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CONVENTIONS AND CONVICTIONS: A VALUATIVE THEORY OF PUNISHMENT

Daniel Maggen*

Abstract

The one thing that most scholars of criminal law agree upon is that we are in desperate need of a comprehensive theory of punishment. The theory that comes closest to meeting this demand is the expressive account of punishment, yet it is often criticized for its inability to explain how the expression of communal values justifies punishment and why the condemnation of wrongdoing necessarily requires punishment. The Article answers these criticisms by arguing against the need to necessarily connect punishment to wrongdoing and by developing expressivism into a novel theory of punishment, grounded in the valuative function punishment serves.

Offering an original interpretation of Immanuel Kant's Critique of Judgment, the Article argues that criminal law should be understood as a device in the service of the individual's interest in affirming her personhood, an interest that is promoted by the creation and communication of values. The Article posits that criminal law serves this purpose by safeguarding the conditions that facilitate valuative communication. It does so by (1) cataloging the values shared in the community; (2) outlining the ways in which these values are commonly interpreted; and (3) penalty responding to forms of behavior that hinder successful valuation.

The Article concludes by examining the prohibition of abortion in light of the values such prohibition purports to protect, distinguishing between prohibitions that legitimately support the function of valuation and those prohibitions that serve communal values irrespective of the important function of valuation. The Article contends that, even if under certain circumstances an affront to protected values could justify the prohibition of abortion, the reasons for prohibition will commonly fail to justify the penal condemnation of those who perform or undergo it.

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INTRODUCTION

During a town hall meeting held in Green Bay on May 2016, Donald Trump, then a contender in the Republican presidential primaries, made a statement that was met with considerable astonishment. Pressed by moderator Chris Matthews, Mr. Trump conceded that if abortion was outlawed, something that he would presumably seek to do as President, then women illegally undergoing abortion would be subject to punishment. This statement provoked immediate rebuke from Democrats and Republicans alike, quickly prompting Mr. Trump to backtrack on its penal conclusion.¹

Why did the move from the criminalization of abortion—hardly surprising for a self-proclaimed “pro-life” candidate—to its punishment draw such ire? Much of the answer no doubt involves election dynamics and the profound moral, philosophical, and political questions that surround the topic of abortion. This Article will, however, argue that an essential aspect of the answer also concerns the ambiguous connection between punishment and crime, as well as their connection to the values they purport to serve.²

These connections were traditionally addressed by the retributive and deterrence-based justifications of punishment, yet neither has proved capable of comprehensively explicating them. As a result, a relatively new *expressive* theory of punishment has been put forward by various authors as an alternative understanding of punishment, to succeed where the traditional accounts have failed.³ The expressive account, which is particularly attractive to those attempting to make sense of the criminalization of abortion, suggests that punishment is justified as a way of

¹ See Matt Flegenheimer & Maggie Haberman, *Donald Trump, Abortion Foe, Eyes ‘Punishment’ for Women, Then Recants*, N.Y. TIMES, Mar. 30, 2016, at A1.

² Contemporary scholarship is almost unanimous in lamenting this ambiguity. See, e.g., DEIRDRE GOLASH, *THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW* (2005) (generally arguing against the ability to theoretically justify punishment); Theodore Y. Blumoff, *Justifying Punishment*, 14 CAN. J. L. & JURIS. 161, 162 (2001) (generally arguing for the impossibility of a coherent general justification of punishment); Alan H. Goldman, *The Paradox of Punishment*, 9 PHIL. & PUB. AFF. 42, 42 (1979) (noting the gap between the pervasiveness of punishment and the unavailability of a clear justification of punishment); J. L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3, 3 (1982) (noting the paradoxical gap between the unavailability of a clear justification of punishment and its familiarity from the perspective of retributivism); Leon Pearl, *A Case Against the Kantian Retributivist Theory of Punishment*, 11 HOFSTRA L. REV. 273, 276 (1982) (arguing that there is today no satisfactory theory of punishment).

³ The most significant authors to write in the expressive tradition include Antony Duff, Joel Feinberg, Jean Hampton, and Dan Kahan. See R.A. DUFF, *TRIALS AND PUNISHMENTS* 233–36 (Sydney Shoemaker et al. eds., 1986) [hereinafter DUFF, *TRIALS AND PUNISHMENTS*]; Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965); Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 217 (1984); Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 U. CHI. L. REV. 591, 597 (1996).

conveying the social reprobation of actions that flout shared social values.⁴ Expressivism, however, is widely criticized on two main points. First, it is often argued that expressivism suffers from what is known as the problem of hard treatment.⁵ A theory of punishment, according to this objection, must be able to explain punishment *qua* hard treatment, meaning the intentional infliction of suffering on the punishee. While expressivism can, perhaps, explain the purpose of punishment, it is argued that it fails to explain why such condemnation needs to take the form of hard treatment.⁶ This failure, it is argued, prevents expressivism from being regarded as a meaningful justification of punishment.⁷

This Article will respond to this criticism by distinguishing between two modes of justifying punishment, based on the kind of *prima facie* wrong that punishment is thought to exhibit. Punishment, on one view, is not inherently different from other state actions, and the kind of justification it entails essentially requires grounding punishment in the kind of good that is generally promoted by the legal order.⁸ Referring to this stance as the *general* approach to the justification of punishment, the Article will suggest that it is characteristic of justifications of punishment as diverse as Bentham's utilitarianism and Kantian contractualism. On another view, to which I will refer as the *special* mode of justification, punishment represents a unique evil, surpassing the general wickedness of non-penal state action, and is therefore in need of a special form of justification, which ostensibly can only be found in its connection to another unique evil, that of crime.⁹ It is not enough, on this account, that punishment could be shown to be in the service of a generally desirable moral purpose; instead, the only purpose that might absolve punishment of its sins can be found in its inversion of crime, in backward-looking retribution or forward-looking crime prevention.

The objection to expressivism for its failure to adequately address the problem of hard treatment comes from the direction of the special mode of justification, yet this Article will argue that there is no reason to heed the demands that expressivism adheres to the underlying premises of the special approach. After shedding light on some of the weaknesses of the special approach, this Article will suggest that expressivism is better understood as a general justification of punishment, rejecting the idea that there is something particularly evil about punishment that cannot be justified by reasons that would be equally applicable to other state actions.

This understanding of the expressive account puts the onus of justification on the beneficial purpose ostensibly served by criminal law, and here it is where

⁴ See, e.g., Feinberg, *supra* note 3, at 400; Kahan, *supra* note 3, at 596.

⁵ See generally Ambrose Y.K. Lee, *Defending a Communicative Theory of Punishment: The Relationship Between Hard Treatment and Amends*, 37 OXFORD J. LEGAL STUD. 217 (2017) (surveying the difficulty expressive theories have in justifying hard treatment).

⁶ See, e.g., Linda Ross Meyer, *Herbert Morris and Punishment*, 22 QUINNIPIAC L. REV. 109, 118 (2003).

⁷ See, e.g., Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1421–22 (2000).

⁸ See *infra* Section I.A.1.

⁹ See *infra* Section I.A.2.

expressivism encounters a second, more formidable objection. On the expressive account, punishment, and criminal law in general, are justified as a way of expressing social values. As some of the proponents of expressivism themselves admit, this purpose seems to put the expressive justification at odds with the fundamental tenets of liberalism, as it seems to transform the individual into an instrument for social progress, or, at least, make the moral stature of the individual overly dependent on the community she is part of.¹⁰

After surveying some of the ways in which different proponents of expressivism seek to overcome this challenge, and how their failure to do so is affected by the unnecessary attempt to resolve the hard treatment problem, this Article will suggest that the expressive justification can be redeemed by viewing the promotion of social values as but one aspect of the more fundamental purpose of promoting *individual valuation*, in which social values are used to promote individual assertions of agency.

Individuals, it will be suggested, assign value to objects as a way of asserting their creative agency and personhood. To validate these valuative self-assurances, individuals seek to communicate their values to others, whom they believe would accept these values in recognition of the agency of their creators. Social values, in this view, deserve legal protection not because of their intrinsic worth but rather because of their ability to contribute to the self-asserting efforts of individuals. Accordingly, when we come to scrutinize the legal promotion of social values, in general, or in criminal law, we must do so with an eye to the more fundamental purpose of promoting individual valuation.

Once the shift from values to valuation is incorporated into the expressive theory, we can distinguish between two main ways in which criminal law promotes the purpose of valuation, doing so either *directly* or *indirectly*. Beginning with the latter, this Article will argue that criminal law can be understood as part of a general endeavor to facilitate the necessary conditions for the successful creation and communication of values.¹¹ Criminal law does this, this Article will suggest, by giving voice to the values shared by members of the community, describing the ways in which the scope of these values is commonly understood, and prohibiting the creation of conditions that hinder their communication. This indirect mode of operation, this Article argues, is most characteristic of the protection of those aspects of valuation that are further from the core of self-assurance, as they are generally less significant for the very ability to assert one's personhood.

¹⁰ See, e.g., Kahan, *supra* note 3, at 597.

¹¹ There is some resemblance between this direction and Jürgen Habermas' communicative theory. Habermas, however, views communication in dialectical terms, mediating between the individual and the community, while I see it as an *immediate* instrument of self-assertion. See JÜRGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 157 (Jeremy L. Shapiro trans., Heinemann Educ. Books, 2d. ed. 1978) (1968) [hereinafter HABERMAS, KNOWLEDGE AND HUMAN INTERESTS]; JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 65–66 (Christian Lenhardt & Shierry Weber Nichol森 trans., Mass. Inst. Tech. 1990) (1983); JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 17–19 (Thomas McCarthy trans., Beacon Press 1984) (1981).

This Article will then proceed to argue that in addition to the general purpose of safeguarding social values, criminal law at times responds more directly to forms of behavior that negatively affect the valuative efforts of others. Here, this Article will suggest that rejecting the ability of others to form communicable values, by treating them as inferior, imposing on them judgments that are divorced from their self-asserting valuation, or treating them as objects, can have a direct disruptive effect on the ability of those thus treated to continue using valuation for the purpose of self-assertion. In responding to such forms of behavior with penal condemnation, criminal law expresses the falsity of such behavior and reassures the victim, and all members of the community, that their values can be validated through communication, despite the contrary message implicit in wrongdoer's actions.

The argument will proceed in several steps. Part I will situate the expressive account, and the problem of hard treatment from which it allegedly suffers, within the scholarly debate on the justification of punishment. In doing so, Part I will respond to the hard treatment objection by distinguishing between general and special forms of justification. Part I will subsequently argue that the demand for special justification places an unnecessary burden on the justification of punishment, and that heeding this demand risks leading the practice of punishment down a dangerous path. Part II will then explore the difficulty with the expressivist claim that punishment is meant to promote social values. Part II will survey three ways in which expressive theories attempt, and fail, to justify punishment in terms of its contribution to the promotion of values, using utilitarian,¹² Kantian,¹³ and Hegelian¹⁴ justificatory frameworks. Part III will respond to the problem of promoting values by introducing a shift from values to valuation. Offering an innovative reading of Immanuel Kant's theory of judgment, this Part will explore the logic of communicative valuation and how it can be thought of as assisting the affirmation of personhood. Returning to the subject of punishment, Part IV will explore the ways in which criminal law could be explained and justified as an instrument for the promotion of valuation. This Part will argue that criminal law serves three main functions that facilitate valuative communication: the enumeration of values shared by members of the community; the specification of common interpretations for various forms of behavior with regard to the affirmation or denial of valuation; and the reaffirmation of values and valuation in the face of criminal behavior that flouts them. This Part will further distinguish between the direct and indirect ways in which criminal law promotes valuation, either by focusing on the disruption of valuation itself or on the erosion of social values.

Finally, Part V of this Article will explore the possible criminalization of abortion, as it is presented in the Supreme Court's opinion in the case of *Roe v. Wade*¹⁵ as a case of *indirect* legal protection of individual valuation. Viewed from this perspective, this Article will argue that the social values that commonly inform

¹² See *infra* Section II.A.

¹³ See *infra* Section II.B.

¹⁴ See *infra* Section II.C.

¹⁵ 410 U.S. 113 (1973).

the prohibition of abortion can be justified in doing so *only as far as they are in the service of individual valuation*. In addition, this Article will argue that even when the prohibition of abortion is justifiable in these terms, the penal condemnation of the women who undergo it may not be, given the distinct functions served by criminalization and condemnation.

I. EXPRESSIVISM AND THE PROBLEM OF HARD TREATMENT

A. *The Problem of Hard Treatment*

Up until recently, the attempts to justify the practice of punishment could be generally divided between those made by utilitarians, who believe that punishment is justified as a form of crime prevention, and retributivists, who insist that punishment is justified by virtue of being a just response to past wrongdoing.¹⁶ Endless debate between these two opposing schools has led to the point of mutual destruction, as both views develop devastating critiques of each other.¹⁷

In response to the failure of these traditional justifications, several influential scholars of criminal law have begone over the past few decades to develop an alternative *expressive* justification of punishment.¹⁸ As their name suggests, expressive theories maintain that punishment must be understood and justified as a communicative act.¹⁹ Joel Feinberg influentially set the tone for this approach by describing punishment as “a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted.”²⁰ The fact that punishment expresses condemnation seems intuitively true, almost to the degree of truism, but can this insight justify punishment?²¹

The family of approaches that took Feinberg’s lead has mainly focused on punishment’s expressivity to answer this question;²² however, I believe that it would be more useful to address it by stressing punishment’s conventionality. In one sense

¹⁶ See, e.g., J.P. Day, *Retributive Punishment*, 87 MIND 498, 498 (1978).

¹⁷ See, e.g., George Kateb, *Punishment and the Spirit of Democracy*, 74 SOC. RES. 269, 269 (2007).

¹⁸ This idea dates back to the work of Émile Durkheim. See ÉMILE DURKHEIM, *MORAL EDUCATION: A STUDY IN THE THEORY AND APPLICATION OF THE SOCIOLOGY OF EDUCATION* 176–178 (Everett K. Wilson ed. & trans., Herman Schnurer trans., The Free Press of Glencoe 1961) (1925).

¹⁹ See, e.g., Feinberg, *supra* note 3.

²⁰ *Id.*

²¹ Some indeed argue that its intuitive appeal is in fact nothing more than a form of unhelpful truism that fails to take us beyond the arguments made by the traditional justifications. See, e.g., Michael Davis, *Punishment as Language: Misleading Analogy for Desert Theorists*, 10 LAW & PHIL. 311, 319 (1991); A. J. Skillen, *How to Say Things with Walls*, 55 PHILOSOPHY 509, 511 (1980).

²² See, e.g., Adler, *supra* note 7, at 1375.

of the word, the one most clearly used by Feinberg in the above passage, punishment's conventionality concerns the medium of punishment.²³ Against the tendency of the traditional justifications to take as their point of departure the familiar image of punishment as an act meant to inflict unwelcome "hard treatment" on the punishee,²⁴ Feinberg suggests that this external expression of punishment is incidental to its more fundamental essence, which could be expressed through various conventional vehicles of punishment.²⁵ I will explore the second meaning of punishment's conventionality in Part II, after first exploring the main objection aimed at the first use of this notion.

According to one influential line of argument, Feinberg's appeal to the conventionality of the penal medium understates the centrality of hard treatment for punishment.²⁶ On this view, punishment differs from other forms of expression and other actions in general in that it intends to cause suffering.²⁷ Accordingly, leaving this fact out of the justification of punishment, or making it merely a matter of convention reflects, on this view, failure to justify punishment.²⁸ While a condemnatory message could be conveyed through the infliction of suffering, this purpose could also be served in ways that do not include the infliction of suffering, making it superfluous.²⁹ Given the moral depravity of the infliction of suffering, this objection continues, the fact that expressivism is willing to impose superfluous suffering makes it morally objectionable.³⁰

In responding to this objection, it is important to situate it within two distinct modes of understanding the task of justification. According to one mode of justification, the fact that the phenomenon of punishment commonly involves the intentional infliction of pain is a consideration to be addressed within the internal calculus of punishment: in certain instances, the suffering punishment causes would render punishment unjust, while at other times the suffering could be outweighed by the benefits punishment involves. Below, I will regard this view as the *general*

²³ See Feinberg, *supra* note 3, at 400.

²⁴ See, e.g., J.R. LUCAS, ON JUSTICE 124–27 (1980).

²⁵ See Feinberg, *supra* note 3, at 402.

²⁶ See, e.g., Nathan Hanna, *Say What? A Critique of Expressive Retributivism*, 27 LAW & PHIL. 123, 134 (2008) ("Punishment, after all, treats people in ways that are wrong under most circumstances. Just because we can express certain things with punishment does not mean that doing so is justified, especially if adequate alternative means of expression are available"); Meyer, *supra* note 6, at 118 ("If there is not a necessary correlation between the offender's suffering and the victim's social reaffirmation, then why punish?").

²⁷ For discussion of this idea, see Bill Wringer, *Must Punishment Be Intended to Cause Suffering?*, 16 ETHICAL THEORY & MORAL PRAC. 863, 866 (2013).

²⁸ See, e.g., MATT MATRAVERS, JUSTICE AND PUNISHMENT: THE RATIONALE OF COERCION 79 (2000).

²⁹ See, e.g., R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1, 40 (1996) [hereinafter Duff, *Penal Communications*].

³⁰ See, e.g., Lee, *supra* note 5, at 220 ("If formal convictions or purely symbolic punishments can communicate the censure that offenders deserve for their crimes, there would be no good reasons to communicate it by way of hard treatment. Doing so would simply be wrong.").

approach to justification. In contrast, another view suggests that the fact that punishment involves the intentional infliction of suffering makes it a uniquely wicked phenomenon, in need of *special* justification. On this account, evident in the hard treatment objection, the unique evil of punishment entails that any attempt to defend it must be equally exceptional in its justificatory framework.³¹ This form of justification, it is often suggested, could only derive from punishment's inverse connection to the crime.³²

Below I will defend the first, general mode of justification, asking whether the moral benefit provided by punishment is justified despite the use of hard treatment. The alternative special approach, I will suggest, is but one understanding of the kind of justification that is required of punishment; even if it is not inherently misguided, it certainly places an undue and dangerous burden on the practice of punishment. Preferring the general to the special mode of justification, I will conclude, obviates the need to respond to the hard treatment objection, as it is premised on the belief that the justification of punishment must be uniquely tied to the crime.

B. Justifying Punishment

Justification means different things under different theories of punishment. As Mitchell Berman suggests, of the idea of justification, conceptually assumes that there is some *prima facie* cause for concern about punishment—a reason for which it stands in need of justification.³³ Different theories of punishment, he suggests, differ on how they seek to go beyond this initial “demand basis.”³⁴ Berman accordingly believes that we can distinguish between penal theories that seek to demonstrate that there are considerations that override the *prima facie* wrongness of punishment and theories that deal with it by arguing that, upon reflection, the act of punishment does not give rise to the demand basis in question.³⁵ David Dolinko suggests another helpful distinction between theories that practice rational justification by articulating the logic of punishment and theories that purport to offer a moral justification of punishment by explaining why it is morally permissible or

³¹ See, e.g., Meyer, *supra* note 6, at 118.

³² See, e.g., John Tasioulas, *Punishment and Repentance*, 81 *PHILOSOPHY* 279, 296 (2006).

³³ See Mitchell N. Berman, *Punishment and Justification*, 118 *ETHICS* 258, 265 (2008).

³⁴ *Id.*

³⁵ Berman correctly adds that defeating the demand basis does not necessarily entail that the action is justified for all intents and purposes, only that “it imposes no further obligation” on its proponent. *Id.* “This,” he suggests, “is not to say that the practice is thereby rendered justified, or even justifiable, all things considered. Maybe it is, maybe not. The more modest (yet significant) upshot is only that the practice no longer stands, embarrassedly, ‘in need of justification.’” *Id.* David Dolinko likewise notes the limited justificatory force of this form of justification. See David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 *LAW & PHIL.* 507, 521 (1997) [hereinafter Dolinko, *Retributivism*].

desirable to engage in punishment.³⁶ A third distinction is inspired by H.L.A. Hart's suggestion that we can differentiate between the distribution of punishment and its imposition.³⁷

Another distinction I wish to pursue in this Section, related to the previous three, is one between *general* and *special* modes of justification. I will suggest that for those theories that take the general approach to justification, the demand basis of punishment is no different from the one raised by state action in general, at least not categorically so.³⁸ Viewed from this perspective, the justification of punishment primarily requires elucidating the beneficial purpose that punishment purportedly promotes and explaining why this purpose overrides or erases the initial ground for objection.

In contrast to the general theories, and often in response to their shortcomings, various *special* modes of justification seek to narrow the scope of inquiry from state action in general to the justification of punishment.³⁹ For these theories, punishment involves a unique evil, mirroring the evil of criminal wrongdoing.⁴⁰ It is not enough, on these views, to show that punishment is beneficial; instead, the unique evils of punishment can only be atoned by an equally unique benefit, derived from its response to crime.⁴¹

1. *General Justification*

One of the clearest examples for the general approach to the justification of punishment comes from Jeremy Bentham's utilitarianism, particularly when it is contrasted with J.S. Mill's utilitarian approach to punishment. For Bentham, the justification of punishment is mostly subsumed under the general justificatory

³⁶ David Dolinko, *Some Thoughts About Retributivism*, 101 ETHICS 537, 539 (1991).

³⁷ See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 8–9 (2nd ed. 2008).

³⁸ See Section I.B.1.

³⁹ See Section I.B.2.

⁴⁰ See, e.g., R.A. Duff & D. Garland, *Introduction: Thinking About Punishment*, in A READER ON PUNISHMENT 1, 2–3 (R.A. Duff & D. Garland eds., 1994) (“[Punishment] is morally problematic because it involves doing things to people that (when not described as punishment) seem morally wrong.”); Jeffrie G. Murphy, *Introduction*, in PUNISHMENT AND REHABILITATION 1 (Jeffrie G. Murphy ed., 3d ed. 1995) (“If locking human beings in cages or killing them is not a bad way to treat people, it is hard to imagine what would be.”); Christopher Ciocchetti, *Wrongdoing and Relationships: An Expressive Justification of Punishment*, 29 SOC. THEORY & PRAC. 65, 68 (2003) (arguing that the kind of justification punishment requires derives from the fact that it essentially constitutes the same behavior that criminal law proscribes); Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 310 (2004) (suggesting that punishment is in need of justification because of its resemblance to wrongdoing).

⁴¹ “The deep intuition that a punishment should follow a crime, and should be limited by the offender's subjective malice,” Linda Ross Meyer thus observes, “is a grounding principle of both criminal law and everyday morality.” Meyer, *supra* note 6, at 109.

framework of the state.⁴² Punishment, for Bentham, is primarily an expression of governance, in need of justification because of its interference with the choices and preferences of those subject to it.⁴³ Hence, if punishment *qua* state action is to be justified, such imposition must show itself to be motivated by objectively valid considerations.⁴⁴ “The immediate principle end of punishment,” Bentham writes, “is to control action”;⁴⁵ accordingly, “[t]he business of government is to promote the happiness of the society, by punishing and rewarding.”⁴⁶ Notwithstanding all other considerations, punishment, like all state action, is justified according to Bentham when properly guided by the general principle of utility.

Bentham, of course, also recognizes that punishment is distinct from rewards in that it seeks to control action through the production of suffering.⁴⁷ “All punishment is mischief,” Bentham writes, “all punishment in itself is evil.”⁴⁸ However, despite its added mischievousness, the justifiability of punishment, like that of all state action, depends on its accordance with the general felicific calculus: “[u]pon the principle of utility, if it ought be at all be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.”⁴⁹ To put it in other words, because punishment’s justification as a means of control is contingent on its conformity with the principle of utility, the fact that it produces suffering merely implies that it can be justified only when and if this suffering is offset by other pleasures it creates. Although, as Bentham notes, there are good reasons for which punishment could only be justified in response to crime, there is nothing inherent in the justification of punishment that makes this connection necessary.⁵⁰

This aspect of the Benthamian justification of punishment is often seen as grounds for objection, precisely for its inability to insist that it is inherently wrong to apply punishment irrespective of crime.⁵¹ According to its critics, this form of utilitarianism, we can call it general for our purposes, is faulted for its willingness to take into account various considerations beyond the wrongdoer’s guilt, so that in principle, there may very well be occasions in which the general utilitarian recommends punishment even in the absence of guilt.⁵²

⁴² See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 75 (J.H. Burns & H.L.A. Hart eds., 1996).

⁴³ See *id.* at 287.

⁴⁴ See *id.* at 18.

⁴⁵ *Id.* at 164.

⁴⁶ *Id.* at 74.

⁴⁷ See *id.* at 158.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See, e.g., Fredrich Rosen, *Utilitarianism and the Punishment of the Innocent: The Origins of a False Doctrine*, 9 UTILITAS 23, 25 (1997).

⁵¹ See, e.g., Igor Primorac, *Utilitarianism and Self-Sacrifice of the Innocent*, 38 ANALYSIS 194, 195–96 (1978) (juxtaposing the utilitarian justification and the logic of the Soviet show trials).

⁵² For these objections, see, for example, S.I. Benn, *An Approach to the Problems of Punishment*, 33 PHILOSOPHY 325, 331 (1958) (discussing the more categorical objections to

Without taking full stock of this argument and the various ways in which Benthamians respond to it, it should be noted that the “generality” of this account is also a substantial factor weighing against disregarding culpability. As we recall, punishment’s success on this account depends on the kind of fear it induces: ideally, would-be wrongdoers’ fear of being subjected to hard treatment. The intentional infliction of pain on the innocent—“telishment,” as John Rawls terms it—not only needlessly amplifies the suffering caused by punishment by spreading it to those who are not would-be criminals, but also diminishes the effectiveness of the threat aimed at those who are.⁵³ Of course, the adverse effects of telishment are contingent on the public knowing that innocent people are being telished, but any utilitarian contemplating it must contend with the inevitable possibility of the telishment becoming publicly known.⁵⁴ Given the wide variety of means of control at the general utilitarian’s disposal, including punishments and rewards alike, it seems highly unlikely that she would opt for the risky practice of telishment.⁵⁵

Another important example of the difference between the general and the special modes of justification is manifested by the difference between retributivism, a form of justification often attributed to Immanuel Kant, and Kant’s actual views on legal punishment.⁵⁶ Kant today is often mentioned as one of the main protagonists of retributivism, mainly because of several passing notes he has in which he passionately promotes this view.⁵⁷ Nevertheless, a more in-depth examination of Kant’s writing makes it obvious that such notions cannot coexist with his more

the utilitarian justification); Igor Primoratz, *Punishment as Language*, 64 *PHILOSOPHY* 187, 187–88 (1989) (objecting to the utilitarian justification in general terms).

⁵³ For Rawls’ description of this term, see John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 11–12 (1955). For others who likewise answer this objection, see Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 *RUTGERS L.J.* 115, 133 (2000); William Lyons, *Deterrent Theory and Punishment of the Innocent*, 84 *ETHICS* 346–48 (1974); George Schedler, *Can Retributivists Support Legal Punishment?*, 63 *MONIST* 185, 186 (1980).

⁵⁴ See, e.g., Pearl, *supra* note 2, at 280–86 (discussing the risk of telishment becoming known).

⁵⁵ Characterizing punishment as a means of control, however, exposes Benthamian utilitarianism to a different, much more penetrating objection, for its dehumanization of its citizenry, an objection often associated with Hegel. See Duff, *Penal Communications*, *supra* note 29, at 13–14 (discussing the Hegelian objection).

⁵⁶ For discussion of this discrepancy, see, for example, George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 *CAL. L. REV.* 687, 695–97 (2000); Thomas E. Hill Jr., *Kant on Wrongdoing, Desert, and Punishment*, 18 *LAW & PHIL.* 407, 409 (1999); Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 *COLUM. L. REV.* 509, 512–18 (1987).

⁵⁷ See, e.g., Blumoff, *supra* note 2, at 168 (“All recent [retributive] theorists start with Kant.”); M. Margaret Falls, *Retribution, Reciprocity, and Respect for Persons*, 6 *LAW & PHIL.* 28, 39 (1987) (grounding the retributive argument in the kind of respect persons are due); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 *CRIME & JUST.* 55, 59–61 (1992) (identifying retributivism with Kant).

overarching transcendental treatment of autonomy and human dignity.⁵⁸ Instead, the question of legal punishment is appended by Kant to the more general puzzles of political dominion.⁵⁹

For Kant, the justification of political authority rests on two arguments. First, given the metaphysical nature of human freedom, Kant believes that no state action (or any physical action for that matter) can negatively or positively affect an individual's autonomy.⁶⁰ As a result, what political control requires is not justification but rational reasons.⁶¹ From here, Kant continues to argue that a well-ordered legal system, as a whole, promotes legal freedom by making it more

⁵⁸ See, e.g., ALAN BRUDNER, PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL JUSTICE 42–45 (2009) (arguing that Kantian formalism cannot positively justify punishment); Otfried Höffe, *Kant's Principle of Justice as Categorical Imperative of Law*, in KANT'S PRACTICAL PHILOSOPHY RECONSIDERED 149, 153 (Yirmiyahu Yovel ed., 1989) (noting that Kantian freedom cannot be protected by law); Peter Benson, *External Freedom According to Kant*, 87 COLUM. L. REV. 559, 576 (1987) (discussing the difficulties that result from the gap between Kant's moral theory and his legal theory); Hill, *supra* note 56, at 409 (noting that Kant's thesis concerns "our liability to suffer in the recognition of our own misdeeds, not our right or duty to make others suffer for theirs."); Marcus Willaschek, *Why the Doctrine of Right Does Not Belong in the Metaphysics of Morals: On Some Basic Distinctions in Kant's Moral Philosophy*, 5 JAHRBUCH FÜR RECHT UND ETHIK 205, 208–11, 224 (1997) (discussing the gap between Kantian morality and law).

⁵⁹ See, e.g., Immanuel Kant, *Answer to the Question: What Is Enlightenment?*, in TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTROY 17 (Pauline Kleingeld ed., David L. Colclasure trans., 2006) [hereinafter Kant, *What Is Enlightenment*]; Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215, 224 (1987).

⁶⁰ As Kant puts it at some point, even when one is stretched on the torturer's wheel, she does not lose one iota of her freedom—for if that were the case, it would render her less worthy of respect:

No man can be pathologically compelled, because of freewill. Human choice is *arbitrium liberum*, in that it is not necessitated *per stimulus*; if a man, for example, is forced to an action by numerous and cruel tortures, he still cannot be compelled to do these things if he does not will it; he can, after all, withstand the torture. . . . In a free being an action can be practically necessary, and that in a high degree, which simply cannot be surpassed – and yet it does not contradict freedom.

IMMANUEL KANT, LECTURES ON ETHICS 59–60 (J.B. Schneewind ed., Peter Heath trans., 1997). For more on this aspect of Kant's conception of freedom, see Onora S. O'Neill, *Agency and Anthropology in Kant's Groundwork*, in KANT'S PRACTICAL PHILOSOPHY RECONSIDERED 63, 74 (Yirmiyahu Yovel ed., 1989); Henry E. Allison, *The Concept of Freedom in Kant's "Semi-Critical" Ethics*, 68 ARCHIV FÜR GESCHICHTE DER PHILOSOPHIE 96, 105 (2009). In his legal writing the separation between the moral domain of freedom and the legal domain is manifested in his assertion that legal norms create no moral obligation. See IMMANUEL KANT, THE METAPHYSICS OF MORALS 24–25 (Mary J. Gregor ed., 1996) [hereinafter KANT, THE METAPHYSICS OF MORALS].

⁶¹ See, e.g., Kant, *What Is Enlightenment*, *supra* note 59, at 133.

effectual.⁶² The combination of these two arguments eventually leads Kant to develop an account of state authority that is remarkably similar to the Hobbesian model of the social contract.⁶³ According to this explanation, the law represents a formal agreement about the rights of individuals, ensuring that they are secure from the interference of others in their earthly endeavors.⁶⁴ Punishment, in this view, is justified in light of its contribution to this desirable state of affairs, underscoring the legal rights that ensue from the social agreement.⁶⁵

⁶² See KANT, *THE METAPHYSICS OF MORALS*, *supra* note 60, at 92–93. For discussion of Kant’s theory of law and punishment that are in line with his general conception of freedom, see, for example, Murphy, *supra* note 56, at 516–18, 521; Igor Primorac, *Is Retributivism Analytic?*, 56 *PHILOSOPHY* 203, 203–11 (1981); Mark Tunick, *Is Kant a Retributivist?*, 17 *HIST. POL. THOUGHT* 60, 66–67 (1996). Likewise, for neo-Kantians such as John Rawls, a theory of law is meant to outline the general political institutions of a “well-ordered society,” and much less so to establish the “wrongness” of disorder or crime. See, e.g., THOMAS NAGEL, *EQUALITY AND PARTIALITY* 33, 161 (1991) (admitting the general Kantian’s difficulty with distinguishing tolerable from intolerable behavior); JOHN RAWLS, *POLITICAL LIBERALISM* 441, 472 (Expanded ed. 2005) (admitting that the meaning of a denial of voluntariness is “disputed” and “cannot be fully discussed.”); Seyla Benhabib, *Liberal Dialogue Versus a Critical Theatre of Discursive Communication*, in *LIBERALISM AND THE MORAL LIFE* 149 (Nancy L. Rosenblum ed., 1989) (noting the limited ability of general public reason approaches to delineate criminality); JOSEPH RAZ, *The Politics of the Rule of Law*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 370, 373 (1994) (admitting that demarcating the protected scope of voluntariness is a difficult problem while denying the need to address it); Onora O’Neill, *Political Liberalism and Public Reason: A Critical Notice of John Rawls, Political Liberalism*, 106 *PHIL. REV.* 411, 422 (1997) (criticizing Rawls’ inability to deal with those who disagree with the community’s values); John Rawls, *The Idea of an Overlapping Consensus*, 7 *OXFORD J. LEGAL STUD.* 1, 3 (1987) (viewing the subject matter of a conception of justice as working out the “‘basic structure’ of modern constitutional democracy,” meaning “society’s main political, social and economic institutions, and how they fit together into one unified scheme of social cooperation.”); John Rawls, *Kantian Constructivism in Moral Theory*, 77 *J. PHIL.* 515, 520 (1980) (explaining that the original position serves its role by “modeling the way in which the citizens in a well-ordered society, viewed as moral persons, would ideally select first principles of justice for their society.”).

⁶³ See, e.g., Tom Sorell, *Punishment in a Kantian Framework*, in *PUNISHMENT AND POLITICAL THEORY* 10, 22–23 (Matt Matravers ed., 1999) (discussing the Hobbesian foundation of Kant’s theory of law).

⁶⁴ See KANT, *THE METAPHYSICS OF MORALS*, *supra* note 60, at 40–46; Robert B. Pippin, *Mine and Thine? The Kantian State*, in *THE CAMBRIDGE COMPANION TO KANT AND MODERN PHILOSOPHY* 416, 416–20 (Paul Guyer ed., 2006).

⁶⁵ Many have discussed Kant’s idea of punishment as a formal vindication of law. See, e.g., B. SHARON BYRD & JOACHIM HRUSCHKA, *KANT’S DOCTRINE OF RIGHT: A COMMENTARY* 264 (2010); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 300–24 (2009); ANDREW VON HIRSCH, *PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS* 51–53 (1985) (discussing how a “morally neutral fashion” response would “depreciate the importance of the rights” that criminal conduct had infringed on); B. Sharon Byrd, *Kant’s Theory of*

These examples present us with a justification of punishment that acknowledges but downplays the demand basis of punishment. Punishment, according to this approach, is a coercive practice, and as such, it must be used for good purposes, but in this, it is no different from other state actions. As is the case with other state actions, the pursuit of these purposes often lays constraints on the use of punishment: both the promotion of utilitarian wellbeing and Kantian political freedom preclude, for instance, the use of telishment, for reasons that are internal to the purposes they serve.

2. *Special Justification*

The shift from a general to a special approach to justification is clearly evident in J.S. Mill's departure from Bentham's utilitarianism. Bentham, as we recall, places internal constraints on the use of punishment for the production of happiness, yet he does not *categorically* limit the purpose of punishment to crime prevention.⁶⁶ In contrast, for Mill and his contemporary followers Bentham's general appeal to a simple, felicific, calculus, employing a unitary notion of pleasure as its driving engine, is an affront to human liberty, the value of which, they believe, is incommensurate with lesser sources of pleasure.⁶⁷ Consequently, for authors in the Millian tradition, best exemplified in his famous harm principle, punishment represents a unique threat to liberty, so it can only be legitimately used to prevent the equal threat of crime, meaning behavior that likewise threatens the liberty of others.⁶⁸

Punishment: Deterrence in Its Threat, Retribution in Its Execution, 8 LAW & PHIL. 151, 180–81 (1989).

⁶⁶ See BENTHAM, *supra* note 42, at 156–74.

⁶⁷ John Stuart Mill, UTILITARIANISM 14 (2nd ed. 1864) (stating that Mill, who strove to put a more humane face on Bentham's utilitarianism, contends that not all pleasures are cut from the same cloth and that the contribution of some higher forms of pleasure to one's overall happiness is incommensurate with that of lower pleasures. It is better, Mill argues, to be a "Socrates dissatisfied than a fool satisfied."); see JOHN STUART MILL, ON LIBERTY AND THE SUBJECTION OF WOMEN 17–18, 65–66 (Alan Ryan ed., Penguin Classics 2006) (1859) [hereinafter MILL, ON LIBERTY] (noting that paramount among these pleasures is the exercise of personal liberty, for this represents pleasure of a uniquely human form, transcending the immediate brutishness of pleasure and pain: "He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties."); see also JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 35, 116 (1984) (addressing contemporary equation of wrongdoing with coercion) [hereinafter FEINBERG, HARM TO OTHERS]; JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW 28–30 (1986); SUSAN MENDUS, TOLERATION AND THE LIMITS OF LIBERALISM 51–55 (1989); Isaiah Berlin, *John Stuart Mill and the Ends of Life*, in FOUR ESSAYS ON LIBERTY 179, 192 (1969).

⁶⁸ For Mill, the problem is that the majority of people are conformists, who do not value individuality and therefore seek to repress any signs of individualism that disturb the consensus. See MILL, ON LIBERTY, *supra* note 67, at 18, 65–66. On the unique meaning of

As Joel Feinberg, a contemporary Millian maintains, the uniqueness of punishment is a result of its coerciveness, so profoundly connected to liberty that the absence of coercion defines the meaning of liberty itself.⁶⁹ Although human freedom is constrained in many ways, physically, biologically, psychologically, and socially, the Millian approach views punishment and crime as distinctly coercive limitations of liberty.⁷⁰ This shared distinctiveness, they believe, means that punishment could only be justified by virtue of its ability to deter crime.⁷¹ For this reason, while the state is free to exercise control over the individual in order to promote various utilitarian ends, it can only do so as long it does not do so coercively, i.e., through punishment.⁷²

Unfortunately, Mill never quite gets to explaining why the coerciveness of punishment and crime is so markedly different from the other ways in which individual liberty is restricted.⁷³ Like Mill, contemporary authors who justify

liberty for Mill's harm principle, see MENDUS, *supra* note 67, at 51–55; Berlin, *supra* note 67, at 179, 192.

⁶⁹ As Feinberg puts it:

Not all forms of constraint and compulsion are of equal interest to the social and political philosopher. If there is a special kind of freedom that deserves to be called “political freedom” or “liberty,” it must consist in the absence of that one special kind of constraint called *coercion*, which is the deliberate forceful interference in the affairs of human beings by other human beings.

JOEL FEINBERG, *SOCIAL PHILOSOPHY* 7 (Elizabeth Beardsley & Monroe Beardsley eds., 1973) [hereinafter FEINBERG, *SOCIAL PHILOSOPHY*].

⁷⁰ See MILL, *ON LIBERTY*, *supra* note 67, at 18, 22–63. For a discussion of this aspect in Mill's thought see, for example, David Edwards, *Toleration and Mill's Liberty of Thought and Discussion*, in *JUSTIFYING TOLERATION* 87 (Susan Mendus ed., 1988).

⁷¹ MILL, *ON LIBERTY*, *supra* note 67, at 17.

⁷² *Id.* at 16 (“These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not compelling him, or visiting him with any evil in case he do otherwise.”).

⁷³ *Id.* at 95 (stating that for Mill this demarcation involves no more than a feigned difficulty, easily undone by common sense). Others, however, concede that this challenge could hardly be shrugged. As Feinberg ultimately admits, the definition of coerciveness “absolutely require[s] the help of supplementary principles, some of which represent controversial moral decisions and maxims of justice.” JOEL FEINBERG, *The Interest in Liberty on the Scales*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY* 30, 30 (1980); see also FEINBERG, *SOCIAL PHILOSOPHY*, *supra* note 69, at 9; FEINBERG, *HARM TO OTHERS*, *supra* note 67, at 52; JOEL FEINBERG, *Legal Paternalism*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 110, 123–25 (1980); RICHARD E. FLATHMAN, *WILLFUL LIBERALISM: VOLUNTARISM AND INDIVIDUALITY IN POLITICAL THEORY AND PRACTICE* 62 (1992); ALAN WERTHEIMER, *COERCION* 204–211 (1987); Bernard Gert, *Coercion and Freedom*, in *COERCION* 30, 33 (J. Roland Pennock & John W. Chapman eds., 1972); John Horton, *Toleration, Morality and Harm*, in *ASPECTS OF TOLERATION: PHILOSOPHICAL STUDIES* 113, 115 (John Horton & Susan Mendus eds., 1985);

punishment as a form of deterrence often assume that there is something unique about the way in which punishment diminishes liberty, inherently different from other ways in which the state can negatively affect its citizens.⁷⁴

Surprisingly, a similar approach to the justification of punishment is characteristic of the view commonly thought to be diametrically opposed to deterrence, that of retributivism.⁷⁵ As noted above, despite Kant's more general approach to the justification of punishment, contemporary retributivists often draw support from Kant's moral theory, at times making specific reference to several passing comments he makes in favor of the special retributive approach.⁷⁶ In accordance with Kant's turn to the actor's will as the decisive factor in the moral composition of her actions,⁷⁷ many retributivists believe that crime and punishment are unique phenomena by virtue of the special kind of willing they involve, namely the intentional treatment of another as means to an exterior ends.⁷⁸ For this reason, many retributivist believe that punishment could only be justified when it is directed at the promotion of a morally valuable end: the infliction of deserved suffering, i.e., suffering that mirrors the wrongdoer's own wicked act.⁷⁹ Unfortunately, like the Millian form of justification, retributivists commonly fail to elaborate what makes punishment so unique, other than asserting its necessary connection to crime—an avoidance for which critics such as H.L.A. Hart complain that it is either “a

Joseph Raz, *Autonomy, Toleration, and the Harm Principle*, in JUSTIFYING TOLERATION 155, 156 (Susan Mendus ed., 1988).

⁷⁴ See, e.g., BENTHAM, *supra* note 42, 331–32.

⁷⁵ See, e.g., Robert A. Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379, 381–82 (1979).

⁷⁶ See generally Hill, *supra* note 56 (arguing that Kant's “mature theory of justice implies that the principle wrongdoers ought to suffer can have only a contingent, limited, and derivative role as a practical principle. This interpretation . . . is compatible with several famous passages where Kant seems to take a stronger retributive position.”).

⁷⁷ KANT, THE METAPHYSICS OF MORALS, *supra* note 60, 41–45.

⁷⁸ See, e.g., BRUDNER, *supra* note 58, at 5 (connecting the meaning of free will to the justification of punishment); LUCAS, *supra* note 24, at 124–27 (arguing that the quintessential feature of punishment is that it is intended to be unwelcome); Berman, *supra* note 33, at 267 (“Punishment stands in need of justification both on account of the fact that it causes the punished person to suffer and on account of the supposed fact that, by intentionally inflicting suffering, it infringes an individual's rights.”); *id.* at 279 (“Because wrongdoers experience suffering as a bad, a usual way to respect them is to not cause them pain. But insofar as they have exercised their wills to violate legitimate interests of others, it is also plausible that causing them to suffer on account of their willing respects them too.”); Falls, *supra* note 57, at 28 (seeing the voluntariness of wrongdoing as the reason for which the wrongdoer and she alone should be punished).

⁷⁹ Mark R. Fondacaro & Megan J. O'Toole, *American Punitiveness and Mass Incarceration: Psychological Perspectives on Retributive and Consequentialist Responses to Crime*, 18 NEW CRIM. L. REV. 477, 481 (2015).

mysterious piece of moral alchemy” or “the abandonment of any serious attempt to provide a moral justification for punishment.”⁸⁰

C. *Should Expressivism Be Special or General?*

Of the two approaches examined above, expressivism, I believe, is clearly more at home with the general approach to justification. For some critics, this is a sign of its inadequacy, but this is only so if viewed from the perspective of the special approach.⁸¹ Which of the two views is preferable?

The answer to this question can benefit from a historical observation on the modern project of justifying punishment. At the inception of modern penology, Cesare Beccaria insisted that punishment can *only* be justified when it derives from “absolute necessity,” subsequently arguing that such necessity can be achieved only when punishment is used to prevent future crime.⁸² Beccaria, however, qualifies this notion by noting that “[t]he proposition may be made general thus: every act of authority between one man and another that does not derive from absolute necessity is tyrannical.”⁸³ Indeed, punishment ought not to be needlessly used, but this is also true of any state action. The necessity of state action, penal or otherwise, need not be *categorically* restricted to any single purpose, including crime prevention; instead, it must be judged on its contribution to the underlying purpose of the legal system as a whole, be it deontological or utilitarian.

The choice between the general and special modes of justification is not one between equally available views. As we saw, for both the Millian and the retributivist, the shared uniqueness connecting crime and punishment remains very

⁸⁰ HART, *supra* note 37, at 234–35. “In the end” as Morris Cohen likewise observes, rather than explain how punishment derives from crime, Kant, and the retributivists who follow him, fall back on “the assumption that just as our moral conscience tells us that ‘Thou shalt not kill’ is an absolute duty for the individual, so is ‘You shall kill the murderer’ an equally absolute duty for the community.” Morris R. Cohen, *Moral Aspects of the Criminal Law*, 49 *YALE L.J.* 987, 992 (1940); *see also* MATRAVERS, *supra* note 28, at 46 (arguing that without further argumentative work, “the retributive reaction would seem to be less a consequence of our regarding one another as capable of agency, and more a matter of appeal to some kind of ‘celestial mechanics’ in which every criminal action . . . deserves an ‘equal and opposite reaction,’ in the shape of punishment.”); Benn, *supra* note 52, at 327 (“what pass for retributivist justifications of punishment in general, can be shown to be either denials of the need to justify it, or mere reiterations of the principle to be justified, or disguised utilitarianism”); Dolinko, *Retributivism*, *supra* note 35, at 518–22 (arguing against the Kantian duty to punish); Hanna, *supra* note 26, at 123 (criticizing the questionable reliability and justificatory strength of the intuitions on which retributivism rests); Murphy, *supra* note 56 at 523; Pearl, *supra* note 2, at 286–293.

⁸¹ *See, e.g.*, Hanna, *supra* note 26, at 134; Lee, *supra* note 5, at 220.

⁸² *See* CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS: AND OTHER WRITINGS* 11 (Aaron Thomas, ed., Aaron Thomas & Jeremy Parzen, trans., 2008) (“As the great Montesquieu says, every punishment that does not derive from absolute necessity is tyrannical.”).

⁸³ *Id.*

much inexplicable. A more functional explanation of this uniqueness can, however, be found in the sociological meaning of punishment, as explored by René Girard. In his seminal depiction of “sacred violence,” Girard suggests that the belief in the exceptionality of crime and punishment serves an important social and psychological function of differentiation.⁸⁴ As Girard’s brilliant analysis suggests, the ritualistic linking of crime and punishment has, throughout history, served as a way of alleviating the pressures caused by mimetic desire, doing so by creating and reaffirming the distinction between the sacred and the profane.⁸⁵ Famously describing the “scapegoating mechanism” animating punishment, Girard demonstrates how society is founded on the ability to sublimate such volatile desires into moments of “sacred,” i.e., exceptional violence, first attributed to the wrongdoer and then to the communal response expunging and sanctifying it.⁸⁶ As he observes, the exceptionality of crime and punishment is not a corollary of some hidden quality they share but, instead, represents the purpose they serve as an affirmation of order against the threat of blurring social boundaries.⁸⁷

In rejecting expressivism since its justification of punishment is equally applicable to state actions that do not involve hard treatment or respond to crime, the hard treatment objection essentially demands that it adheres to the special mode of justification. Girard’s analysis not only allows us to see the conventionality of this requirement, but also cautions us as to the dangers of believing that there is some inherent truth to it.⁸⁸ Punishment surely requires justification, and given the toll it takes from those upon which it is inflicted and from society as a whole, there is good reason to demand that punishment’s justification exceeds that of non-penal state actions.⁸⁹ Suggesting, however, that there is something exceptionally wicked about crime, which alone is capable of justifying punishment, risks transforming criminal law into a holy crusade.⁹⁰

⁸⁴ See generally RENÉ GIRARD, *VIOLENCE AND THE SACRED* (Patrick Gregory trans., 1977).

⁸⁵ See RENÉ GIRARD, *THE SCAPEGOAT* 24–44 (Yvonne Freccero trans., Johns Hopkins University Press 1989) (1982) [hereinafter GIRARD, *THE SCAPEGOAT*].

⁸⁶ See GIRARD, *supra* note 84, at 143–68.

⁸⁷ See GIRARD, *THE SCAPEGOAT*, *supra* note 85, at 45–56.

⁸⁸ See GIRARD, *supra* note 84, at 1–38.

⁸⁹ See, e.g., Douglas N. Husak, *Why Punish the Deserving?*, 26 *NOÛS* 447, 450–51 (1992).

⁹⁰ See, e.g., Richard Rorty, *The Priority of Democracy to Philosophy*, in *THE VIRGINIA STATUTE OF RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY* 257, 267 (Merrill D. Peterson & Robert C. Vaughan eds., 1988) (noting the pragmatic necessity in separating criminalization, as the decision that constitutes intolerable behavior, from moral epistemology); Rainer Forst, *Tolerance as a Virtue of Justice*, 4 *PHIL. EXPL.* 193, 195 (2001) (regarding this difficulty as the “paradox of drawing the limits” of toleration); John Steele, *A Seal Pressed in the Hot Wax of Vengeance: A Girardian Understanding of Expressive Punishment*, 16 *J.L. & RELIGION* 35, 68 (2001) (“The moral panics, insanity induced by demagoguery, and stubborn public vengefulness that are chronically associated with expressive punishment are best understood as symptoms of the

Against the hard treatment objection, expressivism ought to stand for the recognition of the conventionality of the connection between punishment and crime, and the important social function this connection serves. Punishment, as we will see in the remainder of the Article, is not some horrible weapon to be used to smite evil wrongdoers, but a legal tool for the promotion of a political end. The real question, to which I will now turn, is whether this purpose makes it justifiable.

II. EXPRESSING VALUES

Punishment, the expressive theory argues, is justified as a conventional device for the expression of condemnation.⁹¹ In Part I, I argued that this modest form of justification is not, in itself, a reason to reject expressivism, but that this still gives us no reason for which punishment is justifiable on the expressive account. “‘Expression’ itself,” as A.J. Skillen rightly notes, “is no adequate ethic, any more than is sincerity. Some of the worst deeds have been, no doubt, sincere expressions.”⁹² Indeed, if expressivism were to merely stress the communicative element in punishment, it would be no more than a description of punishment, adding little to the traditional justifications of deterrence and retribution.⁹³

What expressivism adds, in fact, is the insight concerning punishment’s conventionality, first, as we have seen, by exposing the conventional nature of the means of punishment and the connection between crime and punishment, but also, as will be discussed below, in the idea that punishment is justified for its contribution to social conventions, embodied in the community’s values.⁹⁴ As Dan Kahan observes, the suggestion that punishment expresses values ultimately sets the expressive theory apart from other theories of punishment:

archaic scapegoating mechanism . . .”); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 774 n.198 (1998).

⁹¹ Feinberg, *supra* note 3, at 400.

⁹² Skillen, *supra* note 21, at 521.

⁹³ See, e.g., Adler, *supra* note 15, at 1357–76 (“Morality is surely plural and complex – it incorporates a wide variety of moral factors, such as overall well-being, equality, status and self-respect, deontological constraints, the factors of desert and responsibility, and other factors that, in various ways, may seem to involve linguistic meaning – but in every case the purportedly express factor turns out to be nonexpressive.”); Davis, *supra* note 21, at 311, 319 (arguing that expressivism inherits the problems of retributivism); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 218–19 (2003) (equating expressivism with retributivism); Primoratz, *supra* note 52, at 202 (arguing that expressivism is torn between retributive and utilitarian arguments); Skillen, *supra* note 21, at 511 (arguing that expressivism is merely a “spiritual form of retributivism,” and that expressivism is a mix between retributivism and utilitarianism, exacerbating the difficulties both invoke).

⁹⁴ Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 420 (1999) (punishment signals “society’s commitment to the values that the wrongdoer’s act denies.”); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2028 (1996) (punishment speaks “on behalf of the nation’s basic principles and commitments.”).

[d]eterrence justifies punishment to prevent harm to others; retributivism confines it to those who voluntarily choose to inflict such harm. The expressive theory, by contrast, appears to emphasize neither consequences nor choices, but rather the enforcement of society's moral values.⁹⁵

The real question expressivism has to account for, therefore, is whether it is justifiable to enforce society's values through punishment⁹⁶ As described below, expressive authors usually address this question in utilitarian, Kantian, and Hegelian terms.

A. *The Utility of Expressing Values*

For some authors, the benefits produced by the penal expression of values are primarily factors to be taken into consideration when deciding whether the projected beneficial consequences of punishment outweigh the expenses and suffering it is likely to produce.⁹⁷ According to this view, the expression of values can have various beneficial implications: it can increase social cohesion, facilitate collaboration, decrease—or enliven—social conflicts, and the like.⁹⁸ Feinberg thus argues that “the condemnatory aspect of punishment [serves] a socially useful purpose,” which for him includes authoritative disavowal, symbolic non-acquiescence, vindication of the law, and absolution of others.⁹⁹ Rather than argue that expressivism justifies punishment as such, these authors rely on the traditional utilitarian justification to argue that without understanding the expressive ways in which criminal law and punishment operate, any attempt to use them to produce desirable results would likely miss the target.¹⁰⁰

The main problem with this approach is its evident social relativism.¹⁰¹ Punishment, this view seems to imply, serves an important social function in its support of social values, regardless of the form and substance of these values. In

⁹⁵ Kahan, *supra* note 3, at 596; *see also* Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2206–15 (2001); Tasioulas, *supra* note 32, at 296.

⁹⁶ Skillen, *supra* note 21, at 521 (asking the question expressivism needs to answer is “which values should have acceptance and priority and therefore be expressed?”).

⁹⁷ *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1513 (2000); Dan M. Kahan, *Punishment Incommensurability*, 1 BUFF. CRIM. L. REV. 691, 692–93 (1998); Sunstein, *supra* note 94, 2029–30.

⁹⁸ *See, e.g.*, Kahan, *supra* note 94, at 485–92 (discussing the benefits and drawbacks of the criminal reification of social conflicts); Sunstein, *supra* note 94, at 2029–30 (assessing the utilitarian benefits of criminal value-expression).

⁹⁹ Feinberg, *supra* note 3, at 420.

¹⁰⁰ *See, e.g.*, Anderson & Pildes, *supra* note 97, at 1516; Feinberg, *supra* note 3, at 404–08; Sunstein, *supra* note 94, at 2029–30.

¹⁰¹ Skillen, *supra* note 21, at 519.

appealing to utilitarian arguments, expressivists who hold this view risk ignoring the difference between promoting liberal and illiberal, just and unjust values.¹⁰² This color-blindness is an inherent feature of utilitarianism, translating all questions of value into considerations of utility, but the moral challenge it presents us with is exacerbated by coupling it with the idea that regardless of their substance, the promotion of values through punishment could be justified out of utility.¹⁰³

B. Expressing the Right Values

In response to the concern of moral relativism, some authors suggest that punishment is justified not for the promotion of values as such but for the expression of the *right* values, commonly understood in Kantian terms.¹⁰⁴ Specifically, these authors often frame crime and punishment in terms of their relation to the value of equality.¹⁰⁵ Jean Hampton, for example, writes that punishment

is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.¹⁰⁶

Essential to this approach is the idea that the evil of the wrongdoer's deed lies in her denial of her equality to the victim, effectively diminishing the victim's worth to elevate her own.¹⁰⁷ In this view, crimes are evil due to their negative effect on the victim's social estimation, which, Hampton suggests, is translatable to a moral harm: "a person is morally injured when she is the target of behavior whose meaning, appropriately understood by members of the cultural community in which the behavior occurs, represents her value as less than the value she should be accorded."¹⁰⁸ Punishment, Hampton argues, reinstates equality by expressively denying "what the wrongdoer's events have attempted to establish, thereby lowering

¹⁰² *Id.*; see also CHRISTOPHER BENNETT, *THE APOLOGY RITUAL: A PHILOSOPHICAL THEORY OF PUNISHMENT* 126 (2008); Kahan, *supra* note 3, at 599; von Hirsch, *supra* note 57, at 56.

¹⁰³ See, e.g., Skillen, *supra* note 21, at 520.

¹⁰⁴ See, e.g., Pablo de Greiff, *Deliberative Democracy and Punishment* 5 *BUFF. CRIM. L. REV.* 373, 390 (2002); Hill, *supra* note 56, at 418–22.

¹⁰⁵ See, e.g., Guyora Binder, *Victims and the Significance of Causing Harm*, 28 *PACE L. REV.* 713, 715 (2008) ("[W]e punish harm not only in order to express something to the offender and about the offender, but also to express something to the victim and about the victim to others.").

¹⁰⁶ Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659, 1686 (1992) [hereinafter Hampton, *Correcting Harms*].

¹⁰⁷ See, e.g., Hampton, *supra* note 3, at 217; John Kleinig, *Punishment and Moral Seriousness*, 25 *ISR. L. REV.* 401, 418 (1991).

¹⁰⁸ Hampton, *Correcting Harms*, *supra* note 106, at 1670.

the wrongdoer, elevating the victim, and annulling the act of diminishment.”¹⁰⁹ In reinstating the value of equality, punishment is justified as an expressive cure to the victim’s diminished moral stature in the eyes of others.¹¹⁰

The evil of crime in this view is not the immediate harm it causes to the victim or the community, but the denial of equality that is conveyed by the act; it is this evil that punishment aims to annul.¹¹¹ “A criminal act,” George Fletcher likewise argues, “establishes a particular relationship” between the wrongdoer and the victim, in which the offender “gains a form of dominance that continues after the crime has supposedly occurred.”¹¹² Punishment, on Fletcher’s view, is meant “to overcome this dominance and reestablish the equality of victim and offender.”¹¹³ Likewise, John Kleinig contends that punishment “negates or cancels the claim implicit in wrongdoing, that the interests of others are not all that important, that the wrongdoer is superior to others — or at least may determine how others are to be treated.”¹¹⁴

There is, however, a critical flaw in this line of argument. If, as the proponents of this brand of expressivism insist, the value of equality is objectively valid, then how is it possible that the wrongdoer so effectively damages that value?¹¹⁵ If, in contrast, the wrongdoer’s actions do not “harm” the value of equality but only falsely contradicts it, why go through all the trouble of condemning it instead of simply refuting the wrongdoer’s error?¹¹⁶ As Christopher Ciocchetti reminds us, “[f]alse moral messages just are not the kind of thing that the criminal law punishes”; “true moral messages, while potentially useful, are, by themselves, not sufficiently morally important to justify punishment.”¹¹⁷ If punishment merely expresses the undeniable rationality of equality, why should it not be responded to, as Anthony Duff asks, with “a public and formal declaration, or the imposition of a purely symbolic punishment,” to “make it clear to everyone that we do deny the demeaning message implicit in the crime?”¹¹⁸

¹⁰⁹ *Id.* at 1686–87 (“Punishment affirms as a fact that the victim has been wronged, and as a fact that he is owed a certain kind of treatment from others. Hence, on this view, it is natural for the victim to demand punishment because it is a way for the community to restore his moral status after it has been damaged by his assailant.”).

¹¹⁰ See Hampton, *supra* note 3, at 217; see also BENNETT, *supra* note 102, at 191; Ciocchetti, *supra* note 40, at 66; Duff, *Penal Communications*, *supra* note 29, at 37–38; Meyer, *supra* note 6, at 119.

¹¹¹ Hampton, *supra* note 3, at 217.

¹¹² George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 *BUFF. CRIM. L. REV.* 51, 57 (1999).

¹¹³ *Id.*

¹¹⁴ Kleinig, *supra* note 107, at 418.

¹¹⁵ This weakness is already implicit in its Kantian roots. See Duff, *Penal Communications*, *supra* note 29, at 36–37.

¹¹⁶ See, e.g., Peter Königs, *The Expressivist Account of Punishment, Retribution, and the Emotions*, 16 *ETHICAL THEORY & MORAL PRAC.* 1029, 1044 (2013).

¹¹⁷ Ciocchetti, *supra* note 40, at 70; see also GOLASH, *supra* note 2, at 52–60; Brian Slattery, *The Myth of Retributive Justice*, in *RETRIBUTIVISM AND ITS CRITICS* 27, 33 (Wesley Cragg ed., 1992); Dolinko, *supra* note 36, at 551.

¹¹⁸ Duff, *Penal Communications*, *supra* note 29, at 40.

C. Reconnecting with Values

A third strand of expressivism seeks to justify the promotion of values with an argument that at the same time (unnecessarily) responds to the hard treatment problem by adopting what I have referred to above as a special approach to justification.¹¹⁹ The unique wrongness of crime, on this view, comes from the distance it creates between the wrongdoer and society's values, and it is the purpose of punishment to eliminate this distance.¹²⁰ In response to the wrongdoer's painful loss of "allegiance to the values of society," punishment, *qua* hard treatment, is justified as a form of moral education meant to better the moral composition of the wrongdoer by reconnecting her to society's values.¹²¹ In this fashion, Robert Nozick, one of the first to justify punishment along these lines, suggests that the purpose of punishment is to "(a) connect the wrongdoer to value qua value (b) so that value qua value has a significant effect in his life, as significant as his own flouting of correct values."¹²² To explain the "significant effect" of punishment, Nozick argues that "when [the wrongdoer] undergoes punishment these correct values are not totally without effect in his life (even though he does not follow them), because we hit him over the head with them."¹²³ Certainly, punishment hits the wrongdoer over the head, physically or figuratively, but why is doing so a meaningful and effective way of "connecting" her to "correct values?"

I suggest that the answer to this question is to be found in the Hegelian inspiration of this strand of expressivism.¹²⁴ Hegel is often mentioned in penal scholarship with reference to his peculiar yet influential suggestions that punishment

¹¹⁹ See Jean Hampton, *Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law*, 11 CAN. J.L. & JURIS. 23, 40 (1998) (This is evident, for instance, in Hampton's adoption of the view that in addition to its general purpose, punishment also serves the *special* purpose of curing the wrongdoer's soul through the infliction of hard treatment); see also DUFF, TRIALS AND PUNISHMENTS, *supra* note 3, at 233–36; Duff, *Penal Communications*, *supra* note 29, at 33–35 (arguing that unless punishment is a necessary means of achieving the moral end it serves it cannot be justifiable).

¹²⁰ See, e.g., Hampton, *supra* note 3, at 40.

¹²¹ See *id.* at 40; see also, e.g., Anderson & Pildes, *supra* note 97, at 1508 (distinguishing between expression and communication); Dolinko, *supra* note 36, at 549 (distinguishing between the two arguments Hampton makes); Duff, *Penal Communications*, *supra* note 29, at 32–33 (distinguishing between one-sided expression and reciprocal communication); Garvey, *supra* note 90, at 739 (distinguishing shaming punishment from punishment as moral education).

¹²² ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 375 (1981).

¹²³ *Id.* at 375; see also Slattery, *supra* note 117, at 33; von Hirsch, *supra* note 57, at 59.

¹²⁴ For a recent exploration of this connection, see Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485 (2016). For similar discussions, see, for example, Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY 111, 115, 131, 142 (Jules Coleman ed., 1988) [hereinafter Hampton, *The Retributive Idea*]; see also Stephen P. Garvey, *A Hegelian Criminal Law*, 61 U. TORONTO L.J. 147, 157–58 (2011); Hampton, *supra* note 3, at 208; Meyer, *supra* note 5, at 119; Skillen, *supra* note 20, at 511.

“annuls” crime and that the wrongdoer “wills” her punishment.¹²⁵ These ideas, however, are only specific aspects of Hegel’s overarching theme of actualization, by which he means the progress of the individual from insular and abstract consciousness to objectively true knowledge, achieved through her convergence with *Geist*—the unified mindfulness of the world.¹²⁶ In the Hegelian worldview, the individual can only exist by itself in the abstract, alienated from herself and the world.¹²⁷ By reconnecting with the community—which for Hegel manifests the *Geist* in its progress through history—the wrongdoer is uplifted from her wretched insular existence and brought closer to a meaningful existence.¹²⁸

Authors such as Duff, Hampton, and Nozick speak of the beneficial moral effect punishment arguably produces by connecting the wrongdoer to the communal values she abandoned; this idea makes non-metaphorical sense only if read in light of the political community’s role in Hegelian teleology as a necessary conduit between the individual and objective truth.¹²⁹ Punishment, as the forced realignment between the wrongdoer and society’s values, is justified in this Hegelian fashion as a unique remedy to the wrongdoer’s metaphysical ailment:

A person can find well-being only within a community which is, necessarily, structured by certain shared values and concerns, and within the kinds of relationships which such a community makes possible. A criminal who flouts the just laws of her community thereby injures herself: she separates herself from the values on which the community and her own well-being depend [. . .]She may not in fact be made consciously unhappy by her crime [. . .][b]ut this shows only that she, and those with whom she lives, have turned away from the values which should concern them; that they fail or refuse to see how such criminal pursuits are inconsistent with the existence of a community within which any worthwhile human life is possible; and that their relationships are themselves corrupted by false values. If she would only recognize the moral truth about her criminal

¹²⁵ See, e.g., Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 LAW & HIST. REV. 113, 117–19 (1998); Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1060–62 (2004).

¹²⁶ A relatively concise pronouncements of Hegel’s teleological dialectics can be found in G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT 11, 51 (A.V. Miller trans., 1977); see also CHARLES TAYLOR, HEGEL AND MODERN SOCIETY 47 (Alan Montefiore et al. eds., 1979).

¹²⁷ See, e.g., HEGEL, *supra* note 126, at 21; Tronn Overend, *Alienation: A Conceptual Analysis*, 35 PHIL. & PHENOMENOLOGICAL RES. 301, 306–07 (1975); Gavin Rae, *Hegel, Alienation, and the Phenomenological Development of Consciousness*, 20 INT’L J. PHIL. STUD. 23, 25 (2012).

¹²⁸ For explicitly Hegelian theories of punishment see, for example, Alan Brudner, *In Defence of Retributivism*, in RETRIBUTIVISM AND ITS CRITICS 93, 93–94 (Wesley Cragg ed., 1990); Markus Dirk Dubber, *Rediscovering Hegel’s Theory of Crime and Punishment*, 92 MICH. L. REV. 1577, 1581–83 (1994).

¹²⁹ See Kleinfeld, *supra* note 124, at 1543.

attitudes and activities, she would see how they are injurious to her true well-being.¹³⁰

If we are to understand these words as something other than mere platitudes, we must acknowledge their embeddedness in the Hegelian conception of the individual.¹³¹ Although Hegel accepts the fundamental Kantian ideal of equality,¹³² his teleological philosophy insists that the individual's existence becomes more meaningful, more actual, in her encounter with others, *en route* to the final convergence with *Geist*.¹³³ This encounter, Hegel tells us, is initially perceived as the violent threat of self-destruction, amounting to what he describes as the life and death struggle for recognition, only to result, as his master/slave dialectic tells us, in a mutually-dependent recognition that brings with it the ascent to a greater level of self-consciousness.¹³⁴ From this moment on, individuals—now parts of society—constantly further their self-actualization against the forceful imposition of the community's values, moving from the inner realm of essence to the external realm of concrete existence.¹³⁵

Animated by this teleological understanding of values, the special expressive approach argues that by committing a crime and alienating herself from the community's values, the wrongdoer wrongs herself by making her moral existence less meaningful, as the recognition she receives from others diminishes.¹³⁶ When

¹³⁰ DUFF, TRIALS AND PUNISHMENTS, *supra* note 3, at 256–57; *see also* Duff, *Penal Communications*, *supra* note 29, at 48; R.A. Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL. 345, 371–80 (1993) [hereinafter Duff, *Choice, Character, and Criminal Liability*].

¹³¹ *See, e.g.*, R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 48–55 (2003) [hereinafter DUFF, PUNISHMENT] (admitting his communitarian/Hegelian conception of the self); Henrique Carvalho, *Terrorism, Punishment, and Recognition*, 15 NEW CRIM. L. REV. 345, 353–63 (2012) (connecting the relations implicit in expressive theories with Hegel's notion of recognition).

¹³² *See, e.g.*, Dubber, *supra* note 128, at 16–17; *see generally* Jay Drydyk, *Hegel's Politics: Liberal or Democratic?*, 16 CAN. J. PHIL. 99 (1986) (discussing Hegelianism in the French Revolution and the tensions with the Kantian idea of equality).

¹³³ *See* HEGEL, *supra* note 126, at 290–91; *see also* ALAN PATTEN, HEGEL'S IDEA OF FREEDOM 130–33 (1999) (discussing the idea of community as necessary for a more meaningful existence).

¹³⁴ *See* HEGEL, *supra* note 126, at 116–19; *see also* PATTEN, *supra* note 133, at 130–33; ROBERT STERN, ROUTLEDGE PHILOSOPHY GUIDEBOOK TO HEGEL AND THE PHENOMENOLOGY OF SPIRIT 78, 113–14 (2002).

¹³⁵ *See* G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 241 (Allen W. Wood ed., 2011) [hereinafter, HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT]; G.W.F. HEGEL, HEGEL'S LOGIC 247–48 (William Wallace trans., 2009); *see also* STEPHEN HOULGATE, AN INTRODUCTION TO HEGEL: FREEDOM, TRUTH, AND HISTORY 78–82 (2nd ed. 2005); TAYLOR, *supra* note 126, at 1–14.

¹³⁶ *See, e.g.*, Falls, *supra* note 57, at 40–41 (discussing this idea as a form of “earned” moral respect); Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263, 265 (1981) (“[T]he price paid for unconcern is some rupture in relationships, a separation

this approach speaks of the evil suffered by the wrongdoer for her crimes, it refers not to some psychological or metaphorical aches but to the “pain” of losing meaning, which affects the wrongdoer whether she is conscious of it or not:

the immoral person thinks he is getting away with something, he thinks his immoral behavior costs him nothing. But that is not true; he pays the cost of having a less valuable existence. He pays that penalty, though he doesn't feel it or care about it. Not all penalties are felt.¹³⁷

Punishment, so the special expressive theory argues, repairs this evil by reconnecting the wrongdoer to the community, restoring her diminished moral status by once again violently imposing the community's values on her.¹³⁸

But exactly how does punishment eradicate the alienation of crime? Duff speaks of the three R's punishment aims to accomplish: repentance, reform, and reconciliation.¹³⁹ The question remains, however, as to what benefit there is in coerced repentance. Of even more consequence is the question of how imposing punishment for these purposes can be justified as a way of making the wrongdoer's existence more meaningful.¹⁴⁰ All too often the answers to these questions border on metaphor: the wrongdoer, we are told, is “hit over the head” with the community's

from others, a feeling ill at ease with oneself, and some inevitable loss of emotional sustenance and sense of identity”); Tasioulas, *supra* note 32, at 294 (“[B]laming involves a withdrawal of full recognition from the wrong-doer, because their flouting of moral demands diminishes their status as a member of the relevant moral community.”).

¹³⁷ NOZICK, *supra* note 122, at 409; *see also* Duff, *Penal Communications*, *supra* note 29, at, at 48–49.

¹³⁸ *See, e.g.*, MATRAVERS, *supra* note 28, at 247–51 (arguing that punishment can “deepen the agent's understanding of morality and lead to her becoming a fully morally autonomous being.”); NOZICK, *supra* note 122, at 379 (“Wrong puts things out of joint in that acts and persons are unlinked with correct values; this is the disharmony introduced by wrongdoing. Punishment does not wipe out the wrong, the past is not changed, but the disconnection with value is repaired (though in a second best way); nonlinkage is eradicated.”); Dubber, *supra* note 128, at 1583 (“[T]he dialectic naturally moves from crime to punishment as punishment follows crime in the process of Reason's self-actualization.”); Meyer, *supra* note 6, at 119 (“If separation is the result of wrong, then punishment is perhaps best understood as a practice repairing that separation, as Morris, Garvey, and Hegel understand it.”).

¹³⁹ *See* Duff, *Penal Communications*, *supra* note 29, at 47–51.

¹⁴⁰ *See, e.g.*, DUFF, TRIALS AND PUNISHMENTS, *supra* note 3, at 243–44 (admitting that that there is no real way of translating the hard treatment of punishment to the moral language and the desired moral outcome it purports to produce); MATRAVERS, *supra* note 28, at 89–91 (discussing the difficulty of forcefully educating the wrongdoer); Garvey, *supra* note 90, at 769–770 (arguing that moral education by punishment can be unnecessary or futile); Hampton, *supra* note 3, at 233–34 (admitting the difficulty of appealing to moral education to justify punishment).

values, “woken up” by punishment, and the like.¹⁴¹ Detached from their Hegelian roots, such explanations cannot but be seen as a denial of the need to justify punishment.¹⁴² Hegelian dialectics, however, purport to give these words non-metaphorical meaning by suggesting that the healing power of punishment represents the kind of superior access to true knowledge that the community provides, imprinted on the individual in the form of external force.¹⁴³

Admittedly, the proponents of the special expressive justification seldom make the appeal to Hegelian dialectics explicit.¹⁴⁴ Yet these extravagant metaphysical presumptions undermine this strand of expressivism none the less. In insisting that punishment can *only* be justified as an exhaustive and inimitable response to crime, this view casts the moral education of the wrongdoer—her realignment with the community’s values—as the *sole* way in which she can overcome the pains of alienation.¹⁴⁵ In insisting on the necessary connection between punishment and crime, the proponents of this approach essentially suggest that there is some inherent therapeutic truth to communal values, unavailable to the individual who distances herself from them. This truth, they argue, does not represent any universal moral laws or consequential benefits but, rather, is the manifestation of the inherent metaphysical importance of communal life.¹⁴⁶

¹⁴¹ See Garvey, *supra* note 90, at 763 (“[T]he state punishes the offender in order to ‘wake him up,’ to get him to recognize and understand why what he has done was wrong, and ideally, to repent.”); Slattery, *supra* note 117, at 33 (criticizing the metaphorical and mystical terms in which hard treatment is described); von Hirsch, *supra* note 57, at 59 (criticizing Nozick’s lack of clarity).

¹⁴² As Marcus Dubber notes, doing so essentially requires connection with Hegel’s more problematic fundamental assumptions: “Demetaphysicizing Hegel without de-Hegeling him is tricky business. Merely to envision his political philosophy, or for that matter any other aspect of his philosophical system, without his metaphysics requires considerable effort, as Hegel equated philosophy with metaphysics.” Dubber, *supra* note 128, at 1585.

¹⁴³ See PATTEN, *supra* note 133, at 135.

¹⁴⁴ Some explicit appeals to Hegel include Hampton, *The Retributive Idea*, *supra* note 124, at 131, 142; Hampton, *supra* note 3, at 208.

¹⁴⁵ See, e.g., Garvey, *supra* note 90, at 766.

¹⁴⁶ See, e.g., DUFF, PUNISHMENT, *supra* note 131, at 51 (focusing “not on the question of how ‘I’ should live or what associations ‘I’ should form, but of how ‘we’ should live.”); MATRAVERS, *supra* note 28, at 191 (“Rather than understand one’s ends as those of a separate, asocial being, and as better secured through co-operation, one must understand one’s ends as the ends of a co-operative being. One’s flourishing is thus not merely contingently aligned with the flourishing of the whole, but necessarily connected to it.”); R.A. Duff, *Punishment, Communication, and Community*, in PUNISHMENT AND POLITICAL THEORY 57–58 (Matt Matravers ed., 1999) (arguing that autonomy could only be understood “as autonomy *within* a shared form of life, which alone can give the notion any substantive sense”); Duff, *Choice, Character, and Criminal Liability*, *supra* note 130, at 382–83 (“Our life together, as a community, requires us to develop and sustain appropriate attitudes towards and concerns for each other – appropriate dispositions of thought, feeling and motivation. The criminal law, which embodies the values central and essential to that communal life, should thus be concerned with failures or defects in such dispositions, and

In turning to Hegelian theory as a way of addressing both the problem of hard treatment and of using punishment to express values, expressivism of the special sort inevitably inherits Hegel's elevation of one's communal belonging, attributing to the community the exclusive ability to propel the individual towards a more meaningful existence, even against her (wretched) will.¹⁴⁷ This, as Duff admits, represents a substantial departure from those liberal theories that emphasize the separate and distinct identity of each individual, allocating her "an extensive private sphere which includes her moral beliefs and attitudes."¹⁴⁸ Still, as Charles Taylor notes, what is most troubling about this worldview is not so much the extravagant metaphysical assumptions it makes but the unadulterated optimism and certainty with which it makes them, putting immense, almost unlimited, trust in politics and its presumed progressivism.¹⁴⁹ To hold such views is to have faith that despite its occasional errors, the community's interaction with the individual and the imposition of its values is fundamentally beneficial. Surely, this view asks too much of us. To suggest that the runaway slave is somehow being bettered by her penal reunification with the communal value of slavery seems to give too much credit to the inherent truthfulness of communal values, despite Hegel's best dialectical attempts to claim otherwise.¹⁵⁰

with the criticism and correction of such failures or defects."); Meyer, *supra* note 6, at 120 (arguing that for this approach, "[a]nything that denies the fact (not the statement) of togetherness with others is crime. The relationship at stake is not the communication between victim and offender or even offender and society. The relationship is just the fact of togetherness in the world as creatures who reason."); Jeffrie G. Murphy, *Retributivism, Moral Education and the Liberal State*, 4 CRIM. JUST. ETHICS 3, 8–9 (1985) (noting that the moral education approach is more at home in a Hegelian, non-liberal theory).

¹⁴⁷ See HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT*, *supra* note 135, at 46–49; HEGEL, *supra* note 126, at 262–71; see also KARL AMERIKS, *KANT AND THE FATE OF AUTONOMY: PROBLEMS IN THE APPROPRIATION OF THE CRITICAL PHILOSOPHY* 313–17 (Robert B. Pippin et al. eds., 2000); NOZICK, *supra* note 122, at 410; Sean Sayers, *The Actual and the Rational*, in *HEGEL AND MODERN PHILOSOPHY* 143, 147 (David Lamb ed., 1987); Andrew Arato, *A Reconstruction of Hegel's Theory of Civil Society*, 10 CARDOZO L. REV. 1363, 1372 (1989).

¹⁴⁸ DUFF, *PUNISHMENT*, *supra* note 131, at 56.

¹⁴⁹ As Charles Taylor puts it, what separates us from Hegel's writing is "the sense men had that the horrors and nightmares of history, the furies of destruction and cruelty which remain enigmatic to agent and victim, were behind us. This sense, which Hegel expressed in his philosophy . . . is just about unrecoverable even by the most optimistic of our contemporaries." TAYLOR, *supra* note 126, at 135.

¹⁵⁰ For Hegel's Master/slave dialectic, see HEGEL, *supra* note 126, at 118–19. However, see DUFF, *PUNISHMENT*, *supra* note 131, at 60, questioning the practical desirability of this theory given the grave risks of distortion, oppression and manipulation it gives rise to. On this risk Garvey states:

The moral education theory of punishment asks a great deal. Of those who impose punishment, it asks that they do so in the spirit of a parent punishing a child. Of those who receive punishment, it asks that they respond to it and accept it as a

III. FROM VALUES TO VALUATION

In the remainder of this Article, I want to offer a different answer to the question of why punishment ought to be used to support social values. Doing so, I will suggest, involves viewing the promotion of values as an indirect way of supporting the individual interest in asserting her agency through *valuation*, meaning the process of assigning value to objects and communicating this value to others.¹⁵¹ Values, in this sense, are not inherently valuable, but only conventional devices used for individual self-affirmation, media through which individuals communicate their reciprocal recognition of the other's creative agency.¹⁵²

A. *The Threat of Meaninglessness*

The Hegelian treatment of values, discussed above, takes its cue from the modern threat of meaninglessness.¹⁵³ Rene Descartes, who famously asserted that the only thing we can be certain of is our thinking self, our *cogito*, attributed such certainty to divine benevolence.¹⁵⁴ David Hume's more secular philosophy later denied this religion-based self-validation, leaving human thought struggling with the effort to find any sound meaning or truth in our existence.¹⁵⁵ Max Weber later came to describe this loss of meaning as the "disenchantment of the world," which he believed to be a result of modern science.¹⁵⁶

way of making amends. All of which may be asking too much of citizens of the modern state.

Garvey, *supra* note 90, at 774. See also Dolovich, *supra* note 40, at 313 (noting the risk to politically disenfranchised minorities); Steele, *supra* note 90, at 67; Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 132 (1987) ("If a person's true self is thought to be partly or wholly constituted by the social order, then that self cannot ask the critical question 'Is this the sort of order I accept? Is it one that I would have chosen?'").

¹⁵¹ "Valuing," Samuel Scheffler writes, "comprises a complex syndrome of interrelated attitudes and dispositions, which includes but is not limited to a belief that the valued item is valuable," adding that it is, therefore, "an attitudinal phenomenon that has doxastic, deliberative, motivational, and emotional dimensions." SAMUEL SCHEFFLER, *DEATH AND THE AFTERLIFE* 16–17 (Niko Kolodny ed., 2013).

¹⁵² See, e.g., SAMUEL SCHEFFLER, *WHY WORRY ABOUT FUTURE GENERATIONS?* 75–86 (2018) (offering an account of "evaluative reciprocity"); Daniel Maggen, *A Critique of Toleration* (unpublished manuscript) (on file with author).

¹⁵³ See HEGEL, *supra* note 126, at 51–52. See generally *id.* at 104–262 (discussing Hegelian treatment of values).

¹⁵⁴ See RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY: WITH SELECTIONS FROM THE OBJECTIONS AND REPLIES* 73 (John Cottingham ed. & trans., 2013).

¹⁵⁵ Hume was primarily responding to John Locke's view of *ideas* as non-empirical knowledge. See DAVID HUME, *A TREATISE OF HUMAN NATURE* 24 (David Fate Norton & Tom L. Beauchamp eds., 2011).

¹⁵⁶ See HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS*, *supra* note 11, at 13–16 (discussing the modern rejection of inherent knowledge, including knowledge of the self);

The profound anxiety brought about by the loss of the ability to anchor meaning, including the belief in our existence as distinct beings, has later developed into a central theme of existential philosophy and literature, but it does not confine itself to this domain.¹⁵⁷ “[T]he most terrifying feature of human life,” as Ronald Dworkin writes, is “that we have lives to lead, and death to face, with no evident reason to think that our living, still less how we live, makes any genuine difference at all.”¹⁵⁸ Hegel, who took this challenge head-on, believed that the only way to resolutely overcome the challenge of meaninglessness and the feeling of “homelessness” in the world it produces is found in the connection to the community, as a gateway to actual knowledge.¹⁵⁹ For others, particularly in the existentialist tradition that responded to Hegel, the answer lies not in the certainty offered by the community but in the *individual’s decision to view herself as an agent*, even if this decision can only amount to an attestation of belief in her personhood.¹⁶⁰ Taking the Hegelian path leads, as discussed above in Section II.C., to a conception of punishment tilted towards the community and to a view of communal values as

Max Weber, *Science as a Vocation*, in *THE VOCATION LECTURES* 524, 544 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004).

¹⁵⁷ See, e.g., ALBERT CAMUS, *THE STRANGER* (Matthew Ward trans., 1988); VIKTOR E. FRANKL, *MAN’S SEARCH FOR MEANING: AN INTRODUCTION TO LOGOTHERAPY* (Ilse Lasch trans., 1962); MARTIN HEIDEGGER, *BEING AND TIME* (John Macquarrie & Edward Robinson trans., 1962); SØREN KIERKEGAARD, *FEAR AND TREMBLING* (Alastair Hannay trans., 1985); JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS: THE PRINCIPLE TEXT OF MODERN EXISTENTIALISM* (Hazel E. Barnes trans., 1956).

¹⁵⁸ Ronald Dworkin, *The Concept of Unenumerated Rights—Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 414 (1992).

¹⁵⁹ See STERN, *supra* note 134, at 8–11; J. Glenn Gray, *Homelessness and Anxiety: Sources of the Modern Mode of Being*, 48 VA. Q. REV. 24 (1972) (discussing the feeling of homelessness and the phenomenon of anxiety).

¹⁶⁰ One of the first to shift the focus to this decision to view oneself as an agent was Edmund Husserl, focusing on the individual’s *attitude* towards the question of his existence as a free and temporarily enduring being, “continuously constituting himself as existing . . . not only as flowing life but also as I, who live this and that subjective process, who live through this and that cogito, *as the same I.*” EDMUND HUSSERL, *CARTESIAN MEDITATIONS* 66 (Dorion Cairns trans., 1964) (emphasis in original); see also HEIDEGGER, *supra* note 157, at 32 (“Dasein is an entity which does not just occur among other entities. Rather it is ontically distinguished by the fact that, in its very Being, that Being is an *issue* for it. But in that case, this is a constitutive state of Dasein’s Being, and this implies that Dasein, in its Being, has a relationship towards that Being—a relationship which itself is one of Being.”); PAUL RICOEUR, *ONESELF AS ANOTHER* 21 (Kathleen Blamey trans., 1995) (suggesting that “attestation defines the sort of certainty that hermeneutics may claim, not only with respect to the epistemic exaltation of the cogito in Descartes, but also with respect to its humiliation in Nietzsche and his successors”); SARTRE, *supra* note 157, at 595 (“[O]ur being is precisely [this] original choice, the consciousness (of) the choice is identical with the self-consciousness which we have. One must be conscious in order to choose, and one must choose in order to be conscious.”); see generally JEAN-PAUL SARTRE, *EXISTENTIALISM IS A HUMANISM* 17 (Carol Macomber trans., 2007) (describing Sartre’s defense of existentialism against certain criticisms).

things of inherent value, essential for the assertion of one's agency.¹⁶¹ In contrast, I will show below how adopting a more existentialist approach, geared towards the individual's *attitude* towards her agency, can help produce a more liberal conception of values, centered not on the values themselves but rather on the individual's process of valuation that endows them with meaning.

B. Valuing and Self-Assurance

Even when an individual has taken to viewing herself as an agent, existential anxiety is enduring, rearing its ugly head whenever life treats her as if she were nothing but a lifeless object manipulated by forces beyond her control.¹⁶² Valuation, I suggest, can be understood as a mechanism individuals employ in order to overcome such doubts in order to persist in the affirmation of their agency.¹⁶³ As Samuel Scheffler observes, caring for the values we subscribe to considerably assists us in treating ourselves as free continuous beings, providing "continuity amid the flux and contingency of daily life experience" as these values "help to stabilize our selves."¹⁶⁴ Although I do not intend to fully argue in favor of this view here, I will suggest that taking this viewpoint can provide the expressive account with the theory of value it requires.¹⁶⁵

The key to uncovering the link between values of this kind and the individual's assertion of her personhood can be found, I suggest, in Kant's often-overlooked writing on the nature of judgment, and of aesthetic judgment in particular.¹⁶⁶ As is

¹⁶¹ See discussion *infra* Section II.C.

¹⁶² Hannah Arendt most famously described the most extreme way in which personhood might thus be eradicated as the ultimate purpose of totalitarian regimes:

The concentration camps not only eradicate people; they also further the monstrous experiment, under scientifically exacting conditions, of destroying spontaneity as an element of human behavior and of transforming people into something that is even less than animal, namely, a bundle of reactions that, given the same set of conditions, will always react in the same way.

Hannah Arendt, *Mankind and Terror*, in *ESSAYS IN UNDERSTANDING* 297, 304 (1994). But this destruction of selfhood appears also in less extreme cases. As Heidegger suggests, "[R]eal' anxiety is rare. Anxiety is often conditioned by 'physiological' factors . . . Only because Dasein is anxious in the very depths of its Being, does it become possible for anxiety to be elicited physiologically." HEIDEGGER, *supra* note 157, at 234.

¹⁶³ See Maggen, *supra* note 152.

¹⁶⁴ Samuel Scheffler, *The Good of Toleration*, in *EQUALITY AND TRADITION: QUESTIONS OF VALUE IN MORAL AND POLITICAL THEORY* 312, 325 (2010).

¹⁶⁵ This Article continues the work of Dan Kahan, which had explicitly left this theoretical foundation wanting. See Kahan, *supra* note 3, at 597.

¹⁶⁶ One of the few scholars to take serious the normative interest in this part of Kant's writing was Hannah Arendt, who unfortunately passed away before she was able to complete her work on this subject. See HANNAH ARENDT, *LECTURES ON KANT'S POLITICAL PHILOSOPHY* 14 (Ronald Beiner ed., 1989). Arendt's work is continued today by Jennifer

the case with much of his philosophy, Kant's writing on judgment is interested in the meaning of the claims we are purporting to make when we make judgments: when we claim that water boils at 212°F or that it is wrong to murder the innocent, Kant suggests that we are implicitly asserting the existence of laws of reason that ostensibly make our claims objectively valid.¹⁶⁷ When it comes to aesthetic judgments, however, Kant notes that we are making a different kind of claims, purporting to be independently valid despite their lack of objective support.¹⁶⁸ Thus, we may say that a piece of art is beautiful, but also that there is value in genetic connections, in serving turkey for Thanksgiving, or in a national border.¹⁶⁹ Such aesthetic judgments, to which I will refer as *valuative judgments*, are different, Kant suggests, from mere judgments of taste, in that, in contrast with the latter, in making a valuative judgment the individual is making a claim that purports to be valid regardless of her own subjective preferences.¹⁷⁰

Valuative claims of this sort include judgments on “what we care about,” as Richard Greenstein puts it, encompassing “goals, interests, policies, principles, and so forth; moreover, what we care about can touch on economic, moral, political, aesthetic, religious, and other concerns.”¹⁷¹ The meaning of such judgments of value, Kant suggests, is found not in their object—meaning the values themselves—but rather in the kind of claim they stake: a demand that others recognize the individual's

Nedelsky, whose work has some important points of convergence with the view suggested here. See JENNIFER NEDELSKY, *LAW'S RELATIONS* (2011).

¹⁶⁷ To put it differently, despite our inability to even come close to cognizing the “laws” that necessitate our scientific and moral convictions, such objective statements betray a *lawful disposition towards the world*, an expression of the belief that our experience of it is ultimately and unequivocally amenable to reason. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* 178–79 (Paul Guyer & Allen W. Wood eds. & trans., 1999) (describing this disposition as the function of understanding); see also AMERIKS, *supra* note 147, at 69–70; see generally Karl Ameriks, *Kant's Deduction of Freedom and Morality*, 19 J. HIST. PHIL. 53 (1981).

¹⁶⁸ See IMMANUEL KANT, *CRITIQUE OF JUDGMENT* 91–95 (Werner S. Pluhar trans., 1987) (1790) [hereinafter KANT, *CRITIQUE OF JUDGMENT*] (describing the free lawfulness of the imagination); see also Jennifer Nedelsky, *Judgment, Diversity, and Relational Autonomy*, in *JUDGMENT, IMAGINATION, AND POLITICS: THEMES FROM KANT AND ARENDT* 103, 106–07 (Ronald Beiner & Jennifer Nedelsky eds., 2001); Brad Seeman, *What if the Elephant Speaks? Kant's Critique of Judgment and an Übergang Problem in John Hick's Philosophy of Religious Pluralism*, 54 INT'L J. PHIL. RELIGION 157, 161 (2003).

¹⁶⁹ Kant primarily deals in this category with judgments of beauty and sublimity, but by this he broadly refers to judgments that stand in a *symbolic* relationship to objective value. See KANT, *CRITIQUE OF JUDGMENT*, *supra* note 168, at 225–28.

¹⁷⁰ See KANT, *CRITIQUE OF JUDGMENT*, *supra* note 168, at 57–60 (discussing judgment that is universally valid objectively and subjectively); see also Barbara Herman, *Pluralism and the Community of Moral Judgment*, in *TOLERATION: AN ELUSIVE VIRTUE* 60, 63–64 (David Heyd ed., 1996).

¹⁷¹ Richard K. Greenstein, *Toward a Jurisprudence of Social Values*, 8 WASH. U. JURIS. REV. 1, 4–5 (2015).

ability to form them.¹⁷² Although our modern sensibilities force us to recognize that the validity of such judgments only can come from the individual's valuative attitude towards them, we generally treat them *as if* they were somehow inherently important.¹⁷³

Although Kant does not explicitly detail why individuals form valuative judgments and acknowledge their validity, he recognizes that the ability to create judgments of value represents an unmatched form of agential freedom.¹⁷⁴ It could, however, be speculated that the importance of valuative judgments lies precisely in their ability to validate one's creative agency through others.¹⁷⁵ In making a valuative claim and communicating it to another, one makes oneself vulnerable to the possibility of rebuff and ridicule, for the most rational response to such groundless claims is that of bewilderment.¹⁷⁶ By nonetheless expecting others to acknowledge the validity of one's values as judgments that go beyond mere personal preferences, the individual thus trusts the other to recognize her as a creative agent, capable of assigning meaning to otherwise meaningless objects.¹⁷⁷ When such communicative valuation succeeds, it can assist the individual in asserting her agency against the threat of meaninglessness.

Our values, in other words, are meaningful only to the extent that they are expressions of the ability to create and communicate meaning. Even though we often speak of values as things of inherent importance, what matters in this description is not whether we are correct in doing so, but rather our willingness to hold them as meaningful and to engage with others based on this attitude.¹⁷⁸ The subject matter of which we speak when making a valuative judgment—the substance of our values—is but a placeholder for our assertion of creativity; the medium of valuation is itself the message, to borrow Marshall McLuhan's phrasing.¹⁷⁹ In asking others to join us in the communal and ongoing commitment to values, we ask and expect them

¹⁷² See KANT, *CRITIQUE OF JUDGMENT*, *supra* note 168, at 89–95 (discussing judgment of taste as a subjective necessity that is presented as objective by presupposing a common sense).

¹⁷³ As Rudolf Makkreel notes, the thought that there might be something inherent to these valuations would go against the heart of Kant's critical ideas. See RUDOLF A. MAKKREEL, *IMAGINATION AND INTERPRETATION IN KANT: THE HERMENEUTICAL IMPORT OF THE CRITIQUE OF JUDGMENT* 50 (1990).

¹⁷⁴ These kind of claims, Kant notes, exceed even the claim to freedom made by moral judgments. See KANT, *CRITIQUE OF JUDGMENT*, *supra* note 168, at 35; see also MAKKREEL, *supra* note 173, at 55.

¹⁷⁵ See HUSSERL, *supra* note 160, at 89–150 (discussing the role of inter-subjectivity).

¹⁷⁶ See, e.g., Samuel Scheffler, *Valuing*, in *EQUALITY AND TRADITION: QUESTIONS OF VALUE IN MORAL AND POLITICAL THEORY* 15, 23 (2010) (describing valuation as a form of emotional vulnerability); Niko Kolodny, *Love as Valuing a Relationship*, 112 *PHIL. REV.* 135, 150–52 (2003) (likening love, as a form of vulnerability to valuation).

¹⁷⁷ See KANT, *CRITIQUE OF JUDGMENT*, *supra* note 168, at 157–62 (discussing the idea that individuals experience sensations differently).

¹⁷⁸ See HUSSERL, *supra* note 160, at 92 (discussing the notion of cultural objects).

¹⁷⁹ MARSHALL MC LUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 7–21 (MIT Press 1994) (1964) (suggesting that “the medium is the message.”).

to mirror and affirm our belief in our enduring creativity, in our existence as persons rather than as mere atemporal agents.¹⁸⁰

C. *The Conditions of Successful Valuation*

If we accept the view of values as instruments for the support of agential self-assurance, then their normative appeal, including their ability to justify punishment, becomes contingent on the ability of such values to support the function of self-assurance through valuation. In assessing whether various values are indeed supportive of this purpose, we can make use of a set of conditions Kant referred to as the maxims of judgment.¹⁸¹ For Kant, these maxims require the individual to (i) think for herself,¹⁸² (ii) think from the standpoint of everyone else,¹⁸³ and (iii) think consistently.¹⁸⁴ For our discussion here, I will focus on the first two maxims, referring to them as the conditions of (1) creativity and (2) communicability, accordingly.

I. *Creativity*

If an individual is to treat her valuations as signs of her creative agency, she must first and foremost be able to view her values as her own creations rather than something externally imposed on her.¹⁸⁵ In contrast to the Kantian notion of moral autonomy, this does not entail, however, that she must see herself as the sole creator of her values.¹⁸⁶ As other-relating claims, the formulation of values, even of one's most personal and intimate ones, is an inherently collaborative process, based in social conventions and hermeneutics.¹⁸⁷ Nevertheless, the influence of others on the formulation of one's values must be limited to the language and terms in which the

¹⁸⁰ As Samuel Scheffler puts it, “through the repetitive performance of acts that express our distinctive values and desires, we mark the world with continuities that are expressive of ourselves. In so doing, we confirm our sense of ourselves as persistent creatures, manufacturing, as it were, evidence to support our confidence in our persistence.” Samuel Scheffler, *The Normativity of Tradition*, in *EQUALITY AND TRADITION: QUESTIONS OF VALUE IN MORAL AND POLITICAL THEORY* 287, 299 (2010) [hereinafter Scheffler, *The Normativity of Tradition*]. Richard Rorty makes a similar point, while emphasizing the fetishistic nature of such constructs. RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 344–45 (1980).

¹⁸¹ See KANT, *CRITIQUE OF JUDGMENT*, *supra* note 168, at 160–61.

¹⁸² See *id.* at 161.

¹⁸³ See *id.* at 161–62.

¹⁸⁴ See *id.* at 162.

¹⁸⁵ See *id.* at 79 (discussing that a person's taste is individually developed).

¹⁸⁶ See *id.* at 15–16, 44.

¹⁸⁷ See, e.g., ARENDT, *supra* note 166, at 14 (discussing the dependence of judgment on sociability); CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 31 (1989) [hereinafter TAYLOR, *SOURCES OF THE SELF*] (describing the social frameworks of meaning that are essential for communication).

individual's claim to valuation is voiced.¹⁸⁸ As Charles Larmore puts it, "being fully ourselves does not require us to free ourselves from the imprint of social conventions—which is impossible, anyway—but only that we stop seeking our bearings from what we believe or imagine another might expect from us."¹⁸⁹ What this entails, in essence, is that values must be understood as purely conventional, subjective creations—fetishisms of a sort—intended to serve those who participate in their production rather than rule them.¹⁹⁰

2. *Communicability*

The second condition of judgment requires that the individual voicing the valuative judgment stakes her claim on the recognition of her creative agency rather than on some objectively valid considerations.¹⁹¹ Kant describes this condition in terms of the judgment's communicability, or the ability of the individual to believe that another would accept her valuation as valid despite its subjectivity.¹⁹² Essentially this condition entails that in seeking another's recognition of her agency through communication, the individual is appealing to the other's agency, and not to some objectively compelling considerations.¹⁹³

This means that in order to be communicable, judgments must first present themselves as impossibilities so that if they are indeed accepted, it is solely by virtue of another's free recognition of the communicator's creativity.¹⁹⁴ If an individual argues that a particular value is inherently compelling, by claiming, for instance, that they are divinely or naturally mandated, then she does not, in fact, make her claim vulnerable to refutation as she does not expect the other to freely accept her claims. Likewise, if she makes the statement while waving a gun, acceptance of her claim would only be a sign of the objective validity of the material considerations to which her gesture is alluding. In either case, no true recognition could grow out of the other's acceptance of the claim, for such acceptance would only be a sign of the other's willingness to recognize the compelling appeal of the objective considerations the individual was invoking.

¹⁸⁸ See KANT, *CRITIQUE OF JUDGMENT*, *supra* note 168, at 79, 144, 161.

¹⁸⁹ CHARLES E. LARMORE, *THE PRACTICES OF THE SELF* xiii (Sharon Bowman trans., 2010).

¹⁹⁰ See, e.g., ONORA O'NEILL, *CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY* 46 (1989) (discussing the first maxim of judgment). Similar concerns are voiced by Seana Shiffirin. See Seana Valentine Shiffirin, *Preserving the Valued or Preserving Valuing?*, in *DEATH AND THE AFTERLIFE* 143, 144–154 (2013).

¹⁹¹ See KANT, *CRITIQUE OF JUDGMENT*, *supra* note 168, at 156.

¹⁹² See *id.* at 144.

¹⁹³ See *id.* at 159. The reciprocity of recognition is later picked up by Hegel in his Master/slave dialectic. HEGEL, *supra* note 126, at 118–19.

¹⁹⁴ See, e.g., HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS*, *supra* note 11, at 164 (discussing the leap of faith involved in communication); O'NEILL, *supra* note 190, at 42–48 (discussing the second condition of judgment).

D. The Anti-Valuative Harm of Wrongdoing

If indeed, the importance of values is a function of the interest individuals possess in valuation, then the harm that criminal law has in mind when using punishment to condemn wrongdoing does not concern damage done to these values as such but rather to the ability of values to serve a valuative function.

This suggests two kinds of harms that can be targeted by criminal law: first, an act of wrongdoing could harm its victim by denying her evaluative claims in a way that denies her ability to create values. By rejecting the victim's power of valuative judgment, either by denying her access to values or by imposing on her external considerations that prevent her from acting on her values, the wrongdoer implicitly threatens to undermine the victim's ability to believe in herself as a person.¹⁹⁵ Eroding the ability of the victim to assert herself through valuation, the wrongdoer stocks her fear of meaninglessness. As Hampton accurately notes, "[f]ear that we are worth less than we wish (or perhaps less than others think we are worth) is a common human phenomenon A value-denying act can, therefore, be frightening to the victim (and others like him), insofar as it plays into those fears."¹⁹⁶

Second, the harm of wrongdoing can present itself in a more general and indirect way, by diminishing the effectiveness of social values, undermining the ability of individuals to rely on them in the course of making valuative claims. Stealing a pen from a department store would hardly affect its owner in a way that would diminish her ability to assert her agency, but it does undermine the efficacy of the value of private property on which both the owner and the rest of society rely in their valuative efforts.¹⁹⁷ Even when a given "victim" does not perceive herself as being negatively affected by value-denying behavior, all of society is victimized by it, as all those who are exposed to its personhood-denying message are potentially discouraged by it.¹⁹⁸ As Scheffler avers:

Given that our normative and evaluative convictions serve these functions, it is not surprising that being prevented from acting in accordance with values one regards as authoritative, or being constrained to act in accordance with values that one rejects, should be perceived as a grave injury. By attacking the deliberative and motivational nexus via which our

¹⁹⁵ See, e.g., O'NEILL, *supra* note 190, at 44, 133.

¹⁹⁶ Hampton, *Correcting Harms*, *supra* note 106, at 1678; see also, CHRISTINE M. KORSGAARD, *THE SOURCES OF NORMATIVITY* 143 (1996).

¹⁹⁷ I am indebted to Daniel Markovits, Gideon Yaffe and Roman Zinigrad for provoking my thinking of this point, even if they might not agree with my resolution of it.

¹⁹⁸ See, e.g., MATRAVERS, *supra* note 28, at 76–77 (noting that the victim does not always feel diminished by the crime); Hanna, *supra* note 26, at 140 (noting that criminal behavior is wrong even when the wrongdoer does not intend to negatively affect the self-worth of the victim); Adam J. MacLeod, *All for One: A Review of Victim-Centric Justifications for Criminal Punishment*, 13 BERKELEY J. CRIM. L. 31, 60 (2008).

values are translated into actions, these forms of interference and constraint amount to a kind of assault on the self.¹⁹⁹

IV. VALUATION AND CRIMINAL LAW

The valuative framework suggested above, and its corresponding conception of wrongdoing, can help us better understand the expressivist claim that punishment is justified as a conventional device for the promotion of social values.²⁰⁰

From a valuative perspective, we can distinguish between three functions served by criminal law in support of valuation: (i) establishing a shared depository of values; (ii) instructing individuals, through criminalization, on the breadth of these values; and (iii) countering the adverse effects of wrongdoing through punishment.²⁰¹ The justification of punishment primarily refers to the last function. On the valuative approach suggested here, when an individual acts in a way that impairs the ability of others to assert their personhood, the state is tasked with responding in a way that reaffirms the ability of others to assert their personhood. The main difference between this approach and the value-minded expressive justification is the realization that not all values are worthy of protection, but rather only those that support valuation, and only to the degree that they do so.

A. Pronouncing Communal Values

For the valuative expressive account, law is concerned with, among other things, the proclamation of the community's values, those objects which are collectively regarded as valuable.²⁰² This does not imply that the state, as a collective of individuals, is capable of the kind of valuation discussed here; instead, the state acts as an aggregate of values, amassing the individual valuations that comprise it.²⁰³

¹⁹⁹ SCHEFFLER, *supra* note 164, at 312, 315, 326.

²⁰⁰ *See, e.g.*, Feinberg, *supra* note 3, at 400; Kahan, *supra* note 3, at 596.

²⁰¹ For similar discussions of the purposes of law, see, for example, JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 450–51 (William Rehg trans., 1996), and SCOTT SHAPIRO, *LEGALITY* 175–76 (2011).

²⁰² *See, e.g.*, BILL WRINGE, *AN EXPRESSIVE THEORY OF PUNISHMENT* 62–64 (Thom Brooks ed., 2016) (describing law as a communication of the commitments of the citizenry to itself); Richard K. Greenstein, *Toward a Jurisprudence of Social Values*, 8 *WASH. U. JURIS. REV.* 1, 4–5 (2015) (suggesting a broad definition of communal values); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Anti-Terrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 *DUKE L.J.* 1, 74–76 (1997) (describing various ways in which law relates to communal values); *see generally* MARGARET GILBERT, *A THEORY OF POLITICAL OBLIGATION* (2008) (addressing an individual's moral obligation to follow the law).

²⁰³ *See, e.g.*, SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* ix (2002) (opposing the thought of cultures as discrete wholes); Anderson & Pildes, *supra* note 97, at 1514–20 (arguing for the possibility of collective agency).

The legal affirmation of values assures individuals that they can communicate their values not only amongst themselves but also on a larger scale, encompassing the entire community—or at least large parts of it. Law, in this sense, is a catalog of those objects toward which the state's citizenry currently holds a valuative disposition. This catalog usually contains general values, such as those of bodily integrity, private property, and the family, in addition to values that are specific to the community and its institutions, including those of particular traditions, state symbols, and common conceptions of the good life.²⁰⁴

By articulating the community's catalog of values, law does more than just demonstrate the feasibility of successful communication. In making publicly known those values upon which members of the community institutionally agree, law can help minimize breakdowns in communication, and enable people to transcend valuative disagreements by placing them within a broader context of agreement on valuation.²⁰⁵ People can, for example, disagree on the particular ways in which private property is allocated or about the extent to which bodily integrity is protected, but the law can help them better realize that they ultimately share the same fundamental form of valuation despite their different interpretations of it. By creating a clear border between one individual's possessions and another's, or by protecting one's body from external transgressions, law declares that private property and one's body are objects to which individuals in the community commonly attach considerable value. While some people in the community may be radical libertarians and others socialists, law frames their disagreement so that they understand each other as agreeing on the fundamental assignment of value to property.

As the conditions of judgment instruct, if law is to serve its valuative function, it must be understood as an example of creative valuation and communication, and not as a statement of fidelity to the inherent importance of the values themselves.²⁰⁶ Consequently, the enactment of values cannot exclude parts of the community from participating in the ongoing creation of the enacted values.²⁰⁷ Exclusionary values, tainted by racism, sexism, or other forms of bigotry, cannot be coherently included in the catalog of values acknowledged by the state.²⁰⁸ Likewise, values that have entered the legal inventory in ways that do not reflect free valuation or have been admitted into it without the possibility of ouster cannot be considered legitimate parts of it.²⁰⁹

²⁰⁴ See, e.g., Greenstein, *supra* note 202, at 4–5.

²⁰⁵ See, e.g., HABERMAS, KNOWLEDGE AND HUMAN INTERESTS, *supra* note 11, at 157 (discussing the identity-assuring function of communication); Scheffler, *The Normativity of Tradition*, *supra* note 180, at 287, 291–95 (discussing the usefulness of conventions for coordination).

²⁰⁶ See *supra* Section III.C.1.

²⁰⁷ See *id.*

²⁰⁸ See *id.*

²⁰⁹ See, e.g., Alasdair MacIntyre, *Toleration and the Goods of Conflict*, in *THE POLITICS OF TOLERATION: TOLERANCE AND INTOLERANCE IN MODERN LIFE* 133, 206 (Susan Mendus ed., 1999) (arguing that the plasticity of traditions is essential to their vitality).

B. Criminalization

If law, in general, aids individuals by presenting them with commonly shared values, the valuative theory suggests that criminalization provides them with specific instruction on how various forms of behavior will either be taken to be in line with the value assigned to the specific object or as a sign of the actor's denial of the value assigned to it. In this way, law advises individuals that promising others payment for their property is commonly viewed as respectful of their valuation of private property while threatening to otherwise destroy it denies it.

Criminalization, in this sense, is a guidebook for proper valuative communication, for even one who genuinely intends to recognize the other's valuative capacities might err in doing so without guidance on shared conventions. As Elizabeth Anderson and Richard Pildes suggest,

[e]xpressive theories of action tell us to express certain attitudes adequately. The standard of adequacy is not met simply by intending to express those attitudes, or by thinking that one's actions do express those attitudes. Rather, the standard of adequacy is public, set by objective criteria for determining the meanings of action.²¹⁰

Whether criminal law is aimed at the "bad man," as Oliver Wendell Holmes maintained,²¹¹ or aimed at the "'puzzled man' or 'ignorant man' who is willing to do what is required, if only he can be told what it is," as H.L.A. Hart replied,²¹² criminal law, according to the valuative account, specifies the ways in which reasonable people in a given society usually interpret external expressions as indications of the actor's disposition toward valuation. Even without the threat of punishment, prohibition is a warning sign that certain actions will be perceived as denials of the possibility of valuation, potentially undermining the ability of others to assert their personhood.²¹³

Law not only directs people on how their interactions with others will be understood, but also on how and whether others will be negatively affected by the more general flouting of communal values.²¹⁴ Law can, for instance, prohibit expressions of racism, pornography, or cruelty toward animals, even when they are

²¹⁰ Anderson & Pildes, *supra* note 97, at 1512.

²¹¹ See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

²¹² See, H.L.A. HART, *THE CONCEPT OF LAW* 39 (1st ed., 1963).

²¹³ See, e.g., Anderson & Pildes, *supra* note 97, at 1511 (suggesting that expressive norms regulate actions by regulating the acceptable justifications for doing them).

²¹⁴ See, e.g., Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 L. & SOC. INQUIRY 60, 70–71 (2017).

not part of direct interpersonal interaction with another individual,²¹⁵ for the valuative account, this can be justified in light of the indirect harm of such actions.²¹⁶

In discussing this idea, Cass Sunstein notes the clearly expressive motivation behind the proposal to ban flag burning.²¹⁷ Any such ban, Sunstein notes, is clearly not aimed at eliminating the threat of flag burning itself or its immediate effect but is meant to clarify that burning the national flag would be obnoxious to the majority of members in the community.²¹⁸ Once we understand criminalization as interested in valuation and not in values as such, it becomes apparent that such grounds for prohibition risk conflating the two. In guiding individuals on how they ought to respect society's values, criminal law cannot go as far as reifying these values themselves, for doing so would only defeat their valuative purpose. An act of flag burning can have various meanings. To burn a national flag in protest of that nation's disrespect of individuals might be offensive to the members of that nation but it is, in fact, an affirmation of the importance of valuative personhood. To ban such protests is to overlook that the flag's value derives only from the support it lends to the ability of all individuals to assert themselves.²¹⁹ Burning the flag to protest the mistreatment of minorities is an affirmation of this conception of the flag, an expression of disappointment with the particular flag's failure to fulfill its purpose.²²⁰ The meaning of the act would be different, for instance, with regard to burning a gay pride flag, when the act is meant not as a protest against mistreatment (say of certain members within the LGBTQ community) but as a protest against equality and inclusion. To ban the burning of a gay pride flag is to signal that people will generally see the act not as an internal argument within the confines of valuation, but as a denial of the ability of certain individuals to express their personhood.²²¹

²¹⁵ In some cases, this will involve serious questions of freedom of expression, as is the case, for instance, with hate speech that does not amount to direct harm to another. See SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF A CONTROVERSY* 58–59, 101 (1994); Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629 (1985); Sunstein, *supra* note 94, 2023–24.

²¹⁶ See Sunstein, *supra* note 94, at 2023–24.

²¹⁷ See *id.*

²¹⁸ *Id.*

²¹⁹ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 413 (1989) (“[T]he State’s claim is that it has an interest in preserving the flag as a symbol of nationhood and national unity, a symbol with a determinate range of meanings.”); *Spence v. Washington*, 418 U.S. 405, 413 (1974) (“For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure. It evidences both the unity and diversity which are America.”).

²²⁰ For a similar approach, albeit in First Amendment terms, see *Spence*, 418 U.S. at 414–15.

²²¹ This clearly ignores, for the sake of argument, the First Amendment implications of such prohibition, in light of its effect on the value of free speech.

Context is of utmost importance here, and the criminal law must tread lightly if it is to refrain from stifling communication rather than encouraging it.²²² Conflict and disagreement are almost inherent to valuation, and certainly do not express, in themselves, its denial. As the conditions of judgment dictate, to make a valuative claim is to open oneself up to the possibility of rebuff, and ruling out all possibility of denial would only diminish the payoff of successful communication.²²³ Behavior that denies another's valuative capacities might cause her great anxiety, but, as such, it is no different from the fundamental crisis of meaning that prompts her to assert her personhood to begin with.²²⁴ Rather than contradict itself by seeking to eliminate any form of existential anxiety, criminal prohibition must be limited to those instances in which one individual interferes with another's attempt at valuative self-assertion, thereby denying her this route of dealing with this anxiety.²²⁵

C. Punishment

Criminal law, as we have seen, can aid individuals in asserting their personhood via valuative communication by presenting them with a shared vocabulary of values and by supplying them with guidelines that can help them interpret the actions of others and predict how their own actions are likely to be interpreted.²²⁶ Despite this support, there will always be those who choose to reject the conditions of judgment and act in ways that disrupt the ability of others to valuatively assert their personhood: by treating them as objects, denying their power of valuation, or by undermining the values they subscribe to.²²⁷ Being treated in such ways or observing such behavior toward others diminishes the ability of individuals to believe that there is truth to their belief in communicability, presenting them with what appears to be evidence that human beings are incapable of engaging one another in intersubjective valuation.²²⁸ By inflicting punishment on the wrongdoer, the state sends out a

²²² See, e.g., Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261, 2303–08 (2004).

²²³ See, e.g., O'NEILL, *supra* note 190, at 21–24 (arguing that only actively interfering with communication constitutes a denial of judgment); Hampton, *Correcting Harms*, *supra* note 106, at 1686–87 (“When we face actions that not merely express the message that a person is degraded relative to the wrongdoer but also try to establish that degradation, we are morally required to respond by trying to remake the world in a way that denies what the wrongdoer's events have attempted to establish.”).

²²⁴ See *supra* Section III.A.

²²⁵ See KANT, CRITIQUE OF JUDGMENT, *supra* note 168, at 86; O'NEILL, *supra* note 190, at 105–06. I leave to a later time the discussion of the precise details of this distinction.

²²⁶ See *supra* Section IV.A and IV.B.

²²⁷ See *supra* Section III.D.

²²⁸ See, e.g., Hampton, *Correcting Harms*, *supra* note 106, at 1678; see also KORSGAARD, *supra* note 196, at 143.

resolute countermesssage, intended to reassure the belief of all members of the community in the possibility of communicability.²²⁹

Punishment, thus understood, operates by example and, as was discussed above, it must take care not to set the wrong one.²³⁰ According to the valuative argument, by penalizing the wrongdoer, the state signals the community's continued commitment to the idea of communicability, assertively suppressing the damage done by the wrongful act. The purpose of such communication is not to convince its recipients of the truth of personhood or on the possibility of valuation—any attempt to do so would be futile, if not counterproductive—but only to offset the force with which the wrongdoer imposed her nihilism on the victim and society at large.²³¹

In order to refute the wrongdoer's message and reaffirm the belief in values and valuation the message conveyed by punishment must be expressed according to the conventions that inform such expressions.²³² As expressivists generally note, the conventions prevalent in most, if not all human societies entail that such expressions take the form of hard treatment.²³³ There is, however, nothing inherent in the conventional connection between crime and punishment *qua* hard treatment, and there are certainly no reasons to make use of hard treatment to express the message of punishment when there are more efficient ways of doing so.²³⁴

²²⁹ See generally, e.g., Kenworthy Bilz, *Testing the Expressive Theory of Punishment*, 13 J. EMPIRICAL LEGAL STUD. 358 (2016) (discussing the restorative qualities of punishment.).

²³⁰ See discussion *supra* Parts I, II, and III.

²³¹ See, e.g., LARMORE, *supra* note 189, at 87.

²³² Kahan, *supra* note 3, at 600 (“Just as it would be irrational for a person who wishes to express respect and affection for a friend to offer her money rather than shared experiences, so would it be irrational for society to attempt to condemn a wrongdoer by imposing an affliction that does not signify condemnation within that society.”)

²³³ See, e.g., LUCAS, *supra* note 24, at 134–36 (“[T]he function of punishment on this theory is to give weight to reprimands. Although for some men words are weighty enough, they are not so for all men. A punishment, unlike a merely verbal reproof, cannot be tossed aside. . . . With human nature being what it is, we do not believe that mere words can carry the full weight of the disapprobation and disavowal that is required.”); Tim Dare, *Retributivism, Punishment, and Public Values*, in *RETRIBUTIVISM AND ITS CRITICS* 35, 36–37 (Wesley Cragg ed., 1992); Feinberg, *supra* note 3, at 402; Garvey, *supra* note 90, at 768 (“For other theorists, actions speak louder than words. Hard treatment, and that of the right sort, is needed to make sure the condemnation is taken seriously”); Kahan, *supra* note 3, at 600; Kleinig, *supra* note 107, at 417; Primoratz, *supra* note 52, at 198; Tasioulas, *supra* note 32, at 296 (“[O]nly punishment adequately conveys the blame the wrong-doer deserves. This captures a widespread and deeply ingrained judgment, viz. that the seriousness of the wrong committed warrants a blaming response that operates *through* the infliction of hard treatment, since only such a response adequately reflects the gravity of the wrong that has been committed.”) (emphasis in original).

²³⁴ See, e.g., Matt Matravers, *Duff on Hard Treatment*, in *CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF* 68, 76–77 (Rowan Cruft et al. eds., 2011); Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143 (2006).

The valuative underpinning of punishment entails that when forcing the wrongdoer to be part of its expressive undertaking, the state must take care not to ignore the wrongdoer's own claim to personhood in the process.²³⁵ This significantly limits the availability of various forms of punishment, even if they can effectively communicate condemnation.²³⁶ As Kahan advises, effective punishment requires a strong fit between the use of punitive means and the message punishment aims to convey.²³⁷ Identifying the condemnatory function of punishment can lead us in some cases, he argues, to prefer so-called "shaming" sanctions, such as widely publicizing the names of wrongdoers, demanding that they bear marks of their wrongdoing or participate self-debasing or apology rituals, over the traditional hard treatment of incarceration and fines.²³⁸ However, while shaming sanctions can indeed be more effective means of condemnation, their effectiveness must be weighed against their impact on the more general purpose of supporting individual self-assertion. As James Whitman responds to Kahan, shaming punishments risk undermining the purpose of punishment, not because the shaming means might be inappropriate, but because they risk expressing the wrong kind of disposition toward personhood.²³⁹ "Speaking of shame sanctions as 'condemnation,'" Whitman observes, "does not do justice to our intuitive sense of their peculiar kind of brutality and terror."²⁴⁰ Indeed, shaming, in this context, may be an appropriate expression of condemnation, but it risks distorting the meaning of condemnation, so it becomes synonymous with retaliation and vengeance, connecting crime and punishment so closely that condemnation is no longer cognizant of the more fundamental purpose of assisting individuals in asserting their personhood.

V. SOME THOUGHTS ON THE CRIMINALIZATION OF ABORTION

This Article has argued that substituting the language of values with the language of valuation not only makes better sense of the expressive theory of punishment but also illuminates some of the constraints on using punishment as a means of expressing condemnation.²⁴¹ In the following pages, I will briefly explore some ways in which these limits can present themselves in the case of the possible criminalization and punishment of abortion. In doing so, I do not intend to make substantive arguments for or against the permissibility or appropriateness of abortion. A large part of the debate on abortion concerns the specific meanings assigned to the various values abortion invokes and the moral and scientific

²³⁵ See, e.g., Hill, *supra* note 56, at 439.

²³⁶ See, e.g., Meyer, *supra* note 6, at 118.

²³⁷ See Kahan, *supra* note 3, at 600.

²³⁸ See *id.*; Kahan, *supra* note 97, at 704–06.

²³⁹ See James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 *YALE L.J.* 1055, 1091 (1998).

²⁴⁰ *Id.* at 1062.

²⁴¹ See *supra* Parts III and IV.

determinations to be made regarding the status of the fetus.²⁴² As the subject of this Article is the justification of punishment, this Article cannot take account of these considerations. I do, however, believe that acknowledging the valuative function of criminal law can help clarify the relationship between the potential criminalization and punishment of abortion and the social values that would ostensibly justify them.

To illuminate the points in which the valuative paradigm is the most pertinent, I will confine the issue of abortion to the way in which it was framed by the Supreme Court's opinion in *Roe v. Wade*.²⁴³ The Court's opinion was informed by four factors: the moment during which the fetus becomes a person,²⁴⁴ the state's interests in regulating abortion,²⁴⁵ the changes in the relative weight of these interests as the pregnancy progresses,²⁴⁶ and the woman's right to privacy.²⁴⁷ These factors, we shall see, are aligned with the valuative framework proposed above, suggesting the extent to which these factors can be interpreted by those who would disagree with the way in which they played out in the Court's opinion.

A. Abortion and Personhood

According to the *Roe v. Wade* Court's interpretation, the legal proscription of abortion can have in mind three potential "victims": the fetus, the woman, and the state's interests.²⁴⁸ Of these, the Court primarily dealt with the effects of abortion on the third.²⁴⁹ Given the nature of the proceeding before it—a case brought by a woman against the state's prohibition of abortion²⁵⁰—it is hardly surprising that the Court largely avoided the possible victimization of women by abortion.²⁵¹ But the Court was also reluctant to consider the fetus a potential victim of abortion—a stance shared by the following discussion.

The Court reached this decision primarily by considering the moment at which the claim to personhood materializes as a matter of legal convention.²⁵² Distancing itself from any pretense of making a scientific, moral, or philosophical statement of fact, the Court surveyed the ways in which the term "person" was used by common

²⁴² See, e.g., John Baker, *Philosophy and the Morality of Abortion*, 2 J. APPLIED PHIL. 261 (1985); Michael Tooley, *Abortion and Infanticide*, 2 PHIL. & PUB AFF. 37 (1972); Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

²⁴³ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁴⁴ *Id.* at 156–62.

²⁴⁵ *Id.* at 147–52.

²⁴⁶ *Id.* at 162–64.

²⁴⁷ *Id.* at 152–59.

²⁴⁸ *Id.* at 147.

²⁴⁹ See, e.g., Mark Tushnet & Louis Michael Seidman, *A Comment on Tooley's Abortion and Infanticide*, 96 ETHICS 350 (1986).

²⁵⁰ *Roe*, 410 U.S. at 120.

²⁵¹ This of course excludes the cases of John and Mary Doe and the physician James Hubert Hallford, which the court dismissed. *Id.* at 120–29.

²⁵² See *id.* at 159–62.

law, concluding that it was not commonly understood to include the unborn.²⁵³ Although I see no reason to diverge from this conclusion, I want to remark on how the question might be treated by the valuative theory.

Under the valuative approach, respect for an agent's personhood is mandated by her ability to mirror and validate another's claim to personhood.²⁵⁴ To deserve such respect, an agent does not necessarily have to be capable of actual verbal communication; the question is whether others can envision her as capable of doing so.²⁵⁵ The validity of one's valuative judgments is a matter of communicability, not of communication. To be able to believe that she is capable of assigning value and communicate it to others, the individual needs only to be able to believe that others would acknowledge her ability to do so, not that others actually do so. Accordingly, the respect individuals are due are as potential agents, which could be perceived by others as capable of communication. A potential partner for communication could, therefore, be unavailable—she could be far away, asleep, or unconscious—but she could also be incapable of actual communication, being an infant, mentally impaired, an unborn fetus, or even an animal.²⁵⁶ The question of who or what is potentially a person concerns the limits of valuative imagination and is a matter of social conventions.²⁵⁷

Nevertheless, I believe that a persuasive case can be made in favor of viewing the moment after birth, in which we meet the eyes of another human being as the moment in which we begin to perceive them as potential partners in communication. As Sartre notes, it is in the imagined gaze of another that we are constantly made aware of the possibility of our own personhood.²⁵⁸ Although we can bear with us the

²⁵³ See *id.* 410 U.S. at 158.

²⁵⁴ See *supra* Section III.B.

²⁵⁵ See KANT, CRITIQUE OF JUDGMENT, *supra* note 168, at 88.

²⁵⁶ This is not to be confused with the way in which the potential for personhood is often used in the abortion debate. See, e.g., Baker, *supra* note 242, at 265 (describing how some use viability as a criterion for personhood); R.M. Hare, *Abortion and the Golden Rule*, 4 PHIL. & PUB. AFF. 201, 204–06 (1975) (discussing how the use of the word “person” is not “by itself” a moral reason for killing or not killing a fetus); Tooley, *supra* note 242, 38–40 (noting the tensions when one calls a fetus a “person”); Roger Wertheimer, *Understanding the Abortion Argument*, 1 PHIL. & PUB. AFF. 67, 79–82 (1971) (same).

²⁵⁷ For a similar view, see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 927 (1973).

²⁵⁸ SARTRE, *supra* note 157, at 374. As Sartre indicates:

The proof of my condition as man, as an object for *all* other living men, as thrown in the arena beneath millions of looks and escaping myself millions of times—this proof I realize concretely on the occasion of the upsurge of an object into *my* universe if this object indicates to me that I am probably an object at present functioning as a *differentiated this* for a consciousness. The proof is the ensemble of the phenomenon which we call the *look*. Each look makes us prove concretely—and in the indubitable certainty of the *cogito*—that we exist for all living men; that is, that there are (some) consciousnesses for whom I exist.

thought of another's gaze even though we have never set eyes upon them nor they on us, there is, as Levinas noted, something remarkable about the encounter with another's *visage*, "in the gleam of exteriority or of transcendence in the face of the Other."²⁵⁹ In this sense, the Court's ruling that an unborn fetus is not a rights-bearing person is a matter of legal convention, but it is not one that could be easily altered. A child minutes after birth barely has more capacity for agency than a fetus moments prior to it.²⁶⁰ By the same token, it takes quite some time after birth for a child to actually develop the qualities that are commonly associated with agency. What changes in birth is not some physical or metaphysical quality of the fetus but the tendency to view it as a potential partner in communication by virtue of its ability to mirror the claims to personhood of others.

B. The Values Protected by Abortion Prohibition

When law prohibits certain behavior, it will not always be clear what values the prohibition serves. In such cases, it is up to the court deciding on the justifiability of the prohibition to discern which values inform the law and whether their enactment into law conforms with the valuative purpose of the prohibition.²⁶¹

The *Roe v. Wade* Court acknowledged three sets of values as potentially informing the prohibition of abortion: the value of "proper" sexual conduct; the safety of medical procedures; and potential life.²⁶² The first of these values was promptly rejected by the Court, as the state did not purport to justify the prohibition by reference to it.²⁶³ The valuative theory suggests that this omission may have been too hasty. The question of whether the state's proclaimed intention in enacting the prohibition necessarily determines its actual meaning exceeds the bounds of our discussion. Still, given the conventional nature of values, it is clear that the enactment of values into law cannot sever them from the broad cultural context that gives them concrete meaning.²⁶⁴ Accordingly, the values implicitly promoted by the prohibition of abortion—sexuality, womanhood, procreation, maternity, and the like—can have a profound impact on how the protection of the more explicit values is interpreted.²⁶⁵ Although the involvement of such implicit values does not necessarily disqualify any prohibition that is informed by them, they can still inform

Id.

²⁵⁹ EMMANUEL LEVINAS, *TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY* 24 (Alphonso Lingis trans., 2007).

²⁶⁰ *See, e.g.,* Wertheimer, *supra* note 256, at 78–79.

²⁶¹ 410 U.S. 113, 129 (1973).

²⁶² *See id.* at 147–51.

²⁶³ *See id.* at 148.

²⁶⁴ *See, e.g.,* Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353 (2008).

²⁶⁵ *See generally* Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007) [hereinafter Siegel, *Sex Equality*] (arguing from a sex equality standpoint on reproductive rights that implicit understandings and convictions impact those that are explicit).

the determination of whether the prohibition in question indeed supports the purpose of promoting individual valuation. Values that circumscribe the creativity of women to certain aspects of their physiology and that undermine their ability to be perceived as full-fledged political agents, capable of shaping communal values, can only be regarded as values in a very narrow sense, incongruent with the purpose of valuation.²⁶⁶ To the extent that such “values” inform the prohibition of abortion, the prohibition necessarily lacks justification.

Similar considerations apply to the value of bodily integrity as it informs the regulation of medical procedures. Although there is no doubt that the integrity of one’s body is a legitimate value, this value must be expressed in a way that does not reflect differently with respect to men and women; specifically, such protection cannot single out the reproductive capacities of women as a sole, or superior cause for concern.²⁶⁷ Certainly, there are good reasons for the state to seek to prohibit *needlessly* dangerous medical procedures, meaning procedures that can be made less hazardous.²⁶⁸ The Court, however, went on to allow the prohibition of *excessively* dangerous abortions, meaning those procedures in which the predicted risk to the women’s bodily integrity from the abortion is higher than the risk posed by the continuation of the pregnancy.²⁶⁹ While there is nothing inherently biased about this degree of care for the bodily integrity of patients, no such excessive caution is taken with regard to many other medical procedures that are riskier than the condition they seek to eliminate, from elective surgeries to various procedures meant to promote fertility and conception, at times involving risk to those who undergo them.²⁷⁰ Such forms of partiality raise doubt as to whether the connection between the prohibition of abortion and the general concern with physical well-being is sincere, raising the

²⁶⁶ See, e.g., Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISCOURSE 160, 163 (2012) (“[A]bortion restrictions deprive women of control over the timing of motherhood and so predictably exacerbate the inequalities in educational, economic, and political life engendered by childbearing and childrearing.”).

²⁶⁷ Although much of the debate today concerns regulation of the medical procedure of abortion, this discourse must be understood within the general struggle of the antiabortion movement to ban abortion altogether. See, e.g., Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1706–12 (2008).

²⁶⁸ See, e.g., Jeffrey A. Van Detta, *Compelling Governmental Interest Jurisprudence of the Burger Court: A New Perspective on Roe v. Wade*, 50 ALB. L. REV. 675, 699 (1986); Lindsay F. Wiley, *From Patient Rights to Health Justice: Securing the Public’s Interest in Affordable, High-Quality Health Care*, 37 CARDOZO L. REV. 833, 875–876 (2016).

²⁶⁹ This is implicit in the Court’s calculating of the risks involved in abortion against the risks involved with birth to the conclusion that prohibition of abortion is justifiable when the former outweighs the latter. See *Roe v. Wade*, 410 U.S. 113, 149–50 (1973).

²⁷⁰ See, e.g., Franklin G. Miller et al., *Cosmetic Surgery and the Internal Morality of Medicine*, 9 CAMBRIDGE Q. HEALTHCARE ETHICS 353 (2000); Michelle Leve et al., *Cosmetic Surgery and Neoliberalisms: Managing Risk and Responsibility*, 22 FEMINISM & PSYCHOL. 121 (2012); Jennita Reefhuis et al., *Fertility Treatments and Craniosynostosis: California, Georgia, and Iowa, 1993–1997*, 111 PEDIATRICS 1163 (2003).

suspicion that the prohibition is informed by considerations that diminish rather than strengthen the valuative claim to personhood of those involved.

The third and final value involved with the prohibition of abortion, the value of potential life, is the value with the most evident connection to the prohibition. It must, however, be kept in mind that in talking of the protection of potential life, we are discussing not the protection of the fetus *qua* rights-bearing (potential) person, but rather the protection of the social value assigned to biological objects that have the potential of transforming into persons.²⁷¹ This does not suggest, however, that the value of biological life is meaningless for the valuations of people in the community, for as we saw, values are important as media of valuation.²⁷²

“A community,” as Dworkin writes, “has an interest in protecting the sanctity of life—in protecting the community’s sense that human life in any form has enormous intrinsic value—by requiring its members to acknowledge that intrinsic value in their individual decisions.”²⁷³ Dworkin, however, errs in suggesting that there is “intrinsic” value to biological life.²⁷⁴ Instead, as Dworkin himself notes in the same sentence, the value assigned to biological life represents the “community’s sense” that a biological connection to the human race makes certain objects unique.

Even though the value assigned to biological humanity could, theoretically, justify the prohibition of abortion, as Neil and Reva Siegel point out, there are good reasons to suspect that this value is, in fact, that which informs the prohibition.²⁷⁵ As Siegel and Siegel further note, while many legislatures purport to anchor the prohibition of abortion in the value of biological humanity, if that was their true intent, it would be expected that legislatures “would bend over backwards to provide material support for the women who are required to bear—too often alone—the awesome physical, emotional, and financial costs of pregnancy, childbirth, and childrearing,” which they often fail to do.²⁷⁶

C. Prohibiting Abortion

Despite the fact that the Texas statute at the center of the *Roe v. Wade* litigation was primarily aimed against the physician performing the procedure, the Court largely ignored the physician’s role and charted the limits of the prohibition in light of the relation between the woman’s right to privacy and the state’s interest in securing the values discussed above.²⁷⁷ For the Court, the weight assigned to the

²⁷¹ See, e.g., Dan Moller, *Abortion and Moral Risk*, 86 PHILOSOPHY 425 (2011) (discussing the potentiality argument).

²⁷² See Section III.D.

²⁷³ Dworkin, *supra* note 158, at 408.

²⁷⁴ *Id.*

²⁷⁵ See Siegel & Siegel, *supra* note 266, at 162–63.

²⁷⁶ *Id.* at 163–64; see also Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 382 (1992).

²⁷⁷ Beyond the procedural reasons for this neglect it is patently that treating the prohibition of abortion as aimed at the physician and not the woman would only contribute

protected social values increases as the pregnancy progresses.²⁷⁸ As a result, the Court ruled that protecting the value of safe medical procedures justifies the prohibition of abortion when abortion becomes riskier than carrying the pregnancy to term, and that the social value assigned to biological humanity justifies prohibition once the fetus reaches the stage of viability, when the state interest in protecting this value outweighs the woman's right to privacy.

The appeal to privacy as the right against which the state's interests are measured struck the dissenting Justice Rehnquist as odd, and not without good reason:

I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the *Fourth Amendment to the Constitution*, which the Court has referred to as embodying a right to privacy. *Katz v. United States*, 389 U.S. 347 (1967). If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the *Fourteenth Amendment*, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty.²⁷⁹

Against this objection, the valuative theory suggests that the language of privacy is an appeal to a substantive right but rather a proxy for the communicative aspects of the act in question, designed to determine whether the prohibition is logically aimed at the protection of values *qua instruments of valuation*. Prohibition, the valuative theory tells us, is meant to specify the forms of behavior that are likely to be interpreted by members of the community as a denial of their ability to form values.²⁸⁰ In this sense, to deem abortion private is to view it as a non-communicative behavior; meaning a form of behavior that is not commonly understood to take place between two or more individuals.²⁸¹ What makes the act of abortion private is not its reproductive subject matter or its role in the decisions that shape one's family life, but the fact that it is not understood to convey a message.

to the disastrous rise in self-abortions. See, e.g., Suzanne M. Alford, *Is Self-Abortion a Fundamental Right?*, 52 DUKE L.J. 1011, 1030 (2003).

²⁷⁸ *Roe v. Wade*, 410 U.S. 113, 162–64 (1973).

²⁷⁹ *Id.* at 172 (Rehnquist, J., dissenting).

²⁸⁰ See Section III.D.

²⁸¹ Kent Greenawalt, *O'er the Land of the Free: Flag Burning as Speech*, 37 UCLA L. REV. 925, 948 (1990).

As the Court notes, the interpretation of the act of abortion may change as the pregnancy progresses;²⁸² abortion might in this sense become a public matter if its denial of the protected value is so severe that it cannot but be seen by the community as a denial of valuation itself. An abortion performed one minute prior to birth could, by this token, become communicative, even though the fetus is not yet regarded as a person, for the proximity to the moment in which the claim to personhood materializes makes it a form of behavior that people throughout the community cannot disregard. Deciding on the exact moment in which the act of abortion enters the public domain is a matter of convention, evaluated in light of the principles governing valuation.²⁸³

D. Punishing Abortion

The criminalization of abortion, the Court found, can be justifiable in view of the message it sends, expressing support for the values of biological humanity and medical safety.²⁸⁴ As the valuative theory suggests, the criminalization of actions that harm these values is justified because, through criminalization, the law both signals its support of valuation and instructs people on how to express similar support.²⁸⁵ These purposes, however, can be promoted independently of the response to wrongdoing.²⁸⁶ Although in most cases, the lack of a condemnatory response to criminal wrongdoing would be seen as diminishing or even excoriating the state's expression of commitment towards the protected values, the valuative point of view suggests that there can certainly be cases in which the connection between the legislative declaration of support and the penal expression of condemnation is not as immediate.

Abortion can be seen as one such case. Even though there may be good reasons to accept certain aspects of the prohibition of abortion, particularly those concerning its effect on the value of biological humanity during later stages of pregnancy, there may nonetheless be reason to believe that they do not necessitate supplanting criminalization itself with a condemnatory message. Valuation, as we have seen, is based in part on the possibility of disagreement; insisting on condemning those who commit controversial illegal acts risks becoming an attempt to reify values and eliminate the possibility of disputing them. Although this does not pave the way to disregarding the law, it makes law more appreciative of the possibility of dissent and less condemnatory in its reply to it.

²⁸² *Roe*, 410 U.S. at 162–64.

²⁸³ See, e.g., Elizabeth Harman, *Creation Ethics: The Moral Status of Early Fetuses and the Ethics of Abortion*, 28 PHIL. & PUB. AFF. 310, 310 (1999); John A. Robertson, *Science Disputes in Abortion Law*, 93 TEX. L. REV. 1849, 1850 (2015).

²⁸⁴ *Roe*, 410 U.S. at 159.

²⁸⁵ See Section IV.B.

²⁸⁶ See, e.g., Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858 (2014); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000).

This is particularly so, when, as is the case with abortion, condemnation would only exacerbate an already existing difficulty with the protected values.²⁸⁷ As Siegel suggests, even if we accept, for the sake of argument, the legitimacy of prohibiting abortion, we cannot disregard the troubling side effects it involves:

(1) whatever the asserted fetal-protective rationale, in actual practice legal restrictions on abortion have reflected and entrenched customary, gender-differentiated norms concerning sexual expression and parenting; (2) they have conscripted the lives of poor and vulnerable women without similarly constraining the privileged; (3) they have punished women for sexual activity without holding men commensurately responsible; and (4) they have used law to coerce, but not to support, women in childbearing.²⁸⁸

Despite the importance of the values the prohibition of abortion is intended to express, the condemnation of the act of abortion cannot be considered apart from the profound—and at times life-changing—implications that performing, or not performing it carry with them.²⁸⁹ Even when we can attribute to this act, the wrongness associated with flouting the community's values, we cannot disregard the fact that heeding these values involves an immense incursion into the lives of individuals, particularly of women, and that the prohibition is often unaccompanied by meaningful provisions that might offset the price it extracts.²⁹⁰ While these considerations might fall short of upending the justifiability of the prohibition, they carry much more weight when justifying the condemnatory response. Given the alternative ways in which the value of biological humanity might be affirmed, particularly those that would obviate the need for abortion, such as contraceptives and sexual education, a policy that ignores the latter while focusing on condemnation seems to betray the kind of dishonesty that can undermine the state's expression of allegiance to valuation.

CONCLUSION

The valuative theory of punishment tells us that punishment is justified for its contribution to the general legal purpose of assisting individuals in their valuative self-assurance. The individual, the theory argues, is driven by an existential interest in believing that she is a person: enduring, creative, and distinct from the world. To promote this interest, the individual, among other things, seeks to endow inconsequential objects with meaning and communicate this meaning to others so that they can affirm her claim to personhood by acknowledging her valuative claim. Law, this Article argues, promotes this interest in three main ways: by creating an

²⁸⁷ See, e.g., Siegel, *Sex Equality*, *supra* note 265.

²⁸⁸ *Id.* at 822.

²⁸⁹ See, e.g., Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917 (2012).

²⁹⁰ Siegel, *Sex Equality*, *supra* note 265, at 822–24.

inventory of agreed-upon values; by providing hermeneutic guidelines for the interpretation of the relation of various forms of behavior to these values; and by sending a counter-message to offset the effects of those forms of behavior that set back the interest in self-assurance.²⁹¹

As this Article illustrated, this theory does not contend that there is some inherent importance to the values it supports, nor that there is some necessary connection between crime and punishment. Punishment, this Article argues, is a response to crime, but there is nothing unique or obligatory about this response. The state contributes in various ways to the valuative interest, and punishment is one of them. That punishment serves to express condemnation of wrongdoing is essential to punishment's understanding. However, condemnation itself is only a conventional response, which, like the other conventional components of criminal law, is merely an instrument in the service of the conviction that human beings are persons.

The key to understanding this idea lies with its ironical stance, taking the conventions and convictions it deals with with a grain of salt without disparaging them.²⁹² The irony of the valuative approach is the recognition that the meaning we assign to the things we hold dear—even to our own personhood—is of our own making. This does not mean that such things are any less meaningful, only that we must find the source of their meaningfulness in our interest in valuing those things we care about, injecting the argument with a healthy dose of modesty and moderation.²⁹³ As Thomas Nagel pointedly articulates,

philosophical skepticism does not cause us to abandon our ordinary beliefs, but it lends them a peculiar flavor. After acknowledging that their truth is incompatible with possibilities that we have no grounds for believing do not obtain – apart from grounds in those very beliefs which we have called into question – we return to our familiar convictions with a certain irony and resignation.²⁹⁴

The irony of the valuative approach does not mean that it is relativistic in its promotion of values or flippant in employing punishment against those who undermine the interest in valuation. The evil of criminal wrongdoing, it tells us, is concrete; but it is also ultimately a matter of perception, not of essence. Correcting the damage done by wrongdoing is not in any way unique to punishment. As long as punishment is genuinely aimed at the affirmation of valuation, it needs no further justification. However, we must also consider whether, in any given case, it is the most appropriate and effective way of reaffirming the meaning assigned to the flouted values.²⁹⁵

²⁹¹ See *supra* Part IV.

²⁹² See, e.g., RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 83 (1989).

²⁹³ See, e.g., TAYLOR, *SOURCES OF THE SELF*, *supra* note 187, at 8–17.

²⁹⁴ THOMAS NAGEL, *MORTAL QUESTIONS* 19–20 (1991).

²⁹⁵ For a similar approach, see, for example, Braman, *supra* note 234.

These insights have an immediate bearing on the potential criminalization of abortion. Once we construct the question, as the *Roe* Court did, as one that concerns the potential harm the act of abortion might cause to protected social values, we must treat it differently than we would actions that threaten to undermine the valuative efforts of others directly. This does not rule out the legitimate prohibition of abortion, for its negative effect on social values might indirectly affect others; but we must be cautious not to think it wrongful for its flouting of values *simpliciter*. Accordingly, when we come to assess whether, in any given case, the prohibition of abortion is justified, we must first of all inquire whether it is genuinely aimed at the support of the individual faculty of valuation, or whether it sacrifices the individuals involved in the name of fantastic values that are divorced from their human creators.