Race, Ideology, and the Communicative Theory of Punishment

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> *[In] retributively punishing someone we mean something. Retributive punishment is an act of communicative behavior.*
> —Robert Nozick

> *Black people know what white people mean when they say, 'law and order'.*
> —Fannie Lou Hamer

I. Introduction

A prominent philosophical view holds that criminal punishment should be understood as a social practice thoroughly imbued with symbolic, communicative, or expressive meaning. Communicative theorists have argued, for instance, that punishment communicates society's values, marks boundaries between acceptable and unacceptable behaviors, condemns convicted persons for their actions, expresses crucial moral emotions, or distances the community from citizens' bad behavior.[1] However, philosophers defending such views have failed to systematically explore important dimensions of communicative punishment as it is exemplified by actual penal systems. Consider, for instance, punishment in the United States. It is widely recognized that American criminal justice is systematically biased against people of color; that American policing and penal practices grew out of previous forms of racial control and that U.S. criminal justice reinforces racial hierarchies.[2] In ignoring or abstracting away from the defining features of the world's most expansive criminal justice system, familiar philosophical approaches yield an incomplete and misleading view of what punishment actually communicates. Even if punishment,

1. Such theorists include Feinberg (1965), Nozick (1981), Hampton (1984; 1998), Duff (2001), Bennett (2006; 2016), and Wringe (2016; 2017), among others.

2. For discussions of both historical and contemporary issues see Johnson (1995), Kennedy (1997), Davis (2003), Mauer (2006), Weaver (2007), Muhammad (2010), Alexander (2012), Epp et al. (2014), Ghandnoosh (2014), Lerman and Weaver (2014), Nellis (2016), and Swartzer (2018). In focusing on race, I don't mean to ignore other dimensions of oppression tied to American criminal justice. Class, mental illness, sex, gender, sexual orientation, and immigration status are also highly relevant. Understanding the full range of messages conveyed by criminal justice would require a greater examination of these other dynamics as well.

conceived in the abstract, communicates one thing, existing penal practices likely convey something completely different.

That U.S. criminal justice often communicates a very different message is apparent in Dr. Carl Hart's description of a personal experience, in which he was stopped by police and questioned about a robbery while he was a researcher at the National Institutes of Health:

> There I was with my NIH ID around my neck and my bank statement in my hand and I was still seen as a likely bank robber who'd strong-armed a customer. Or a 'Negro cocaine fiend', for that matter. Here in the United States, I was still just another nigga, no matter how many hours I had put into studying or conducting my experiments. (2014, 248)

This police action did not communicate anything about the wrongness of robbery, or express society's disapproval of such bad behavior. At least, these were not the most salient messages. To Hart, being interrogated in this way seemed much more like he was being identified with a slur or epithet — being seen as a "Negro cocaine fiend" or "just another nigga". Hart is not alone in hearing this message. People of color frequently describe all-too-common experiences of police suspicion, harassment, and violence by invoking racial pejoratives:

> Erroll McDonald [...] tells of renting a Jaguar in New Orleans and being stopped by the police — simply 'to show cause why I shouldn't be deemed a problematic Negro in a possibly stolen car'. Wynton Marsalis says, 'Shit, the police slapped me upside the head when I was in high school. I wasn't Wynton Marsalis then. I was just another nigger standing out somewhere on the streets whose head could be slapped and did get slapped'. (Gates 1995)

> When asked what she believed the patrolman [a North Carolina State Trooper] was thinking when he was hitting her, [Sandra Antor] immediately responds, 'Damn black bitch'. She goes on to say, 'He was pissed … he couldn't believe this bitch didn't stop for him. Who the hell do I think I am? Don't I know where I am? This is his neck of the woods,' adopting a white southern accent for the last sentence. 'This is how I interpret it', she says [...] (Ritchie 2016, 145)

These passages and others illustrate that to many African Americans, common police activities convey a message that is much like calling their target the N-word or other racist insults.

This paper attempts to account for this message by placing it within the context of a novel version of the communicative theory. A central hypothesis of my view is that penal practices in societies characterized by systematic injustice take on more sinister communicative roles than is theorized by extant communicative frameworks. Indeed, given systematic racial injustice within American policing and punishment, it is plausible that problematic forms of racialized discourse might offer useful models for understanding some of these more objectionable penal messages. Ultimately, I argue that understood as communicative behaviors, American policing and punishment express a commitment to racially derogatory, subordinating ideologies in much the same way that objectionable forms of racial discourse do.

The plan is as follows. Section II provides an entry point into this topic by drawing on a related philosophical account of slurs to briefly illustrate and explain what it means to express a commitment to a derogatory, subordinating ideology. Section III, then, argues that communicative punishment is intelligible in virtue of its connection to a broader ideology, and that criminal justice can in principle express a commitment to derogatory, subordinating ideologies. Sections IV and V present evidence that American policing and punishment are tied, in the relevant ways, to derogatory and subordinating ideologies toward people of color. Section VI draws attention to key implications of this understanding of penal meaning.

II. Derogatory Discourse and Ideologies

I will argue that, given the longstanding and systematic injustice within the U.S. penal system, we should understand communicative punishment in the American context as a type of problematic ideological discourse. To help us get a better grip on this idea, and to tease out some of the details, we might look to types of speech that are discriminatory, derogatory, or otherwise unjust as useful models. Consider, for instance, slurs and similar forms of derogatory speech. Slurs are derogatory speech acts that are paradigmatically used to insult or demean people on the basis of their race, class, gender, sexual orientation, disability, or other types of group membership. There is a rich philosophical literature debating how slurs function semantically and pragmatically, what grounds their offensiveness, how they (and related forms of hate speech) should be understood as a legal matter, and even where the precise boundaries of the category lie.[3] I am not in a position to settle these debates here. Instead, I will forward a view, defended by others elsewhere, that is meant to explain an important part of the harm of slurs and related forms of racist, classist, sexist, homophobic, transphobic, and ableist discourse. According to this approach, such group-based derogatory discourse is harmful in large part because of the problematic ideologies that it expresses and perpetuates.[4] In their paradigmatic uses, on this view, slurs are used to insult or demean someone by expressing the endorsement of a derogatory ideology that assigns the target a subordinate position in virtue of the relevant group membership. Even though this falls short of a complete

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3. For discussion of some of these issues, see Delgado (1993), Lawrence (1993), Matsuda (1993), Tirrell (1999, 2012), Himma (2002), Kennedy (2002), Hom (2008), Richard (2008), Anderson and Lepore (2013a; 2013b), Camp (2013), Croom (2013), Jeshion (2013a; 2013b), Kukla (2018), Neufeld (2019), and Swanson (Forthcoming).

4. Here, and in the account of ideology to be discussed shortly, I am significantly following the views of Tirrell (1999, 2012), Camp (2013), Kukla (2018), and Swanson (Forthcoming). For related discussions, see Hill (2008) and Haslanger (2017), as well as Shelby's (2003) discussion of what he calls "forms of social consciousness".

philosophical account of slurs, it provides a useful guide to think about how punishment could play a derogatory communicative role.

As we will discuss them, ideologies are self-reproducing webs of cognitive, affective, behavioral, and social structures. These structures consist partly of sets of background assumptions, heuristics, conceptual associations, patterns of salience, and interpretive dispositions. Ideologies thus form the socially-shared conceptual background that works to shape beliefs. They are also tied to sets of attitudes, interests, norms, and social roles.

Derogatory ideologies derogate members of the target group at least partly through the influence of generic stereotypes and cognitive associations. The insults 'hick' or 'redneck', for example, give rise to an image of white, rural Americans that incorporates negative stereotypes about them: e.g., that they are unintelligent, poor, racist, narrow-minded, and so on. Calling someone a redneck represents them as largely conforming to these stereotypes. Moreover, such associations are often understood to identify something essential or otherwise central to the target group.[5] As a result, derogatory ideologies frequently represent contingent social stratifications as the inevitable and deserved result of the target's flawed nature (Kukla 2018).

Derogatory ideologies also frequently license negative attitudes toward subordinate groups — including animus, contempt, disrespect, fear, disgust, or the desire to intimidate, harm, or put them "in their place".[6] They also support cooler attitudes that "distance" oneself from targeted groups (Camp 2013, 338). Such attitudes are part of how subordinating ideologies mark those groups as out-groups (Tirrell 2012, 190). Ideologies may also draw lines of affection in ways that dispose in-group members to feel special affinity and solidarity for one another.

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5. See, e.g., Tirrell (1999, 52; 2012, 191), Camp (2013, 337–338, 342), Kukla (2018, 19–20), and Neufeld (2019).

6. For more on the centrality of such attitudes to the *white* folk conception of what it means to slur a member of a group, and about the white folk conception of racism more generally, see Hill (2008, Ch. 3–4).

Intimately connected to action, ideologies also generate habits and norms telling people how to behave, including how individuals occupying different positions within the hierarchy should act and interact with each other. These norms may license (or even require) acting in ways that exclude out-group members from certain spaces or roles, that advantage others at their expense, that demean or dehumanize them, or that constitute acts of violence. Subordinating, derogatory ideologies also support norms governing out-group behavior — often constraining how they are permitted to respond to their own subordination.[7]

The elements of derogatory, subordinating ideologies are mutually-reinforcing. Negative attitudes toward a group are usually grounded in stereotype-based assumptions about what "they" are like (Tirrell 2012; Camp 2013, 337–338; Swanson Forthcoming). Contempt toward an out-group, in turn, makes one more receptive to negative representations of them, thus reinforcing dispositions to see stereotype-conforming members as more salient, to accept them as representative of the group as a whole, and to endorse demeaning caricatures. Both stereotypes and negative attitudes also influence behavior: stereotypes surrounding "hicks" or "rednecks" license treating "them" dismissively, derisively, or contemptuously. Sometimes, ideological discourse contributes to especially tragic events. As Lynne Tirrell (2012) points out, widespread depictions of Tutsis as snakes or cockroaches in the lead-up to the Rwandan genocide helped license genocidal behaviors, by portraying them as deserving the same treatments such animals frequently receive.

In their central uses, then, slurs and similar forms of problematic discourse express a commitment to derogatory, subordinating ideologies. In targeting another person with a slur — either to their face or to a third party — a speaker places that person in the subordinate out-group role the ideology assigns, licensing the relevant assumptions, attitudes, and behaviors toward them (Kukla 2018). Deploying

a group-based insult in this way implies an endorsement of the system of social classifications posited by the underlying ideology (Tirrell 1999; 2012; Swanson Forthcoming). Moreover, these speech acts reproduce ideologies, partly by keeping the derogatory stereotypes and conceptual associations in circulation (Hill 2008; Hom 2008; Croom 2013), but also by signaling (to the conversational partner and anyone who overhears it) that their hierarchical classification schemes are acceptable for others to deploy as well (Swanson Forthcoming).

It is worth noting that derogatory, subordinating discourse is not always recognized as such. Some people recognize the racial dimension of 'oriental', 'redskins', and 'squaw' without recognizing them as pejorative.[8] It is, therefore, possible to use these terms without derogatory intentions. Or, someone might recognize a term as derogatory without recognizing its group-based associations — there are, for instance, public debates over whether 'thug' is racialized. To address these cases, one must recognize that expressing a commitment to a problematic ideology does not require conscious awareness of this commitment. In the sense we are discussing, one may even express such a commitment while believing herself to reject many aspects of the ideology.[9] Like other forms of speech, the meaning of a derogatory term is not fixed by a speaker's conscious mental states. A form of speech, *S*, can

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7. For discussion of this point, see Tirrell (1999, 53–54), Shelby (2003, 158), Kukla (2018), and Swanson (Forthcoming).

8. For an extensive discussion of the last example, see Hill (2008, Ch. 3). I am setting aside cases where the target group re-appropriates a slurring term. For, it is arguable that in these cases, the re-appropriated term ceases to function as a derogatory or pejorative term — at least in certain contexts. But these issues are complicated. For further discussion, see Kennedy (2002), Tirrell (1999), and Anderson and Lepore (2013a; 2013b), among others.

9. As a brief example, in talking and writing about criminal justice I have frequently (and often uncritically) used the terms 'offender', 'criminals', 'inmate', 'felon', 'ex-convict', and related labels. I have become increasingly convinced that these terms — including my use of them in other work, and even in earlier drafts of this paper — are bound up with a variety of problematic ideological commitments that I am consciously interested in rejecting. (For arguments to this effect, see Brownlee (2016).) Even as I was thinking a great deal about how criminal justice is connected up to pernicious ideological discourse, I found it quite easy to remain ignorant of the ways that these terms (and, I am sure, many others that I continue to deploy) express commitments to problematic ideologies.

be a conventional means by which a community expresses derogatory views about group, *G*, and the ideological commitments expressed by *S* in the mouth of an individual community member will be somewhat parasitic on such conventions.[10] Moreover, given that ideologies exist largely in the background, prior to conscious thought, someone can tacitly or implicitly accept ideologies that are largely inaccessible to them (Shelby 2003, 161; Swanson Forthcoming). Additionally, meta-theories often serve to keep the operations of derogatory ideologies out of sight while easing the dissonance between one's tacit or unconscious ideological commitments and her conscious beliefs and attitudes (Hill 2008; Haney López 2014; Saul 2018; Kukla 2018).

Beginning in the next section, I will be arguing that, understood as communicative or expressive behaviors, U.S. criminal justice activities also express a commitment to a derogatory, subordinating ideology. I have been using slurs as a model of this type of ideological discourse, but it is worth emphasizing that this is not the only type of objectionable speech bound up with pernicious ideologies. There are many ways that one might invoke or hint at a demeaning stereotype, for instance, without using a slur.[11] While the following discussion will sometimes continue using slurs to illustrate various problematic aspects of American policing and punishment, I do not mean to imply that this is the only lens through which one could understand these phenomena. Dog whistles or other forms of covert derogatory discourse may provide additional conceptual resources that help to illuminate the workings of communicative punishment, as may other forms of problematic ideological communication. That being said, it is also worth noting that there is often no clear boundary between different types of derogatory, subordinating discourse, and they can sometimes overlap.

Compare slurs and dog whistles. As the label suggests, dog whistles are coded messages directed at some part of the population that are supposed to remain inaudible to the broader community (Haney López 2014; Saul 2018). These messages can be consciously understood by the intended audience, or they can be covert and received subconsciously (Saul 2018). To those who pick up the message (consciously or subconsciously), dog whistles activate the relevant ideology, thereby priming the subject to implement and reproduce it in predictable ways, much like slurs do.

In their central cases, slurs and dog whistles clearly differ. When used as forms of manipulation, dog whistles leave room for doubt — they may leave it open whether anyone is being insulted or placed in a subordinate position, or whether any derogation is undeserved. This plausible deniability is often key to dog whistles' effectiveness (Haney López 2014; Saul 2018). The central occurrences of slur-like attacks, in contrast, present no ambiguity. When someone deploys a well-known slur against a member of a target-group, the insult is clear. However, the fact that slurs are sometimes contestable shows that there can be enough ambiguity for them to simultaneously function as dog whistles.

An illustration may be useful. The American "Alt-Right" has intentionally co-opted mundane symbols — such as the "OK" hand gesture — to signal allegiance to white supremacist ideologies.[12] Part of the intent in co-opting otherwise benign symbols is for the plausible deniability they lend. One can flash the "OK" sign to express one's ideological commitments while remaining undetected by those who aren't privy to this meaning and remaining in a position to deny this problematic message when confronted by those who disapprove. While the "OK" sign invokes an ideology in only quite general terms, we can imagine a variation in which some seemingly mundane word is used as a stand-in for a recognized group-based insult. Among members of the Alt-Right, the term 'globalist' is arguably used in just this

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10. These points are emphasized by Hom (2008) and Hill (2008).

11. See, for instance, Hill (2008) and Haney López (2014) for a variety of examples. I would like to thank an anonymous referee for encouraging me to be more explicit about this point.

12. For discussion of this phenomenon, see Neiwert (2018).

way — as an anti-Semitic slur intentionally used as a dog whistle, audible to those familiar with this use, yet seemingly mundane enough to lend plausible deniability to anyone who is disapprovingly accused of anti-Semitism for deploying the term as an insult.[13] Even if it is not fully audible to the entire community, it nevertheless signals endorsement of an anti-Semitic ideology to those who can hear it.

While I am not in a position to explore all of these issues within the confines of this essay, a complete understanding of the more sinister communicative roles that criminal justice activities can play would require a fuller examination of the available conceptual tools.

III. Punishment as Communicative Behavior

Punishment is a form of communicative behavior. Such behaviors are intelligible signs, conveying meanings in virtue of their relationship to a broader array of social scripts, background assumptions, norms, expectations, and other bits of context. Some scripts (e.g., smiling, crying, or hugging) are largely biologically based. Others are purely conventional — like drinking champagne in celebration,[14] or circulating frog cartoons to convey anti-minority sentiments. Many scripts lie somewhere in between. One can express care for someone by helping paint their living room or cooking them dinner; or, one might convey animus by refusing service or spreading nasty rumors. Such behaviors are fitting, given the underlying attitudes, and not merely because they follow arbitrary social conventions. When one cares for someone, one is disposed to do nice things for them — to demonstrate sensitivity to their needs and interests. When one has animus toward another, one is disposed to do things to undermine those needs and wants — including, sometimes, by lowering their esteem in the eyes of others. Such behaviors are intelligible because they are fitting responses to

the underlying feelings, compatible with (even if not fully determined by) the broader social background.

A community's or society's activities can also be communicative. For convenience, it may be useful to speak of these activities as conveying what the society thinks or feels about some issue. But we need not understand this literally. What a community believes or feels is fixed by its prominent ideologies, and a community's behavior can thus be communicative in virtue of its connections to these ideologies. To illustrate, suppose there is widespread distrust of a given group — call them "*Fs*" — within a community. *Fs*, we may suppose, are stereotypically associated with being untrustworthy. For this reason, *Fs*' behaviors may often be interpreted as sneaky, underhanded, or manipulative. Moreover, when an *F* engages in dishonest behavior, this is frequently interpreted as evidence confirming the dishonesty of *Fs* more generally. Suppose further that the community establishes policies or practices that systematically treat *Fs* differently — routinely placing *Fs* under surveillance and officially or unofficially excluding them from positions of influence or responsibility — and that these broader anti-*F* attitudes partly explain and are deployed to defend these actions.[15] These communal activities are intelligible in virtue of their connection to this broader ideology. These actions express (among other things) the community's distrust of *Fs*, signaling that the community views *Fs* with suspicion and has decided to treat them accordingly. Moreover, these social actions reinforce this ideology. Placing *Fs* under surveillance, for instance, actively licenses community members' anti-*F* stereotypes and attitudes, signaling that distrust of *Fs* is warranted and that members of this group deserve to be treated with suspicion.[16]

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13. While 'globalist' is presently used as an anti-Semitic slur and dog whistle exclusively among members of the Alt-Right, this term has a long history of being used in similar ways. For a discussion of this history, see Zimmer (2018).

14. This example comes from Feinberg (1965, 402).

15. The community's acts are not all official acts of government. Communal decision-making is widely distributed — many types of formal governance occurs through private actors, and many other exercises of the community's agency involves informal norms, rather than formal rules and regulations. Many of these acts of the community will also be expressive in the sense discussed here. I want to thank Brookes Brown for helping me notice this point.

16. Even when anti-*F* beliefs or attitudes are not antecedently widespread, the feedback signal created by the community's public acts creates opportunities

Now, to punishment. Insofar as they impose physical, psychological, or social costs, punitive behaviors are particularly well-suited to express negative beliefs and attitudes. Just as one might express anger or resentment by kicking the target in the shin or giving them the cold shoulder, it's fitting for communities to respond to members' bad behavior with some form of harsh treatment. While the specific forms of harsh treatment may be entirely conventional, imposing costs of some sort can be a natural signal of disapproval, dislike, or some similarly negative attitude.

Communicative theorists have found it tempting to try to isolate the attitudes or messages that are essential to punishment. In his early statement of the view, Joel Feinberg portrays penal harsh treatment as expressing significant moral emotions. On his view, criminal punishment expresses social condemnation of bad behavior — a "fusion" of reprobation (i.e., "the stern judgment of disapproval") and "vengeful" or "vindictive" emotional responses Feinberg classifies as forms of resentment (1965, 403). Robert Nozick (1981, 369–374) contends that retributive punishment is intended to make the punishee understand that he is being treated harshly to show him the wrongness of his actions. Punishment, in effect, conveys to the punished individual: "*This is how wrong your actions were*". Jean Hampton likewise sees penal behaviors as representing moral facts:[17]

> Punishments are like electrified fences. […] But because punishment 'fences' are marking *moral* boundaries, the pain which these 'fences' administer (or threaten to administer) conveys a larger message to beings who are able to reflect on the reasons for these barriers' existence: they convey that there is a barrier to these actions *because* they are morally wrong. (1984, 212)

When theorizing criminal punishment in the abstract, it's natural to focus, like these philosophers, on socially significant moral emotions or judgments. Salient criminal behaviors, such as acts of interpersonal violence, are especially likely to evoke such emotions or moral criticism in response. Additionally, such reactions seem called for — it seems only right that society would express indignation, resentment, or other condemnatory attitudes toward such violence.

There are two problems with this focus. First, portrayals of punishment as an expression of legitimate ideologies are overly optimistic. Criminal justice systems routinely punish more than the most significant criminal acts and may not always communicate the moral emotions such acts elicit. We can quite easily imagine public officials meting out punishments in a fit of pique or frustration. Second, focusing on one or another moral attitude as the *sine qua non* of punishment ignores or minimizes other important messages conveyed through penal action — messages that might be more loudly communicated in a given context. Understanding the expressive meaning of punishment requires appreciation of how penal systems actually operate, and of the political, economic, cultural, and historical contexts in which they are situated. Penal activities must be interpreted in terms of the community's broader beliefs, assumptions, norms, attitudes, practices, and institutions that license them.

To better understand what this means in practice, think about "supermax" prisons that subject incarcerated persons to extreme levels of control, including long-term solitary confinement. This institution communicates much more than that the imprisoned person did things that were wrong or disapproved of. Supermax imprisonment reflects and reinforces an image of those we choose to impose it on: They are extremely dangerous "criminals" who pose serious threats to their jailers, to other people incarcerated beside them, or to the broader community, and who are incapable of meaningful rehabilitation. The state's decision to implement this form of punishment conveys that this perceived threat is real, that those who commit crimes *are* extremely dangerous, and that our fear of them is warranted. Other

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for political entrepreneurs to establish policies and practices in order to *generate* distrust of *F*s among the general public — either because of animus or for purely strategic reasons.

17. See also Hampton (1998, 40), Duff (2001), and Wringe (2016).

penal practices — housing restrictions, child removal, loss of voting rights, etc. — are rationalized by, and serve to affirm, that people with criminal convictions are untrustworthy, bad parents, bad democratic citizens, and so on. These practices are intelligible only in the context of the broader ideology that licenses them.

In some ideological contexts — such as those involving systematic and longstanding injustice and oppression — penal practices might express contempt or animus toward members of a target group more clearly than they express condemnation. Or, even if punitive behaviors express condemnation in Feinberg's sense, the constituent judgments of disapproval and feelings of resentment might be grounded in the punishee's group membership, along with the community's desire for members of targeted castes to "mind their place". But notice what this means: In some social, political, and historical milieus, punishment expresses a commitment to an ideology that is tied up with the same negative beliefs, emotions, desires, and behaviors as the derogatory, subordinating ideologies expressed by slurs and related forms of derogatory speech.

The same basic point might be made about other social activities as well. Punishment is not the only type of communicative behavior a society can engage in. These other communicative behaviors must also be understood in reference to the community's prominent ideologies. When other social institutions, policies, or practices assign subordinate statuses based on generic group membership in a way that reflects widespread derogatory stereotypes, attitudes, and the like, these decisions reflect the community's commitment to a pernicious ideology. Redlining, the creation of exclusionary television lineups, and a variety of other social acts can express commitment to white supremacy, too.

But even if other social practices can convey a derogatory, subordinating message, criminal punishment is especially ripe for doing so. In fact, punishment is capable of communicating this meaning in an especially immediate and visceral way. Punishment is inflicted in ways that can look and feel very much like a direct, personal attack. The

same can be said for many forms of police contact. The messages that criminal justice activities send can hit especially close to home — the target often sees these messages as being about *them*, and as directly imputing their essential character or worth. Punishment can present itself as particularly demeaning when the target is portrayed as *deserving* the harms that punishment often inflicts, or as not worthy of the protection and respect due to other citizens. Relatedly, the criminal justice context often makes the target's subordinate role highly salient. The looming threat of penal action is a vivid reminder of the costs that subordinates bear for failing to mind their place. People being detained literally have their bodies and lives placed under the control of police officers or jailers, who may be licensed to impose their (and the community's) will through force. Disempowered targets often have a visceral awareness of this reality. Much like the paradigmatic uses of slurs, criminal justice practices make problematic ideologies — and the target's subordinate position within them — manifest in ways that many other communicative behaviors don't.

IV. The Anti-Black Expressive Force of Police Violence and Harassment

That punishment could express the same problematic ideologies expressed by other types of derogatory discourse shouldn't be surprising. It quite clearly did this throughout much of U.S. history. Penal power has routinely been deployed to express contempt and dislike for out-groups, and to denigrate, dehumanize, and subordinate them. As others have repeatedly argued, American criminal justice has played an integral role in communicating and enacting white supremacist ideologies. To Randall Kennedy, the Black Codes, Jim Crow segregation laws, and so-called "convict leasing" practices were unmistakable expressions of contempt toward African Americans that "nakedly diplay[ed] the former Confederate states' desire to keep blacks in bondage" (1997, 85). Mary Ellen Curtin points out the desire for "racial retribution" was not only expressed through enforcement of these problematic provisions, but also through widespread false accusations of black crime, especially false accusations of theft and sexual assault

(2000, 44). W.E.B. Du Bois argued that clear racial bias continued to affect punishment's condemnatory message in the twentieth century:

> Murder may swagger, theft may rule and prostitution may flourish and the nation gives but spasmodic, intermittent and lukewarm attention. But let the murderer be black or the thief brown or the violator of womanhood have a drop of Negro blood, and the righteousness of the indignation sweeps the world. Nor would this fact make the indignation less justifiable did not we all know that it was blackness that was condemned and not crime. (1920)

Discussing Harlem forty years later, James Baldwin asserted a related thought — that the abusive and racially-discriminatory actions of police "reveal, unbearably, the real attitude of the white world" which is, he argued, the desire "to keep the black man corralled up here, in his place" (1961, 174–176).

The penal meaning that has existed throughout most of American history should inform our understanding of punishment's message today. But to settle the matter, we need to look more closely at the modern American carceral system. One place to start is the widespread violence perpetrated by criminal justice officials. In this context, it's worth highlighting a point that has been implicit throughout the foregoing discussion. Communicative theories are traditionally framed as views of criminal *punishment*. Yet penal communication does not occur through formal punishment alone. Policing practices and so-called "collateral consequences" of criminal convictions modulate the broader penal message. Given that citizens' contact with criminal justice is primarily with police officers, not courtrooms or prisons, policing is likely the primary vehicle of penal communication.[18] Vigorous policing of a behavior carries a condemnatory or boundary-marking meaning even absent high rates of prosecution or conviction. Conversely, systematic inaction of law enforcement in the face of clear violations of

rights expresses that the community does not take those violations seriously, perhaps even that it condones them.[19]

With this in mind, appreciating the anti-black ideology expressed by American criminal justice requires a closer examination of salient features of American policing. Begin with the high level of lethal violence against people of color carried out in the name of crime control. American police officers use lethal force far more often than their counterparts in other countries, and people of color face a significantly disproportionate share of this violence. Examining the more than 1,100 officer-involved killings in the U.S. in 2015, *The Guardian* found that "young black men were nine times more likely than other Americans to be killed by police officers".[20] The same held true in 2016.[21] Moreover, when men, women, and children of color are needlessly killed by law enforcement or needlessly die while in police custody, officers rarely face significant repercussions.

Black Lives Matter activists have drawn two key conclusions from this set of facts: that the ideology underlying American criminal justice is one that licenses a disturbing level of lethal violence, and that this violence is significantly rooted in dehumanizing, denigratory, and subordinating attitudes toward black people. Lethal police violence that disproportionately affects people of color — along with official responses that excuse or minimize it — signals that black lives are disvalued.

Lethal force is part of a much broader pattern of expressive violence police officers and jailers are permitted to engage in — other forms of violence include verbal harassment, insults, invasive and humiliating body searches, slapping, shoving, hair pulling, choke holds, punching, kicking, knee blows, baton blows, use of pepper spray, electric shock, dog bites, and unholstering (or discharging) a firearm. Most of this

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18. For convenience, I will sometimes continue to speak of the communicative function of punishment, even though this broader understanding is intended.

19. See, e.g., Feinberg (1965, 407) and Bennett (2006; 2016). This inaction is sometimes explicitly written into law, in which case the expressive message is even clearer. See, e.g., Feinberg (1965, 405–406) and Hampton (1998, 38).

20. See Swaine et al. (2015).

21. See Swaine and McCarthy (2017).

violence serves no compelling public safety need. Instead, needlessly aggressive police behavior commonly expresses derogatory attitudes while reinforcing its targets' subordinate positions.

Consider an encounter described by one African American teenager to sociologists Ron Brunson and Ronald Weitzer:

> We had grills [decorative dental molds] in our mouth[s] and [the officer] made us take them out, we showed them to him in our hand[s] and [the officer] smacked 'em out and when they [hit] the ground, he stomped on them and laughed. (2009, 866)

This teen understood perfectly well what these actions expressed: "that he had more power, authority over us at the time, so there was nothing we could do or say" (Brunson and Weitzer 2009, 866). In effect, the officer's actions conveyed that these teens should mind their place. Brunson and Weitzer found that this was not an isolated incident — residents of highly policed communities consider this "a routine aspect of neighborhood life" (2009, 871). To them, the contemptuous, subordinating message of needless aggression is clear. The subordinating character of this ideology is amplified by the fact that it frequently legitimizes the use of additional violence in response to those who don't demonstrate the "appropriate" level of deference.

Let's suppose that violence committed by criminal justice officials conveys denigratory, subordinating messages toward its victims. It may yet be argued that these messages aren't racialized in the same way that racial hate speech is. After all, a skeptic might note, whites are also subjected to police violence, even if at a lower rate. Given that violent policing is largely directed toward "criminals" and "suspects", it is most reasonably interpreted as expressing an anti-crime, rather than anti-black or anti-minority ideology.

There's much to be said in response to such skepticism. First, many people subjected to police violence aren't engaged in criminal activity when it occurs, and very few are engaged in serious wrongdoing. Much of this violence is associated with unwarranted or pretextual

stops in which there is little, if any, reason for suspecting the target of anything. This escalation of force follows a common script:

> Too often, officers overstep their authority by stopping individuals without reasonable suspicion and arresting without probable cause. Officers frequently compound the harm by using excessive force to effect the unlawful police action. Individuals encountering police under these circumstances are confused and surprised to find themselves being detained. They decline to stop or try to walk away, believing it within their rights to do so. They pull away incredulously, or respond with anger. Officers tend to respond to these reactions with force. (U.S. Department of Justice 2015, 34)

Given systematic misalignment between patterns of official violence and reasonable suspicion of serious criminal behavior, the claim that police violence expresses anti-crime attitudes is highly suspect.

Second, this skepticism minimizes the stark disparities in use of force against people of color.[22] The fact that police violence correlates more strongly to the target's race than to patterns of serious criminal activity signals that these actions express a racialized ideology.

Third, routine police violence is sometimes accompanied by explicitly racialized language — including the explicit use of racial slurs by law enforcement. In many communities, racialized verbal harassment by police and other criminal justice officials remains pervasive.[23] The broader message communicated through police violence must be interpreted in the context of these related communicative acts.

Fourth, even if, as the skeptic insists, police violence expresses anti-crime attitudes, it may *also* express an anti-black ideology. As we will

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22. For instance, in Ferguson, MO, "nearly 90% of documented force used by FPD officers was against African Americans. In every canine bite incident for which racial information is available, the person bitten was African American" (U.S. Department of Justice 2015, 5). See also Goff et al. (2016).

23. See, e.g., Brunson and Weitzer (2009, 869), U.S. Department of Justice (2015).

see in Section V, the ideologies supporting police behaviors are replete with problematic stereotypes, inferential dispositions, and biased heuristics that associate crime and race. Given the strength of these racial biases, it is incredibly difficult to express negative ideas or attitudes toward crime without also expressing similar ideas or attitudes toward people of color. Anti-crime attitudes licensed by these ideologies are themselves racialized.

Fifth, slurs are frequently used to insult people outside of their associated target group — for the ableist slur 'retarded' or the derogatory use of 'gay', this usage is extremely widespread. When so used, a speaker insults the targeted individual by associating them with the group that the underlying ideology derogates. If police violence is connected to anti-black ideologies in general, it can express that ideology even in instances where white people are targeted. Occasionally, this message is made explicit. While being aggressively arrested at Orlando International Airport, Jeffrey Epstein, a white man, loudly complained that the officers were treating him "like a fucking black person!"[24] Epstein's complaint suggests that this treatment at the hands of the officers demeaned and subordinated him as though he were black — that his treatment was a misfire of an ideology that licenses aggressive policing, but only against people of color.

Another objection must also be addressed: Even if needlessly violent policing gives voice to anti-minority beliefs and sentiments, this behavior needn't be expressive of the community's views. Instead, police violence only expresses the views of the "bad apple" officials involved. No. Violent policing is too widespread and systematic in the U.S. to be considered anything other than standard practice. African Americans' interactions with criminal justice officials are run through with some level of intimidation, harassment, and unnecessary force. The possibility (read: threat) of escalating violence is a subtext of police encounters — especially for people of color. Communicative approaches don't portray legitimate penal measures as expressing only

24. For video of the incident, see https://www.newsweek.com/white-doctor-who-accused-cops-treating-him-black-person-says-he-was-proving-1079142/.

judges' or officers' attitudes, and they shouldn't portray other systematic behaviors as expressing only attitudes of the specific officials involved.

Finally, systematic inaction can also be expressive. A related point about slurs is instructive. When a speaker uses a slur or another form of hate speech, he thereby implies that he sees it as acceptable or warranted and that those he is interacting with will, too. If this presumption is not adequately rebuffed, it is reasonably understood as accepted by other parties to the conversation (including bystanders). Anyone who does not explicitly rebut the slur effectively condones, consents to, or endorses it, along with the ideology it expresses (Tirrell 1999; Kukla 2018; Swanson Forthcoming). The implication of endorsement is especially strong when one fails to rebuff slurs that are asserted by someone speaking on their behalf. The same is true when a community remains silent about expressive acts of public officials acting in their official capacity — when "speaking" on the community's behalf. A community that fails to check behaviors systematically carried out by its public officials expresses that it condones or views such behavior as acceptable; in doing so, it also expresses that it accepts the ideologies those behaviors express. The U.S. has failed to distance itself from the widespread racialized violence carried out by criminal justice officials, or from their derogatory, anti-black message, and its relative silence on the matter says something.

V. The Broader Penal Message

A similar derogatory ideology is implicated in other dimensions of American criminal justice as well. Here are some well-known facts. Compared to other countries, the U.S. has an exceptionally expansive and harsh criminal justice system that disproportionately harms people of color. Though whites and minorities commit most crimes at similar rates, minorities are detained, arrested, charged, convicted, and incarcerated at significantly higher rates.[25] On average, people of

25. See, e.g., Mauer (2006), Alexander (2012), Epp et al. (2014), Ghandnoosh

color also receive harsher punishments. As a case in point, after accounting for the victim's race, black and brown people are more likely to receive the death penalty than convicted white killers — especially if they look more stereotypically black (Eberhardt et al. 2006).[26]

Given this constellation of facts, it's reasonable to interpret the excessive and racialized harms imposed through American policing and punishment as expressions of an ideology that is hostile toward people of color. This ideology licenses practices and institutions that are disposed to catch a large proportion of minorities in its net, and that are disposed to treat them harshly once they are there. This interpretation of the underlying ideology is further supported by the very concrete ways that American criminal justice has grown out of widespread anti-minority sentiments and stereotypes.

According to a prominent historical narrative, U.S. criminal justice's massive expansion and increased punitiveness since the 1960s was largely a counter-reaction to the Civil Rights movement. During key moments in the fight for civil rights — especially during periods of widespread protest and urban unrest — white racial anxiety and anti-black animus fueled political decisions to be "tough on crime". Making coded racial appeals with "law and order" and "crime control" rhetoric, conservative elites engineered or amplified populist pressure.[27] These same processes have led to the continued growth and increased punitiveness of American systems of policing and punishment for decades.[28]

Historically, public debates over criminal laws frequently invoked racist stereotypes — e.g., that either because of genetic predisposition or inferior culture, people of color are especially disrespectful, aggressive, violent, unruly, deceptive, addiction-prone, lazy, bad parents, sexually uncontrollable, etc. Reinforced by anti-minority animus, contempt, and fear, these stereotypes profoundly shaped American criminal justice. For decades, stereotype-laden myths about drug-crazed black (and Latino) rapists, crack babies, black men with drug-induced superhuman strength, and unredeemable juvenile superpredators were regularly invoked by politicians and pundits to justify the punitive War on Drugs and related policies that are the hallmark of the American carceral state.[29]

Widespread anti-minority sentiments and stereotypes continue to influence policymakers. As an especially clear example, Donald Trump's successful 2016 presidential campaign, which frequently deployed "law and order" rhetoric, began with a speech unabashedly invoking stereotypes of Mexican immigrants as rapists and drug smugglers. President Trump's administration has continued to leverage similar stereotypes in support of its favored policies — including punitive decisions to incarcerate amnesty seekers and to separate immigrant children from their parents. Moreover, among the public, a great deal of support that harsh criminal justice activities enjoy is due to racial stereotypes and anti-black animus. Psychologists Rebecca Hetey and Jennifer Eberhardt examined white subjects' support for harsh criminal justice measures after manipulating their perceptions of prisons' racial composition (2014). They found that *the blacker* the subjects perceived prison populations to be, the *less* likely they were to sign petitions calling for ending California's three-strikes laws or New York City's stop-and-frisk policy. In effect, the more that subjects saw a set of criminal justice policies negatively impacting African Americans,

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(2014), Nellis (2016), Baumgartner, Epp, et al. (2017), and Baumgartner, Christiani, et al. (2017).

26. See also Baumgartner et al. (2015) — although these researchers found a strong race-of-the-victim effect.

27. See, e.g., Weaver (2007), Alexander (2012), and Haney López (2014).

28. While this historical narrative is correct in its broad outline, the details are complicated. For example, the increased reliance on policing and punishment was sometimes supported by liberals concerned about improving the quality of life for residents of urban communities. See, e.g., Kennedy (1997) and Mauer (2006).

29. See, e.g., Kennedy (1997), Mauer (2006), and Provine (2007). For more on the historical influence of such stereotypes, see also Curtin (2000) and Muhammad (2010).

the less motivated they were to change them.[30] These experimental findings complement years of survey-based sociological research establishing that racial resentment, racial animus, and acceptance of negative racial stereotypes strongly predict white Americans' support for harsh penal measures.[31]

Anti-minority ideologies also systematically influence police, prosecutors, and jurors.[32] The millions of police stops occurring each year provide a vivid illustration of this fact. Once again, these stops have little substantive connection to criminal wrongdoing. Instead, police regularly stop and interrogate young men who "fit the description" of a suspect (where the most salient aspect of this description is their race) or as a means of uncovering potential wrongdoing (where the most salient signal of criminal activity is that they are participating in activities that, given their race, are deemed "suspicious").[33] That police officers are licensed to approach these stops with aggressive postures also reflects anti-black conceptual associations, as black males are disproportionately categorized as aggressive or threatening, are seen as physically larger than they actually are, and are more likely to be perceived (or misperceived) as holding weapons.[34] Thus, the most prominent crime control practice in the U.S. strongly reflects the dubious assumption that black and brown men are dangerous threats, requiring constant surveillance and control. Such stereotypes continue to give political cover for the racially-biased harms that predictably arise from unequal enforcement — these disparities are justified, it is (wrongly)

30. See also Hetey and Eberhardt (2018).

31. For an overview of this body of research, see Unnever (2014). See also Hurwitz and Peffley (1997), Peffley et al. (1997), Chiricos et al. (2004), Unnever et al. (2008), Welch et al. (2011), Unnever and Cullen (2012), and Ghandnoosh (2014).

32. See, e.g., Kennedy (1997) and Alexander (2012, Ch. 3).

33. See, e.g., Johnson (1995), Davis (1997), Kennedy (1997, Ch. 4), Alexander (2012, 61–73, 130–137), Epp et al. (2014), Ghandnoosh (2014), and Lerman and Weaver (2014, 42, 113–118).

34. See, e.g., Wilson et al. (2017), Kleider-Offutt et al. (2018), and Lundberg et al. (2018).

assumed, because people of color are significantly more likely to commit crimes.

Given that the American carceral system had its origins in an explicitly white supremacist ideology, and given that this ideology continues to strongly influence policymakers and the public, the harsh and racially-biased measures characteristic of American policing and punishment are most reasonably understood as continuing expressions of it.

There's more. Ideologies run deep. They support a variety of heuristics, inferential and evidential dispositions, conceptual association, and automatic cognitive biases. They structure our thinking about the subject matters within their domains. It is no coincidence, then, that many of the common derogatory crime-related labels that structure our crime-related thoughts — like 'thug', 'illegals', 'pimps' and 'hos', 'dealer', 'crackhead', 'gangbanger', 'hood rat', and 'inner city crime' — carry significant racial connotations. Indeed, Jennifer Eberhardt et al. provide compelling evidence that the stereotypical black male is the *prototype* for the concept CRIMINAL (2004). In one experiment, they found that research subjects subliminally primed with an image of a black face detected crime-related stimuli (such as handguns) more rapidly than subjects primed with an image of a white face or subjects receiving no prime at all. (Conversely, subjects primed with a white face detected crime-related objects *more slowly* than unprimed subjects.) This confirms that activation of the racial concept BLACK *automatically* activates the concept CRIME (and that activation of the racial concept WHITE makes the CRIME concept less cognitively accessible). In another experiment, these researchers found that subliminally priming a subject with crime-related cues (images of handguns, handcuffs, or fingerprints, or words like 'violent', 'crime', 'arrest', or 'apprehend' briefly flashed onto computer screens) activated his racial concept BLACK — leading him to pay closer attention to black male faces, and to misremember those faces as being more stereotypically black than they actually are. Additionally, Eberhardt et al. confirmed that the more stereotypically black an African American male looks, the more "criminal" police officers

will perceive him to be (2004, 888–889). In sum, crime-related cues also serve as conceptual cues for race, and vice versa.

That our concept CRIME and its relatives are automatically and subconsciously structured by racial categories places psychological limitations on how criminal punishment draws boundaries. Expressive punishment is bound to mark boundaries primarily or most sharply around *black* crime — or even, to echo DuBois, around blackness itself. The concept CRIMINAL itself becomes partly racially defined.

This partly explains why racially-coded white behaviors are sometimes seen as less problematic than analogous behaviors performed by people of color — or, more precisely, why certain behaviors of whites are seen as less problematic when performed in the ways stereotypically performed by white people. An anecdote offered to Michelle Alexander by a former U.S. Attorney illustrates this dynamic:

> I had an [assistant U.S. attorney who] wanted to drop the gun charge against the defendant [in a case in which] there were no extenuating circumstances. I asked, 'Why do you want to drop the gun offense?' And he said, 'He's a rural guy and grew up on a farm. The gun he had with him was a rifle. He's a good ol' boy, and all good ol' boys have rifles, and it's not like he was a gun-toting drug dealer.' But he was a gun-toting drug dealer, exactly. (2012, 118)

Subconscious conceptual structures also mean that behaviors of people of color are more easily conceptualized as criminal. Even permissible activities are more readily seen as out of bounds. And, of course, this is exactly what happens. Once again, pretextual traffic stops and stop-and-frisk pedestrian stops reflect generalized suspicion of crime, and very few of those who are detained are actually engaged in criminal behavior. People of color — especially young black men — are routinely singled out for permissible behaviors that are stereotypically associated with minorities, such as wearing certain types of clothing, walking in minority neighborhoods, riding in a car with other people of color, and so on. In other words, predominant forms of

policing effectively mark boundaries in ways that convey the derogatory message that it's bad to act "like blacks do".

This understanding of policing's message sheds light on another effect Brunson and Weitzer identify in their research on urban youth:

> White youths reported fewer experiences, overall, with police stops. […] But White youth's risk of being stopped was heightened in three specific situations: (1) while in the company of young Black males, (2) when in racially mixed or majority-Black neighborhoods, or (3) while dressed in hip-hop apparel. It has been argued that Whites enjoy a 'racial halo effect' that reduces chances of being viewed with suspicion by police officers (Weitzer 1999), but this halo appears to dim in these three situations of guilt by association. (2009, 866–867)

The upshot is that white people can also be condemned for "acting black". There's a clear analogue with the slur 'wigger', which communicates a slurring message about African Americans even though its "targets" are white — specifically, whites who emulate aspects of African American hip-hop culture. Both this slur and this pattern of policing express the same ideological commitment that it is bad for whites to "act black" in these ways, because these are degenerate ways of behaving.

Even if acting in ways stereotypically associated with black youth makes white youth more susceptible to police stops, black youth have it worse. These stops do not merely convey that it is bad to act "like blacks do", but also that it's bad to *be* black. This is the message people of color often *receive*. Minority commentators have expressed that the regularity with which they face police encounters while engaging in everyday behaviors — e.g., "walking while black" and "driving while black" — shows that the main crime they are accused of is being black. In other words, according to these social critics, such stops communicate that blackness itself is criminal.

Someone might accept this much while denying that this speaks to the message of criminal justice as a whole. Perhaps stop-and-frisk policing and harsh drug penalties are expressive of anti-minority ideologies, but this isn't obviously true of other parts of the penal message. After all, punishments for robbery, murder, and other genuinely serious crimes are quite easily interpreted as expressing legitimate moral emotions, rather than racial derogation.

As racial disparities in capital punishment demonstrate, this objection ignores that anti-minority ideologies can be expressed by responses to serious offenses, too. It is not enough to point out that a form of punishment, in the abstract, does not carry problematic ideological commitments; we must examine the ideology it expresses in its given context. In the American context, the facts are clear: (i) Convicted persons are systematically punished more harshly here than they are in most other countries, (ii) These harsh penalties disproportionately harm people of color, and (iii) These excessively punitive measures (and support for them) are significantly rooted in anti-minority sentiments, stereotypes, and conceptual associations. The overall system of punishment the U.S. deploys is fully intelligible only in this specific racial context. We must understand the message expressed through specific punishments in light of the overall penal ideology, even when those punishments are meted out for truly serious offenses. If anti-minority sentiments, assumptions, stereotypes, and biases undergird a system of criminal laws and punishments, we should interpret these laws (and individual punishments under them) as expressions of a derogatory, subordinating, anti-minority ideology, especially when black and brown community members bear the brunt of the harm.[35] This is the presumptive meaning of U.S. criminal justice activities; unless this presumption can be sharply cancelled by the contextual factors surrounding a given penal action, that action is bound to convey this objectionable meaning.

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35. However, once again, harsh penalties can express anti-minority attitudes even when whites receive them.

VI. Communicative Punishment and the Harms of Derogatory Speech

Communicative punishment has traditionally been discussed in ways that abstract away from the nitty gritty details of actual penal systems. Yet, it's also important to understand the symbolic, communicative, or expressive workings of penal activities considered more concretely. I have been arguing that, so considered, U.S. criminal justice activities largely express a commitment to a derogatory, subordinating, anti-minority ideology. In this respect, communicative punishment in the U.S. functions much more like racist hate speech than like the expression of legitimate moral emotions or drawing of moral boundaries. This derogatory meaning has important explanatory and normative upshots — upshots that are quite different from those of penal meaning, more abstractly construed.

One advantage of this approach is that it makes certain problematic features of the American carceral system especially salient. Recall, once again, the first-hand accounts of police stops described at the outset of this paper. These passages make clear that being policed in common ways can feel much like being on the receiving end of racist insults. On the view I have articulated, these first-hand accounts are accurate representations of the American criminal justice message. A broader range of phenomena can be explained in a similar way. Consider yet another description of an investigatory traffic stop offered by an African American man — the type of police encounter that is considered perfectly normal and routine in the U.S.:

> One time that I particularly remember, I was just, I don't know how to explain it — I felt violated.
>
> I was doing the speed limit, I got pulled over and was asked for my driver's license and registration. I went and asked why I was being pulled over. He just pretty much stated that there was a warrant check. And pretty much ran my license and asked if I had any warrants for my arrest and I told him, 'No'. And he ran my plate and driver's

license and asked if that was my current address and all that good stuff and then released me. (Epp et al. 2014, 1)

This man suffered no tangible costs from this encounter. It was over in a few minutes. There's no suggestion that the officer acted unprofessionally. This man nevertheless felt "violated" for reasons not even fully explicable to him. It is common to hear that police stops leave people of color feeling angry, anxious, fearful, mistreated, embarrassed, humiliated, and disrespected — even when officers are acting within the bounds of professional norms, and even when the stops do not end in a citation or arrest.[36] Despite these feelings, people of color frequently modify their demeanor during police encounters, going out of their way to show deference toward officers, to mask their frustration or anger, and to avoid any behaviors that might be read as threatening (Epp et al. 2014, Ch. 4).[37] People of color also frequently avoid places where such interactions are likely to occur, even when they are not engaged in any criminal wrongdoing (Epp et al. 2014).

If investigatory stop policing conveys a derogatory, subordinating message, it makes sense why it produces the strong reactions it does. Individuals targeted by hate speech often describe feeling violated, and suffer the same physical, psychological, and social harms — including intense emotional pain, shock, fear, anxiety, anger, frustration, or humiliation — that come from what they experience as affronts to their dignity, self-respect, or reputation. In an op-ed describing one such experience, Professor Raina Leon says,

> There is always an immediacy in being called [the N-word] — the shaking, the fear, the anger, the self-preservation […]. I had been having a good day; to have it so suddenly violated only reminded me that I had let slip my daily hyperawareness. (2017)

36. See, e.g., Davis (1997), Epp et al. (2014), and Hart (2014, 246–247).

37. Hart's account also notes this point: "By the time they let me go, I was in part relieved and in part working to tamp down my anger, something I'd had to become extremely skilled at by this point" (2014, 246).

Other commentaries emphasize similar physical and emotional reactions.[38] Subordinating language can be especially traumatizing, as Richard Delgado points out, when it is "delivered in front of others or by a person in a position of authority" (1993, 94) — two conditions generally met in criminal justice encounters. Moreover, members of target groups frequently modify their behaviors and demeanor in response to such attacks. This includes avoiding spaces where denigratory language is prevalent, and avoiding any behavior that might draw attention to oneself or increase the risk of being targeted.[39] This avoidance is doubly self-protective — it limits one's direct contact with traumatic stimuli, and it protects one from reacting to these stimuli in ways that puts oneself in further danger. As Charles Lawrence describes, those who are systematically targeted by such insults "must learn the survival techniques of suppressing and disguising rage and anger at an early age" — for expressing rage "will result in a risk to their own life and limb" (1993, 63).

In addition to these direct psychological and emotional consequences, this model of communicative punishment also generates insights into additional harms perpetrated by the American carceral state. A key part of why slurs are problematic is the way that they activate, reinforce, and reproduce the underlying derogatory, subordinating ideologies. Much the same can be said about American criminal justice.

As we discussed earlier, a society's communicative behaviors express a commitment to the underlying ideologies. Policies adopted in response to a widespread set of assumptions can reasonably be understood as corroborating or affirming those perceptions, thereby communicating that they are reasonable. Given the arguments so far, it's plausible to understand the American carceral state as confirming the reasonableness of derogatory attitudes and problematic stereotypes about African Americans — especially the assumptions that black

38. See, e.g., the papers published in Matsuda et al. (eds.) (1993).

39. See, e.g., Matsuda (1993, 24) and Lawrence (1993, 69).

people are violent, dangerous, deceptive, prone to addiction, and, more generally, of poor moral character. Of course, the path between stereotypes and criminal justice is a two-way street: Anti-minority stereotypes generate criminal justice activities that have disparate impacts on minority communities and, in turn, these disparities reinforce and perpetuate many of those problematic stereotypes. High incarceration rates of African Americans are often used as *evidence* of higher prevalence of anti-social behavior and drug use in black communities, blacks' poor parenting skills, and a variety of other failures of "black culture". These arguments are not new. As historian Khalil Muhammad (2010) thoroughly documents, there is a long history of using crime statistics as evidence of black inferiority, despite the fact that those statistics are products of racially biased penal and social systems.

Individual criminal justice activities also reinforce this ideology. When an African American is pulled over as a motorist or stopped on the street as a pedestrian, this effectively asserts — to him and to bystanders — that the objectionable stereotypes are probably true of him, too. The same message is also sent when a black or brown defendant is convicted and handed a long sentence. Many people implicitly (and often explicitly) see such stops and convictions as confirming the salient stereotypes about black people more generally. Importantly, this is part of the penal message even when the person in question has engaged in serious criminal activity and is thus an appropriate target for penal action. Once a commitment to a derogatory ideology is so thoroughly incorporated into the broader penal message, it is incredibly easy for individual criminal justice actions against people of color to serve as further confirmation of its overall accuracy. This is especially so given the automatic conceptual interconnections discussed above. Moreover, when the pathways that encode these associations are activated frequently, their hold on our thinking is strengthened still further, making it increasingly difficult to dislodge the heuristics, cognitive biases, and inferences they support.

Returning to the issue of police violence, everyday criminal justice activities also reinforce the norms that legitimize needless aggression.

By reinforcing the perception that people of color are inherently violent, threatening, and worthy of contempt, criminal justice itself helps to excuse or justify a great deal of violence toward them. Stopping someone out of a generalized suspicion of criminal wrongdoing primes officers to see him as less deserving of the benefit of the doubt, or even of protection. The broader ideology expressed through these actions also includes presumptions about the extent of officers' authority, norms regarding when others are to comply with officers' demands, and dispositions to categorize responses of minority community members as sufficiently (or *in*sufficiently) deferential, respectful, or compliant. The frequent activation of these dominant and subordinate roles has a naturalizing effect, leading law enforcement officials to feel more entitled to exert their power over others. This makes violent confrontations more likely. Then, in many instances of police violence, the officers' behaviors are subsequently defended through platitudes that render these violent reactions natural consequences for those who fail to mind their place — 'they should've known better', 'they should've cooperated', 'that's what they get for resisting (or for fleeing)', 'everyone knows that you should obey the police', and so on.

If the derogatory, subordinating message of communicative punishment accounts for some of the direct and indirect harms of American mass incarceration, it should also inform our approaches to penal reform. If this pernicious meaning remains intact, so will the harms. Unfortunately, rehabilitating punishment's meaning presents its own significant challenges.

As we just explained, derogatory discourse activates, reproduces, and reinforces problematic ideologies. If this holds true of criminal justice activities, the very presence of this public signal will reinforce negative stereotypes about African Americans, increase the suspicion that is focused on them, and so on. As long as U.S. criminal justice carries a derogatory, subordinating message, its social presence likely perpetuates the very conditions under which that message is expressed. Additionally, penal systems exist within broader sociopolitical contexts that influence what punishment communicates. The

broader cultural, political, and economic systems in the U.S. were all historically shaped by white interests, values, and perspectives; and broadly white supremacist ideologies continue to have profound influence. If we do nothing to eradicate the broader anti-minority ideology prominent within American communities, the criminal justice system cannot be quarantined from its effects. Not only will such biases continue shaping policies and police behaviors in ways that disproportionately impact people of color, they will also continue influencing how the public implicitly understands the penal message. So long as these broader systems continue working to the disadvantage of minority communities, the message conveyed by policing and punishment is reasonably interpreted as expressing a commitment to that overall system of white supremacy — especially when criminal justice reproduces other social disadvantages.

It may be suggested that an analogy with slurs points to a way out of this problem. After all, according to this suggestion, slurring terms can lose their problematic connotations. The N-word and the word 'queer', for instance, have been reclaimed by members of the African American and LGBTQ communities; many community members embrace these labels, and use them to express an alternative ideology. Furthermore, the shift to a positive meaning for these terms happened remarkably quickly and without dramatic antecedent social shifts.

We should be skeptical of this suggestion for at least three reasons. First, a slur's re-appropriation is driven by the subordinate group. The dominant group cannot decide that a term they have routinely used with derogatory meaning should now be understood to mean something different. Derogatory or harmful penal meaning is not something that can be unilaterally changed by those who have greatest control over American criminal justice: public officials and powerful political and economic actors outside of the most heavily affected communities. Second, re-appropriation of a slur is a contentious matter that generally results in, at best, only partial rehabilitation of slurring terms. The N-word is still considered a seriously offensive word in many contexts. There is significant debate whether African Americans should use

this word,[40] and its re-appropriation decidedly does not permit white people to use it, even with positive intent. Third, it is not clear how the analog of re-appropriation would even work in this context. When a derogatory term is re-appropriated, its *valence* changes — the term that is initially considered negative is co-opted to mean something positive. In the context of penal meaning, the analogous change would seemingly result in communicative punishment conferring *positive* attitudes (such as approval), rather than its traditional condemnatory message. This would be to give up the important social role that punishment was supposed to play in the first place.

It is, of course, possible for practices to change meaning over time. Yet to the extent that they maintain their central features, and to the extent that the broader social, economic, and political context maintains its central features, the message will remain largely the same. This suggests that no amount of tinkering around at the margins will be enough to break punishment's ties to its current ideological meaning. Piecemeal criminal justice reform will not do. The implication is that achieving an adequately acceptable form of communicative punishment would require the radical transformation of policing and penal practices, as well as the surrounding socio-political context — transformative changes that would likely amount to the abolition of much of policing and punishment as we know it.[41]

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