan. 25, 2019, 2:51 AM), https://www.npr.org/2019/01/25/688501884/new-york-city-reaches-3-3-million-settlement-with-kalief-browders-family [https://perma.cc/699V-KK6Z].

109. *Id.*

110. *Id.*

111. Ta-Nehisi Coates, *The Brief and Tragic Life of Kalief Browder*, ATLANTIC (June 8, 2015), https://www.theatlantic.com/politics/archive/2015/06/the-brief-and-tragic-life-of-kalief-browder/395156/ [https://perma.cc/B7LN-GNTS]; Dana Ford, *Man Jailed as Teen Without Conviction Commits Suicide*, CNN (June 15, 2015, 4:49 PM), https://www.cnn.com/2015/06/07/us/kalief-browder-dead/index.html [https://perma.cc/DXV3-G3BA].

112. *Who Kalief Browder Might Have Been if He Hadn't Spent Over 1,000 Days in Jail Without a Conviction*, ABC NEWS (June 17, 2015, 5:54 PM), https://abcnews.go.com/US/kalief-browder-spent-1000-days-jail-charges/story?id=31832313 [https://perma.cc/5C8M-UX73].

113. *Id.*

114. Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html [https://perma.cc/3RQY-66PC].

115. *Id.* Kalief's mother, Venida Browder would die the next year of complications from a heart attack, prompting her lawyer to say, "In my opinion, she literally died of a broken heart." Rachaell Davis, *Kalief Browder's Mother Dies of a 'Broken Heart'*, ESSENCE (Oct. 26, 2020), https://www.essence.com/news/kalief-browder-mother-death/ [https://perma.cc/629A-ETHW].

116. *See, e.g.*, *Time: The Kalief Browder Story* (Netflix television broadcast Mar. 1, 2017).

117. Jesse McKinley & Ashley Southall, *Kalief Browder's Suicide Inspired a Push to End Cash Bail. Now Lawmakers Have a Deal.*, N.Y. TIMES (Mar. 29, 2019), https://www.nytimes.com/2019/03/29/nyregion/kalief-browder-cash-bail-reform.html [https://perma.cc/Y5VA-ZAV8]. There was significant backlash to New York's bail reform measures, causing the state to roll back some of the reforms. *See* Peter Sterne, *A (Not So) Brief Guide to New York's Bail Reform Evolution*, CITY & STATE N.Y. (May 5, 2023), https://www.cityandstateny.com/policy/2023/05/not-so-brief-guide-new-yorks-bail-reform-evolution/385379/ [https://perma.cc/7TRC-FWVN].

118. Mark Berman, *Kalief Browder and What We Do and Don't Know About Solitary Confinement in the U.S.*, WASH. POST (Jan. 26, 2016, 7:32 AM), https://www.washingtonpost.com/news/post-nation/wp/2016/01/25/kalief-browder-and-what-we-do-and-dont-know-about-solitary-confinement-in-the-u-s-2/ [https://perma.cc/SS6X-V575].

altogether.[119]

The year after Browder's death, Glenn Martin, who himself had been incarcerated at Rikers and is now an advocate for decarceration, kicked off the #CLOSERikers campaign, which was supported by a coalition of organizations.[120] Organizers also joined forces with Akeem Browder, Kalief's brother, and formed the Campaign to Shut Down Rikers.[121] The immediate response from Mayor Bill de Blasio was that while closing Rikers was a "noble concept," it was unrealistic.[122] But a commission created by the New York City Council Speaker and chaired by former New York Chief Judge Jonathan Lippman concluded that "Rikers has to close as soon as possible" because the "jails there hurt public safety and endanger the lives of everyone inside their walls."[123]

In light of the commission's report, what was just dismissed as impossible—the closing of Rikers—was now a moral imperative.[124] And with momentum gaining, just a year later, de Blasio vowed to shutter Rikers.[125] Opinion shifted quickly. Everyone generally agreed that Rikers had to close. The question became what next? New York City was "pushed to consider a far more fundamental question: Should it jail people at all?"[126] Based on the plan approved by the New York City Council, the answer, was

---

119. Hope Reese, *The Case for Shutting Down New York City's Rikers Island Jail*, VOX (June 7, 2018, 12:20 PM), https://www.vox.com/conversations/2018/6/7/17434206/shut-down-rikers-island-jail-new-york-city-kalief-browder [https://perma.cc/7T9V-68ED].

120. *See Former Inmate Glenn Martin Advocates to Close Rikers Island*, DEFENDER NEWS SERV. (Mar. 14, 2017), https://defendernetwork.com/news/national/former-inmate-glenn-martin-advocates-close-rikers-island/ [https://perma.cc/D2KR-67QE]. In 2014, Martin founded Just Leadership USA, "an advocacy organization working to cut the U.S. prison population in half by 2030." Juleyka Lantigua-Williams, *Can a Notorious New York City Jail Be Closed?*, THE ATLANTIC (Apr. 26, 2016), https://www.theatlantic.com/politics/archive/2016/04/will-rikers-island-be-closed/479790/ [https://perma.cc/B9XF-F2ZX].

121. Osha Oneeka Daya Brown et al., *$11 Billion for What?! Incarcerated Organizers with No New Jails NYC Explain How to Shut Down Rikers Without Building New Jails*, 23 CUNY L. REV. 1, 7 (2020); *see* J. David Goodman, *De Blasio Says Idea of Closing Rikers Jail Complex Is Unrealistic*, N.Y. TIMES (Feb. 16, 2016), https://www.nytimes.com/2016/02/17/nyregion/de-blasio-says-idea-of-closing-rikers-jail-complex-is-unrealistic.html [https://perma.cc/UX84-WMN7].

122. Goodman, *supra* note 121.

123. Ryan Schwach, *Commission to Create New Plan to Close Rikers*, QUEENS DAILY EAGLE (Oct. 21, 2023), https://queenseagle.com/all/2023/10/21/commission-to-create-new-plan-to-close-rikers [https://perma.cc/Q34W-M6MZ]. Chief Judge Lippman called Rikers "a stain on the soul of our city." *Id.*

124. *Cf.* McLeod, *Prison Abolition and Grounded Justice*, *supra* note 25, at 1164 ("Abolition instead entails a rejection of the moral legitimacy of confining people in cages, whether that caging is deemed 'civil' or whether it follows a failure to comply with technical terms of supervised release or a police order.").

125. J. David Goodman, *Mayor Backs Plan to Close Rikers and Open Jails Elsewhere*, N.Y. TIMES (Mar. 31, 2017), https://www.nytimes.com/2017/03/31/nyregion/mayor-de-blasio-is-said-to-back-plan-to-close-jails-on-rikers-island.html [https://perma.cc/UEY8-S9TH].

126. Melissa Gira Grant, *Imagining a World Without Prisons*, NEW REPUBLIC (Oct. 17, 2019), https://newrepublic.com/article/155411/imagining-world-without-prisons [https://perma.cc/4D59-X6WV].

"yes."

B. What's After Rikers?

In 2019, the New York City Council voted on a plan that would close Rikers by 2026.[127] City officials finally realized what had long been clear: the conditions of Rikers were intolerable, attempts to monitor and reform Rikers had been unsuccessful, and continuing to incarcerate people in that hellscape was morally indefensible. In its place, the City would build four new jails spread across its boroughs.[128] Each jail would house about 900 people.[129] Under the plan, the jails will "not only be smaller and safer, but they will also provide [those who are incarcerated] with job training, mental health counseling, and education services."[130] These smaller facilities are "intended to be more humane holding places, closer to inmates' own communities, with space dedicated to educational programs and big visiting areas."[131] To be successful, the City has to engage in drastic decarceration and reduce the current jail population by close to 50%.[132] The estimated price tag for construction alone: $8.7 *billion*.[133]

While various objections were raised to the proposed plan,[134] No New Jails NYC (NNJ), "a multiracial and intergenerational coalition of organizers, residents, [and] community members" argued that the City can close Rikers without building new jails.[135] The "cornerstone" of the campaign is straightforward: "Divest from Incarceration to Invest in Communities."[136] As NNJ saw it, it's "through investing in community-led

---

127. Matthew Haag, *N.Y.C. Votes to Close Rikers. Now Comes the Hard Part.*, N.Y. TIMES (Oct. 17, 2019), https://www.nytimes.com/2019/10/17/nyregion/rikers-island-closing-vote.html [https://perma.cc/Q7H8-NQQJ].

128. *See id.*

129. Heather Loepere, *Prison Abolition and the Fight to Close Rikers*, COLUM. POL. REV. (Dec. 4, 2019), https://www.cpreview.org/blog/2019/12/prison-abolition-and-the-fight-to-close-rikers [https://perma.cc/97TY-CQBF].

130. *Id.* This type of plan was not new for New York. In 2011, the City closed Spofford Juvenile Detention Center and relocated youth in smaller borough-based facilities. *See* Jonathan Marty, *The Story of the Bronx's Spofford Juvenile Detention Center*, URB. DEMOCRACY LAB (May 23, 2018), https://urbandemos.nyu.edu/2018/05/23/the-story-of-the-bronxs-spofford-juvenile-detention-center/ [https://perma.cc/V2TF-RXLQ].

131. Mary Harris, *What Will It Take to Finally Shut Down NYC's Most Notorious Jail?*, SLATE (Sept. 27, 2021, 12:17 PM), https://slate.com/news-and-politics/2021/09/rikers-island-new-york-city-jail-deaths-abuse-staff-shortage.html [https://perma.cc/2Z2U-ZCVR].

132. *See* Loepere, *supra* note 129.

133. *Id.*

134. For example, there were complaints about the process of forming the plan and lack of community input, and complaints from members of the community about jails being built in their backyards. *See, e.g.*, *NYC Council Hears Public Input on Plan to Replace Rikers with Borough-Based Jails*, CBS NEWS (Sept. 5, 2019, 5:02 PM), https://www.cbsnews.com/newyork/news/new-york-city-council-public-hearing-on-borough-based-jails/ [https://perma.cc/5NA3-9JFJ].

135. Brown et al., *supra* note 121, at 2.

136. *Id.* at 5.

social programs, *not jails and prisons*, [that the City] can close Rikers now."[137] As one organizer explained: "All the problems with Rikers are symptoms of the larger problem of incarceration . . . The only reason to build new jails is because the city is actively planning to incarcerate more people rather than actually addressing the issues that lead to incarceration."[138] NNJ made clear that their abolitionist vision was a positive one: "Abolition is less about the absence of prisons and jails, and much more about the presence of everything we need in order to thrive and build a society that does not rely on our imprisonment and premature death."[139]

At the same time, other groups that supported the closure of Rikers support the plan to build smaller jails throughout the City. The #CLOSErikers campaign claimed the City's plan to close Rikers and build borough-based jails "as a victory for people currently incarcerated in NYC," including because it "la[id] the groundwork for more widespread decarceration."[140] #CLOSErikers agreed that the "approval of new buildings isn't enough to address the culture of abuse and violence with City jails."[141] Thus the campaign saw the plan as a "start[] in addressing the decades of disinvestment that have harmed communities of color."[142]

One major sticking point between NNJ and #CLOSErikers was what to do in the immediate term. Some thought that NNJ's vision of wholesale abolition was "just not realistic"—"[w]e're not going to close Rikers on Monday and not have any type of detainment."[143] But NNJ had a plan, rejoining that people could be incarcerated in existing borough jails.[144] NNJ did note that the conditions at the existing borough jails "are dangerous, toxic, and harmful to the health of the incarcerated people," and thus also suggested that some money be redirected to those jails to improve the conditions.[145] By contrast, those associated with #CLOSErikers campaign considered this position "morally indefensible" for the 3,000 people who

137. *Id.* at 17.

138. Ashoka Jegroo & Raven Rakia, *How the Push to Close Rikers Went from No Jails to New Jails*, APPEAL (May 29, 2018), https://theappeal.org/how-the-push-to-close-rikers-went-from-no-jails-to-new-jails/ [https://perma.cc/N4CU-ZVNQ].

139. Loepere, *supra* note 129.

140. *Id.* #CLOSErikers grew "into a coalition with more than 170 partner organizations." Jegroo & Rakia, *supra* note 138.

141. Loepere, *supra* note 129.

142. *Id.*

143. Bill Keller, *What Do Abolitions Really Want?*, MARSHALL PROJECT (June 13, 2019, 6:00 AM), https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want [https://perma.cc/T8MD-95X2].

144. *See* Jeff Coltin, *No New Jails Now Has AOC on Board, but Opponents See a Fatal Flaw*, CITY & STATE N.Y. (Oct. 4, 2019), https://www.cityandstateny.com/politics/2019/10/no-new-jails-now-has-aoc-on-board-but-opponents-see-a-fatal-flaw/176847/ [https://perma.cc/JVH4-KSRN].

145. *Id.*

would be sent to these jails,[146] especially when considered against the alternative of building new facilities: "We're talking about rebuilding and improving conditions to create facilities that can actually serve people who are there. This plan is a tangible path forward that commits to further decarceration than we are currently at."[147]

The difference in positions between NNJ and #CLOSErikers could easily be recast in terms of suffering. NNJ is clearly focused on the long-term suffering that a system of incarceration can wrought. And to end such a system of suffering, some immediate pain of those incarcerated now would likely be necessary, although NNJ clearly explained that they also supported steps to mitigate the suffering of those presently behind bars. To #CLOSErikers, this tradeoff was intolerable. While the campaign agreed with NNJ's vision, their position prioritized the suffering of those incarcerated now with a concrete plan, understanding that any abolitionist horizon is potentially far off in the future.

C. Extrapolating from Rikers

Rikers powerfully demonstrates why one would turn to abolition as a solution for our prison crisis. A jail so impervious to change needs to be torn down. Thus, the story of Rikers may well reveal that we all should be on the abolition side of the spectrum, at least when it comes to this particular jail.

But that does not solve the whole problem. The tension around what to do after Rikers echoes much of the debate in criminal law scholarship. As one organizer put it: "There's a whole conversation of 'this is abolition, this is not abolition,' or what is pure abolition."[148] These same conversations are happening in law reviews. You see the practicability concerns that those who champion reform have with abolition.[149] You see the overreliance on carceral systems concerns that abolitionists assert.[150] You see the general

---

146. *Id.*

147. Emily Nonko, *What Would 'No New Jails' Actually Look Like*, GOTHAMIST (July 18, 2019), https://gothamist.com/news/what-would-no-new-jails-actually-look-like [https://perma.cc/6E3H-JHHC].

148. *Id.* A final coda to the Rikers story: Some believed the #CLOSErikers campaign was captured by corporate interests: "[C]ritiques of the #CLOSErikers campaign extend[ed] beyond . . . [the] decision to support community jails; they question[ed] the group's ability to decouple itself from its funders' interests." Jegroo & Rakia, *supra* note 138.

149. *See, e.g.*, Barkow, *supra* note 31, at 280.

150. *See, e.g.*, Kate Levine, *The Progressive Love Affair with the Carceral State*, 120 MICH. L. REV. 1225, 1234 (2022) (book review) ("Ensuring that progressives are aware of their attachment to prisons and that abolitionists pay attention to the obstacles posed by this love affair among their allies is crucial to understanding why even moderate, but certainly radical, reduction in the criminal legal system is difficult to attain."); Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform"*, 128 YALE L.J.F. 848, 851 (2019) (arguing that criminal justice reform is "deceptive

agreement across positions that slashing the jail population is a net good.[151] And you see the murkiness of it all, with all sides being represented by activists on the ground and purporting to center the voices of those impacted in their positions.[152]

Beyond that, the story of Rikers also allows you to zoom out and see how the debates can unfold over time. "[W]hen it opened, Rikers was hailed as a 'model' facility, at the cutting edge of prison design and prisoner rehabilitation."[153] Though Rikers has a "history littered with good intentions," as is the case with most reforms—both small and radical, bureaucrats must share the vision of the initial reform and then act to implement them.[154] At first, when left to the whims of bureaucrats, it did not take long for the "principles of the 'model penitentiary' [to be] abandoned amidst underfunding and neglect."[155] Now, with the abolition of Rikers in the forecast but a new mayor in charge, the bureaucratic process has significantly slowed the progress to close the facilities and has begun to undermine the decarcerative goals that fueled the plan to close Rikers in the first place.[156] Thus, Rikers is a cautionary tale of how building new jails will never be a solution to solving the problem of crime and a reminder that reform, when offered as a solution, can leave you just where you were or even worse off. Relatedly, Rikers reveals how change can be stymied by those in charge of implementing it, and thus serves as a reminder that there needs to be nimbleness when thinking about how to address the problems related to mass incarceration.[157] It is also a reminder that the divisions between those seeking to fix or abolish our current penal system are far less substantial than those who would prefer to leave it as is or expand its noxious reach further.

The story of Rikers also teaches us how adding cries of abolition to calls

---

because those who want largely to preserve the current punishment bureaucracy—by making just enough tweaks to protect its perceived legitimacy—must obfuscate the difference between changes that will transform the system and tweaks that will curb only its most grotesque flourishes").

151. *See* Frampton, *supra* note 36, at 2019–20.

152. The murkiness of these debates is turtles all the way down. What does it mean to center those impacted? How do we define those impacted? How do we know for sure what reforms will make it harder to realize more sweeping change? How do we know what non-reformist reforms will actually lead to liberation? These are all questions that I hope to explore in future work.

153. Jayne Mooney & Jarrod Shanahan, *Rikers Island: The Failure of a "Model" Penitentiary*, 100 PRISON J. 687, 687 (2020).

154. *Id.* at 690.

155. *Id.* at 702.

156. *See* Joe Anuta, *NYC Vowed to Close One of the Nation's Worst Jails. It Isn't Going Very Well.*, POLITICO (Oct. 12, 2023, 2:00 PM), https://www.politico.com/news/2023/10/12/nyc-rikers-closure-jeopardy-00120971 [https://perma.cc/KP4V-MC83]; Jacob Kaye, *Four Year Countdown to Rikers' Closure Begins*, QUEENS DAILY EAGLE (Sept. 1, 2023), https://queenseagle.com/all/2023/9/1/four-year-countdown-to-rikers-closure-begins [https://perma.cc/B9N3-FQ9F].

157. *Cf.* Akbar, *supra* note 76, at 2568 ("Strategies and tactics require ongoing assessment.").

for reform can help challenge "the pace of reform and the status quo."[158] At first, the cries to shutter Rikers were seen as off the wall. Within a year, they were very much on the wall, with the question shifting to what's next. Adding abolition to the reform conversation moved the Overton window.[159] And the disagreement over what follows post-Rikers has enriched the conversations about how we use incarceration more broadly. This shift in the conversation must be seen as valuable no matter if one considers themselves an advocate for reform, a criminal law minimalist, or an abolitionist. In other words, the story of Rikers perhaps demonstrates how positional tension can be *productive* in the broader efforts to address the ills of mass incarceration.

Which leads to the next point. Most who are critical of the criminal legal system agree that people who are incarcerated now deserve more humane conditions, and that fewer people should be behind bars. This holds true whether you are advocating for reform, pushing for criminal law minimalism, or looking to the abolition horizon. But whether that allows for the building of new, purportedly more humane and rehabilitative facilities, requires some limited investment in the already constructed facilities, or something else altogether becomes a sticking point. The means and ends are contested. And as shown by Rikers, we know that directly impacted people can in good faith disagree on this point. Rikers provides just one example from which we can learn. There are many other movements and moments from which we can glean insight when debating abolition and reform.[160]

In criminal law scholarship, the disagreements over whether to pursue reform, abolition, or some other path, are just as deep, with elbows just as sharp. And in the literature, the projects are often portrayed as superior to one another, with each focusing on the other's flaws. But is this necessary? Moving from national headlines to the personal, the final Part suggests that despite the very real divides, when centering human suffering, the tensions between reform, abolition, and minimalism, may actually point to the value of all three projects in an era of mass incarceration.

---

158. Keller, *supra* note 143 ("[T]he abolition debate is 'a healthy tension that is really challenging the pace of reform and the status quo.'"). As Professor Tommie Shelby explained, even if one is not a prison abolitionist, abolitionist arguments "help us see the urgency, not only for fundamental prison and sentencing reform, but also for broader structural reform of society itself." SHELBY, *supra* note 86, at 117.

159. This is true in the literature as well, as the growth of criminal law minimalism in the U.S. criminal law literature can be seen as a response to the emergence of abolition.

160. For example, the deinstitutionalization movement can provide important insight into conversations about abolition and reform. *See, e.g.*, Barkow, *supra* note 31, at 256; Langer, *supra* note 32, at 66–67.

III. OUT OF THE SHADOWS: STORIES OF SUFFERING

If you believe prisons "are social institutions that reflect and reinforce conditions of racism, socioeconomic inequality, and other injustices," and think "there are limits to how humane any prison can be,"[161] does that mean you should abandon reform and pursue only the maximal abolitionist position given that reform alone will never alleviate all the suffering that accompanies imprisonment?[162] To the extent we focus on prison reform, should we only pursue reforms that "eliminat[e] or reduc[e] features of prisons that degrade and dehumanize"—in other words, non-reformist reforms that make "prisons less prison-like"?[163] What if abolition, rather than being on the horizon, is more like *chasing* the horizon—an unreachable goal? Does that mean that abolitionists should give up and instead focus on the tangible? The literature often makes it seem like there's only one right (or righteous) answer. But as hopefully revealed through the stories below,[164] an insistence on one approach to the exclusion of all others obscures the fact that each approach is attempting to do real work at improving people's lives, which in turn underestimates the power in a heterogenous criminal law reform/reimagination project.

As the previous Part shows, some who believe in prison abolition are against building any new prisons or jails, no matter the cost. But as the guidance from Critical Resistance reveals,[165] prison abolition is about more than just not building any new facilities—the position generally cautions against *any* investment that would further expand the reach of the prison industrial complex. As someone who works with people who are incarcerated, the questions over the best path forward create a personal tension within me that this Part explores.

---

161. Sophie Angelis, *Limits to Prison Reform*, 13 U.C. IRVINE L. REV. 1, 3 (2022).

162. *Id.* at 31 ("The problem with reform, as opposed to abolition, is that it leaves a great deal of pain and degradation on the table, because it does not contest the prison qua prison as a method of punishment."). Professor Sharon Dolovich has urged a more robust conception of Eighth Amendment protections to remedy some of the deplorable conditions found in our nation's prisons. *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009).

163. Angelis, *supra* note 161, at 32 & n.147.

164. Although I do not use clients' real names, the situations described are all real. And in conversations with these clients (and their families), they have been clear that they do not want their plights to be swept under the rug. *See generally* Julia Hernandez, *Lawyering Close to Home*, 27 CLINICAL L. REV. 131, 137 (2020) (explaining that narrative storytelling "works against epistemic injustice . . . . Marginalized people are often harmed both in the denial of their individual capacity as bearers of knowledge and when significant areas of one's social experience are obscured from collective understanding." (quotation marks omitted)).

165. *See supra* nn. 81–83 & accompanying text.

A. No New Prisons?

The building of a new prison is the quintessential reformist reform. But for one client (and anyone else in a similar position), if I could wave a wand and erect a new prison, I would do so in a second.

Matthew, who was in his early twenties at the time, pleaded guilty to second-degree murder and was sentenced to spend fourteen years in prison. A native Washingtonian, D.C. was all he knew. He was close to his mother and adored his baby daughter, so much so that the idea of being away from them weighed on him just as heavily as the prison term he was set to serve.

There used to be a prison for people from D.C. It was in Lorton, Virginia, a suburb a little over twenty miles away from D.C. Superior Court, the place where punishment is imposed.[166] Lorton Correctional Complex, once Lorton Reformatory, was infamous for its deplorable conditions and horrendous violence.[167] Virginia lawmakers, on behalf of their suburban (mostly white) constituents, pushed hard for Lorton to close.[168] They got their wish when Congress passed the National Capital Revitalization and Self-Government Improvement Act of 1997.[169] The Act, among other autonomy-stripping provisions, reformed D.C.'s local criminal justice system, including mandating that Lorton close by the end of 2001.[170] Under the Act, the Federal Bureau of Prisons (BOP) would take custody of all D.C. prisoners.[171] Lorton had been closed for more than a decade by the time Matthew was sentenced. In its place now stands an idyllic arts center and family-friendly athletic fields.[172]

---

166. *See* Serge F. Kovaleski, *Lorton's Final Lockdown*, WASH. POST (Nov. 19, 2001, 7:00 PM), https://www.washingtonpost.com/archive/local/2001/11/20/lortons-final-lockdown/dddc4cf1-42f2-4fdb-ac07-2524a452ac16/ [https://perma.cc/3V58-7ALZ].

167. *See* Eddie Dean, *Documentary by Former Lorton Inmate Looks Beyond Prison's Violent Reputation*, WASH. POST (Dec. 6, 2022, 11:36 AM), https://www.washingtonpost.com/magazine/2022/12/06/lorton-prison-film/ [https://perma.cc/6YU8-28DR].

168. Eddie Dean, *Maximum Insecurity*, WASH. CITY PAPER (June 6, 1997), https://washingtoncitypaper.com/article/282743/maximum-insecurity/ [https://perma.cc/KG28-BZLS].

169. National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, § 11201(b), 111 Stat. 712, 734 ("Notwithstanding any other provision of law, not later than December 31, 2001, the Lorton Correctional Complex shall be closed and the felony population sentenced pursuant to the District of Columbia Code residing at the Lorton Correctional Complex shall be transferred to a penal or correctional facility operated or contracted for by the Bureau of Prisons.").

170. *See, e.g.*, Knight Chamberlain, *600 Protestors Picket for D.C. Outside Faircloth's Front Door*, WASH. POST (Aug. 24, 1997, 1:00 AM), https://www.washingtonpost.com/archive/local/1997/08/24/600-protesters-picket-for-dc-outside-faircloths-front-door/566f1f61-2a9a-46b0-a27f-54757a90cc4e/ [https://perma.cc/V293-LUQ3].

171. *See* National Capital Revitalization and Self-Government Improvement Act of 1997 § 11201(b).

172. *See* Andrew Beaujon, *A Notorious DC Prison Is Now a Classy Suburban Development. Here's What It Looks Like*, WASHINGTONIAN (May 22, 2020), https://www.washingtonian.com/2020/05/22/notorious-dc-prison-lorton-classy-suburban-development-heres-what-it-looks-like/ [https://perma.cc/LEW9-FPLH].

With Lorton gone, today, when a D.C. resident is convicted of a crime and sentenced to prison, they can end up in virtually any prison within the BOP.[173] I've had D.C. clients in federal prisons as far north as New Hampshire, as far south as Florida, and as far west as Colorado.[174] Matthew was first sent to a federal prison in rural West Virginia—not ideal, but at least in driving distance from D.C. But soon after, he was sent to a prison an hour outside of Orlando—a twelve-plus hour drive from home—a distance that prohibited Matthew's family from visiting him.

Being that far from family took a toll on Matthew. He went from having monthly visits to no visits at all. For all its flaws (for lack of a better word),[175] when Matthew was held pretrial at the D.C. Jail, he knew people or knew of people from the neighborhood and through family. He had a form of community. Even when Matthew was in West Virginia, there were at least a sizeable number of guys from D.C. to look out for one another. Florida was a different story. Matthew was one of only two people from D.C. in the prison. Therefore, not only did Matthew no longer have access to his family, but he was also cut off from anything and everybody that was even remotely familiar. He lacked the safety that comes with numbers and the love that comes from family. Being so far from home only amplified the suffering attendant to Matthew's incarceration.

The Department of Justice, which oversees the BOP, acknowledges that "[r]esearch shows that close and positive family relationships during incarceration reduce recidivism, improve an individual's likelihood of finding and keeping a job after prison, and ease the harm to family members separated from their loved ones."[176] The BOP, by incarcerating Matthew so far from home, robbed Matthew of his family and all the benefits that come from being close to them. In so doing, the BOP exacerbated the suffering that Matthew and his family faced and increased the likelihood that

---

173. The Bureau of Prisons has a policy stating a preference for incarcerating people "within 500 miles of the release area." *See* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., PROGRAM STATEMENT, INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION ch. 5, at 3 (Sept. 12, 2006), https://www.bop.gov/policy/progstat/5100_008.pdf [https://perma.cc/R8RN-9LP5]. As explained, the policy is clearly not binding as it is often not followed.

174. *See generally Two-Thirds of DC Felons Serve Prison Sentences Outside the Region*, NBC WASH. (Aug. 7, 2019, 7:16 PM), https://www.nbcwashington.com/local/two-thirds-of-dc-felons-serve-prison-sentences-outside-the-region-3/177924/ [https://perma.cc/US7J-A388].

175. *See, e.g.*, Jaclyn Diaz, *Jan. 6 Detainees Say a D.C. Jail Is So Awful that They'd Like a Transfer to Guantanamo*, NPR (Oct. 7, 2022, 2:32 PM), https://www.npr.org/2022/10/07/1127481476/capitol-riot-detainees-request-guantanamo-transfer-dc-jail-conditions [https://perma.cc/VCJ4-JMJY].

176. *Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons*, ARCHIVES: U.S. DEP'T JUST., https://www.justice.gov/archives/prison-reform#:~:text=Re-%20search%20shows%20that%20close%20and,sepa-%20rated%20from%20their%20loved%20ones [https://perma.cc/K4GA-KFYL].

Matthew would not succeed upon reentry to the community.[177]

If I could build a prison closer to home for Matthew and all the other people from D.C. incarcerated far from home, I would.[178] To be clear, I am not the only one who feels this way. D.C. native Robert Barton is serving thirty years to life in the BOP. Coincidentally, for a time he was at the same prison in Florida as Matthew. Rob founded the organization More than Our Crimes, which "seeks to give a voice to the thousands of Americans, mostly people of color, who were once convicted of violent crimes and now have served a decade or more behind bars and deserve a second chance to live freely and contribute to their families and society."[179] One of the issues Rob is passionate about is the need for a prison for D.C. residents.[180] Rob fully believes in decarceration.[181] But he also knows "incarceration is not going away any time soon."[182] He therefore advocates for a D.C. prison with the understanding that "[t]here is probably nothing more important to rehabilitation than connection to family."[183] Rob's views are representative. A survey of incarcerated people from D.C. revealed that 70% supported building a prison in D.C., and 62% would prefer to serve their sentence in a D.C. prison.[184] It's hard to hear the persistent pleas for a new prison from people currently incarcerated and not want to help.[185] And if responding to that plea is the impetus for a "reformist reform," *especially* given the views of those imprisoned now, sobeit.

Matthew's story also speaks to the need for decarceration or

---

177. *See, e.g.*, Justin Brooks & Kimberly Bahna, *"It's a Family Affair"—The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271 (1994); Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793 (2011).

178. The problem of being incarcerated far from home is not unique to D.C. For an important account of the harms of imprisoning one out of their home state, see Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1856–66 (2020).

179. *Who We Are*, MORE THAN OUR CRIMES, https://morethanourcrimes.org/who-we-are/ [https://perma.cc/64FQ-W7JT].

180. *The Case for a D.C. Prison*, MORE THAN OUR CRIMES, https://morethanourcrimes.org/the-issues/the-case-for-a-d-c-prison/ [https://perma.cc/FQ3G-JK66].

181. *Id.*

182. *Id.*

183. Robert Barton, Opinion, *Robert Barton: 'Black Lives Matter' Reforms Should Include Bringing Incarcerated DC Residents Home*, DC LINE (Aug. 31, 2020), https://thedcline.org/2020/08/31/robert-barton-black-lives-matter-reforms-should-include-bringing-incarcerated-dc-residents-home/ [https://perma.cc/PT8X-2NGQ]. For an account from Rob on his experiences in the BOP, see Pam Bailey, *'Diesel Therapy': The BOP's Unique Form of Psychological Torture*, MEDIUM (Aug. 29, 2020), https://morethanourcrimes.medium.com/diesel-therapy-the-bop-s-unique-form-of-psychological-torture-77c96091c1db [https://perma.cc/WQS4-M5QR].

184. BAILEY GILMORE, NAT'L REENTRY NETWORK FOR RETURNING CITIZENS, DC PRISON POPULATION SURVEY 5–6 (2020), https://www.courtexcellence.org/uploads/publications/Analysis_of_Survey_of_DC_Residents_in_BOP.pdf [https://perma.cc/NHC6-RYDH].

185. For another account of the travails D.C. residents face in BOP custody, see Martin Austermuhle, *D.C. Inmates Serve Times Hundreds of Miles from Home. Is It Time to Bring Them Back?*, WAMU 88.5 (Aug. 10, 2017), https://wamu.org/story/17/08/10/d-c-inmates-serving-time-means-hundreds-miles-home-time-bring-back/ [https://perma.cc/B958-YERZ].

minimalization. According to one government report, there are over 4,000 D.C. residents in over 120 BOP facilities across thirty-five states.[186] If all of the D.C. prisoners were housed in one local prison, the prison would have a population larger than any current BOP facility by a wide margin.[187] Over 500 of those residents are serving sentences of less than five years, and close to 1,000 are serving sentences less than ten years.[188] If you look at the population of the BOP more broadly, over 40% of those in BOP custody are serving time for drug related offenses,[189] and over 50% are housed in minimum or low security level prisons.[190] Assuming building a new prison is consistent with the minimalist agenda, it would presumably be important to shrink the D.C. prison population to ensure that any new prison is reserved for "the most serious offenders."[191]

But when I think of Matthew, I also support the aim of abolition. Just consider the suffering that he's facing in prison, the suffering his family faces because he is imprisoned, and then multiply that suffering by thousands. A system that exacts that much suffering seems like a system not worth saving. And think of what happened when D.C. had its own prison. Much like Rikers, Lorton was supposed to be an "ideal" prison "without walls," where people would learn a trade and were "taught the value of [hard day's work]."[192] In reality, it was a bastion of inhumanity.[193] There's no reason to think that whatever the intention of building a new prison, a similar story won't follow. Then add on top of that the criminogenic and stigmatizing effects of prisons and the many hurdles one faces after

186. *Annual Report 2019*, D.C. CORR. INFO. COUNCIL 2, https://cic.dc.gov/sites/default/files/dc/sites/cic/page_content/attachments/CIC%20Annual%20Report%20FY%202019%20FINAL.pdf [https://perma.cc/Z2GC-5F3M].

187. *See Population Statistics*, FED. BUREAU PRISONS, https://www.bop.gov/mobile/about/population_statistics.jsp [https://perma.cc/BJ89-U6A7]. A recent lawsuit alleges that BOP discriminates against D.C. prisoners. *See* Jenny Gathright, *D.C. Prisoners File Lawsuit Alleging Unequal Treatment in Federal Facilities*, DCIST (Feb. 7, 2022, 3:12 PM), https://dcist.com/story/22/02/07/dc-prisoners-sue-bureau-of-prisons/ [https://perma.cc/2VX4-ZPTE].

188. *Information About DC Code Offenders Based on Roster from Bureau of Prisons April 1, 2023*, D.C. CORR. INFO. COUNS., https://cic.dc.gov/sites/default/files/dc/sites/cic/page_content/attachments/DC%20Residents%20in%20Custody%20Length%20of%20Sentence%20April%201%2C%202023%20.pdf [https://perma.cc/JYP6-498M].

189. *Offenses*, FED. BUREAU PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp [https://perma.cc/L2CP-D6MJ].

190. *Prison Security Levels*, FED. BUREAU PRISONS https://www.bop.gov/about/statistics/statistics_inmate_sec_levels.jsp [https://perma.cc/4LCA-SLN8].

191. Slobogin, *supra* note 32, at 534. Minimalists must provide more detail about how they would go about their decarcerative agenda, including how many people should be imprisoned and who exactly is worthy of being behind bars.

192. Joanne Tang, *Here's a Fascinating Story About the Old Lorton, Virginia Prison*, GREATER GREATER WASH. (July 9, 2020) (alteration in original), https://ggwash.org/view/78346/the-old-lorton-virginia-prison-is-being-turned-into-homes-heres-its-fascinating-story#:~:text=Proponents%20of%20the%20Lo-ton%20Reformatory,gain%20valuable%20skills%20upon%20release [https://perma.cc/BJ3B-SXQ7].

193. *See supra* notes 166–172 & accompanying text.

release.[194] When I contemplate all that, I think, aligned with abolitionists, there must be a better way to redress criminalized behavior other than our current prison system.

In short, when I think of Matthew, and I think of his suffering, I see the need for reform of the reformist variety, minimalism, and abolition. With him in mind, I can make sense of all three projects not only independently, but in conversation with one another. To be sure, each project may at times think of itself as being a solution exclusive of all others. Even still, a focus on suffering binds them together.

B. Investing in Prison Programs?

Richard is serving a life sentence in the BOP. His story is not unfamiliar. Richard had a traumatic childhood and was raised in a chaotic household in an impoverished community. As a teenager, Richard got involved in a gang, and before his frontal lobe was fully developed, was convicted of a murder arising from a drug deal gone wrong. Today, in the waning days of middle age, Richard is not the same person he was when he entered prison in his early twenties. He is a voracious reader. He works in the prison library. And he mentors the younger men in prison. Now, Richard wants to go to college. He wants to pursue a liberal arts degree to learn more about the world outside of prison that he barely got to experience.

Given the exploitive nature of prison labor,[195] Richard could never afford classes on his own. But recently, Congress granted incarcerated persons access to Pell Grants, allowing those in prison the opportunity to pursue a secondary education.[196] Richard was thrilled. A college education, once a far-off dream, now seemed like a real possibility.

But money wasn't the only hurdle to Richard earning a college degree, it was just the initial one. Because even if he now technically had some means to go to college, the actual attendance part was still a challenge. Some jails and prisons work with willing educational institutions to provide in-

194. *See, e.g.*, Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 595 (2012); Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104–05 (2013); Zoe R. Feingold, *The Stigma of Incarceration Experience: A Systematic Review*, 27 PSYCH. PUB. POL'Y & L. 550 (2021).

195. *See generally* Andrea C. Armstrong, *Beyond the 13th Amendment – Captive Labor*, 82 OHIO ST. L.J. 1039 (2021) (discussing the laws and judicial decisions that govern the labor of incarcerated persons).

196. *Pell Grants Restores Possibilities for Incarcerated People*, FED. BUREAU PRISONS (July 12, 2023, 6:38 PM), https://www.bop.gov/resources/news/20230712_pell_grant.jsp#:~:text=As%20of%20July%201%2C%202023,for%20jobs%20with%20livable%20wages [https://perma.cc/Q9BD-R9HF]. In 1994, Congress had made incarcerated persons ineligible for Pell Grants. *Id.*

person instruction.[197] Not the facilities where Richard has been. Thus, like many in prison who wish to attend college, Richard must rely on distance learning.[198] In the outside world, distance learning is routine. Nearly thirty percent of all college students take classes exclusively online.[199] But the various prisons where Richard has lived have been technologically unequipped to allow for any meaningful online education, not to mention that Richard would need basic computer literacy lessons that have never been offered to him.[200] Therefore, Richard, if he wants to get an education, needs to essentially teach himself, as he must review materials on his own and can only correspond with his instructors by mail. Though void of basic pedagogical benefits, this correspondence learning arrangement alone may not have been insurmountable for Richard given his drive. But the fact that Richard is regularly bounced from facility to facility has made the process virtually impossible.[201] It was hard to witness Richard's excitement when he thought a college education was possible to only see him deflate when he realized how hard it would be to achieve.

If an executive branch official or lawmaker proposed earmarking money to create the infrastructure in prisons that would allow Richard and those like him to get an online education, I would support their efforts wholeheartedly. Formerly incarcerated people, too, have advocated for those in prison to have greater resources that allow them to pursue education.[202] While this would require investing more in prisons rather than tearing them down, I would do that for Richard. It is the very least he deserves.

Richard's story also raises broader questions, though, about how and why we incarcerate. Why *isn't* education readily available for those who are incarcerated given data showing that not only is education while incarcerated correlated with rehabilitation and more successful reentry, it is

---

197. *See, e.g.*, *What We Do*, PRISON EDUC. PROGRAM, [https://perma.cc/SP7M-M6Y2] (N.Y.U.); *Prison Education Project*, WASH. UNIV. ST. LOUIS, https://prisonedproject.wustl.edu/ [https://perma.cc/2HPN-A4VU].

198. *See generally* CHRISTOPHER ZOUKIS, PRISON EDUCATION GUIDE (Susan Schwartzkopf ed., 2016) (providing a comprehensive guide for correspondence programs that serve incarcerated individuals).

199. Ilana Hamilton, *By the Numbers: The Rise of Online Learning in the U.S.*, FORBES: ADVISOR (May 24, 2023, 1:31 PM), https://www.forbes.com/advisor/education/student-resources/online-learning-stats/ [https://perma.cc/T65S-PKZG].

200. *See generally* Michelle Weise, *Online Education Behind Bars*, EDUCAUSE REV. (Oct. 19, 2015), https://er.educause.edu/blogs/2015/10/online-education-behind-bars [https://perma.cc/W4EE-P3CV].

201. Over the course of the two years I represented him, Richard was incarcerated in four different prisons in four different states: California, Oklahoma, Virginia, and New Jersey.

202. *See, e.g.*, Reginald Dwayne Betts, *We Must Give All Prisoners Access to Resources to Pursue College Education*, TIME (May 27, 2021, 3:29 PM), https://time.com/6052113/prisoners-college-education/ [https://perma.cc/8KC5-XZZA]; CHRISTOPHER ZOUKIS, COLLEGE FOR CONVICTS: THE CASE FOR HIGHER EDUCATION IN AMERICAN PRISONS (2014).

also linked to more positive prison environments and overall lower cost to government?[203] It would seem to be in everyone's best interest to provide education services for incarcerated persons, that is unless prisons are not about rehabilitation or public safety at all—the very points abolitionist make.[204] So in the end, Richard's story points both ways. His story points to the immediate needs of those who are incarcerated that may require investment in prisons. His story also raises larger questions of how and why we incarcerate and whether the current mode of incarceration is worth maintaining. Either point, as I see it, warrants focus.[205]

C. More Prison Staff?

Tom was also serving a life sentence, except he was incarcerated in a Southern state prison. Like Richard, Tom was also in prison for murder, but the circumstances of the alleged crime for which he was incarcerated were much different. Tom suffered from severe mental illness that went undiagnosed and untreated. He was convicted of killing a loved one during the course of a psychotic episode—a tragedy that haunted him in his lucid moments. As is not unusual, Tom's mental illness was only diagnosed after his arrest. And because everyone agreed that Tom was severely mentally ill (although the government would not agree that he was not too ill to be tried criminally), he was housed in the "therapeutic" wing of the prison. Therapeutic is in scare quotes because there was very little therapy happening. In a good month, Tom spent two fifteen-minute sessions with a mental health professional. These mental health consults were conducted through the food slot in Tom's cell door. The prison said that this was all it could do given staffing shortages.

Predictably, Tom's mental health deteriorated. Tom tried to get help, filing a pro se suit under the Americans with Disabilities Act and the Eighth Amendment arguing that the prison's failure to provide him with adequate mental health services was discriminatory and cruel and unusual punishment. Tom warned in his pleadings that he was afraid that if he wasn't

---

203. *See* Sarah Wood, *Prison Education Programs: What to Know*, U.S. NEWS (July 20, 2023), https://www.usnews.com/education/articles/prison-education-programs-what-to-know [https://perma.cc/C376-QCZX]; Alexandra Gibbons & Rashawn Ray, *The Societal Benefits of Postsecondary Prison Education*, BROOKINGS (Aug. 20, 2021), https://www.brookings.edu/articles/the-societal-benefits-of-postsecondary-prison-education/ [https://perma.cc/4C4U-HTNW]. It is also important to recognize that incarcerated persons organize and provide each other with peer support programming to fill the gap left by the lack of official prison programming. *See, e.g.*, Jane South, Anne-Marie Bagnall & James Woodall, *Developing a Typology for Peer Education and Peer Support Delivered by Prisoners*, 23 J. CORR. HEALTH CARE 214 (2017).

204. *See, e.g.*, DAVIS, *supra* note 37, at 3.

205. Again, where minimalism stands on investing in prison infrastructure needs to be developed in the literature.

treated, he would die. Despite the urgency, Tom's case languished in the district court before the judge summarily dismissed his suit. The judge found Tom's case to be frivolous even though while the case was pending, Tom attempted suicide multiple times.[206]

I agreed to represent Tom on appeal. It was clear after a quick read that his case was not frivolous. In fact, it was hard to see how, if a judge were to fairly apply the law, Tom would not win. But just like in the district court, Tom's case languished in the court of appeals, sitting for months with no movement after briefing was long complete. Tom could not hold on. He died by suicide while his appeal was pending.[207] I will never know whether, if Tom had access to regular mental health treatment, he would be alive today. I know that *he* thought it would save his life. In part due to staffing shortages, Tom never received the treatment he so desperately needed.[208]

Prison staffing shortages are a nationwide problem.[209] And the idea of adding more staff to prisons can also be cast as a reformist reform that feeds into the already massive prison industrial complex. To be sure, there are ways to litigate prison staffing cases consistent with an abolitionist ethic. As an example, one could emphasize decarceration as the remedy to the prison staffing crisis rather than adding new staff, which is also an approach that would seem to resonate with most minimalists.[210] But what if the solution was just to add more staff, especially more qualified mental health professionals? Incarcerated persons across the country have sued for greater access to mental health treatment while in prison.[211] At a minimum, Tom

---

206. *See generally* 28 U.S.C. § 1915A (requiring courts to screen prisoner complaints seeking relief from a government entity and employee and allowing for dismissal of the complaint if the court deems it to be frivolous); Katherine A. Macfarlane, *Procedural Animus*, 71 ALA. L. REV. 1185, 1209 (2020) (explaining the prisoner litigation screening process).

207. Tom's story is also not unfamiliar. The Bureau of Justice Statistics reports that in 2019 (the last year for which it has reported data), 355 people died by suicide in local jails, and 340 people died by suicide in state and federal prisons. Jeff McDonald & Kelly Davis, *Suicides in U.S. Jails, Prisons Rose Sharply Over Two Decades, Federal Data Shows*, SAN DIEGO UNION-TRIBUNE (Oct. 7, 2021, 7:00 AM), https://www.sandiegouniontribune.com/news/watchdog/story/2021-10-07/suicides-in-u-s-jails-and-prisons-rise-sharply-over-past-two-decades-new-federal-research-shows [https://perma.cc/L6AK-QRLQ].

208. For a searing account of the experiences faced by those with mental illness who are incarcerated, see generally ALISA ROTH, INSANE: AMERICA'S CRIMINAL TREATMENT OF MENTAL ILLNESS (2018).

209. *See, e.g.*, Katherine LeMasters, Morgan Maner, Meghan Peterson & Lauren Brinkley-Rubinstein, *Staff Shortages in Prisons and Jails Highlight Opportunities for Decarceration*, HEALTH AFFS. (Jan. 21, 2022), https://www.healthaffairs.org/content/forefront/staff-shortages-prisons-and-jails-highlight-opportunities-decarceration [https://perma.cc/SV26-XC2F].

210. *See* Petchenik, *supra* note 29, at 21–23. One scholar has argued that prison conditions litigation has contributed to mass incarceration. *See* Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y. REV. 731 (2010).

211. *See, e.g.*, Parsons v. Ryan, 754 F.3d 657 (9th Cir. 2014); Tellis v. LeBlanc, No. CV 18-541, 2022 WL 67572, at *1 (W.D. La. Jan. 6, 2022); Samuel v. Centene Corp., No. 1:23-cv-01134 (D. Del.

was owed that. And given the urgency of his needs, Tom could not wait for the gradual pace that any decarceration effort would take given the urgency of his needs and especially given that, considering the crimes he was convicted of committing, he would almost certainly be left behind bars.

But why was Tom in prison at all? Tom needed treatment, not punishment. Yet even that might not have solved the problem, because when you look around at the "hospitals" designed to treat mentally ill people who have committed crime, they are often indistinguishable from prison and are sometimes even worse.[212] Which leads right back to the abolitionist point: what exactly are we hoping to accomplish with our current penal system? If the goal is the mass imposition of violence and suffering, then in those terms, the system is a resounding success. And if that is the main output of our system of "justice," then it is easy to see the abolitionists' argument for why it is not a system that should be saved.

* * *

When I think about my many clients, the projects of reform, minimalism, and abolition all resonate with me. I pray people hear the stories of Matthew, Richard, and Tom and push for immediate interventions for those behind bars. I hope hearing the stories of Matthew, Richard, and Tom prompt people to question who we imprison and why, which will then hopefully prompt them to realize that we imprison far too many people in disgustingly inhumane conditions. And I dream that those who hear the stories of Matthew, Richard, and Tom are inspired to reconceptualize the way we think about crime and how we punish people for engaging in it, and how we need to address the root causes of crime to prevent it from happening altogether.

There needs to be a project that addresses the urgent needs of the Matthews, Richards, and Toms of the world. If abolition is not the project for that, then that spells out the need for reform.[213] We need to radically reimagine our entire criminal legal system, especially in spaces where reform efforts have failed (for examples, Rikers).[214] If that sort of reimagining is beyond reform, then that spells out the need for abolition.

Oct. 11, 2023). And at times the litigation has been successful, proving the importance of prison conditions litigation. *See* Maggie Angst, *California Faces $50 Million in Fines for Failing to Meet Prisoners' Mental Health Needs*, SACRAMENTO BEE (Oct. 24, 2023, 4:10 PM), https://www.sacbee.com/news/politics-government/capitol-alert/article280656380.html [https://perma.cc/8NCD-V6M7].

212. *See, e.g.*, STEPHEN B. SEAGER, BEHIND THE GATES OF GOMORRAH: A YEAR WITH THE CRIMINALLY INSANE (2014).

213. For instance, some abolitionist groups are staunchly against the building of any new prisons, even if it would be a closer to home prison. *See* Barkow, *supra* note 31, at 299 & n.275; *see also supra* notes 81–83 and accompanying text.

214. *See, e.g.*, Thusi, *supra* note 27, at 1589.

And we need a viable path forward by building coalition. If that's what minimalism provides, then it's a project worth developing. Then perhaps, as Rikers demonstrates, when all the perspectives are considered alongside one another, real, meaningful change can (potentially) be possible.

There is no need for everyone to agree on the precise path forward. One can push for more humane *conditions* while another pushes for more humane *systems* and yet another offers what they see as a navigable path to change. The point is that almost everyone agrees that *something* needs to be done about the current state of incarceration, and there are no bad ideas in a brainstorm (that's not to say that any idea is above critique). It's okay for us to make different, even discordant, choices about how we choose to address the suffering that the criminal legal system exacts, as each position necessarily comes with a set of tradeoffs, and people may feel differently about what tradeoffs are worth it. Or at least that's what I tell myself. And perhaps it's possible to hold abolition in your heart while pursuing reform, even those of the reformist variety. Just as it's possible to pursue abolition in its most absolutist terms while also understanding the deep desire to do whatever it takes to help those laboring in prison now. Because in the end, hopefully, when the different positions are considered alongside one another and with their powers combined,[215] there is a *real* chance to alleviate at least some of the suffering, both now and in the future.

Professor James Forman observed that our current system of mass incarceration stems from "a series of small decisions, made over time, by a disparate group of actors."[216] Thus, as Forman continues, "mass incarceration will likely have to be undone in the same way"—i.e., through a series of small decisions made by a disparate group of actors.[217] Maybe reformists, abolitionists, and minimalists are part of this diverse coalition, and while they don't necessarily agree on strategy, they are all rowing in the same general direction—trying to fix the intractable problem that is our current system of incarceration. Maybe the different projects, by advocating for change both small and revolutionary, are striving together toward meaningful transformation. At their best, the projects push each other to sharpen their messages, rethink their methods, and account for their weaknesses. The projects are necessarily tied together as they help conceptualize one another. And when the projects are braided together, the combined effect can change the tenor of conversations and reshape what one imagines as possible. In other words, we can pursue different strategies and hope that together, the projects work to radically reduce the amount of suffering left in the wake of the quest for "justice."

---

215. *See Captain Planet and the Planeteers* (TBS Syndication television broadcast 1990).
216. FORMAN JR., *supra* note 58, at 229.
217. *Id.*

CONCLUSION

In his recent book about the lives and legacies of Martin Luther King Jr. and Malcolm X, Professor Peniel Joseph takes pains to describe how the two storied civil rights leaders' visions and strategies converged as a rebuttal to the conventional wisdom that the two were oppositional or antagonistic.[218] As Joseph explains, the "neat juxtaposition" between Martin and Malcolm "obscures more than it reveals, erasing the profound ways in which their politics and activism overlapped and intersected, and oftentimes helped to transform national and global debates over racial and economic justice, the role of the criminal justice system, the use of violence, and the resilience of American democracy."[219]

It's worth considering whether the balkanization of criminal law reform scholarship "obscures more than it reveals."[220] From a place of humility and with an emphasis on humanity, this Essay asks whether good can come from the tensions between the abolition, reform, and minimalism. Whether, along with critiquing, we should be exploring how the projects, and the gaps between them, can work together to reorient debates and policy around criminal law and punishment. And as we ask these questions and look for answers, this Essay hopes to remind readers of one thing: We are debating in the shadows of suffering.

---

218. *See* Annette Gordon-Reed, *Martin, Malcolm and the Fight for Equality*, N.Y. TIMES (Apr. 6, 2020), https://www.nytimes.com/2020/03/31/books/review/the-sword-and-the-shield-martin-luther-king-jr-malcolm-x-peniel-e-joseph.html [https://perma.cc/F225-96JQ].

219. PENIEL E. JOSEPH, THE SWORD AND THE SHIELD: THE REVOLUTIONARY LIVES OF MALCOLM X AND MARTIN LUTHER KING JR. 25 (2020).

220. *Id.* Of course we will never know what the world would have looked like if there was only Martin or only Malcolm.