

Originally published as Engen, Andy. 2020. "Punishing the Oppressed and the Standing to Blame." *Res Philosophica* 97 (2): 271-295. <https://doi.org/10.11612/resphil.1842>. Please cite that article.

Victor Tadros (2009) raises a dilemma for criminal justice systems in distributively unjust states. According to his line of thought, distributively unjust states that know their unjust policies create conditions in which the disadvantaged are more likely to commit crimes bear some responsibility for many of the crimes committed by the disadvantaged. This complicity undermines the standing of states to hold accountable disadvantaged citizens under conditions of criminogenic distributive injustice. For such a state, punishing the disadvantaged for crimes in which it is complicit would be a criminal injustice. At the same time, not punishing the disadvantaged would also be a criminal injustice. The criminal justice system would fail to recognize the wrong done to the victims and, in failing to deter crime among the poor, increase insecurity among the already disadvantaged.

One might think that this dilemma is not of much practical significance, at least without further account of what constitutes distributive injustice and which actual states exhibit distributive injustice. However, Gary Watson maintains that oppressive policies in the United States have contributed to a higher rate of crime among some oppressed people. He draws on the analysis of Tommie Shelby (2007) to argue that racially unjust policies have created criminogenic conditions inhabited by the poor people living in ghettos in the United States. If Watson is right, Tadros's dilemma is not simply of theoretical interest, but one that confronts the United States as it punishes the crimes of those disadvantaged by ghetto conditions that its racially unjust policies have created. Watson calls the people who have been so disadvantaged "the dispossessed" and concludes, "speaking collectively, we have no business punishing the

dispossessed without taking responsibility for our role in their crime” (2015, 185). Nevertheless, Watson maintains we still have reason to punish the serious crimes of the dispossessed to affirm the moral status of their victims and deter serious wrongdoing.

In his recent book *Dark Ghettos*, Shelby (2016) acknowledges that Tadros’s dilemma applies in a relatively straightforward way to the crimes committed by poor people living in United States ghettos. Shelby offers a way out of the dilemma, however, at least for some crimes. He distinguishes the state’s right to condemn from its right to punish. According to this view, the United States could retain the right to punish certain crimes committed by the dispossessed, even if complicity undermines its standing to condemn those crimes. Shelby recognizes that this resolution requires rejecting expressivist theories of punishment. According to these theories, punishment is justified by the message of condemnation that it expresses or communicates.

In this article, I explain how Tadros’s dilemma applies to the situation of the dispossessed in the United States and how Shelby resolves the dilemma. I raise some concerns about Shelby’s resolution. I contend that punishment is widely and reasonably understood to condemn criminals for their crimes. Moreover, I draw on expressivist theories to highlight the importance of this feature of punishment to its justification. I concur with Tadros and Watson, then, that the dilemma raises an important challenge to our criminal justice system. I next consider a few potential responses to it. In the final section, I develop the potential response I find most promising: exploring how the United States could resolve the dilemma by taking responsibility for its complicity in the crimes of the dispossessed.

## 1 The Dilemma

Many philosophers writing on the ethics of blame highlight the distinction between whether someone is blameworthy and whether it is appropriate to blame that person. The appropriateness of blame depends not only on the extent of the wrongdoer's responsibility and the seriousness of the wrongs, but also on the standing of the blamer (see, e.g., Cohen 2006; Duff 2001, 2010; Friedman 2013; Scanlon 2008; Smith 2007; Wallace 2010). Someone who is being blamed can object to blame that would otherwise be appropriate if the one expressing blame lacks the standing to do so. For example, the blamed can legitimately object, "it's none of your business," when blamed by a stranger for a private wrong, even if his partner could appropriately blame him for the same action. Tadros argues that complicity undermines the standing of political states to hold citizens criminally responsible. Complicit blamers are those who blame others for actions for which they themselves bear some culpable responsibility. On the face of it, blameworthy wrongdoers can validly object to blame from complicit blamers. If I hire someone to steal a car for me, I lose the standing to blame her for stealing the car, even though she has committed a blameworthy action, because I bear culpable responsibility for that very action. Tadros claims that some states are responsible for distributive injustice and know that such conditions are criminogenic—that is, they make the poor more likely to commit crimes. The state is partially responsible for the crimes of poor citizens in these circumstances. This complicity gives criminals a valid objection to being blamed by the state for those crimes: "Even if they cannot deny that they are responsible for their crimes, the poor can deny that the state is entitled to hold them responsible, on the grounds that the state has created unjust conditions in which their responsible criminal offending becomes more likely" (2009, 409).

Tadros defends against a number of objections to the claim that states are sometimes complicit in the wrongdoing of their citizens through being responsible for criminogenic policies. According to an objection he considers, one is not necessarily culpably responsible for the foreseen harm that results from one's actions. A strategic bombing in war that foreseeably kills civilians could be justified if the civilians are not targeted. Likewise, if a higher crime rate among the poor is a predictable result of some public policy, policymakers are not necessarily culpably responsible for the increase in crime, provided they do not aim to increase crime with the policy and the harm of the increased crime does not outweigh the good achieved by the policy (408).

Tadros convincingly replies that the bomber avoids culpable responsibility for civilian death in the bombing case only if the bombing is morally justifiable, and, by analogy, a state avoids complicity in crimes resulting from criminogenic policies only if the policies are morally justifiable. A state that is responsible for distributive injustice must own the criminogenic consequences of that injustice; it cannot justify them as an unfortunate side effect of a just policy. This elaboration of Tadros's view opens up the possibility that it has limited application. Someone could deny that many states are complicit in the crimes of the poor with appeals to particular principles of distributive justice. For instance, one could defend a libertarian view of distributive justice on which vast distributive inequality could be found in a just distribution of goods.

There is no plausible theory of distributive justice according to which the situation of most poor black people living in the ghettos of the United States is just, however.<sup>1</sup> Watson

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<sup>1</sup> For example, those libertarians who claim that any distribution of goods is just if it arose from just transactions must concede that slavery undermines the claim that the current distribution of goods in the United States arose from unjust transactions.

emphasizes the importance of this point to the claim of complicity in his application of Tadros's dilemma to the dispossessed in the United States (2015, 183). In the rest of this section, I will briefly explain how oppressive policies in the United States have contributed to higher rates of crime among the dispossessed in the United States. My explanation, like Watson's, will draw heavily on Shelby's explanation of how a lack of opportunity and racial prejudice structure the choices that the dispossessed have available to them and thereby make them more likely to engage in some criminal behaviors.<sup>2</sup>

Shelby characterizes ghettos as "(1) predominantly black, (2) urban neighborhoods, (3) with high concentrations of poverty" (2007, 134). The existence of ghettos can be traced to government policies that nearly everyone recognizes as unjust, such as those that allowed and endorsed racist policies such as slavery and Jim Crow. In obvious ways, slavery made it much more difficult for ancestors of the current dispossessed to acquire and pass down wealth than the ancestors of white Americans. Jim Crow laws influenced where black people could live, work, learn, and go to school, as well as with whom they could associate. Shelby emphasizes that these policies not only generated unjust wealth distributions, but also, like slavery, "stigmatized blacks as social inferiors unworthy to associate with whites on equal terms" (2016, 43). Although slavery and Jim Crow have been rejected as unconstitutional in the United States, their legacy of economic inequality remains influential. Shelby emphasizes ways in which laws and institutions still perpetuate the existence of the ghetto (44–45). Unaddressed institutional racism in

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<sup>2</sup> My explanation here will be a more straightforward application of Tadros's argument than Watson's explanation. Watson first considers an argument from Duff (2010). According to Duff, the state acts wrongly in punishing the wrongdoing of the dispossessed because of the claim of exclusion. Watson characterizes his view, "Many of those convicted and punished by the criminal law of countries such as the United States have been and are being unjustly excluded and severely disadvantaged" (2015, 178). He draws on Shelby (2007) largely to support the claim of exclusion in the case of the dispossessed in the United States. He ultimately concludes that the case that punishment is unjust is stronger when the state is complicit in the crimes of the dispossessed. "[O]nly in the case of complicity is the political community holding the defendants responsible for crimes which it ought to hold itself responsible. And that is a further instance of the unequal treatment that constitutes the wrong of exclusion" (182).

employment, housing, and education continues to limit the opportunities of those living in ghettos. The higher crime rates in ghettos are predictable consequences of the racially unjust policies that created and maintain them. The lack of good schools and desirable jobs incentivize the illegitimate acquisition of money and other goods. Racial stigmatization further limits the life choices of ghetto residents, making it more difficult for them to get good jobs or to find housing outside the ghetto (207-208). The United States is complicit in many of the crimes of the dispossessed because of its responsibility in structuring their choices through racially unjust policies in a way that increases the likelihood of their commission of crime.

In addition to distributive injustice, unjust policies of the criminal justice system itself make the United States complicit in the crimes of the dispossessed. Much attention has been paid recently in academic literature and political discussion to the way in which the War on Drugs unfairly targets poor black people in the United States. Michelle Alexander (2011) argues that the contemporary War on Drugs functions similarly to slavery and segregation. Alexander explains why the dispossessed are much more likely to be arrested and imprisoned for drug offenses, despite evidence suggesting that rates of drug use are roughly equivalent across society. Here I will sketch only parts of her rich explanation. In the War on Drugs, the federal government has provided resources to those police departments willing to prioritize drug crimes (72–84). Additionally, departments benefit financially from laws that authorize them to keep goods suspected of being used in the drug trade. This incentive motivates departments to aggressively pursue drug crimes. Were the police to target white suburban areas, however, there would be a great deal of resistance to their efforts. They face much less resistance targeting the

politically weaker dispossessed.<sup>3</sup> For similar reasons, drug arrests of the dispossessed are much more likely to lead to prison sentences, because, for instance, the poor lack the resources to fight the charges in court. Police and prosecutors have a clear incentive to target the dispossessed in the War on Drugs, regardless of whether they harbor racial animus (123–126).

The unfair targeting of the dispossessed in the War on Drugs has criminogenic consequences for both those convicted of drug crimes and other ghetto residents. In a summary of the views of criminologists, Francis Cullen et al. assert, “Most criminologists would predict that, on balance, offenders become more, rather than less, criminally oriented due to their prison sentences,” because of “differential associations with offenders in a ‘school of crime,’ enduring noxious strains, having conventional social bonds severed, and facing stigmatizing labels that foster anger and a sense of defiance” (2011, 53S).<sup>4</sup> Furthermore, there are opportunity costs for the imprisoned. Prison separates offenders from their families and puts their lives on hold during years in which they might otherwise develop skills required to succeed in the legitimate economy. Alexander stresses how the treatment of prisoners after release functions like segregation. “Once you’re labeled a felon the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunity, denial of food stamps and other public benefits, and exclusion from jury duty are suddenly legal” (2011, 2). This discrimination again makes it difficult for released criminals to

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<sup>3</sup> One might question this part of Alexander’s account. Forman Jr. (2017) explains how many leaders and community members of poor, black communities have historically supported tough criminal penalties for drug crimes. This may suggest that, rather than unfairly targeting the dispossessed in the War on Drugs, the United States was engaged in battle on behalf of the dispossessed. However, Forman emphasizes that the choice to support such policies was itself shaped by racial oppression (11–12). Moreover, he points out that proposals from black leaders for tough drug enforcement policies were often paired with policies meant to address the root causes of crime, which were not adopted by the wider political community.

<sup>4</sup> Note, however, that the authors’ endorsement of this position, based on a survey of available research, is provisional. “On balance, the evidence tilts in the direction of those proposing that the social experiences of imprisonment are likely crime generating” (60S).

pursue legitimate means to goods and incentivizes further criminal behavior. The War on Drugs has additional criminogenic effects through the way that it reinforces negative racial stereotypes. Shelby emphasizes that the stigma of criminality exacerbates difficulties that the dispossessed have in finding employment and exiting the ghetto.

We are now in a position to apply Tadros's dilemma to the dispossessed in the ghettos in the United States. I have made the case that higher rates of crime among the dispossessed are not simply a foreseeable result of a justifiable social policy; rather, the United States bears some responsibility for some of those crimes by creating conditions that would make them more likely through unjust policies. Social scientist Glenn Loury vividly underscores how the responsibility of the American government and citizenry for ghetto conditions in the United States makes problematic our condemnation of the wrongdoing of ghetto residents.

What we Americans fail to recognize—not merely as individuals, I stress, but as a political community—is that these ghetto enclaves and marginal spaces of our cities, which are the source of most prison inmates, are products of our own making: precisely because we do not want those people near us, we have structured the space in our urban environment so as to keep them away from us. Then, when they fester in their isolation and their marginality, we hypocritically point a finger, saying in effect: 'Look at those people. They threaten the civilized body. They must therefore be expelled, imprisoned, controlled.' (2009, 12)

Because the state lacks the standing to blame criminals for their crimes, it would be unjust for the state to punish them for their crimes. On the other hand, it seems very much the business of the state to punish criminals among the dispossessed to affirm the value of their victims and to protect the rights of members of society by deterring future law-breaking. Whether the United States punishes the dispossessed or refrains from doing so, it perpetuates injustice.



## 2 Shelby's Proposed Resolution of the Dilemma

In *Dark Ghettos*, Shelby proposes a way out of the dilemma. He maintains that punishment need not express blame, but it can be imposed on criminals only to serve a deterrence function. Punishment can be fully justified in this role of preventing wrongdoing that would violate the rights of others. Even when a state lacks the standing to blame those who commit crimes, it may retain the right to hold them accountable. The right to hold accountable, according to Shelby, requires not that one have the standing to blame, but only that one be an impartial judge of wrongdoing. A state that lacks the standing to blame can still legitimately enforce some of its criminal laws through punishment to deter crime, so long as it has an impartial system for determining the guilt of offenders. Assuming that the criminal justice system in the United States meets certain standards of fairness and effectively deters serious wrongdoing, it acts justly in punishing those among the dispossessed who commit crimes, even if it lacks the standing to condemn those crimes because it is complicit in them.

In the rest of this section, I will expand on some aspects of Shelby's resolution before raising objections to it in the following Section 3. I will start by explaining a couple of distinctions Shelby employs. One of the main issues that Shelby takes up in his work on ghettos is when it is reasonable for ghetto residents to commit crimes. In answering this question, he distinguishes between natural duties and civic duties. People are bound by natural duties in virtue of being persons, regardless of the political system within they live. For example, we are all bound by the duty to not cause unnecessary suffering. People are bound by civic duties in virtue of being citizens. These duties exist between citizens and bind them to cooperate to maintain a fair basic political structure of society (213). Shelby also distinguishes between enforcement legitimacy and legitimate authority. Enforcement legitimacy is the right to use coercion to

enforce a natural duty enshrined in law. Legitimate authority is the right to be obeyed, including the right to issue new commands that become duties for those to whom they are addressed. A state with legitimate authority can create new civic obligations when laws are passed through democratic means (229–230). A state that is fundamentally unjust lacks legitimate authority. Assume that the United States is fundamentally unjust in its treatment of the dispossessed.<sup>5</sup> The dispossessed would not have civic duties to obey the law simply because it is the law, and the United States could not legitimately punish offenders simply for breaking the law. However, the dispossessed would still be bound by natural duties and could be legitimately punished by the United States for violating them as long as it retains enforcement legitimacy.

Shelby believes that this enforcement right is grounded in the moral right to use force to prevent harmful wrongdoing. For the United States to maintain the enforcement right, a number of criteria of fairness must be satisfied.

1. Criminal offenses and associated penalties must be publicized so that citizens have the opportunity to avoid them.
2. Alleged offenders must be able to defend themselves publicly against the charges.
3. The rules of the criminal justice system must be applied impartially.
4. Punishments should be humane and not exceed what is necessary to deter the conduct it punishes.<sup>6</sup>

Assuming that the criminal justice system in the United States satisfies these criteria, and any other criteria whose satisfaction is required for the fair and impartial operation of justice, it is in a position to determine whether accused criminals have violated the law. It is justified on the grounds of deterrence in punishing those among the dispossessed who violate the natural rights of others.<sup>7</sup>

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<sup>5</sup> Shelby leaves this question open to an extent.

<sup>6</sup> This is a summary of points Shelby makes at 233–234.

<sup>7</sup> Shelby seems to think that it does satisfy the criteria, though raises some doubts (246–247). Fritz (2019) argues that the inconsistent application of the law to black and white defendants undermines the standing of the United States to punish.

Shelby also distinguishes between the right to punish and the standing to condemn. He acknowledges that there are reasons for the state to condemn crime, including affirming the value of victims of crime and communicating to criminals the wrongness of their actions. But on Shelby's view, the enforcement right to punish does not depend on the state having the standing to condemn crime. One might worry that even if the United States is justified in punishing some crimes of the dispossessed, it still acts wrongly in punishing them because punishment expresses the state's condemnation of their crime, condemnation that it does not have the standing to express. Shelby's position avoids this worry because he denies the claim that punishment expresses condemnation. In denying this claim, he rejects a view of the nature of punishment dominant in the philosophical literature since Joel Feinberg's (1965) "The Expressive Function of Punishment." Feinberg maintains that punishment should be defined not only by its characteristic rights deprivation of criminals, but in the way that those rights deprivations symbolically express a message of disapproval and negative reactive sentiments from the community. Instead, Shelby holds that we ought to view conviction as the point in the criminal justice process that condemnation is expressed:

[T]he relevant condemnation properly occurs at the time of conviction—once the offender's admission of guilt has been formally accepted or when the judge or jury renders a guilty verdict after a trial—rather than at sentencing or when the sentence is being carried out. As conviction is the final public judgment of guilt, it would be natural to view it as also expressing condemnation of the legal violation and of the person for committing the prohibited act. (240)

On this view, punishment does not condemn wrongdoing. The United States is not expressing condemnation of the dispossessed when punishing them to control crime and therefore finds itself in no dilemma when deciding whether to punish the dispossessed for rights violations.

### 3 Some Expressivist Worries about Shelby's Resolution

Consider a possible difficulty for the resolution, given Shelby's identification of conviction as the point in the criminal justice process that condemnation is expressed. In order to punish an offender, a state with enforcement authority presumably needs to reach a finding of legal guilt, convicting the accused of the offense. How could a state that lacks the standing to condemn retain the right to convict if convictions express condemnation? Here it seems that Shelby allows for the possibility of finding legal guilt without blaming.<sup>8</sup> In many other contexts, we do separate the identification of blameworthiness from blaming responses and could do so in this one.<sup>9</sup> This move would seem to be problematic for Shelby's argument against Feinberg's claim that punishment expresses condemnation, however.

Feinberg insists that not only is penal hard treatment (imprisonment in particular) inseparable from condemnation but hard treatment itself expresses condemnation. As he famously says, "the very walls of his cell condemn [the criminal] and his [prison] record becomes a stigma" (1965, 402). This doesn't appear to be strictly true, however. What of those being merely detained in jails prior to trial? They are being incarcerated after being accused or suspected of committing a crime; they have not been convicted. A final judgment of guilt has not been rendered (though, once guilt has been settled, such jail time can be retroactively treated as "time served"). Imprisonment itself therefore can't express condemnation. It is more plausible to think that the public judgment of guilt (say, at the end of a trial) expresses condemnation. (2016, 241)

Shelby seems to hold here that we ought to identify conviction, rather than imprisonment, as the point at which condemnation is expressed, because confinement does not always express condemnation.<sup>10</sup>

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<sup>8</sup> In cases of the dispossessed, the criminal justice system could emphasize that the conviction merely indicates law-breaking, but that the state lacks the standing to condemn the crime because of its own complicity. Shelby suggests such a strategy (2016, 249).

<sup>9</sup> For instance, while reading a historical text I might come to the conclusion that Alexander the Great acted in a blameworthy manner without condemning him.

<sup>10</sup> Note that it is not clear that this reasoning would rule out sentencing as the point at which condemnation is expressed.

The fact that a thing sometimes has no symbolic value does not imply that it never does. Flowers growing in a field have no symbolic value. When I give flowers to my beloved, they express love. When I received them after my mother died, they expressed sympathy for my loss. The message or emotions expressed by flowers, and whether they express anything at all, depend on the intentions of the expressers and the context in which they arise. Further, it does not seem as though we need to identify exclusively either conviction, or sentencing, or imprisonment as expressing condemnation. When say, “I love you” and hand my beloved flowers, my words express my love, and the flowers continue to symbolize it after my verbalization. Likewise, the conviction and the punishment could both express condemnation of the punished.

Whether or not punishment, in addition to conviction, expresses condemnation is largely a matter of whether people interpret it to do so. When Feinberg claims that the walls of the cell condemn the convicted criminal, part of what he has in mind is the way that convicted prisoners experience their imprisonment as condemnation for their actions.<sup>11</sup> This experience distinguishes imprisonment from the experience of being accidentally locked in a room by someone and suggests a distinctive expressive content to imprisonment. Likewise, members of the wider community typically interpret sentencing and punishment for crimes not simply as playing the role of crime control but as blaming criminals for their crimes. Consider possible complaints that members of the community might have about a case in which a criminal is convicted of a serious crime and subsequently receives a very lenient sentence. They may complain that the light sentence will not serve to deter the punished and others in the future. They may complain that the

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<sup>11</sup> Feinberg writes, “I think it is fair to say of our community, however, that punishment generally expresses more than judgments of disapproval; it is also a symbolic way of getting back at the criminal. To any reader who has in fact spent time in a prison, I venture to say, even Professor Gardner’s strong terms—‘hatred, fear, or contempt for the convict’—will not seem too strong an account of what imprisonment is universally taken to express” (1965, 403).

light sentence is unfair because others who have committed the same crime have received harsher sentences. They may complain that the sentence lets the criminal “off the hook” not compared with others, but because of the wrongness of the crime itself. Serious crimes require responses that show that the community takes those crimes seriously and such a slap on the wrist does not sufficiently hold the criminal responsible for the crime. The naturalness of this last complaint suggests that punishment does express the community’s condemnation. One could reject the complaint as morally irrelevant, insisting that there is no moral imperative to express a certain degree of condemnation from the community, but that does not entail it is nonsensical. When the state punishes the crimes of the dispossessed, even if it does so only to deter those crimes, the punishment will likely be understood by community members to blame them for those crimes.

This line of objection may misinterpret Shelby’s rejection of Feinberg’s position. He characterizes his conclusion not in terms of what we actually do, but in terms of what is possible: “We needn’t attach any symbolic significance to the sentence itself” (241). For all that I have argued so far, this claim might be correct. It could be that punishment expresses condemnation, but only because of social facts that are not inevitable. In this case, however, the dilemma is not resolved. The United States would be in a position in which punishment of the dispossessed is justified as enforcement of natural duties, but unjustified as an expression of condemnation. A reorientation of society’s understanding of the criminal justice system— including the understanding of criminals and the dispossessed—would still be required, so that the sentencing and punishment is not understood to express condemnation. Some may find this reorientation a worthy undertaking, but until it is successfully completed, punishing the dispossessed in the United States remains morally problematic.

Shelby recognizes that his resolution to the dilemma requires that the expressive element of punishment play no role in its justification. Of course, this omission is unproblematic if Shelby is correct that punishment can be justified in its deterrence role, provided certain considerations of fairness and impartiality are met. But expressivist theories of punishment find themselves in direct opposition to this claim because they give pride of place to the condemnatory role in punishment's justification.<sup>12</sup> In characterizing these views, Thom Brooks writes

Expressivists argue that punishment should be understood as the expression of public disapproval. Punishment . . . is not the mere infliction of pain but a statement of denunciation. It is this expressive character of punishment that justifies punishment. . . . Expressivists argue that punishment may address several penal goals through its expressive character including retributive desert, the promotion of general deterrence, and offender rehabilitation. (2012, 10)

Expressivism is presented as an alternative to traditional retributive, deterrence, and rehabilitative theories of punishment, but it often takes on some features of those views, because retributive, deterrent, and rehabilitative features of different forms of punishment could inform what constitutes appropriate blame of crime. I will not here give a full defense of any version of expressivism, but I will highlight two reasons that expressivists often give for preferring their views over pure deterrence theories: they explain why punishment should be proportional and why punishment does not treat people as mere means. In fact, one might disbelieve that expressivism provides the fundamental justification of punishment while still accepting that the condemnatory aspect of punishment is morally important to our practice of punishment, insofar

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<sup>12</sup> Theories that could be classified as expressivist are presented in Bennett 2008, Duff 2001, Engen 2015, Hampton 1984, Nozick 1981, Narayan 1993, von Hirsch 1993, and Wringer 2016.

as it ensures that punishment fits the crime and that punishment treats people as ends in themselves.<sup>13</sup>

According to the principle of proportionality, punishment should be proportionate in its severity to the seriousness of the crime committed and the degree of responsibility of the agent for the crime. Expressivism gives us a straightforward and intuitive account of proportionality. Holding fixed the degree of responsibility, more serious crimes deserve a higher degree of blame than less serious crimes. Holding fixed the seriousness of the offense, offenders with a higher degree of responsibility deserve a higher degree of blame for their crimes. More severe penalties express a higher degree of blame. Thus, we ought to follow the principle of proportionality.<sup>14</sup> Shelby's deterrence account of the justification of punishment suggests that penalties "should be no more severe than is justified by the need to deter the type of unjust conduct in question" (234). This principle potentially directs a society to punish less blameworthy crimes more harshly than more blameworthy crimes. Consider the following example from David Boonin (2008, 77). We can imagine that to best prevent people from attacking others, more severe punishments should be imposed on provoked attackers than nonprovoked attackers, since provocation provides an extra incentive to attack. It seems as though Shelby's theory directs us to impose more severe penalties on provoked attackers than nonprovoked attackers, even though provoked attackers have a mitigating excuse. This is an unintuitive result that could be avoided by adding an expressive element to his crime control justification of punishment.

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<sup>13</sup> Of course, one might claim that a different sort of justification of punishment besides deterrence theory or expressivism best satisfies these desiderata. Alternatively, one might claim that a sophisticated deterrence theory satisfies them. For such a theory, see Tadros 2011. I will not be able to consider these claims here, except to insist that even if one accepts them and maintains that the expressive function of punishment plays no role in their justification, the fact that punishment does express condemnation is enough to pose the dilemma of punishing the dispossessed.

<sup>14</sup> See especially von Hirsch 1992. While not an expressivist himself, Feinberg argues for an expressive, rather than retributive, understanding of proportionality (1965, 423).



Kant (1797, 6: 331) applies the formula of humanity in rejecting deterrence as a justification of punishment. While few contemporary philosophers defend Kantian retributivism, many maintain that punishment that treats people merely as a means is unjustified and reject deterrence theory for this reason. They object to a crime control system of threats that manipulates people to behave in certain ways, while harming those on whom the manipulation is unsuccessful as a warning to others (see, e.g., Murphy 1973, 219–221; Boonin 2008, 60–62). Typically raised against justifying the punishment of anyone on purely deterrent grounds, the objection has particular resonance on behalf of the members of the dispossessed, whose agency has not been equally respected by the state. Expressivists characteristically hold that their accounts explain how punishment can be consistent with the formula of humanity. If the hard treatment of punishment constitutes appropriate blame for their crimes, their punishment addresses members of the community as moral agents, rather than mere tools to produce good social outcomes. In fact, on some expressivist theories, because it respects the agency of the punished, the expressive aspect of punishment can make sense of the idea that criminals have a right to be punished.<sup>15</sup>

Of course, the interpretation of “merely as a means” is in dispute among Kant scholars. It comes as no surprise then that expressivists disagree about the extent to which the deterrence function of punishment can play a role in its justification without violating the formula of humanity. Shelby cites expressivists who hold that the expressive function alone does not justify the hard treatment of punishment (Narayan 1993; von Hirsch 1993). According to Andrew von Hirsch, its characteristic hard treatment is justified by providing a disincentive to law-breaking.

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<sup>15</sup> For example, Duff writes, “We accord [the wrongdoer] the respect which he is due as a responsible moral agent—we do not simply try to manipulate or coerce him into conformity. He may therefore claim a right to be blamed, or even punished, for his wrongdoing; a right to be treated, respected and cared for as a moral agent” (1986, 70).

This potential disincentive does not violate the formula of humanity, because we recognize that we are fallible. “[A]n agent who has accepted the sanction’s message that he ought not offend, and who recognizes his susceptibility to temptation, could favor the existence of such a prudential disincentive, as an aid to carrying out what he himself recognizes as the proper course of conduct” (13).<sup>16</sup> If von Hirsch’s position required that we all recognize temptation to engage in criminal activity, those of us who are not disposed to rape and murder might find it implausible. Shelby proposes a version of the view that avoids this worry by invoking the veil of ignorance.

One can imagine the parties in Rawls’s original position, after noting that those they represent might be morally weak, agreeing to establish a set of nonmoral incentives (penalties) to encourage themselves to comply with the principles of justice as articulated through law. If the political community should accept the practice of hard treatment as a prudential supplement to the moral reasons for compliance, this avoids the problem of treating lawbreakers as . . . “mere means” to promote the common good. (243)

Punishment does not violate the formula of humanity because it is in the interest of those who would be most likely to be tempted to do wrong to have their behavior deterred by threatened punishments.

This is an interesting suggestion, but its reasoning goes quickly. First, it is not obvious that treating someone in a way that an ideally rational version of themselves would choose to be treated amounts to treating them as ends rather than mere means.<sup>17</sup> In medical ethics, for instance, the formula of humanity is often invoked to explain why it is wrong to provide treatment against a patient’s actual will, even when a perfectly rational patient would accept treatment. Second, it is not obvious that it is rational to choose a system of deterrent punishment

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<sup>16</sup> Some expressivists have criticized von Hirsch’s account on the grounds that any prudential manipulation is inconsistent with respect for rational agency. See, e.g., Duff (2001, 87–88) and Bennett (2008, 188).

<sup>17</sup> Duff argues against the claim that a retributive system of punishment rationally chosen behind a veil of ignorance is thereby consistent with the formula of humanity (1986, 217–228).

from behind the veil of ignorance, considered from the perspective of a morally weak person in a dispossessed class. Perhaps a system that supplied the prudential supplement by incentivizing following the law rather than providing onerous disincentives for breaking it would afford a greater advantage, if that were one's lot. Unless these concerns can be convincingly answered, Shelby's crime control justification of punishment needs an alternative account of how it is consistent with the formula of humanity. Whereas, according to von Hirsch's overall account, penal sanctions play the dual role of blaming wrongdoing and providing a disincentive to wrongdoing.<sup>18</sup> Expressivists believe that the first role necessarily acknowledges the agency of wrongdoers.

I have raised a couple of worries about Shelby's resolution to the dilemma that the United States faces in considering whether to punish crimes committed by the dispossessed. First, I have maintained that Feinberg is correct that punishment, and not merely conviction, expresses the condemnation of the community. Second, I have provided reasons to think this expressive aspect of punishment is relevant to its moral justification, in particular to the explanation of why punishment must be proportional to the crime and how a system of punishment is consistent with the formula of humanity.

#### **4 Other Potential Responses to the Dilemma**

In the rest of this article, I will consider three ways of responding to the dilemma of punishing the dispossessed that requires denying neither the claim that punishment expresses condemnation nor expressive theories of punishment. One potential response could reinterpret whose condemnation is expressed by punishment. Expressivists typically take punishment to

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<sup>18</sup> Von Hirsch explicitly argues that the expressive nature of punishment accounts for how it is consistent with the formula of humanity (1985, 54–57).

express the condemnation of the entire community of citizens. According to the dilemma, the community lacks the standing to condemn crime because it is we (collectively) who are complicit in the crimes that are the result of criminogenic conditions created by unjust state policies over which we exert democratic control. There are at least a couple of reasons that it is natural to think that the criminal justice system expresses the condemnation of the community as a whole in the United States. The first reason draws on a point I made in the previous section. What something expresses is determined at least in part by how it is interpreted. If members of the community widely and reasonably take the criminal law to speak on their behalf in condemning crime and the punished widely and reasonably interpret their punishment to express the community's condemnation, those facts are evidence that it does. Another reason to think that, in the United States, the criminal justice system expresses the condemnation of the entire community is that it is responsive to the democratic will of the citizenry. Because the community is able to exert control over the rules of the criminal justice system and their operation, when the criminal justice system condemns crimes, the condemnation speaks on behalf of the community as a whole.<sup>19</sup>

The United States might restructure the criminal justice system with respect to the crimes of the dispossessed so that only those with standing to blame control the criminal justice system.<sup>20</sup> It is not obvious how this could be implemented, but presumably it would require a

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<sup>19</sup> According to some expressivists, the state is the appropriate punishing agent at least in part because the state is in a unique position to speak on behalf of the community as a whole. In the case that blame from only some members of the community is to be expressed, it is not clear how the state is in a particular position to represent them, undercutting the state's claim to be the punishing agent.

<sup>20</sup> Chau maintains that such restructuring is unnecessary because "our courts need not be seen as acting on behalf of the whole polity in criminal proceedings. They can be seen as acting on behalf of a subset of the citizens, namely, the just citizens in criminal proceedings" (2012, 249). He argues against the idea that the blame expressed by punishment is determined by who has control over those proceedings. "Suppose that I authorized my agent to blame a wrongdoer on behalf of me and I am the only person in the world who has the right to blame the wrongdoer. Suppose, however, that my agent hated the wrongdoer so much that even if I do not authorize him he would still blame that wrongdoer. It seems to me that my agent can legitimately say he is acting on behalf of me even though I

drastic change in the way that the criminal justice system in the United States processes the crimes of the dispossessed. Perhaps if members of the community of the dispossessed were to exert control over the implementation of criminal justice procedures, punishment would be widely and reasonably understood to express the condemnation of those who are not complicit in the crimes of the dispossessed. A drawback of this resolution is that some of the reasons that the state has to condemn crime would not apply to a system that expresses the blame of only a subset of its citizens. Punishment of the dispossessed would not speak on behalf of the whole community in affirming the value of victims of crime, for instance, but only those citizens whose condemnation is expressed by punishment.

Another response to the dilemma could focus not on whose blame is expressed by punishment, but on the degree of blame. I suggested in the previous section that the degree of blame expressed by punishment is a function of the severity of its hard treatment. One strategy that the United States might pursue in acknowledging its responsibility for the crimes of the dispossessed could be to give less severe sentences to crimes committed by the dispossessed compared with crimes committed by others in society. According to this response, the standing to blame is not a binary matter. One could have a diminished standing to blame, that appropriately tempers one's blame without lacking standing altogether. While the United States is complicit in the crimes of the dispossessed because of its unjust, criminogenic policies, those policies are remote enough causes of criminal wrongdoing that they do not completely eliminate its standing to blame them for those crimes. If the criminal justice system in the United States

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do not have control" (250). It does seem plausible in this case that the agent can say that he is acting on my behalf, but it seems implausible for him to say he is only expressing my blame, not his own. Consider a version of the case where many other people besides me have control over the agent. The agent acts at their urging, while ignoring my wishes. While it may be true that the agent could be seen as acting on my behalf, it seems to me that the wrongdoer could reasonably say that the agent is instead expressing blame from those without standing.

gave less severe sentences to the dispossessed, it would thereby temper the blame their punishment expressed and meaningfully acknowledge its responsibility in their crimes. Like the first potential response to the dilemma, it is not self-evident how this response would be operationalized. Convicted offenders would have to be given the opportunity to make the case that they are properly thought to be in the dispossessed class and that their crime was made more likely by their dispossession.<sup>21</sup> Further, the response does not fully resolve the dilemma of punishing the dispossessed insofar as lighter sentences would presumably have less deterrent force. A cost of expressing a lower degree of blame would be that the law would not protect the potential victims of crimes of the dispossessed to the same extent as others in society.<sup>22</sup>

A third alternative response to the dilemma claims that the United States could gain the standing to blame the dispossessed by taking responsibility for its role in their crimes. Generally, by taking responsibility for one's participation in a wrong, one can gain the standing to blame others who participated in the same wrong. Consider how this operates in the interpersonal context. Imagine someone had been a member of a crime syndicate, but realized the error of her ways, left the syndicate, sought forgiveness from her victims, and made reparations for her wrongdoing as far as she was able. She seems, at that point, to have the standing to criticize other members of the syndicate for crimes that she participated in. This example suggests that taking responsibility for one's wrongdoing has both backward-looking and forward-looking components. Merely giving up a life of crime does not seem to be enough. It is only when a

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<sup>21</sup> Watson suggests, for instance, that dispossession does not make one more likely to be a serial killer (2015, 184).

<sup>22</sup> Watson expresses similar misgivings about a general policy of sentence mitigation (2015, 186). There may be other reasons to reject this proposal. For instance, Holroyd questions whether a system in which crimes committed by the dispossessed are punished less, because such a system would fail to be sufficiently transparent and systematic (2010, 108).

meaningful apology for past wrongdoing accompanies and is partly embodied by her change in lifestyle that she can be said to have addressed her past wrongdoings. Likewise, seeking forgiveness from her victims while remaining active in the syndicate seems insufficient. One might question whether she actually regrets her complicity in wrongdoing if she continues contributing to similar wrongs. Extrapolating from the interpersonal case, the United States taking responsibility for its role in the crimes of the dispossessed would involve an apology for its complicity in those crimes and significant policy reforms to avoid future complicity. In the final section, I will offer suggestions on what the policy reforms might be and what form the apology might take.

## **5 Exploring Taking Responsibility as a Means to Regaining Standing**

To gain the standing to blame offenders among the dispossessed, the United States would have to pursue serious reforms in the domains of both distributive and criminal justice. Unjust social policies, which have structured the choices of the dispossessed in a manner that makes them more likely to commit crimes, would have to be transformed or replaced by just policies. Such reforms would require providing economic opportunities for and redistributing goods to the dispossessed. Drawing on Shelby's analysis of the criminogenic features of the ghetto, pursuing justice in employment, education, and housing would be especially important for the United States to gain the standing to condemn the crimes of the dispossessed. In the realm of criminal justice, the United States would likely have to abandon the unjust War on Drugs with its criminogenic consequences, or drastically change its tactics in fighting that war so that it does not unfairly target the dispossessed.

One might worry about whether expressivism provides a firm basis for necessary criminal justice reform because it does not address the problem of mass incarceration. The preceding reasoning does not establish that imprisoning large numbers of people who commit drug crimes is unjust. It is consistent with a policy of continuing to imprison drug criminals in the United States, so long as the dispossessed are not unfairly targeted. An advocate for criminal justice reform might argue, however, that the remarkably high rate of incarceration in the United States itself is unjust. One might think that an expressivist is not in a position to accept such an argument. After all, a willingness to use the criminal justice system to express blame may have contributed significantly to the problem of mass incarceration in the first place.<sup>23</sup>

I believe that expressivists could respond to this challenge by emphasizing that the public censure expressed must be appropriate according to their theories. Expressivists typically insist that public censure is appropriate only in response to wrongdoing, and beyond that only a subset of wrongdoing (see, e.g., Duff 2014; von Hirsch 2014). One way of responding to the challenge then could be to argue that offenses people in the United States are currently being imprisoned for are not actually wrong or not among the subset of wrongs that are appropriate objects of public censure. For example, I do not believe that most instances of drug use violate moral obligations. Of course, this is not an uncontroversial position.<sup>24</sup> I will not dwell on it, however, because scholars have recently convincingly argued that the problem of mass incarceration in the United States is actually driven by imprisonment of those who commit violent crimes, rather

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<sup>23</sup> I owe this objection to an anonymous referee from *Res Philosophica*.

<sup>24</sup> I am sympathetic to Husak's point of view: "Clearly, we owe a reply to those commentators who insist that illicit drug use is wrongful. One would like to respond to their arguments. Unfortunately, arguments for the alleged immorality of drug use are almost never produced; this judgment is typically put forward as a kind of brute moral fact or incontrovertible moral intuition. In the absence of an argument in favor of this judgment, it is hard to know how a reply should be structured." (2008, 150–151)



than nonviolent drug offenses.<sup>25</sup> Presumably, a large majority of violent offenses will be classified as punishable by any expressivist theory of criminalization. An expressivist need not be committed to the idea that prison sentences are always the appropriate way to punish all crimes classified as violent, however.<sup>26</sup> An expressivist can endorse noncustodial sanctions to at least some violent crimes, so long as the sanctions can be understood to express a proportionate degree of blame from the community. Consider, for instance, that a key function of blame is to discourage immoral behavior. If a system of expressive punishment is punishing in a way that is increasing the crime rate, blame is not effectively expressed by that system. In Section 1, I noted some of the ways in which imprisonment in the United States is criminogenic. These considerations provide reason to publicly censure through noncustodial methods. Conversely, blame's function of discouraging wrongdoing appears to support imprisonment, if imprisonment has a significant deterrent effect. Some critics of mass incarceration, however, insist that long prison sentences do not have such a deterrent effect on potential violent criminals (Pfaff 2017, 190–194).<sup>27</sup>

I have maintained that an expressivist theory of punishment with an account of when public censure is appropriate and how it ought to be expressed could be consistent with arguments that mass incarceration is unjust.<sup>28</sup> Moreover, the present response to the dilemma of punishing the dispossessed recommends policy changes that have the potential to reduce the incarceration rate, because it focuses on reforming unjust policies that are also criminogenic.

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<sup>25</sup> See especially Pfaff (2017, 185–202). He uses this point to criticize Alexander's analysis of mass incarceration. See also Forman (2017, 228–231).

<sup>26</sup> Some prominent expressivists, such as Duff (2001, 150), explicitly defend this position. Duff's reasoning is grounded in his particular expressivist theory and appeals different considerations than the consequentialist ones that I do here.

<sup>27</sup> Here Pfaff also marshals evidence against the idea that prison is necessary to incapacitate violent criminals.

<sup>28</sup> Furthermore, any theory of punishment will be embedded in a larger political theory of the state. It may be that the larger theory will put external limits on ways blame should be expressed that are relevant to the problem of mass incarceration.

Indeed, insofar as unjust mass incarceration itself has a criminogenic effect, the United States would have reason to end unjust mass incarceration to avoid complicity in the crimes of those whose criminal behavior is made more likely by unjust mass incarceration. I have outlined possible reforms that might be enacted by the United States in order to have the standing to blame the crimes of the dispossessed. I now turn to the backward-looking component of taking responsibility for complicity, apologizing for one's participation in the wrongdoing. What makes an apology meaningful and how might the United States offer a meaningful apology to the victims of its complicity in the crimes of the dispossessed? In *I Was Wrong*, Nick Smith (2008) provides a standard of apologetic meaning, the "categorical apology," which possesses eleven distinguishing features.<sup>29</sup> Using Smith's work as a guide, we can identify some features that might make an apology from the United States for the crimes of the dispossessed a meaningful one. Before laying out those features, it is important to note that what is meaningful in an apology in large part depends on what is meaningful to the object of the apology. The United States should hence endeavor to include victims of its unjust policies and their criminogenic consequences in the process of formulating its apology.

According to Smith, among the features of categorical apologies that make them meaningful is a corroborated factual record of the wrongdoing. It is questionable whether we could ever get a full account of the wrongs of slavery, segregation, and continuing injustice in the United States, as well as their contribution to criminal wrongdoing among the dispossessed. Nevertheless, the government might employ historians and social scientists to compile as good a record as is feasible based on available evidence to make clear what the United States is

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<sup>29</sup> Those features are corroborated factual record, acceptance of blame, identification of each harm, identification of the moral principles underlying each harm, endorsing moral principles underlying each harm, recognition of victim as moral interlocutor, categorical regret, performance of the apology, reform and redress, intentions for apologizing, and emotions.

apologizing for. In all likelihood, an apology for the criminogenic effects of historical and continuing racial injustice in the United States would be part of a larger apology for that injustice itself and not just a narrow apology focused on its criminogenic effects. Another key feature of a categorical apology is the acceptance of blame. Smith distinguishes the acceptance of blame from expressions of sympathy, where, for example, someone acknowledges that it is unfortunate that a wrong has occurred without accepting any moral responsibility it. To give a meaningful apology to the victims of the crimes of the dispossessed, the United States must accept blame for its unjust policies and for the contribution of those policies to the crimes of the dispossessed. Only when it has it accepted this blame, would the United States be in a position to blame dispossessed criminals for the crimes in which it is complicit. Categorical apologies also characteristically involve reform and redress. Through redress the apologizer attempts as much as is possible to return the victim to the state they were in before the apology. Through reform one demonstrates that one takes seriously the norm violated by committing not to violate it in the future and following through. The redress criterion suggests that to take responsibility for its role in the crimes of dispossessed, the United States should offer some sort of compensation for the victims of those crimes. The reform criterion is presumably met by the policy changes recommended by the forward-looking component of taking responsibility.

Although I have employed Smith's account of the features of a meaningful apology in exploring how the United States should apologize for its complicity in the crimes of the dispossessed, Smith is actually quite skeptical of the meaningfulness of apologies by collective entities, such as states and corporations. For each of the eleven features of the categorical apology, he identifies special difficulties collective apologies face with respect to that feature (Smith 2008, 2014b). Each of these difficulties merits attention from someone defending the

present response to the dilemma of punishing the dispossessed.<sup>30</sup> Here I will focus on two difficulties that clearly pose potential problems for the United States' ability to apologize for its complicity in the crimes of the dispossessed: difficulties in making sense of how one could take responsibility for the actions of the dead and in how collectives can experience emotions associated with meaningful apologies.

A number of Smith's concerns about the meaning of collective apologies relate to the idea that the person making the apology is often not in a position to accept blame for the wrongdoing because the apologizer is not responsible for it. One of the straightforward ways that these concerns apply to an apology for unjust racist policies in the United States and their criminogenic consequences is many of the people responsible for those policies are long dead (Smith 2008, 209-210). Smith suggests that when it comes to slavery, the United States is in a position to offer a "value-declaring apology," rather than a categorical apology. The value-declaring apology, "primarily serves to announce the values of the speaker (or denounce the acts of others) and to commit her to honoring those principles. The apologizer does not accept personal blame for the past wrongdoing but instead proclaims that actions committed by others were somehow wrong and vows not to commit similar offenses" (148). Smith maintains that while such an apology lacks some of the meaning of a categorical apology, it may be appropriate in some circumstances. The United States could offer such an apology for the wrongs of slavery without accepting blame. The state would emphasize its commitment to justice by enacting the reforms outlined above, while distancing itself from past generations in the United States.

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<sup>30</sup> How an expressivist addresses some of Smith's concerns about collective apologies will likely depend on the particular expressivist theory being defended. For instance, an account of how a collective could be understood to express an apology could draw on the expressivist's account of how the community expresses blame through punishment. It is also worth noting that the salience of some of these concerns will largely depend on whether the objects of the apology find them to be concerning, which cannot be determined by philosophical theorizing alone.

According to this approach, the United States would gain the standing to blame crimes of the dispossessed not by taking responsibility for those crimes, but by signaling its break from the past state that bore such responsibility.

Some victims of racial injustice in the United States would be reasonably suspicious of an apology that boldly declares a break from its racially unjust history without grappling with the legacy of that injustice, however. Instead of, or in addition to, the value-declaring apology, the United States could provide an apology that focuses not on the injustices of past generations, but on current unjust policies and their criminogenic consequences.<sup>31</sup> Nevertheless, such an apology need not be silent on the racist history of the United States insofar current policy fails to address that history. Glen Pettigrove (2003) argues that while United States citizens are not blameworthy for slavery, privileged citizens in the United States continue to benefit unjustly from it and are blameworthy for reaping those benefits while in a political position to redistribute the benefits to those who have unjustly been deprived of them. The United States could provide an apology that accepts such blame for the policies that sustain unjust inequality from its racist history and resulting criminogenic consequences. The United States would be able to gain the standing to blame the dispossessed by taking responsibility for its complicity in their crimes, even if it cannot take responsibility for the sins of its ancestors.

Another of Smith's concerns about the meaning of collective apologies relates to whether collectives can feel the emotions associated with meaningful apologies, such as guilt, sorrow, empathy, and sympathy (2008, 241–243). I did not highlight this feature of categorical apologies in explaining how the United States could apologize for its complicity in the crimes of the

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<sup>31</sup> Another possible way of addressing Smith's concern would be to argue that current United States citizens can meaningfully take responsibility for wrongs for which they cannot personally accept blame (see, e.g., Thompson 2012).

dispossessed, in part because many philosophers deny that meaningful political apologies need be accompanied by emotions (see, e.g., Joyce 1999; MacLachlan 2014; Mihai 2013; Thaler 2012). They assert that the meaning granted by emotions in individual apologies can be provided by policy reforms when it comes to political apologies. Some of these philosophers maintain that the significance of emotions in individual apologizers is that they provide evidence that the apologizer is sincere. When it comes to political apologizers, appropriate policy reforms demonstrate that the state is sincere in its apology.<sup>32</sup> Some of these philosophers hold that negative emotions are important to an apology because those who feel them in response to wrongdoing are less likely to reoffend. On this metric, however, just policy reforms seem a more secure basis of future right action by the state than emotions. In either case, if these philosophers are right, an apology from the United States for its role in the crimes of the dispossessed could be meaningful, even without an account of how the United States might feel appropriate emotions in response to the wrongdoing.

One might worry, however, that this response relies on a limited conception of the meaning of emotions. Smith highlights a number of different roles that emotional reactions to wrongdoing play in human interaction. Of particular interest for my argument is the claim that the guilt an apologizer feels is appropriate because wrongdoers deserve to suffer (2008, 103). Retributivists may claim that to gain standing to inflict painful blame on others for a wrong in which one is complicit, one must have undergone some deserved suffering for the same wrongdoing. Perhaps this point is obscured by focusing on the interpersonal context because, given plausible assumptions about moral psychology, genuine acceptance of blame by an individual apologizer typically involves painful feelings of guilt. If collectives do not typically

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<sup>32</sup> Smith agrees that other features of the categorical apology may be more important than emotions in establishing sincerity (2008, 98).

feel guilt in accepting blame for wrongdoing, however, they have not undergone the suffering required to have standing to painfully blame others for that wrong. An expressivist could respond to this challenge in a number of ways. Of course, retributivism could be rejected. Alternatively, an expressivist might develop an account according to which a collective could feel emotions. Perhaps for the apology to be meaningful, a significant portion of the United States populace would need to feel guilt for their complicity in the crimes of the dispossessed.<sup>33</sup> Finally, an expressivist might argue that other aspects of the apology which impose burdens on the apologizer, such as providing sufficient redress, could take the place of negative emotions in giving the complicit apologizer the standing to blame.<sup>34</sup>

I have explored how the United States could take responsibility for its complicity in the crimes of the dispossessed and thereby gain the standing to condemn their crimes, while touching on some of the theoretical challenges such a proposal faces. I will conclude by highlighting something peculiar about the proposal: to pursue this strategy to resolve the dilemma of punishing the dispossessed, the United States ought not primarily be guided by the intention to resolve the dilemma. The United States has reason to reform its oppressive policies, based on the injustice of those policies. Further, so long as a defensible account of political apologies can be developed, the United States has reason to apologize for those wronged by oppressive policies primarily out of concern for those victims. The apology should not be employed merely instrumentally as a means to gain the standing to blame. This response to the dilemma thus advises the United States to do what it has more direct reason to do on other grounds.<sup>35</sup>

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<sup>33</sup> Smith identifies some potential obstacles to this approach (2008, 242–243).

<sup>34</sup> Smith explores whether redress imposes deserved retributive suffering on the apologizer (Smith 2014a, 161–162).

<sup>35</sup> Thanks to audiences at the Pacific Division Meeting of the American Philosophical Association, the Illinois Philosophical Association, the Iowa Philosophical Society, the World Congress of the International Association for

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the Philosophy of Law and Social Philosophy, and Illinois State University. Thanks especially to Larry Alexander, Adam Betz, Mary Coleman, Mark Criley, David Ebrey, Ioan-Radu Motoarca, Jim Simeone, and two anonymous reviewers at *Res Philosophica*.



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