The Inadequacies of Civil Society: Law's Complementary Role in Regulating Harmful Speech

Andrew E. Taslitz

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THE INADEQUACIES OF CIVIL SOCIETY: LAW'S
COMPLEMENTARY ROLE IN REGULATING HARMFUL
SPEECH

ANDREW E. TASLITZ*

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INTRODUCTION

In *Fighting Words*, Professor Richard L. Abel addresses the problem of group-subordinating speech—speech spoken with the purpose or effect of maintaining one group’s domination over another group. Such speech presumably includes face-to-face racial insults, sexually demeaning comments to female employees, and group defamation as paradigm cases. For ease of reference, Professor Abel labels such actions “harmful speech.”

Professor Abel argues, however, that the law is often a clumsy, ineffective, and sometimes even destructive way of addressing speech-based harms. Yet, he is unwilling to tolerate those harms, which cry out for resolution. He recommends, therefore, that “civil society”—institutions of everyday life, such as corporations and universities—take a clear stand against harmful speech, and redress the wrongs that nevertheless occur.

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* Professor of Law, Howard University School of Law; Visiting Professor, Duke University School of Law, 2000-2001; J.D., University of Pennsylvania, 1981; former Assistant District Attorney, Philadelphia, PA. The author thanks his wife, Patricia V. Sun, Esq., and Professors Margaret L. Paris, Robert Mosteller, Girardeau Spann, and Alan Calnan for their comments on earlier drafts of this article, and his research assistants, Nicole Crawford, Eli Mazur, Amy Pope, Nia Ayanna, Semira Asfasha, and Baarez Nebbiat. My thanks as well to MARGINS: MARYLAND’S INTERDISCIPLINARY PUBLICATION ON RACE, RELIGION, GENDER AND CLASS for its invitation to speak at this symposium and to Professor Richard L. Abel for creating the opportunity for these musings by authoring his thought-provoking paper.

1. Richard L. Abel, *Fighting Words*, 1 MARGINS 199 (2001) [hereinafter *Fighting Words*]. The term “group-subordinating speech” is mine, but I think it aptly characterizes the subject matter of Professor Abel’s paper.

2. See id. at 201-02. Many of the stories that Professor Abel tells can be fit into variations on these paradigm cases, and they are, in any event, the core sorts of cases on which scholars in this area tend to focus their ire. See infra Part 1B.

3. See id. at 218. His broader thesis that cultural language wars are about respect for social groups is fully developed at Richard L. Abel, *Speaking Respect, Respecting Speech* (1998) [hereinafter *Speaking Respect*].


For example, Abel’s approach suggests that an employer should ostracize an employee who engages in racial insults on the job. Similarly, his approach suggests that teachers should lecture their students about the evils of sexual harassment. But legal prohibition of either the insults or the harassment is either unwise or inadequate alone.6

Abel’s conclusions stem from his belief that when social groups clash over controversial issues, such as race, wealth, politics, and sexual orientation, their conflict is ultimately about “respect,” which he defines as one group demanding to be recognized as of valuable status by another group.7 The law, he suggests, is often not well equipped to promote inter-group respect. The legal system’s weaknesses, declares Professor Abel, include its failure to recognize that words can be ambiguous, its misreading or disregard of speakers’ intentions (which may not be malicious), its tendency to treat speech as entirely good or entirely bad, its reading of words outside of social context, and its reliance on unproven assumptions that certain forms of harmful speech cause particular types of harms.8 Moreover, he contends that the law may unduly silence legitimate dissenting speech or provoke a backlash against political correctness.9

But the usual alternative option of leaving harmful speech completely unregulated, says Professor Abel, is equally foolish. The anti-regulation position, he suggests, reflects Americans’ tendency to “fetishize” the First Amendment.10 Such fetishization, he explains, ignores the reality that government must and does regulate much speech—the freedom to speak is never absolute.11 Furthermore, speech unregulated by the state is instead regulated by market forces. “Those who pay to disseminate a message, whether advertisers or

6. See Abel, supra note 1, at 215-18. These examples follow from Professor Abel’s arguments, though he does not use these precise examples himself.
7. Id. at 200, 304-5.
8. See id. at 214-18, 254-56.
10. See Abel, supra note 1, at 215.
11. See id.
audience, significantly influence its content.” Complete non-regulation is thus an illusion.

Furthermore, Abel states that group-subordinating speech generates very real harms by reproducing status inequalities. Such speech promotes inequality both “intensively,” through face-to-face insults and humiliations, and “extensively,” through texts, advertising, journalism, popular culture, and public symbols. Liberals, who oppose regulation and insist upon a “false neutrality”—believing that neither one side’s speech nor the other’s should be favored by social institutions—thus become complicit in injustice. Society must openly side with the oppressed. Regulation of some sort is essential.

If neither the law nor the market offer adequate regulation, what does? As previously noted, Professor Abel’s answer is “civil society”—the schools, universities, workplaces, trade unions, shops, cultural venues, mass media, mass transportation, and voluntary associations of everyday experience. These entities are better equipped to engage in conversations that foster understanding and respect. Thus, these institutions can allow offenders to explain that their motives were good; they never meant to hurt or offend. If the victim accepts this explanation, the matter is at an end, the harms largely dissipated. If the victim rejects these explanations, an apology by the offender to his victim must be made. Professor Abel recognizes that apologies do not always suffice—for example, where apologies are insincere or coerced, where the offender indeed intended to insult the victim, or where the offender is responsible for a long history of victim status degradation. Nevertheless, Professor Abel believes that the apology is often a powerful tool even when it is

13. See Abel, supra note 1 at 216.
14. Id. at 216, 285-86.
15. See id. at 303-04.
16. See id. at 218.
17. See id. at 254-55.
19. See Abel, supra note 1 at 254-55, 304.
rejected, because rejecting an inadequate apology "preserves the victim's moral superiority."²⁰

I applaud Professor Abel's exploration of the idea that civil society can be an important mechanism for redressing the risks and harms of group-subordinating speech. Indeed, I agree with his entreaty to give civil society its due. But I worry that his sole emphasis on civil society will lead readers of his article to ignore important advantages that the law may sometimes have over civil society. In particular, harmful speech may justly inspire retributive anger in its victims—anger that merits a retributive response.²¹ The law is generally (if not always) a far better instrument than civil society for wreaking retribution.²² Retributive anger stems from the sense that an oppressor has treated his victim as inferior.²³ Society most effectively expresses its rejection of that message via state-inflicted punishment, for reasons that this article will explore.²⁴ Moreover, respect is about more than status; respect is also about fostering a sense of group and individual inclusion in a broader political community.²⁵ Law, I argue, has a special role to play in promoting equal political belonging by imposing expressive retribution upon oppressors.²⁶ Although civil society may often help in achieving other sorts of goals often served by the law—for example, offender rehabilitation or deterrence of other would-be offenders—

²⁰ Id. at 274. Professor Abel's proposal, by emphasizing addressing group emotional needs and using tools like the apology to further reconciliation, has some commonalities with Eric Yamamoto's "racial praxis." See YAMAMOTO, supra note 18 (emphasizing reconciliation among racial minorities, rather than between minorities and the majority).
²¹ See infra Part I.
²² See infra Part I A1.
²⁴ See infra text accompanying notes 39-140.
²⁵ See infra text Part I C.
only the law adequately addresses societal needs for retribution and political inclusion.  

Professor Abel also recognizes that his turn to civil society requires the subordinated to avoid "victim passivity." Victims must step forward to demand redress. That will not happen, he concedes, unless victims' consciousness is transformed so that they see the harms that they suffer as "contingent rather than inevitable," that is, as subject to change by victim complaint and agitation. Furthermore, the collectivities of civil society must provide moral and political support for victims while protecting them from offender retaliation.

Here, too, I think that Professor Abel is unduly optimistic. Civil society's institutions will often lack either the self-awareness or the will to protect victims from subordinating speech. The fear of legal liability can offer incentives for action in civil society that would otherwise not exist.

In identifying some virtues of legal regulation generally, and of retributive state action specifically, I do not mean either to belittle the benefits of harm-redressing efforts in civil society or to exaggerate the benefits of retribution. As this article will soon explain, there are important limitations on when retribution should play any role in the law. Furthermore, contrary to the conventional wisdom, retribution does not necessarily require criminal punishment. Indeed, I will argue that society should be wary of too quickly turning to the criminal justice system. Instead, the civil justice system can also play an important, and indeed often primary, retributive role—a point partially and somewhat tentatively recently acknowledged by the United States Supreme Court. Sexual harassment civil suits can, for example, be

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27. See infra Part I.
28. See Abel, supra note 1 at 217.
29. Id.
30. See id.
31. See infra Part I E.
32. See Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 121 S. Ct. 1678 (2001) (holding a punitive damages award in a civil suit should be reviewed under a de novo standard because, having a punitive purpose, the award raises constitutional questions under the Eighth Amendment to the United States Constitution's prohibition against excessive fines and cruel and unusual punishments, as well as under the Due Process Clause). The Court majority elaborated:

Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the
understood as serving important retributive functions in responding to some forms of group-subordinating speech.\textsuperscript{33}

As to my former point—that civil society does indeed have important benefits as a mechanism for regulating harmful speech—I

\begin{quote}
plaintiff has suffered by reason of defendant's wrongful conduct,.... The latter, which have been described as "quasi-criminal," ... operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation. See ... Haslip, 499 U.S., at 54, 111 S. Ct. 1032 (O'Connor, J., dissenting) ("Punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible.")

The Court majority also favorably cited Sunstein, Kahneman, & Schkade, Assessing Punitive Damages (With Notes on Cognition and Valuation in Law), 107 YALE L.J. 2071, 2074 (1998) ("Punitive damages may have a retributive or expressive function, designed to embody social outrage at the action of serious wrongdoers.")

While acknowledging a role for retribution in tort law, the Court majority seems to limit that role to punitive damages. Yet some forms of compensatory damages may implicitly serve retributive functions. Justice Ginsburg, in her dissent in Cooper Industries, Inc., laid the groundwork for this sort of argument. Thus she explained that punitive damages are similar in nature to "compensatory" damages for intangible, non-economic injury:

One million dollars' worth of pain and suffering does not exist as a "fact" in the world any more or less than one million dollars' worth of moral outrage. Both derive their meaning from a set of underlying facts as determined by a jury. If one exercise in quantification is properly regarded as fact finding, ... it seems to me the other should be so regarded as well.

Id. at 1691 (Ginsburg, J., dissenting). Both sorts of damages, Justice Ginsburg further explained, involve "more than the resolution of matters of historical or predictive fact." Id. Although Justice Ginsburg addressed these similarities to argue that both sorts of damages should be governed by a similar standard of review, her logic has other implications. If both intangible compensatory and punitive damages involve the jury's determination of the "meaning" arising from an underlying set of facts, then both surely involve the jury's moral judgment. The Court majority concedes that this is the case for punitive damages and that they turn on a retributive morality, yet the words "pain and suffering" seem invited in part to appeal to retributive emotions. Similarly, torts seeking recovery for "dignitary harms," as speech-based-injury lawsuits seem to be, see infra text accompanying notes 100-140, 236-93, involve intangible damages that invite a retributive analysis.


\textsuperscript{33} See infra text accompanying notes 244-63.
note several benefits either ignored or minimized by Professor Abel. Notably, sometimes that mechanism is the only one that the law allows. Furthermore, the act of victim protest in civil society has a special dignity and power that aids human flourishing and the quality of public discourse. Additionally, civil society’s continued engagement in an egalitarian struggle may dramatically improve the likelihood that laws regulating harmful speech will have positive effects. Law and civil society thus serve complementary functions, each helping the other in doing its job more effectively.

Part I explores the special advantages of legal regulation of harmful speech, particularly in redressing legitimate retributive anger. Part I also explains, however, why these advantages are best achieved through the civil, rather than the criminal, justice system. Part I also examines the ways in which law can improve the regulatory performance of the institutions of civil society.

Part II considers the advantages to the turn to civil society that were not fully developed or even noted at all by Professor Abel. Part II further analyzes the ways in which civil society improves the regulatory functioning of law.

A few final caveats. I make no claim to have definitively defended any of the points that I make here. Nor am I recommending any specific sort of regulation for any category of harmful speech. Almost no one is a free speech absolutist. The question for most people is, after weighing the costs and benefits of regulation in a particular area, what speech should be regulated and in what fashion? This question is highly contextual and cannot even be attempted for any one area of potential regulation, much less for many areas, in so general an article. Furthermore, I am addressing the policy wisdom of legal regulation, not its constitutionality, though I necessarily must touch on questions of constitutionality as part of any sound system of practical judgment. My modest goal, therefore, is simply to add a number of concerns to the balancing mix. Professor Abel has started a

34. See infra Part IIA.
35. See infra Part IIB.
37. See infra Part IB3; see infra Part IIC; JONES, supra note 36, at 61-76; RODNEY SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 23-27, 43-54 (1992).
38. See Abel, supra note 1, at 215-16.
new conversation, one that examines not merely whether and how to regulate harmful speech, but what institutions should do so. I want to include in that conversation the recognition that sometimes multiple social institutions must act. To focus on one sort of institution to the exclusion of others is to miss an important part of the picture. But I seek merely to join the new conversation and to stir others to do so too. I make no pretense of having the final word.

I. THE ADVANTAGES OF LEGAL REGULATION OF HARMFUL SPEECH

A. The More-Than-Occasional Necessity of Retribution as a Response to Harmful Speech

1. Retribution Versus Revenge

Among the major advantages of turning to civil society, Professor Abel argues, are that the offender has a chance to disclaim ill motives and, if that explanation is rejected by the victimized individual or group, the offender has the further opportunity to apologize. But, as Professor Abel notes, some insults are conscious, even deliberate. More commonly, the offender sees no offense in his speech or is indifferent to its effects. Relatedly, he explains, apologies may either not be forthcoming or will be rejected because they appear coerced or insincere or cannot begin to undo a harm, such as that stemming from a lengthy history of stereotyping.

I would add that apologies will often be rejected where they are not accompanied by action. Thus, Professor Yamamoto has explained that "a meaningful group apology is tied to a commitment to make amends for past wrongs and to action on that commitment; ‘confession is a charade unless matched with action.” And the chair of Japan’s...
Social Democratic Party, in urging the government to compensate Korean “comfort women,” declared that “words of apology can carry weight only if followed by deeds” because “apologies and compensation are two sides of the same coin.”

Now Professor Yamamoto suggests that the need for action and compensation stems from an urge to repair damage done, a kind of restorative or corrective justice. But I argue that demands for compensation often have a retributive component—a desire to see the offender suffer—a point I develop in section IB below. Where an apology is not even forthcoming at all or appears feigned, the retributive need will be greater still, and this is especially true for the sorts of group-subordinating harms of which Professor Abel speaks.

Commentators often draw distinctions between “retribution” and “revenge,” but both stem from a similar emotional need: to see an offender suffer as a way of restoring the victim’s status in the eyes of the community. When a wrongdoer treats a victim badly, he sends the message that the victim is unworthy of better treatment. When the state fails to condemn the wrongdoer, the state embraces and reaffirms that message. Through retribution, “the community [instead] corrects the wrongdoer’s false message that the victim was


45. See YAMAMOTO, supra note 18, at 195-96 (describing apologies as doing “reparatory work.”). Yamamoto goes on to explain that “Reparatory work covers a range of acts aimed at restoring those harmed financially and psychologically and repairing damaged social relationships—by the payment of money, the return of lands, the opening or restructuring of institutions, and the like.” Id. at 196. See also ALAN CALNAN, JUSTICE AND TORT LAW 99-104 (1997) (defining “corrective justice” and explaining its role in tort law); Gordon Bazemore, Communities, Victims and Offender Reintegration: Restorative Justice and Earned Redemption in Civic Repentance (Amitai Etzioni ed., 1999) (explaining the concept of restorative criminal justice).

46. See infra text accompanying notes 202-32.

47. See YAMAMOTO, supra note 18, at 194-98 (suggesting that when apology and martyrdom fail, revenge is the only remaining option).

48. See Taslitz, Racist Personality, supra note 23 (arguing retributive need arising from group-subordinating harms stems from the messages expressed in hate crimes).


less worthy or valuable than the wrongdoer; through retribution, the
community reasserts the truth of the victim’s value by inflicting a
publicly visible defeat on the wrongdoer.”
Retribution need not always be the function of the criminal justice system. Tort
compensations schemes can serve retributive purposes. Indeed, litigants whom I have known personally and who are involved in civil
rights suits have sometimes expressed the desire to “make them pay,” or “even the score,” the “them” referring to the offending group or institution.

That vengeance and retribution both stem from the emotional
desire to reject the offender’s evil message that he is superior to his victim does not mean, however, that there is no distinction between the
two concepts. Legal philosophers sharply disagree about whether this
difference is real, and, if so, how to define it. Most commonly, retribution is viewed as involving proportionality, cool detachment, and the consistency of fair legal processes while vengeance is “the
voice of the other, the primitive, the savage call of unreason,
‘wildness’ inside the house of law, which, by nature, will not succumb
to rational forms of justice.” Vengeance should have no role in the
law, it is argued, because vengeance knows no limits.

This sort of argument overstates the differences between the
two concepts. Vengeance is not a mere unthinking lashing out. Rather, it is typically “cool,” often involving careful planning, a substantial investment of time and energy, and even an effort to hold its object in long-term and fearful suspense. These ideas are commonly expressed in the aphorism, “revenge is a dish that is best

51. MINOW, supra note 18, at 12.
52. See infra section 1B.
53. See, e.g., AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE
AMERICAN TRADITION 38-43 (2001) (reviewing some scholarly efforts along these lines); IGOR
PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 70-71 (1989) (articulating traditional
revenge/retribution distinction); CHARLES K.B. BARTON, GETTING EVEN: REVENGE AS A FORM
OF JUSTICE 52-69 (1999) (noting revenge is a specialized form of retribution); Solomon, supra
note 32, at 127-37 (distinguishing between revenge and retribution); Vidmar, supra note 49, at
37-38 (retribution and revenge have similar underlying psychological dynamics).
54. SARAT, supra note 53, at 39.
55. See id.
56. See Solomon, supra note 32, at 133.
57. See id. at 130.
served cold.”\textsuperscript{58} The desire for vengeance can still be intense, intractable, and single-minded, but it is neither wild nor unreflective.\textsuperscript{59}

Moreover, the traditional revenge/retribution distinction disregards the reality that “we all recognize the difference between justified and unjustified revenge. Vengeance is not just the desire to harm, but the desire to punish for good reason and to the right measure.”\textsuperscript{60} Similarly, retribution in its everyday meaning of intentionally-inflicted suffering on another may be visited upon an offender in the form of a dispassionate legal process, yet be disproportionate—even cruel.\textsuperscript{61} What adherents of the traditional distinction describe as “retribution” is really a description of what the common layperson would understand as justified revenge.

Furthermore, even many of the traditionalists concede that retribution unavoidably involves a hidden element of vengeance below the surface.\textsuperscript{62} Indeed, a legal system that entirely ignores victims’ emotions may lead to private acts of violence, decreased respect for the law, and a loss of social cohesion.\textsuperscript{63} The real problem is the relative mix of vengeance and retribution in a society and how to permit their expression. But this problem again presupposes that the distinction between the two ideas is real—a position I have thus far disparaged.

\textsuperscript{58} Id.\textsuperscript{59} See id.\textsuperscript{60} Id. at 142.\textsuperscript{61} Id.\textsuperscript{62} See SARAT, supra note 53, at 38-43.\textsuperscript{63} See, e.g., Vidmar, supra note 49, at 43, 47-49, 56 (presenting empirical data that demonstrates retribution reaffirms social norms and at least suggests, although more research is needed, that failure to satisfy retributive anger promotes aggression toward others); accord Joseph E. Kennedy, Monstrous Offenders and the Search for Solidarity Through Modern Punishment, 51 HASTINGS L.J. 829, 835-45 (2000) (proposing retributive punishment promotes social solidarity); Solomon, supra note 32, at 131 (“[S]uppressing the thirst for revenge may well have devious manifestations that are much worse than its satisfaction”). The United States Supreme Court has expressed a similar sentiment:

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they “deserve,” then there are sown the seeds of anarchy—self-help, vigilante justice, and lynch law.

Gregg v. Georgia, 428 U.S. 153, 237-38 (1976); But see infra text accompanying notes 177-366 (cataloguing some of the arguments that the death penalty is in fact inconsistent with retributive theory).
Yet the distinction is both real and significant in one important way: revenge involves a personal quality, the relevant emotions arising in the victim or those close to him; retribution involves the emotional needs of society as a whole. The emotion of “resentment” describes what the victim feels, and “indignation” describes what society feels. Society as a whole can punish, of course, only through the institutions of the state. Individuals, however, can express their will through individual decision and action. The fear of the critics of vengeance is best understood as a concern that individuals are not as well-equipped as the state to determine and administer justified punishment. Notably, scholars fear that victims will become so consumed by resentment toward, even hatred for, the offender that the victims lose sight of proportionality or fair procedures. A different way of making an analogous point is that what we truly fear “is the exercise of vengeance by novices, or those with limited experience (or worse, experiences informed by Hollywood and television) and little knowledge of the consequences of taking revenge. The argument is not against vengeance but in favor of experience, the deep experiences of a legal tradition and the collective wisdom of society and history.”

These concerns suggest that vengeance, like retribution, must be domesticated by the law. Yet the law’s involvement does not necessarily change vengeance into something else. The personal nature of vengeance can be institutionalized. In such a system, the personal views and experience of suffering of the victim are heard and given great weight. The victim is also part of the process of punishment. The process thereby fosters a sense that the victim, using

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64. See Barton, supra note 53, at 52-69 (stating the only real distinction between “revenge” and “retribution” is that the former is more personal than the latter); cf. Calnan, supra note 45, at 111-18 (distinguishing between the more personal “private,” and the less personal, “public” retributive justice).
65. See Tashitz, Racist Personality, supra note 23, at 749-50.
66. See, e.g., Primoratz, supra note 53, at 71; Solomon, supra note 32, at 128.
67. Solomon, supra note 32, at 142
68. Id.
69. Cf. Minow, supra note 18, at 12 (“Retribution can be understood as vengeance curbed by the intervention of someone other than the victim and by principles of proportionality and individual rights”). Minow continues: “Finding some alternative to vengeance—such as government-managed prosecutions—is a matter, then, not only of moral and emotional significance. It is urgent for human survival.” Id. at 14.
the state as her agent, is herself inflicting the offender’s suffering.\footnote{See Barton, supra note 53, at 76-77.} That does not mean that the victim automatically prevails. The whole point of the state’s involvement is to determine whether vengeance is justified, and to do so by fair procedures. But addressing the victim’s need for vengeance would be a significant (albeit not the only) reason for inflicting punishment in such a regime.\footnote{See id. at 77, 82-83.}

Defenders of the Victims’ Rights Movement, which seeks to increase victim involvement in the criminal justice system, either implicitly or explicitly, adopt precisely this sort of reasoning.\footnote{See id. at 77, 82-83, 101-10, 117-21.} In part, they dismiss fears of victim moral blindness and unthinking anger as simply empirically incorrect.\footnote{See id. at 77, 82-83, 101-10, 117-213.} I will argue in the pages that follow, however, that these defenders have it exactly wrong. The civil justice system is usually the appropriate vehicle for the expression of victims’ needs for vengeance.\footnote{See id. at 125-27; infra Part 1B.} The civil system addresses moral wrongs to persons, not to society as a whole.\footnote{Professor Barton, a staunch defender of victims’ rights and the clearest proponent of a philosophical justification for the movement, agrees that significant “privatization” of retribution via the civil justice system makes conceptual sense. See Barton, supra note 53, at 111. But he argues that this is too radical and impractical a change in the criminal justice system in the short run. He misses the point, however, that the existing civil justice system already serves retributive purposes and is readily available to address speech-evoked injuries, or so I will argue infra Part 1B. Moreover, I favor retention of our separate system of public prosecution for criminal cases but would be hesitant about too readily turning to that system for problems that can better be addressed elsewhere. Finally, I do agree that victims need better treatment by the criminal justice system and that their voices need to be heard and considered. See Taslitz, Rape and Culture, supra note 26 (extended consideration of victims’ role in rape cases). But they are costs to doing so, costs sometimes not worth paying. See, e.g., Sarat, supra note 53, at 44-59 (arguing that the use of victim impact statements in death penalty cases results in the “return of revenge,” sentences determined more by private grief and anger than offender culpability or public injury). Victim voices in criminal cases should also be heard in ways that address the public injuries involved and do not detract from the public nature of the proceedings. Furthermore, in all but the most serious cases, private retributive needs are more likely to be met fairly and effectively in the civil justice system. See infra Part 1B.} Although no system of justice is
perfect. The criminal justice system, by contrast, addresses perceived injuries to society as a whole. It is, therefore, the criminal justice system that is more likely to be subject to widespread panic and fear. Panic and fear may lead to precisely the disproportionate "wild" sorts of punishments that traditionalists fear will stem from revenge. Furthermore, criminal penalties may simply be too extreme as a response to many sorts of retributive injuries or wrongly be used to attack what are perceived as primarily private moral injuries. I am not suggesting that retribution should play no role in the criminal law. For the most serious of offenses, the civil justice system's punishment will be too lenient. But criminal sanctions are justified by retribution relatively rarely, and, given the high stakes and risks of error, should be imposed with humility and regret.

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77. See infra text accompanying notes 170-77 (discussing moral panics and their ill effects in the criminal justice system).
78. See infra text accompanying notes 199-266.
79. See infra text accompanying notes 267-53.
80. See infra text accompanying notes 267-53.
81. See infra text accompanying notes 199-266; 304-333; Taslitz, Racist Personality, supra note 23 (arguing for retributive criminal prosecution of violent hate crimes); Taslitz, Two Concepts, supra note 23 (proposing the re-crafting of substantive rape law, guided by retributive principles).
82. See infra text accompanying notes 208-20. The civil justice system, of course, is also justified by the idea that individual harms and the rules governing them may have social consequences. See ALAN CALNAN, JUSTICE AND TORT LAW 85-98, 127-29, 168-69, 181-82, 195-96, 199-202 (1997) (discussing distributive justice in tort law) But only criminal prosecutions are meant to address public moral injuries. See id. at 111-16. Furthermore, criminal prosecution involves more than raising insurance costs, or discouraging certain activities, or other tangible injuries to large numbers of people. Only criminal prosecution involves perceived injuries to "the people," the citizenry organized at the relevant level as an organic, political whole.
83. See infra notes 196-198. See generally Jeffrie G. Murphy, Moral Epistemology, the Retributive Emotions, and the "Clumsy Moral Philosophy" of Jesus Christ, in THE PASSIONS OF THE LAW, supra note 32, at 149, 149-61. Jeffrie Murphy, long a staunch defender of retributivism, worries that if we are too righteous and self-confident about retributive punishment, we will make grave errors and do moral wrong ourselves. See id. at 160-61. But, he writes:

Does this mean that we should abandon institutions of punishment in some sentimental orgy of love and self-doubt? Of course not. What it does mean is that, in punishing, we should act with caution, regret, humility, and with a vivid realization that we are involved in a fallible and finite human institution—one that is necessary but regrettable. The danger arises we forget—as some of us who are retributivists sometimes, I fear, do forget—that nothing but iniquity and madness awaits us if we let
Because I want to emphasize the similar emotions involved in "vengeance" and "retribution" but the different persons or groups who experience those emotions, I will generally in the remainder of this paper reject that traditional terminology. Instead, I will use the terms personal retribution (for vengeance) and public retribution (for retribution). 84 I will return to traditional terminology only when discussing other authors who use those terms.

An important remaining background question needs to be answered first, however: If retribution is primarily about rejecting the offender's message of his victim's inferiority, why is punishment the way to do so? Why not instead issue a public proclamation that both victim and offender are of equal value? Philosopher Jean Hampton, the leading exponent of the communicative retributivism upon which I rely here, examined this question by discussing a heinous case in which a white farmer hung from a tree a black farmhand and his four sons in burlap bags. The farmer next sliced off the farmhand's penis and stuck it in his mouth, then burned all four victims to death. 85 Hampton, relying on the distinction between intended degradation (the desire actually to reduce another person's value) and diminishment (the message or appearance of reducing value), 86 had this to say about the incident:

Re-establishment of the acknowledgement of the victim's worth is normally not accomplished by the mere verbal or written assertion of the equality of worth of wrongdoer and victim. For a judge or jury merely to announce, after reviewing the facts of the farmer's murder of the farmhand and his sons, that they were his own, we think that, in punishing, we are involved in some cosmic drama of good and evil—that, like the Blues Brothers, we are on a mission from God.... Let me then close appropriately with a final word from Nietzsche: “Whoever fights with monsters should take care that he does not become a monster.”

Id at 161 (quoting FRIEDRICH NIETSCHE, BEYOND GOOD AND EVIL, Epigram 146, 89 (transl. Walter Kaufman 1989)).

84. See BARTON supra note 53, at 79-80 (distinguishing between "personal retributive punishment" and the more public "judicial retribution"); infra text accompanying notes 199-266 (similar distinction implied in the work of tort theorist Alan Calnan).


86. See id. at 1674.
equal in value is to accomplish virtually nothing. The farmer, by his actions, did not just "say" that these men are worthless relative to him, but also sought to make them into nothing by fashioning events that purported to establish their extreme degradation. Even if we believe that no such degradation actually took place, to be strung up, castrated, and killed is to suffer severe diminishment. This representation of degradation requires more than just a few idle remarks to deny.  

Hampton's argument is fundamentally a psychological one: that most members of society will not perceive a mere declaration of equality as an adequate and sincere rejection of the offender's message of his superiority to the victim. Instead, society must inflict on the offender an injury comparable to what he inflicted on his victim. "The score is even. Whatever mastery he can claim, she can also claim. If her victimization is taken as evidence of her inferiority relative to the wrongdoer, then his defeat at her hands negates the evidence." Accordingly, "the punishment is a second act of mastery that denies the lordship asserted in the first act of mastery."  

Importantly, Hampton is not saying that "mere words" never merit a retributive response. To the contrary, elsewhere she expressly makes the point that words, such as hate speech, can under certain conditions be used to degrade other persons and can cause damage sufficient to merit retributive punishment. The points suggested by her analysis of the farmer murderer example seem to be first, that an offense consisting only of words does not merit criminal punishment—a point with which I generally agree—but, second, that the mere uttering of comforting words by the state in response to an insulting offender action other than words is insufficient to negate the offender's message of victim subordination. Indeed, Hampton

87. Id. at 1686-87.
88. See Hampton, supra note 85, at 1685; See also JEFFRIE G. MURPHY AND JEAN HAMPTON, FORGIVENESS AND MERCY 128 (1988).
89. Hampton, supra note 85, at 1687.
90. See id at 1679-80.
91. Cf R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 107-09 2001 (2001) (arguing punishment may be necessary to show that the state "means what it says").
suggests that such a minimal response would be insulting, a grievous
violation of the principle that the punishment must be proportional to
the harm.\textsuperscript{92}

At the same time, Hampton recognizes that “punishment,” as
that term is commonly understood, is not the only possible retributive
response. An apology, followed by making amends, humbles us
before those whom we have disrespected, negating the message of
their inferior worth, at least where the injury is small and the apology
accepted.\textsuperscript{93}

Moreover, some innovative sex offender programs include a
requirement that the defendant participate in therapy sessions that
force him to experience some sense of the psychological pain that he
inflicted on his enemies—to teach him empathy.\textsuperscript{94} “By doing so, not
only does the state confirm the victim’s importance, but it also defeats
the rapist’s claim to mastery by putting him in a position where he
must, through his imagination, become her, and suffer as if he were
her.”\textsuperscript{95} This latter example, Hampton agrees, can be seen as
punishment, but it is not the standard sort that we usually associate
with the term.\textsuperscript{96} Nor does she say that “forced therapy” alone is
necessarily an adequate response to rape, though it may be a wise part
of a retributive reaction.\textsuperscript{97} Instead, she rightly maintains that
punishment must be proportional to injury (that is, to the degree of
diminishment). Where an injury is more than de minimis,\textsuperscript{98} or an
apology fails, punishment by the state is required.\textsuperscript{99}

\textsuperscript{92.} Id.
\textsuperscript{93.} See Hampton, supra, note 85, at 1697-98.
\textsuperscript{94.} See id. at 1685, 1690.
\textsuperscript{95.} See id. at 1690.
\textsuperscript{96.} Id. at 1687-99.
\textsuperscript{97.} See id. at 1690. Hampton does not fully explain the forced therapy example as I
have done here, but I believe my explanation captures what she was driving at, given the tenor
of her piece in its entirety.
\textsuperscript{98.} See id. at 1685, 1690, 694. Hampton goes on to say that not all retributive responses
need to be in the form of punishment. See id. at 1694-95. She even goes so far as to say that
“turning the other cheek” can sometimes be an adequate retributive response:
[St.] Paul argues that it [turning the other cheek] can be the equivalent of
“heaping burning coals on someone’s head”—hardly a “nice” thing to do.
How does a beneficent response toward an enemy accomplish this? The
pain Paul describes comes from the emotions of humiliation and shame,
which kindness can evoke in us when we are benefited by those whom we
have wronged. Such treatmentstartles us, prompts us to rethink how our
responses to our benefactor have been so much uglier than our victim’s
responses to our victim.
Having thus laid out why the law serves retributive needs in a way that education, exhortation, and apology in civil society often

behavior toward us, and (assuming we have a decent conscience) makes us ashamed of what we have done. Through that shame we are humbled. The person we have wronged has defeated us, and robbed us of our pretense of elevation over him. We are chastened, just as surely as if we had been punished.

*Id.* at 1694. Hampton eloquently reminds her readers of the scope of possible retributive responses, urging creativity in their design. *See id.* at 1690-91. Nor is she, on the other hand, overly soft-hearted, recognizing that “turning the other cheek” is not an appropriate response by the state where the offender’s conscience will be unmoved or the offense is a serious one. *See id.* at 1691 (“From a retributive point of view, punishments that are too lenient are as bad as (sometimes worse than) punishments that are too severe.”) Rather than quibble over what is a “punishment” and what not, I label all state-imposed retributive responses “punishments.”

99. *See id.* at 1690, 1697-98 (noting the availability of apology, combined with “making amends,” as a potential remedy, but also noting that, “The more awful the wrong, the larger the purported gulf between wrongdoer and victim, and thus the more substantial the punishment must be in order to defeat the wrongdoer and thereby deny his claim to superiority.”).

Because of Hampton’s emphasis on the good results of retributive punishment—the expression and receipt of a message of equality—at least one scholar has argued that her theory is not truly classified as “retributive,” such theories supposedly justifying punishment entirely as an end in itself and not because of any good it brings about. *See Barton, supra* note 53, at 89-90. I see no value in entering this debate. Hampton calls her own theory retributivist, and the term nicely distinguishes communicative retributivism from such justifications for punishment as deterrence and isolation, which stress prevention of future crime caused by current penalties or fear of their future imposition. *See, e.g., Primoratz, supra* note 53, at 62-81. Communicative retributivism instead focuses on correcting past messages of subordination with current and future messages of equal human dignity. In any event, Hampton’s account of “retributivism” is the basis for the sense in which I use the term.

Moreover, I do not see Hampton’s theory and Professor Barton’s as inconsistent. Barton posits that humans are by nature social beings who most flourish and achieve their full humanity in a moral community. *See Barton, supra* note 53, at 93. He defines a moral community as a community of morally responsible individuals who hold each other accountable for wrongs to fellow members and to the common good. *See id.* Such accountability consists of liability for blame and punishment for such wrongs apart from whether the punishment achieves other instrumental goals. *See id.* Individual flourishing and achieving full humanity are goods worth achieving; therefore just retributive punishment should be pursued unless countervailing instrumental considerations require otherwise. *See id.*

I am not convinced that Barton’s theory is any less consequential and more truly “retributive” than Hampton’s, despite his efforts to demonstrate this distinction. *See id.* at 94-97. More importantly, however, I agree that just retributive punishment plays a role in building the social bonds that define a community. *See infra* text accompanying notes 231-32. But I also believe that the messages of equal human dignity sent by such punishment are both independently important, a point Barton seems to concede, see Barton, supra note 53, at 89-90, and part of the mechanisms by which shared membership in a moral community promoting human flourishing is achieved. *See generally Kenneth Karst, Belonging to America (1993).*
cannot, I now turn to a preliminary examination (to be fleshed out further later) of why group-subordinating speech in particular justifiably elicits retributive desires in its victims.

2. The Retributive Needs Stemming From Harmful Speech

Group-subordinating speech often creates an especially powerful retributive need. When a person is demeaned because of his membership in a group, he is denied individualized justice; his demand to be "treated as unique, a 'universe of one.'" Individualized justice rejects classifying others as a stereotype, a mere member of a category, because stereotyping another rejects the belief that each human life is of infinite, irreplaceable value. The need for individualized justice has deep psychological roots and is felt by everyone in our culture. Philosopher William James put it this way:

[A]ny object that is infinitely important to us and awakens our devotion feels to us also as if it must be sui generis and unique. Probably a crab would be filled with a sense of personal outrage if it could hear us class it without ado or apology as a crustacean and thus dispose of it. "I am not such thing," it would say, "I am MYSELF, MYSELF alone."

But human uniqueness is partly a function of the intersection among the groups with whom we identify. Our gender, religion, political party affiliation, among other group connections, define, in part, our sense of who we uniquely are. Stereotyping a person based on group membership thus demeans a core part of his identity.

101. See Taslitz, Racist Personality, supra note 23, at 746-47.
104. See Taslitz, Racist Personality, supra note 23, at 752.
105. See TASLITZ, RAPE AND CULTURE, supra note 26, at 134-45.
Correspondingly, both the individual and other members of his group see the injuries as group injuries as well. The individual and his group recognize that their fates are linked.\textsuperscript{106} Thus, speech that belittles a group as a whole and not any specific member is nevertheless perceived by many members as personal attacks on them.\textsuperscript{107} This sort of insult strikes so deeply at the core of individual and group identity that it often evokes retributive anger.\textsuperscript{108} Often, by society’s imposing suffering on the wrongdoer, his sins can be expiated and the message of his evil cause rejected.\textsuperscript{109}

Note that the extent to which this retributive need must be met by the legal system rather than by apology is contextual. In some group-subordinating speech contexts, such as face-to-face insults and threats of harassment by a superior in the workplace, fear and self-interest may make it unlikely that a victim will step forward to complain without the security of legal protection.\textsuperscript{110} In other instances, ignorance, ill will, or indifference make apologies unlikely or ineffective.\textsuperscript{111} In such instances, only the law, and not civil society, can meet retributive needs.

A further comment is necessary on the role of motive in this retributive process. It is true that retributive needs are most deeply felt when we perceive another’s actions to have been done with the desire to hurt our group, or us, rather than because of inadvertence or indifference.\textsuperscript{112} That observation is also, of course, true of group-

\textsuperscript{106} See Taslitz, Racist Personality, supra note 23, 758-65. See also Richard Delgado & Jean Stefancic, Must We Defend Nazis? 4-11 (1997) (noting the harms of racial insults); The Price We Pay (Richard Delgado & Jean Stefancic eds., 1996) (discussing harms of group-subordinating speech more generally); Matsuda, supra note 50, at 24-26 (exploring harms to individuals from racist hate messages directed against the groups to which the individuals belong).

\textsuperscript{107} See Taslitz, Racist Personality, supra note 23, at 746-65.

\textsuperscript{108} See id. at 746-65. Remember that suffering need not, however, be in the form of criminal punishment. See infra text accompanying notes 220-66. On the communicative nature of punishment and character morality, see Taslitz, Two Concepts, supra note 23, at 3, 45-64.

\textsuperscript{109} See infra text accompanying notes 285-303.

\textsuperscript{110} See Abel, supra note 1, at 217-18. (noting the importance of providing the security to enable victims to come forward); infra text accompanying notes 394-412 (using sexual harassment as an example).

\textsuperscript{111} See Abel, supra note 1, at 254-74.

\textsuperscript{112} See, e.g., Taslitz, Myself Alone, supra note 100, at 14-16 (asserting intentional wrongs are seen as more culpable than accidental ones); Vidmar, supra note 49, at 43, 57
subordinating speech. Professor Abel argues that difficulty in determining the motives behind such speech is one of the reasons that the law is ill-equipped to aid in resolving these disputes.\textsuperscript{113} Yet in the criminal justice system, “motive” is proven every day.\textsuperscript{114} The fear that motive is hard to prove and may be interpreted differently by different parties misconceives the nature of mental state requirements in the law. Mental states are for all practical purposes linguistic concepts.\textsuperscript{115} In thinking and feeling, we partly talk to ourselves.\textsuperscript{116} But we may not fully understand our feelings or we may engage in self-deception.\textsuperscript{117} Every feeling and thought must thus be interpreted. If, for example, I experience a quickened heart, a racing pulse, and a sweating brow, did I feel fear, anxiety, or eager anticipation? We “know” it as one emotion or another when we name it, and that naming involves value judgments and our own knowledge of our history and behavior.\textsuperscript{118} Because we can engage in self-delusion or lack information necessary to fairly naming our thoughts and feelings, others are necessarily involved in this naming process as well.\textsuperscript{119} When the law labels a motive as an inappropriate one, therefore, the community expresses its norms and values through an act of interpretation. “Motive” in the law is thus not something “out there” to be found, but something to be created by the community in dialogue with the speaker.\textsuperscript{120}

\begin{itemize}
\item \textsuperscript{113} See Abel, supra note 1, at 303-04.
\item \textsuperscript{114} See Taslitz, Racist Personality, supra note 23, at 753-58.
\item \textsuperscript{115} Space constraints make my summary here of the argument that mental states are linguistic concepts a truncated one. Readers familiar with the philosophy of mind will have objections. For a fuller statement of my position on these questions, see generally Andrew E. Taslitz, A Feminist Approach to Social Scientific Evidence: Foundations, 5 Mich. J. Gender & L. 1 (1998) [hereinafter Feminist Approach].
\item \textsuperscript{116} See id. at 12-27.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} See id. at 20-24.
\item \textsuperscript{119} See id. at 21-25.
\item \textsuperscript{120} See id. at 25-26. (explaining the jury’s role as a party to this dialogue); Andrew E. Taslitz, Abuse Excuses and the Logic and Politics of Expert Relevance, 49 Hastings L. J. 1039, 1050-56 (1998) (stating how the jury must engage in “dialogic thinking” to understand another’s mental state).
\end{itemize}
The trial thus serves, in part, as a public evaluation, a moral performance of public values in the process of labeling mental state.\(^{121}\) A trial, by engaging in this public performance, can reaffirm values of inclusion and equality when a group or group member claims injury from subordinating speech.\(^{122}\) That may sometimes be true even when plaintiffs lose, both because a fair process giving all participants an effective voice itself expresses respect for those participants\(^{123}\) and because plaintiffs’ loss may be based on the conclusion that no insult was intended or fairly perceived—an implicit acknowledgment that the plaintiff is worthy of compensation where harm is intended.

Importantly, I am not arguing for show trials to achieve some pre-determined result. I do believe that there are historical facts that are true or false in our everyday understanding of these terms.\(^{124}\) For example, did Johnny hit George, or was Waldo the assailant? That question has an “objectively” true or false answer. Furthermore, a defendant’s mental state must be inferred from historically true facts.\(^{125}\) Thus, if Johnny was indeed the assailant, did Johnny first scream, “I won’t let you touch me, George!,” suggesting that Johnny believed that he acted in self-defense, or did Johnny instead scream, “You’re going to die for sleeping with my wife!,” suggesting that Johnny instead understood that he was the initial assailant, acting in a jealous rage.

In many real trials, even once a jury knows the historical truth of what was said and done, the parties’ actions and words are far more

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\(^{121}\) See Taslitz, supra note 115, at 34-46. On trials as moral performances more generally, see Robert Burns, A Theory of the Trial (1999); Sam Schrag, The Trial Lawyer’s Art (1999); Steven Lubet, Nothing But the Truth (2000).

\(^{122}\) See Taslitz, Rape and Culture, supra note 26, at 103-13, 134-48 (1999) (explaining how trial processes can promote or hamper group inclusion and respect); Andrew E. Taslitz, What Feminism Has To Offer Evidence Law, 28 S. W. L. Rev. 171, 179-187 (1999) (investigating how evidence law and trial practices help to constitute wider social relationships and perceptions of reality) [hereinafter What Feminism Has To Offer].

\(^{123}\) See Taslitz, Rape and Culture, supra note 26 (noting the value of an effective voice for women in rape trials); Andrew E. Taslitz, Respect and Justice: The Fourth Amendment From the Bottom Up (draft manuscript) (summarizing social science data on how legal procedures affect group perceptions of respect).

\(^{124}\) See generally Taslitz, supra note 115, at 28-33.

\(^{125}\) See id. at 28-46.
ambiguous than in the Johnny-George example. Giving such actions and words meaning therefore requires an act of interpretation, involving, in part, the infusion of the jurors' values. When Desiree Washington agreed to come to boxer Mike Tyson's room at 1:00 a.m., did she do so with the expectation of having consensual sexual intercourse, or was she instead an innocent, enticed there by Tyson, and subsequently raped? If Washington and Tyson tell different stories, jurors' values may affect whom they believe. But, even if the stories as to the historical facts were the same, whether the events constituted "consent" is not a simple true or false question. Values inevitably affect how the jury characterizes the events that it concludes occurred. Indeed, say many commentators, it is a virtue of our democracy that we thereby involve the people, through the institution of the jury, in making and applying law. If the jury believed that Washington was an innocent taken advantage of by a self-centered Tyson focused on his own pleasure and indifferent to Washington's needs, yet found that Washington nevertheless "consented," that sends an important message about the relative status of men and women: men can, within certain broad limits, use women entirely as means to serve male desires; women who object to that judgment thus better have the wisdom to stay out of the way or the physical and emotional strength to fight off their attackers. The rules of evidence must thus continue to respect historical truth, but it is important to recognize that trials simultaneously send messages about social norms and about the

126. See generally TASLITZ, RAPE AND CULTURE, supra note 26, at 44-57, 81-99 (illustrating ambiguities over whether the alleged victim in several infamous rape trials "consented").
128. See TASLITZ, RAPE AND CULTURE, supra note 26, at 49-53 (discussing the Mike Tyson rape trial).
129. See id at 67-80 (summarizing mechanisms by which values embodied in linguistic practices affect rape victim credibility).
130. See Andrew E. Taslitz, Patriarchal Stories I: Cultural Rape Narratives in the Courtroom, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 419-24 (1996) (discussing how values affect the meaning that jurors give to historical "facts" in gauging consent in a rape trial).
132. See Taslitz, Two Concepts, supra note 23, at 52-64 (arguing social messages sent by rape trial verdicts validate male indifference to female sexual autonomy).
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relative status of both individuals and salient social groups. Group-
subordinating speech liability trials are especially likely to involve this
expressive function because the victim’s specific claim is usually that
the offender sought to diminish the victim and his salient social
group.\textsuperscript{133}

Ill motive, however, is not always necessary to stirring
retributive impulses. Indifference to another’s grave suffering is often
perceived as a species of evil, and the speaker as therefore of an evil
character.\textsuperscript{134} Merely creating a risk of harm to another where the harm
is great, and the indifference to its eventuation evident, can breed
retributive anger.\textsuperscript{135} The sexual harassment regulations under Title
VII, which permit liability for severe, repeated, and pervasive
conduct,\textsuperscript{136} even absent proof of ill will, can partly be seen as
assuaging precisely this sort of retributive anger.\textsuperscript{137}

Retribution is not always called for, and, when it is, it must be
measured and proportionate.\textsuperscript{138} But sometimes it is the only way to
restore fully individual and group status by public denunciation of

\textsuperscript{133} See Taslitz, Rape and Culture, supra note 26, at 109-13 (messages rape trials
send about groups’ social status); Taslitz, supra note 115, at 28-46 (illustrating respective
roles of historical versus values-infused truth at trials); Taslitz, Racist Personality supra
note 23 (arguing that hate crimes cases involve especially clear and powerful messages concerning
group-subordination); see also Schrager, supra note 121, at 1-16 (characterizing the social
communicative function as an attribute of trials generally, not simply rape trials); Andrew E.
Taslitz, What Feminism Has to Offer, supra note 122, 179-87, 199 (1999) (noting evidence
law’s “constitutive” function in contributing to messages helping to create the kind of a
society that is the American community).

Those interested in more detailed treatments of when group and individualized
justice are in harmony and when in tension should see David Ingram, Group Rights:
Reconciling Equality and Difference (2000); Ronald J. Fiscuss, The Constitutional
Logic Of Affirmative Action (1992). It is useful to note here that suits vindicating harms
done to individuals by group-subordinating speech necessarily champion the part of the
victim’s unique nature that is constituted by his connection to his racial, ethnic, religious,
gendered, or other salient group. Cf. Taslitz, Racist Personally, supra note 23, at 758-65
(making similar point in the context of hate crimes). There should, therefore, be no tension
between group and individualized justice. See generally, Delgado & Stefancic, supra note
106 (defending role of group justice in tort suits based on group-subordinating speech).

\textsuperscript{134} See Taslitz, Two Concepts, supra note 23, at 62-65.

\textsuperscript{135} See Taslitz, Racist Personality, supra note 23, at 762-65.

\textsuperscript{136} See Taslitz, Still Officers of the Court, supra note 26, at 830-33.

\textsuperscript{137} See Taslitz, Racist Personality, supra note 23, at 780-85; see infra text
accompanying notes 244-66 (discussing why sexual harassment law meets retributive needs).

\textsuperscript{138} See infra text accompanying notes 163-77.
status-demeaning messages. Moreover, the catharsis that retribution achieves, the increased sense of self-respect it calls forth, and the equalizing it encourages between the status of offender and victim may create the opportunity for meaningful dialogue in civil society that would not otherwise be available.

3. Limits on Retributive Punishment in Criminal Cases

Retributive punishment is limited by a variety of considerations. In this section, I briefly outline some of the more important general constraints. Although these constraints apply to all state-imposed retributive punishment, my emphasis here is on the criminal justice system, in which the idea of retribution is most often embraced. Starting with the criminal system enables us to see its weaknesses, as well as its strengths, as a mechanism for imposing punishment. The next section (Section IB) then elaborates on the general constraints by exploring when the civil justice system might be a better vehicle than the criminal system for meeting retributive needs.

(a) Retributive Anger Must Be Condoned Only Where It Is Consistent with Political Morality

The state may not impose punishment on a purported offender simply because his alleged victims feel retributive anger. That anger must be justified by resorting to fundamental political values. The American constitutional republic accords high value in theory, if not always in practice, to values of equality and human dignity.

139. See Vidmar, supra note 49, at 35-47 (arguing retribution diffuses psychological tension, and restores group cohesion and the victimized party’s status); Taslitz, Racist Personality, supra note 23, at 746-65 (retribution and equality); infra text accompanying notes 220-43.

140. See infra text accompany notes 412-34.

141. See, e.g., Taslitz, Racist Personality, supra note 23, at 765-77 (explaining why hate crimes legislation’s retributive goals are consistent with American political morality); accord Murphy & Hampton, supra note 88, at 48-49 (describing why the law cannot countenance retributive anger felt by whites compelled to have contact with blacks in public places).

142. See Taslitz, Racist Personality supra note 23, at 765-77; see generally George Fletcher, Our Secret Constitution: How Lincoln Redefined American Democracy (2001), (arguing that the “secret” commitment of the post-Civil War Constitution to certain notions of equality and nationhood is now being told); Kenneth Karst, Belonging to America: Equal Citizenship and the Constitution (1989) (noting America’s growing historical commitment to equal belonging in a common political community); J.R. Pole, The
particular, the Republic purports to reject subordination of persons or groups based on race, ethnicity, gender, and political or religious belief. Whether subordination may be permitted based on sexual orientation is (sadly) a question with which our political culture continues to struggle. Nevertheless, equality and dignity-related values implicating the sorts of group-based harms that our constitutional culture accepts should limit what retributive anger the law validates. Correspondingly, social reformers can work to expand the circle of groups protected, as the gay rights movement is now doing, further imposing limits on what our legal system acknowledges as legitimate retributive outrage.

For example, "A white person who is forced to sit next to a black person on a bus might believe this demeans her by making it appear that they are of equal rank and value and should thus be accorded equal treatment." Yet it would violate fundamental equality principles for the law to punish the black passengers for "insulting" the white racist. Indeed, to do otherwise marks blacks as inferior, whites as superior. Sending that message is precisely what Jim Crow racial segregation laws and their enforcement did. Since the Court's decision in Brown v. Board of Education, white superiority is a message our legal culture rejects. On the other hand,

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143. See sources cited supra note 142.


145. See sources cited supra note 144.

146. Murphy & Hampton, supra note 88, at 49.

147. See id; Karst, supra note 142, at 15-27.

148. See Karst, supra note 142, at 15-27.

149. 347 U.S. 483 (1954) (holding segregation by race in public schools is unconstitutional).

150. See Charles Lawrence, Regulating Racist Speech on Campus, in Words That Wound, supra note 50, at 53, 59-76.
these same equality concerns weigh in favor of the law’s validating the retributive anger of an African-American victim of racist hate speech or of a female employee victimized by the sexually demeaning remarks of co-workers.\(^{151}\)

Harder cases arise where the injured parties both feel retributive anger toward each other. Consider this hypothetical: An African-American driving in a largely black neighborhood hits and kills an Orthodox Jewish child, then leaves the scene.\(^ {152}\) Enraged members of the adjacent Orthodox Jewish community assault a local African-American pedestrian in retaliation. Each group angrily maintains that the other group has demeaned it. Whose anger, if anyone’s, should the state redress?

The answer depends on additional facts. Suppose that the African-American driver was aware that he had hit an Orthodox Jewish child, albeit accidentally, but did not care enough to stop and offer aid because Orthodox Jews were not worth the trouble. The victim, his family, and the entire Orthodox community would have been treated as of less than equal worth with the driver. The driver, however, was instead not aware that he had hit anyone at all, then he cannot be seen as intentionally expressing superiority over his victim. Nevertheless, if he was driving so carelessly as to show indifference toward the fate of any pedestrian—whether Jewish or not—his ignorance may not excuse him from some retributive punishment. The driver has still expressed a belief that

\(^{151}\) See Taslitz, Racist Personality, supra note 23, at 755-62 (arguing retributive anger stems from the messages in hate crimes); infra text accompanying notes 244-63, 354-60 (discussing retributive anger from “pure” hate speech and hostile environment sexual harassment).

\(^{152}\) ELI B. SILVERMAN, NYPD BATTLES CRIME 76-81 (1999). This example is a variation on the Crown Heights case in New York City, which has received extensive news coverage. There, an Orthodox Jewish motorist hit a young African-American child. I have reversed the facts in my hypothetical in the hope that it will help each side to see the other’s perspective in this emotionally-charged case, as well as altering other facts to better serve the purposes of illustration I seek to achieve here.

\(^{153}\) See Taslitz, Racist Personality, supra note 23, 746-65 (noting group and individual injuries from intentional, violent hate crimes); Taslitz, Two Concepts, supra note 23, at 52-55 (listing circumstances under which indifference to another’s suffering merits criminal punishment).
taking care to protect others from injury while he goes about achieving his daily goals is not worth his time. But his punishment should be lighter than in the first two instances because his message is both less intense and less harmful.

Correspondingly, if the African-American whom the Orthodox Jews attacked was not simply chosen at random, but was instead the Jewish victim’s actual killer, and if that killer had intended specifically to kill a Jewish victim, then the intensity of the Jewish community’s retributive desires was appropriate. Their acting on those desires was unacceptable, however. For the reasons noted earlier in this article, victims of crime cannot themselves be trusted to mete out fair punishment. That task is for the state to perform, both on the victim’s behalf and on behalf of the wider political community. The Jewish assailants, furthermore, by ignoring the broader political community’s need for order, themselves merit punishment for taking matters into their own hands. Still worse, if the Orthodox group attacked a random African-American—and not the actual killer of the Orthodox child—retributive anger toward the randomly chosen pedestrian is not justified. That anger simply demeans the entire African-American community. Punishing both the black driver and the white Orthodox Jewish assailants for diminishing the equal human value of their respective victims might therefore be appropriate.

But there is at least one more possibility. The driver may have acted perfectly reasonably, hitting a darting child who was too small for the driver to see, despite the driver’s exercise of extreme care. Similarly, the Orthodox Jewish group may not even have been the

154. See Taslitz, Two Concepts, supra note 23, at 52-55 (examining the role of indifference in criminal law).
155. See Taslitz, Myself Alone, supra note 100, at 15 (arguing negligently and recklessly inflicting harms do not merit the “full” moral responsibility required by intentions); See generally Taslitz, Racist Personality, supra note 23 (stating why messages of group-subordination based on race, gender, ethnic, and other stereotypes do more harm than similar crimes that lack group-based animus or indifference).
156. See supra text accompanying notes 64-71. The wider political community must express indignation at the driver’s insult to the Jewish victim’s equal value. See Taslitz, Racist Personality, supra note 23, at 749-53.
157. See generally Andrew E. Taslitz, Mobs and Vigilante Justice, in THE OXFORD COMPANION TO AMERICAN LAW (forthcoming 2002) (explaining how vigilantism, if ever justified at all, was historically justified as necessary when formal legal mechanisms broke down, a possibility assumed away by my hypothetical).
ones responsible for the attack on the local African-American pedestrian. Rather, the local African-American community may have assumed that the Orthodox Jews had to have committed this new assault, both because the Jews had a retaliatory motive and because of stereotypes about Jews being vindictive and deceptive. In that case, each group’s anger stems from ignorance of the true circumstances or from prejudiced beliefs about the intentions and behavior of the other group. Consequently, neither the driver nor the wrongly accused Orthodox Jews merit punishment.

Similar examples can easily be imagined in the case of hate speech. Much of Professor Abel’s article indeed draws on a wide range of real life harmful speech disputes among minority groups. Professor Abel particularly worries that misunderstandings about mutual intentions make the law a blunt instrument. Certain he is right that efforts at understanding and mutual apology should be made. But where they fail to achieve resolution, the law must step in.

When the law does act, similar values analyses can be undertaken even where racial, gender, or related animus or indifference is not even arguably involved. Thus, as I noted above, any hit-and-run where the driver is aware of what he has done rightly merits retributive punishment on that score alone.

On the other hand, if you perceive that your neighbor bought a purple car specifically because he knows you despise purple, your desire to get even is not one calling for legal intervention, even if your perception is correct. You might retaliate by buying a car that is a color that you know your offending neighbor despises too. But the law will stay out of a dispute too silly for it to dignify. More precisely, the insult involved is de minimis because it does not interfere with any values that the state as a political entity deems worthy of protection.

There is an important symmetry here. The law makes judgments every day about what emotions it sanctions that spurred an alleged offender to do wrong. A killer who acts in the “heat of passion” is punished less severely if he was “reasonably provoked” into such passion by his victim. Yet, the law traditionally

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158. See Abel, supra note 1, at 303-04.
160. Id. at 9-12; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 527-36 (3d ed. 2001).
recognizes only certain sorts of triggers for offender passion as "reasonable." Passion never justifies killing, but some passion merits our compassion, some not. Similarly, the retributive passion of victims and not only offenders must be assessed as more or less morally appropriate or not.

(b) Retributive Punishment Must be Proportionate

Retributive punishment must be proportionate. This requirement is sometimes phrased as exchanging "like-for-like," a measure of punishment equal in value to the suffering that the offender imposed on his victim. The like-for-like formula sounds intuitively right and captures an important core of the idea of proportionality. But, if like-for-like means equivalent suffering only, then the aphorism does not fully express how society determines what is a measured and reasonable, that is, a proportionate, response to wrongdoing because the same acts and harms in practice routinely result in different punishments based upon the offender's often unexpressed mental state.

That is in part why the hit-and-run driver example above could be resolved only by first determining the intentions of the varying parties. There were several inter-related questions involved there: (1) What meaning could fairly be ascribed to the driver's or the Orthodox Jews' actions simpliciter?; (2) Does that meaning justify retributive anger, and, if so, to what degree?; and (3) Does our knowledge of the driver's or the Orthodox Jews' intentions alter the answer to either of the first two questions? What is important about this last question is that a "yes" answer assumes that punishment can be mitigated or even foregone for one offender who causes the same victim suffering as

161. See DRESSLER, supra note 160, at 527-36.
163. See BARTON, supra note 53, at 44, 60-62.
164. Professor Solomon uses the "like-for-like" phrase, finding it a less misleading way to identify the proportionality concept than the even-more-frequently-used aphorism, "evil-for-evil." My specific explanation of the phrase tailors it to Professor Hampton's version of communicative retributivism. See Hampton, supra note 85, at 1689-92.
165. See Hampton, supra note 85, at 1690 (rejecting the "lex talionis" of an "eye for an eye" prescription if it means that punishment must inflict the same sort of harm as was done by the offender); Taslitz, Myself Alone, supra note 100, at 14-16 (noting punishment varies with mental state culpability even where otherwise the same harms are inflicted).
another offender but with a less depraved mental state. Individual resentment and social indignation in fact do decline as we move from purposeful, to knowing, to reckless, to merely negligent conduct. Our society indeed answers, “yes” to question number three.

But there is an important consequence stemming from the very process of determining the offender’s mental state. Fairly judging mental state requires the fact finder to know a good deal about the offender’s situation and character. Whether a wife shot her husband to prevent him from attacking her or whether she did so from greedy impatience to inherit his fortune can be determined only by studying the detailed history of their relationship, the wife’s strengths or weaknesses of personality, and the economic and social prospects she faces with, versus without, her husband alive. Yet the very process of receiving this information can further soften retributive anger:

The more intimately we know others, the more familiar we are with their motivation, circumstances, the information they have, and the constraints under which they operate, the less likely it is that we would be willing to allow their evil actions to reflect on their characters. Intimate understanding of human conduct tends to reveal complexities disguised from superficial acquaintances. These complexities, then, function as excuses, preventing us from judging the agents of evil actions as harshly as would be entailed by calling them, and not only their actions, evil.

166. See Taslitz, Myself Alone, supra note 100, at 14-16, 21. Strictly speaking, the suffering in each of the two cases is not necessarily the same. If the victim and society believe after trial that the offender’s mental state was less culpable than originally assumed (e.g., negligent rather than purposeful), the message of diminishment may be perceived as less intense. In this sense, less harm is done where mental state is less depraved.
167. See id. at 21.
168. See id. at 14-20.
169. See id. at 91-102 (arguing the value of history and context in gauging offender mental state); Taslitz, Feminist Approach, supra note 115, at 57-68 (recounting “lessons learned” from the battered woman syndrome about the importance of temporally extended contextual evidence in mental state determination).
This “soft reaction to evil”\textsuperscript{171} does not mean that fact finders do not, or that the law should not, assess character as a basis for gauging punishment. Indeed, our ready willingness to assume evil character in persons who by their actions send subordinating messages has much to do with the strength of our retributive responses.\textsuperscript{172} Fuller knowledge of a person’s circumstances allows us to see him as less than wholly, irredeemably evil. We appreciate the complexity of his nature, the combination of good and evil traits of varying intensity that constitute most humans’ nature. We thus can reject the evil in him without rejecting him entirely from the family of man.\textsuperscript{173} Whether a fact finder learns these details importantly turns on the law of evidence. Evidentiary law, improperly conceived or applied, can thus undercut an important constraint on retribution.\textsuperscript{174}

A second factor in proportionality analysis is the intensity of the demeaning message sent by an offender’s crime. That message intensity varies in part with the degree of harm inflicted or risked.\textsuperscript{175} This concept returns us to the “like-for-like” formulation and can be a powerful limiting principle. As one commentator queried, “But in what way is a brief prison term ‘fit’ punishment for any crime? In what way is unemployment or a ruined reputation ‘like for like,’ except in exceptional cases?”\textsuperscript{176} Even in the “exceptional” cases, a careful attention to the harms inflicted by and on an offender can limit punishment. The well-respected existentialist philosopher, Albert Camus, made this point concerning the death penalty:

For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of

\textsuperscript{171} Id.
\textsuperscript{172} See Taslitz, Two Concepts, supra note 23, at 48-52 (defending a character-based moral retributivism, relying in part on the work of philosopher John Kekes); Taslitz, Racist Personality, supra note 23, at 743-45, 753-58 (similar point in hate crimes prosecutions).
\textsuperscript{173} See Taslitz, Feminist Approach, supra note 115, at 334-46 (contextual testimony can produce a more appropriate degree of juror empathy); Taslitz, Myself Alone, supra note 10, at 14-30 (contextualized testimony improves the accuracy of culpability degree determinations); Taslitz, Racist Personality, supra note 23, at 780-85 (importance of respecting all persons as within the “family of man.”).
\textsuperscript{174} See sources cited supra note 173.
\textsuperscript{175} See Hampton, supra note 85, at 1690-92.
\textsuperscript{176} Solomon, supra note 32, at 138.
the date at which he would inflict a horrible death on him and who, from that moment onward, had confirmed him at his mercy for months. Such a monster is not encountered in private life.\textsuperscript{177}

\begin{quote}
\textit{(c) Punishment Must Respect the Offender's Equal Worth As A Person}

The like-for-like principle is itself limited by the idea of equal human dignity that is at the heart of the theory of communicative retributive justice. This idea requires that the state be barred from imposing a punishment on the offender that is so extreme that it disregards his fundamental equal worth as a human being.\textsuperscript{178} This vague and imprecise formulation nevertheless seems to underlie some judgments that are no longer controversial in American society:

[T]here are ... occasions when the wrongdoer's deed has been so violative of the victim's dignity that doing the same to him would strike us as morally indecent or repulsive. For example, if he tortured or removed body parts of his victim, or threw acid on his victim's face, then doing the same to him would certainly "defeat" him, but in a way that also denied his worth as a human being. The ... value of both offender and victim [must] be recognized in a retributive response; to do otherwise is to use punishment in a hateful attempt to degrade the wrongdoer and represent him as worth less than other human beings.\textsuperscript{179}

There are instances where the moral consensus concerning other punishments is more ambiguous. The debate over the death penalty, for example, can in part be seen as a debate about whether

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\item[178] See Hampton, \textit{supra} note 85, at 1691-93.
\item[179] \textit{Id.} at 1692, Hampton continues:
While he may be morally worse than others, the Kantian theory of value insists that he is still an end-in-himself, and thus still someone whose value requires respect. \textit{Id.}
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entirely snuffing out a person’s life disrespects his minimal fundamental value held simply by nature of his humanity.\footnote{See id. at 1692. Hampton notes the debate, but is reluctant to say that the death penalty is in fact inappropriate.}

But there is another and perhaps unexpected corollary of understanding the importance of vindicating the worth of both the offender and his victim. Consider a poor inner-city teen living in an ugly, dangerous, and impoverished neighborhood. He is already on society’s lowest rungs. Indeed, if he is black, he is already at least subconsciously perceived by many whites as in some sense subhuman, a dangerous “pollutant” to be exiled to other neighborhoods than theirs or to prison. “To permit children to grow up in situations where they are often in danger, where they do not get enough to eat, where they are unable to get adequate health care, and where their schools are ineffective or worse, is to permit severe value-diminishment.”\footnote{Id. at 1699.} Such a teen would be entitled to experience retributive anger at a society that contributed to his condition. But recognition of his own worth might require society also to repair the harm it has done to him.\footnote{See id. (using similar example).} Such repair might justify mitigating his punishment and giving him an opportunity for a quality education or a chance to learn job skills.\footnote{See id.} If this is right, a sensible scheme of retributive punishment might also demand mercy and rehabilitation.\footnote{“Mercy” means foregoing the full extent of punishment that law and morality permit. \textit{See} BARTON, supra note 53, at 97-100.}

The example also illustrates the connection between retributive and distributive justice. A society committed to retributive justice may be required to aspire toward greater equality in how it distributes goods and services to free it from the taint of demeaning its own citizens.\footnote{See Hampton, supra note 85, at 1699-1700.}

\textit{(d) Fair Procedures}

Retributive punishment assumes that we have identified the correct person as the wrongdoer; that we have accurately determined the historical facts; and that we have fully informed the fact finder of
all it needs to know to make the combined factual/moral judgment of with what mental state the offender acted. Procedures likely to foster accuracy are therefore required. But procedures themselves send important messages about the values society assigns to trial participants, as empirical work on procedural justice has demonstrated. Procedures aspiring toward historical accuracy, unbiased decision-making, and a full and fair opportunity for the defendant's story to be heard are essential aspects of a just retributive morality.

(e) Retribution Must Not Unduly Interfere With Other Social Goals

Retributive needs must always be balanced against other social goals, including other goals of punishment. Incarceration alone might be inadequate to rehabilitate an offender or to deter him from future crime. Indeed, there is reason to believe that incarceration often further educates inmates in the ways of criminality. A sentence adequate to deter other potential future offenders may need to be longer or shorter than what retribution requires. A new approach, "restorative justice," seeks to repair the harm crime does to the offender, the victim, and their local communities. Restorative justice is not inconsistent with retribution. Indeed, retributive

186. See Barton, supra note 53, at 49 (arguing just retributive punishment "must not be imposed on the wrong person, an innocent person who is not appropriately responsible for the offense in question" and "should not be imposed without due process, without giving the accused a fair chance to argue and defend their case"); Taslitz, Myself Alone, supra note 100, at 14-30 (noting the importance of fully informing the fact finder).


188. See id.

189. See Hampton, supra note 85, at 1700-02.


191. See Bazemore, supra note 190, at 47-58.

192. See id. at 76 (making similar point but arguing that retributive goals must take a back seat to other restorative ones); Barton, supra note 53, at 136-38 (arguing restorative and retributive justice are entirely consistent and do not necessarily require prioritizing one goal over the other).
punishment may be necessary for the community to heal and to permit it to re-integrate the offender. The older Athenian idea of retribution viewed as a disease of the community, in which retributive anger signals disordered community relationships, clarifies this point.\textsuperscript{193} Because retribution is not about what the individual "deserves" but what the entire community needs to heal, the focus in choosing a remedy is broader than in modern conceptions of retributivism.\textsuperscript{194} Each individual act of drug use might, in society's view, for example, merit some degree of incarceration. Yet, if the result of the drug war is to imprison a huge proportion of African-American males, to deny them the vote and employment even after they have paid their debt to society, and to contribute to family breakup and community disintegration, "healing" may require a different approach.\textsuperscript{195}

(f) Humility

Finally, if retribution requires character assessment, as communicative retributivism assumes, we face cognitive obstacles to making such assessments. It is hard to know what is in another's mind, much less whether they acted from a "hardened, abandoned and malignant heart."\textsuperscript{196} It is harder still because our own prejudices, hypocrisy, and self-deception may bias our judgments or lead to actions motivated more by cruelty than by the desire for vindicating moral principles.\textsuperscript{197} We must, of course, try to make these judgments as a necessary corollary of the goal of defending our nation's commitment to the idea of equal human worth.\textsuperscript{198} Where the stakes are especially high, however, as in a criminal case, the risk of error should make us humble and regretful in going about this task.

\begin{footnotesize}
\textsuperscript{194} See id. at 205-06.
\textsuperscript{196} Murphy, supra note 83, at 157.
\textsuperscript{197} See id. at 154-61.
\textsuperscript{198} See id. at 158-61. I do not address the question of when it is appropriate to forgive. The meaning of "forgiveness" can be debated, but it refers primarily to a positive change of heart toward the wrongdoer and perhaps also a willingness to reintegrate him into society. See Murphy & Hampton, supra note 88.
\end{footnotesize}
(g) Taking Stock

This section has sought to make two main points. First, there are significant limitations on the degree and nature of punishment inherent in the idea of retributive justice. Second, these same limitations often counsel against criminal punishment as the way to vindicate retributive needs. These same general conclusions apply to punishing group-subordinating speech. Punishments must be imposed only where the recipients are justified in feeling demeaned. Moreover, the punishments must be proportionate to the offense, achieved via fair state procedures, and respectful of the offender’s worth as a human being. The harms from group-subordinating speech can be grave, but, as the next section demonstrates, they usually do not merit criminal punishment, and, in some cases, countervailing considerations may mean that there should be no punishment at all. If punishment for harmful speech is required but criminal penalties are unwise, what alternatives are available? The next section answers “civil alternatives, especially via the tort system,” while exploring some of the reasons why no punishment at all may sometimes be the only viable option.

B. The Role of Retribution in Tort Law

Many advocates of legal regulation of group-subordinating speech recommend doing so via tort or other civil law, rather than through criminal prosecution.\textsuperscript{199} For example, Richard Delgado recommends creating a tort for racial insults; sexual harassment is currently regulated by civil anti-discrimination law and, in the view of some thinkers, requires further regulation by the tort system; and still other scholars argue for a tort remedy for group defamation.\textsuperscript{200} Yet retribution, when accepted as a legitimate goal of the law, is most often seen as best served by criminal rather than tort or other civil

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\textsuperscript{199} See e.g., Richard Delgado, Words That Wound: A Tort Action For Racial Insults, Epithets, and Name Calling, in Words That Wound, supra note 50; Margaret A. Crouch, Thinking About Sexual Harassment: A Guide For The Perplexed 176-86 (2001) (summarizing views of theorists arguing for tortious or other civil, but not usually criminal, remedies for sexual harassment).

\textsuperscript{200} See sources cited supra note 199 (on racial insults and sexual harassment); See generally Monroe Freedman & Eric Freedman, Group Defamation (1995) (discussing group defamation).
remedies. To readers versed in tort or criminal law, therefore, my emphasis on retribution may seem odd.

Tort remedies are most often viewed as serving "corrective justice," which requires an offender to repair the physical, psychological, and related wrongful losses (the "harms") that his conduct causes. Wrongful actions are those that violate a moral standard under the circumstances. Retributive justice, or at least the expressive version of that concept that I rely upon here, does not repair harms but rather rights moral injuries—losses to the relative value of victim and offender in a political culture that assumes that in some sense all humans are of inherent, objective, equal worth.

Not all wrongful losses merit retribution. A mother driving her child home from school in a rainstorm who drives just a tad too fast for the rainy conditions, skidding into another car and causing it $3500 in damages, breaches the moral obligation to drive safely. Corrective justice requires that mom to pay the owner of the other car for the damage done. Few observers, however, would feel the need for a retributive response to the mom's wrongdoing. Her negligent driving was not intended to demean the other driver's value as a human being or to elevate the mom's value. Nor was the mom so extremely indifferent to others' needs as to reflect the sort of evil character that we cry out to denounce. Therefore, there is no moral injury for retributive responses to address.

But some wrongful losses do, or at least should, elicit a retributive need. In an ordinary assault case, for example, the assailant, by punching his victim, sends the message, "I am worth

201. See, e.g., Taslitz, Two Concepts, supra note 23, at 45-64.
203. See id. at 1666. It is not necessary for my purposes here to explore all the other types and theories of justice potentially involved in tort law. Corrective justice is the primary sort usually relied upon and simply helps by contrast to make my point that retribution has a role to play in civil justice generally and in tort law specifically. For a thorough analysis of the types of justice involved in tort law, see ALAN CALNAN, JUSTICE AND TORT LAW (1997).
204. See Hampton, supra note 85, at 1661-87.
205. See id. at 1665-66. The example and its analysis are a variation on a similar discussion by philosopher Jean Hampton.
206. See id. at 1665-66.
more than you, so I am free to treat you as I wish." 208 Moreover, assaults intentionally inflict harms, increasing the strength of a retributive response. 209 Philosopher Jean Hampton points out, however, that there are two potential sources of diminishment in such wrongful conduct: (1) the act itself and (2) the harm that the act effects. 210

Beating an assault victim thus itself sends a message of the victim's diminished worth. 211 But a beating might result in lengthy hospitalization, preventing the victim from securing (at least in the short run) things to which his inherent human value entitles him, such as autonomy. 212 The harm effected by the act adds to the sense of diminishment by violating the entitlements that in part constitute the victim's value. 213 An attempted punch to the victim's face that fails to land is also an act that demeans another. But the missed punch is less demeaning than the brutal beating because in the former case no loss is inflicted. 214

The intensity of retributive needs, of course, varies with context, and some actions are so reprehensible that they require a significant retributive response even if no loss results. 215 The central point made here, however, is that an adequate retributive response

209. See Vidmar, supra note 49, at 43-50 (stating the empiricist's view that intentionally-inflicted harms elicit our greatest desire for retribution); Taslitz, Myself Alone, supra note 100, at 21, n.108 (summarizing similar views by moral philosophers).
211. The beating sends the message of the victim's reduced, and the offender's elevated, value, thus constituting "diminishment." See id at 1672-73. "Degradation" would be an actual reduction in human value, rather than the mere expression of a belief in such reduction, see id. at 1672-77. Many theories of equal human worth definitionally deny that degradation can happen because that would mean that certain persons were not then of equal value to that of other persons. See id. at 1672-77.
212. See id. at 1677-78 (cataloguing many of the entitlements that flow from equal human worth, including autonomy, bodily integrity, possession of property, and life).
213. See id. at 1677-79.
214. See id. at 1696-97 (discussing attempts). This analysis flows directly from understanding that actual injuries to entitlements add to the diminishment from the act alone. See id. at 1677-79.
215. See id. at 1681 (using the example of attempted murder).
sometimes requires compensating for losses.\textsuperscript{216} That is a role to which the tort system is often well-suited.\textsuperscript{217}

Jean Hampton squarely makes this point:

\begin{quote}
[T]he demand for a wrongdoer to "make amends" to his victim is a retributive idea, arising from the retributive claim that repairing diminishment requires, among other things, repairing the wrongdoer's damage to the victim's entitlements (generated by her value). A punishment can have built into it actions or services that constitute such amends; otherwise, these amends can be conceived as separate from the punishment, for example, understood as restitution or as a civil remedy, in which case the retributive response would have to be understood as including not only punishment (which would be primarily concerned with repairing damage to the acknowledgment of the victim's value), but also these remedies. Tort remedies can therefore function as part of a retributive response, although as I noted in discussing the case of Mary, the poor driver, they need not do so.\textsuperscript{218}
\end{quote}

\textsuperscript{216} See id. at 1696-97; CALNAN, supra note 203, at 111-18 (also arguing that tort retribution plays a role, even where punitive damages, often conceived as serving a retributive purpose, are not involved). The existence of a system of insurance does not necessarily vitiate the retributive component of the tort compensation scheme. For example, insurance policies often exclude coverage for punitive damages and many, though not most, states void punitive damages coverage as against public policy precisely because such coverage shifts the cost away from the wrongdoer, thus mitigating the retributive purpose of punitive damages. See LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 17.2(B), (C) 227-239 (4th ed. 2000). There are often some exceptions to the no-coverage rule, even in the states prohibiting punitive damages protection. See id. However, as is discussed in several places in this article, there are still punitive elements in tort cases, even if no punitive damages are awarded, or if awarded, are paid by an insurance company. The litigation process is itself designedly unpleasant, and even compensatory damages serve a symbolic retributive function in sending a message that the plaintiff and the defendant are of equal worth and a more-than-symbolic function in raising future rates for insurance coverage or leading an insurer simply to exclude policies written for the defendant.

\textsuperscript{217} See Hampton, supra note 85, at 1687-89, 1696-97.

\textsuperscript{218} See id. at 1697.
Therefore, where no significantly demeaning message is sent by a wrongdoer’s action, tort and other civil compensation schemes are justified primarily by corrective justice. But where a demeaning message is sent and a wrongful loss inflicted, compensation can be an important part of a retributive response, and the civil justice system may often be better equipped to litigate compensation questions than is the criminal justice system.

A very different sort of justification than the tort system’s greater competency for including it in a complete retributive scheme is this: civil options, especially tort suits, address private retributive needs while criminal suits address public retributive impulses. Individuals whose value is affronted would, “in a natural setting,” seek to satisfy their retributive instincts “by doing something ‘bad’ to the actor ourselves or, if we are not strong enough, with the help of some of our friends.” To avoid anarchy and ensure that these individuals do not respond disproportionately, however, the state mandates that courts serve this function instead. “In this way, the judicial system serves the ends of private justice. It allows us to receive the cathartic release of doing something ‘bad’ to our wrongdoer, albeit in a

219. See id. at 1662-66.
220. See id. at 1662-66 (explaining tort compensation as part of a retributive scheme); infra text accompany notes 221-26 (discussing the tort system as being more appropriate than the criminal justice system for achieving personal, as opposed to public, retribution by forcing compensation); Cf. Richard Posner, An Economic Theory of the Criminal Law, 85 COL. L. REV. 1193, 1201-03 (1985) (arguing that where the parties can themselves or through insurance afford to pay damages, tort law is generally a more efficient mechanism of social control than is the criminal law).
221. This theory follows from Alan Calnan’s similar analysis. See CALNAN, supra note 203, at 111-18.
222. See id. at 114.
223. See id. at 114-15. Jean Hampton elaborates on a similar point: To restore this value, the wrongdoer must be defeated in a way that makes the relative value of victim and wrongdoer apparent. Yet, ironically, the victim is often ill suited to deliver the defeat, not only because it will often be the case that he is unable to deliver it in a way that focuses on what is morally relevant in assessing worth—namely, their common humanity. The attractiveness of the state as the agent for accomplishing retribution (for example, through a jury, a judge, or legislative sanction) is that the state is—or at least purports to be—an impartial agent of morality, with greater capacity to recognize the moral facts than any involved individual citizen.

Id.
controlled manner with strict limitations." Tort suits are entitled, "Plaintiff versus Defendant," not, as in criminal cases, "The People versus Defendant," precisely to make the personal nature of this conflict clear. Leading tort theorist Alan Calnan makes this point by asking us to imagine that an offender, "A," fraudulently induces his victim, "B," to trade valuable gold coins for fake pearls. It might at first blush be argued, notes Calnan, that justice would be served by the state's both punishing A in one proceeding and providing B with compensation from a general state fund for B's loss. Yet, Calnan suggests, such an approach would leave B feeling that justice was not served:

There is something very sterile and impersonal in such a scheme of rectification. It may correct the imbalance in accordance with an arithmetic proportion, but it might seem strangely unsatisfying to B nevertheless. B never has an opportunity to return the inconvenience and embarrassment thrust upon him by A. Nor will A see the injurious fruits of his mischief. While B has been made whole by the monetary award, has he been given his due?

A can be given his "due," Calnan suggests, only by fostering B's sense that he has personally wreaked retribution upon A. That personal sense is fostered, Calnan suggests, by the tort system.

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224. CALNAN, supra note 203, at 114.
225. See id. at 111 (articulating this example and its analysis).
226. Id. at 111. Jean Hampton notes that retributive responses need not necessarily involve any legal liability. See Hampton, supra note 85, at 1696-98. Thus she sees an apology combined with "making it up" to our victim by amends as retributive in nature. See id. at 1697-98. "An apology is a way of humbling ourselves in front of the one whose value (and entitlements) we have failed to respect." Id. at 1698. The apology denies the diminishing message of the offender's conduct while the amends "attempt to repair the damage we have done by failing to respect their entitlements." Id. at 1698. Hampton suggests, however, that this is a small-scale response appropriate only for small-scale diminishment. See id. at 1697-98. So understood, Professor Abel's stress on apology can be seen as consistent with my emphasis on retribution via punishment, initially in the tort system, in more serious cases involving more public injuries, in the criminal justice system.
227. See CALNAN, supra note 203, at 111-12, 114-15. Calnan elaborates:
Criminal litigation, by contrast, addresses injuries to the public as a whole. Although a wronged individual may feel “resentment,” observers may instead feel “indignant.” 228 “Indignation” is a less personal sense of retributive anger than the resentment felt by the injured individual. 229 “Indignation is an emotional protest against that individual’s immoral abuse at another’s hands, a defense of the values assailed by the offender.” 230 More generally, criminal punishment promotes social cohesiveness by reaffirming social norms. 231 Professor Abel made a similar point himself in the context of some

To restore the equality between the wrongdoer and the wronged, private retributive justice seems to require that the wronged party be able to hold the wrongdoer responsible for her actions. There must be some gesture which shows that the victim is human, and thus entitled to a minimum of respect, and that the actor is no more than human, and thus not entitled to subjugate others. This is a bilateral adjustment, which can only be effected by and between the parties concerned.... One way of accomplishing this objective is to force the wrongdoer to give something of value to the victim.... In our civil judicial system, the wrongdoer usually must pay compensation to the victim for the loss she has sustained. This remedy has two consequences. It provides a symbolic gesture of the restoration of the moral equality between the parties. In turn, it helps to disgorge from the wrongdoer any gain from her act, and rectify any harm sustained by the victim.

Id. at 114-15. Cf. Vidmar, supra note 49, at 41 (“The most satisfying form of revenge occurs when the offender is aware of why and who is administering the retaliatory punishment.”). 228. See Taslitz, Two Concepts, supra note 23, at 60. The term “indignation” can also refer to an individual’s response to a wrong where that individual’s sense of self-worth is unaffected by the wrong done. See id. But this latter sense of the term is unimportant for my purposes. See generally MURPHY & HAMPTON, supra note 88.

229. See Taslitz, Two Concepts, supra note 23, at 60.

230. Id.

231. See Vidmar, supra note 49, at 42-43:
An offense is a threat to community consensus about the correctness—that is, the moral nature—of the rule and hence the values that bind social groups together. In this sense the offense makes the social group or community a victim. Hostility toward the offender can thus arise from “belongingness” in the group independent of empathy toward the specific victim or of internalized feelings about a social contract.... This perspective about the threat of an offense to group or community values also draws attention to the fact that punishment can serve the goal not only of attempting to change the beliefs or status of the offender but also of reestablishing consensus about the moral nature of the rule among members of the relevant social community....

Viewed from this perspective, “disinterested” retributive justice is not disinterested at all: The response of the individual is based on identification with her or his group and the threat to values held by that group.
racially subordinating expression: "By officially proclaiming transgression of our weightiest norms, criminal accusations and convictions can profoundly influence racial status."\footnote{232} Criminal punishment thus serves public retributive justice, civil law private retributive justice.

The need for tort remedies (if any legal remedies are justified at all) as part of a retributive response to group-subordinating speech seems especially clear. In arguing for a tort remedy for racial insults, for example, Richard Delgado catalogues a wide variety of compensable harms.\footnote{233} Racial slurs can cause long-term emotional pain; can lead its victims to believe in their own inferiority, consequently limiting their ability to make informed life choices; and can engender either racial hostility or passive endurance of pain.\footnote{234} Sufficient emotional pain can lead to mental disease and physical ailments as well, including high blood pressure and stroke.\footnote{235} Most importantly, group subordinating racially insulting speech by definition harms the dignitary interest in recognition of one's equal moral worth with other persons.\footnote{236} Yet that injury is precisely the kind that calls forth a retributive response.\footnote{237}

Indeed, even group defamation expressed in a written text, rather than via a face-to-face insult, can inflict a similar sort of injury:

Merely publishing a work proclaiming that, say, men are better than women, or whites are better than blacks, is to deny value and thereby do something morally offensive, but unless other people respond to the book

\begin{itemize}
  \item \footnote{232} ABEL, SPEAKING RESPECT, \textit{supra} note 3, at 97.
  \item \footnote{233} See DELGADO & STEFANCIC, MUST WE DEFEND NAZIS?, \textit{supra} note 106, at 8-10.
  \item \footnote{234} See \textit{id.}; Cf. \textit{WORDS THAT WOUND, supra} note 50, at 24-26 (cataloguing ill effects of racist hate messages generally rather than only in the specific form of racial insults); DEBRA VAN AUSDALE & JOE R. FEAGIN, \textit{THE FIRST R, HOW CHILDREN LEARN RACE AND RACISM} (2001) (similar arguments but focusing on the impact on children).
  \item \footnote{235} See DELGADO & STEFANCIC, MUST WE DEFEND NAZIS?, \textit{supra} note 106, at 8-10; \textit{WORDS THAT WOUND, supra} note 50, at 24-26. Cf. \textit{THE PRICE WE PAY, supra} note 106 (discussing more general harms of racist messages).
  \item \footnote{236} See DELGADO & STEFANCIC, MUST WE DEFEND NAZIS?, \textit{supra} note 106, at 8-10, 20 (noting that existing torts already protect other kinds of dignitary interests).
  \item \footnote{237} See \textit{e.g.}, Vidmar, \textit{supra} note 49, at 42 ("Social injuries may evoke stronger reactions than physical or economic injuries. Social injuries, that is, insults to oneself or one's family or membership group, speak to the very core of selfhood.")
\end{itemize}
in some way, that damage is negligible and society does not bother to respond. If people take them seriously and come to believe these assertions of superiority, the books become much more dangerous, because such beliefs can prompt people to interfere with the entitlements of these “inferiors” (to the point of inciting violent acts against them), and to propagate the view that they are not valuable enough to be accorded these entitlements. In a way, such books morally injure not one individual, but a whole class of individuals, leaving them sitting ducks for treatment lower (perhaps much lower) than that which they deserve.

This argument recognizes that the mere uttering of group-subordinating speech constitutes a moral injury. The size of that moral injury turns on whether the words are believed by others, lowering the victims’ social esteem in the eyes of the broader community and, in turn, leading that community to deny the victims other goods to which they are entitled as equal persons. Much of the debate about whether the law should regulate group defamation turns precisely on a disagreement over the extent of the resulting moral and other injuries. Opponents of regulation argue that speech harms are de minimis, easily dissipated by counter-speech that points out the defamers’ errors. Proponents argue the opposite. Opponents also worry about deterring free debate where a speaker’s words are perceived as offensive although not so intended. Delgado’s specific proposal concerning a tort for racial insults avoids this last problem because it is limited to intended harms.

Hostile environment sexual harassment rules arguably do not so neatly fit this scheme for dividing responsibilities between the civil

238. Hampton, supra note 85, at 1679.
240. See DELGADO & STEFANCIC, MUST WE DEFEND NAZIS?, supra note 106, at 101-04, 115-16.
241. See id at 101-04, 115-16.
242. See id at 118-19.
and criminal justice systems. Many different justifications have been offered for prohibiting workplace speech that creates a hostile environment for women workers based upon their gender.\textsuperscript{244} Anita Superson's justification fits the scheme proposed here well: such sexual harassment expresses the attitude that a particular woman and members of her sex are, because of their sex, inferior to men.\textsuperscript{245} Superson emphasizes, however, that the resulting dignitary harm is inflicted not only on the female victim, but on all women as a group.\textsuperscript{246} By reinforcing sexist attitudes that women are inferior to men, sexually harassing workplace speech affects the status of all women and the likelihood that their career options will be limited by stereotypical sex roles.\textsuperscript{247} If it is true that a group injury is involved—and not only injuries to an individual or to society as a whole—then civil law must account for the group harm, including the group's retributive needs.\textsuperscript{248} Group needs, suggests Superson and most other egalitarian writers on the subject, are best addressed through statutory discrimination law, not the tort system, because discrimination law exists to ensure equal opportunity regardless of sex, race, national origin, or other culturally salient group memberships.\textsuperscript{249} Tort law is

\begin{itemize}
\item \textsuperscript{244} For a recent summary, see CROUCH, supra note 199, at 141-74.
\item \textsuperscript{245} See id. at 147-54. (summarizing Superson's views). I am not suggesting that Superson's views explain all features of the current regulatory scheme. They do not. See id. at 147-53. Nor do I suggest that her theory has no flaws. It does. But all the various theories have their strengths and weaknesses and are best understood as reflecting different aspects of reality. See id. at 174-75. Each of the theories could be explained in a way that connects them to my arguments here, but Superson's approach is the best fit. Moreover, I note that I am discussing only "hostile environment," not "quid pro quo," sexual harassment. See GWENDOLYN MINK, HOSTILE ENVIRONMENT: THE POLITICAL BETRAYAL OF SEXUALLY HARASSED WOMEN 49-51, 61-63 (2000) (quid pro quo framework applies to an implied or explicit demand for sexual favors to retrain, or advance in a job, but in "a hostile environment situation, the loss suffered by a target of sexual harassment is the quality of the workplace"). For Superson's detailed explanation of her views, see Anita M. Superson, \textit{A Feminist Definition of Sexual Harassment}, 24 J. SOC. PHIL. 46-64 (1993).
\item \textsuperscript{246} See CROUCH, supra note 199, at 147.
\item \textsuperscript{247} See id. at 148.
\item \textsuperscript{248} Superson does not address retributive needs but rather only the group nature of the injury. See id. at 147-53. However, I have argued here, and elsewhere in more detail, see Taslitz, \textit{Racist Personality}, supra note 23, at 746-65, that group-subordinating speech elicits retributive emotions in both the individual to whom the speech is directed and in the salient social group to which he belongs.
\item \textsuperscript{249} See CROUCH, supra note 199, at 176-86.
\end{itemize}
the wrong approach, many of these theorists contend, precisely because it generally portrays harms as being suffered by individuals.\textsuperscript{250} The current federal statutory scheme for regulating sexual harassment indeed adopts, in part, the statutory discrimination model, seemingly recognizing the group nature of part of the injury.\textsuperscript{251} There are also practical advantages to the current scheme: administrative remedies are pursued first, and, if those fail, the government may choose to file suit.\textsuperscript{252} In both instances, the government pays the litigation costs, which an individual may not be able to do on her own.\textsuperscript{253} The administrative scheme, unlike ordinary tort law, also provides mechanisms to preserve confidentiality and protect against retaliation.\textsuperscript{254} Yet precisely because the government often takes the lead role, current law may seem inadequate in taking account of private, individual dignitary harms.

The current scheme has other features, however, that do significantly address individual retributive needs. The Civil Rights Act of 1991 amended Title VII—the statutory authority for sexual harassment regulations—to permit the plaintiff to seek compensatory or punitive damages within certain narrow limits.\textsuperscript{255} Previously, Title VII remedies were limited to equitable relief such as back pay, an injunction against future harassing conduct, or reinstatement.\textsuperscript{256} Moreover, now a plaintiff seeking compensatory or punitive damages can demand a jury trial, as can the employer.\textsuperscript{257} Furthermore, it has

\textsuperscript{250} Id. at 177-78; CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 141 (1987). Similar points about the group nature of part of the injury inflicted by harmful speech can be made where it is directed at racial, ethnic, religious, or other salient groups, not only speech directed against women. See Taslitz, Racist Personality, \textit{supra} note 23, at 746-65.

\textsuperscript{251} See \textit{CROUCH, supra note 199, at 37-84, 176 (explaining nature of legal definition of sexual harassment and its current legal conception as primarily a matter of discrimination law rather than tort law).}

\textsuperscript{252} See 42 U.S.C. § 2000e-5(b)(1994) ("If the Commission determines after [an investigation filed by or on behalf of a person claiming to be aggrieved] that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.").

\textsuperscript{253} See \textit{CROUCH, supra note 199, at 183-84.}

\textsuperscript{254} \textit{Id.} at 183-84.

\textsuperscript{255} See \textit{id.} at 63, 179.

\textsuperscript{256} See \textit{id.} at 63.

\textsuperscript{257} Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a(c)(1)(1994) ("If a complaining party seeks compensatory or punitive damages under this section, any party may demand a
long been true under Title VII that if the government refuses to pursue a case or fails to act in a timely manner, the plaintiff can turn to the courts for statutory relief on her own. All these features—most clearly the availability of punitive damages—seem consistent with satisfying individual retributive needs. Complete satisfaction, however, is unlikely. Only the employer, not the harassing individual himself, can be held liable. An employee facing an employer


258. See 42 U.S.C. § 2000e-5(f)(1)(1994) (“If a charge filed with the Commission … is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the Commission has not filed a civil action under this section … the Commission … shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent….’’); Scott v. Metropolitan Life Ins. Co., No. CIV.A.00-2090, 2000 WL 110787, at *3 (E.D. Pa. Aug. 7, 2000). “In circumstances where the EEOC has failed to issue [the right to sue letter] despite the expiration of the 180-day deadline, however, courts have allowed a plaintiff to proceed so long as she can show she is entitled to the right to sue letter and has requested it.” Dollinger v. State Ins. Fund, 44 F. Supp.2d 467, 474 (N.D.N.Y. 1999) (stating that in order to waive or toll the statutory requirement to procure a right to sue letter before filing suit, a plaintiff must show that an effort was made to procure the right to sue letter or that he raised the failure to issue a right to sue letter or that he raised the failure to issue a right to sue letter with the EEOC prior to filing the action).


260. See CROUCH, supra note 199, at 180. Crouch argues that holding only the employer liable makes sense if sexual harassment is conceived of as a group injury. “Employers are charged with maintaining nondiscriminatory environments for their employees. If an employee is discriminating against someone, the employer has the responsibility to stop it.” Id. at 180. Crouch continues:

However, if one conceives of sexual harassment not as group based, but in terms of individuals, this is likely to seem wrongheaded. The person who performed the harmful act—and especially, the person who benefited from the act—should be held responsible, should pay for the harm; and the person who performed the harmful act and benefited from it is the harasser. The employer might be seen to have harmed the victim in an extenuated way—by not protecting the victim from the harasser—but the employer does not benefit from the harassment.

Id. at 180 (emphasis in original). Crouch’s emphasis on “making the harasser pay,” and Crouch’s language of “responsibility” rather than “liability,” are suggestive of retributive desires directed against the harasser, though Crouch does not make this point explicitly. Unlike Crouch, I do not see the choice as a dichotomous one between group and individual injuries. Sexual harassment causes both sorts of harms. The desire for vengeance would stem
indifferent to its supervisors' harassing conduct could reasonably feel a need for vengeance against the employer.\textsuperscript{261} The victim's retributive anger is also likely to be directed against the individual supervisor or co-worker who harassed her. The statute does not address that need. Moreover, the statutory limits on the amount of compensatory and punitive damages may in some cases be inadequate to nullify the dignitary harm that the harasser inflicted on his victim.\textsuperscript{262} A tort remedy for exceptional cases might thus be a wise addition to the current statutory remedies, as some theorists have proposed, albeit on different grounds.\textsuperscript{263}

from her perception of the employer's cruel indifference to her plight as demonstrating the employer's evil nature. See Taslitz, Two Concepts, supra note 23, at 53-55 (characterizing indifference as evil). Additionally, groups can themselves feel retributive needs when one of their members is harmed because of her membership in the group. See Taslitz, Racist Personality, supra note 23, at 758-62. When the individual is vindicated, so is his group. But that a group is harmed does not automatically convert a private injury into a public one, meriting criminal, rather than civil punishment. See infra text accompanying notes 335-53.

261. The desire for vengeance would stem from her perception of the employers' cruel indifference to her plight as demonstrating the employers' evil nature. See Taslitz, Two Concepts, supra note 23, at 53-55, 58-64 (portraying indifference as evil). The statute, of course, does not limit protection only to female victims, but their plight instigated the legislation, so I thus choose female victims for my examples. See CROUCH, supra note 199, at 25-36, 67-69, 200-06. Various statutory and regulatory provisions also address other kinds of harassment, including those based on race, sex, religion, national origin, age, and disability. See id. at 206-20.

262. See CROUCH, supra note 199, at 63, 179. On the other hand, one commentator has noted that the 1991 amendments making compensatory and punitive damages available for intentional discrimination, "Fundamentally changes the legal model underlying federal discrimination laws. The new Act, in providing for expanded money damages, moves these causes of action away from a format in which the goal is conciliation and improvement of employer-employee relations and toward the more adversarial format of a civil trial for tort damages." Robert S. Adler & Ellen R. Peirce, The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Claims, 61 FORDHAM L. REv. 785, n.62 (1993).

263. See CROUCH, supra note 199, at 178-86. Ellen Franklin Paul favors reliance solely on a tort remedy for numerous reasons, most importantly that she sees sexual harassment as a purely individual rather than a group injury, contrary to my suggestion that it is often both. See Ellen Franklin Paul, Sexual Harassment as Sex Discrimination: A Defective Paradigm, 2 YALE L & POL'Y REV. 333, 349 (1990). See also Ellen Franklin Paul, Bared Buttocks and Federal Cases, 28 SOCIETY 4-7 (1991); CROUCH, supra note 199 at 179-83 (analyzing Paul's work). Others, such as Michael Vhay, argue for a tort remedy in addition to the statutory one. See e.g., Michael Vhay, The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment, 55 U. CHI. L. REv. 328 (1988); CROUCH, supra note 199, at 178-86 (surveying remedy approaches). None of the advocates for an exclusive or supplementary tort remedy, however, make administering retribution central to their theories. See, CROUCH, supra note 199, at 178-86. Nor is retribution articulated by courts and commentators as one important
The discussion so far establishes retributive reasons for providing both tort and criminal remedies for harmful speech. Criminal remedies for group defamation and for sexual harassment have indeed been proposed by some thinkers.\textsuperscript{264} Hate crimes legislation as well criminalizes certain sorts of group-subordinating expression.\textsuperscript{265} Yet most current legal practice and proposed legal reforms turn exclusively to the civil justice system.\textsuperscript{266} Why?

There are at least five answers to this question, and each of these answers helps to identify additional strengths and weaknesses of legal regulation as a mechanism for addressing harmful speech.

1. The Difficulty of Crafting Criminal Punishment That Does Not Degrade the Offender

Remember that retributive punishment must "defeat" the offender without degrading him.\textsuperscript{267} Rephrased, punishment must send the message that the offender and his victim are of equal human worth.\textsuperscript{268} Excessive punishment of the offender instead degrades him, sending the message that he is of less worth than his victim. Yet it is often hard to craft non-degrading criminal punishments.\textsuperscript{269}

Part of the difficulty arises because society's members often view a criminal wrongdoer as himself evil. They wish to denounce not merely the offender's act but the offender himself, seeing his essential character as tainted.\textsuperscript{270} Indeed, some theorists have argued that "Punishment disavows the offensive act because the status degradation justification for the current regime. See id. at 178-86. I argue that the current regime is, in its broad outline, consistent with a retributive justification, though alternative regimes can be conceived that would even better fit a retributive model. Any legislation must also serve a variety of objectives, and that may mean designing a scheme that is not ideal for serving any one goal (such as retribution) but that serves multiple competing goals tolerably well.


\textsuperscript{265} See Taslitz, Racist Personality, supra note 23, at 758-65.

\textsuperscript{266} See supra text accompanying notes 199-201.

\textsuperscript{267} See Hampton, supra note 85, at 1690-91.

\textsuperscript{268} Id.

\textsuperscript{269} Id.

\textsuperscript{270} See, e.g., Taslitz, Racist Personality, supra note 23, at 742-45, 754-58; Taslitz, Two Concepts, supra note 23, at 48-64.
that accompanies punishment defines the offender as outside the group."  

These reactions are not necessarily bad ones. Indeed, I have argued elsewhere that character morality should play an important role in the criminal law. The exclusion of the offender from being a full member of the moral-political community (literal exclusion as well, in the case of imprisonment) has a powerful impact in reaffirming social norms. Furthermore, such exclusion and focus on the offender's evil nature recognizes that while each of us is of equal worth as a human being, entitled to rights that recognize that worth, we are not of equal moral worth, and the immoral part of wrongdoers' natures must be rejected without denying them status as full human beings. In some sense, the offender must still be seen as an end in himself, worthy of our respect. 

Indeed, in the view of some commentators, character morality may be essential to showing respect for an offender because it assumes that he can, and should, change. Whether punishment, in fact, produces positive change is subject to dispute, and no global answer may be possible. For some offenders, suffering may teach them

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271. Vidmar, supra note 49, at 37 (analyzing H. Garfinkel, Conditions of Successful Degradation Ceremonies, 61 Am. J. Soc. 420 (1956)). I am not arguing that Professor Vidmar embraces character morality as the normatively best criterion for imposing criminal liability. He expresses no opinion on that point. But his observations on the effects of punishment on status, exclusion, and social norms are consistent with a character morality— one that judges moral and criminal responsibility based on the nature of one's character as revealed in her actions. See sources cited supra note 270 (defining character morality).

272. See sources cited supra note 240.

273. See sources cited supra note 20; Vidmar, supra note 49, at 37, 41-43.

274. See Hampton, supra note 88, at 1690-91.

275. See PRIMORATZ, supra note 53, at 79; ROGER J. SULLIVAN, AN INTRODUCTION TO KANT'S ETHICS 67-71 (1994).

276. See Taslitz, Two Concepts, supra note 23, at 48-52; Taslitz, Racist Personality, supra note 23, at 755-58, n.90 (making similar point but also offering justifications for character morality even when it is assumed that an offender's future character cannot be changed or even that he lacks free will).

277. See TONRY, supra note 195, at 173 ("The belief that more certain or harsher penalties will reduce the rates for serious crimes is not supported by evidence on the effects of recent increases in punishment severity, the scientific literature on deterrence, or research on the effects of mandatory penalties."); PARENTI, supra note 190, at 163-210 (discussing the negative effects of incarceration on prisoners); DUFF, supra note 92, at 4:

To identify crime prevention as an aim is not yet to specify punishment as the, or even a, means by which we should pursue it: since the end is identified independently of the practice, it is so far an open question, to be
empathy for victims.\textsuperscript{278} For other offenders, suffering may deter them from future crime because they fear punishment but effect no moral transformation.\textsuperscript{279} Still others may be entirely unmoved by their punishment or learn simply that it is a cruel world in which each of us must look out for ourselves.\textsuperscript{280} Such offenders may be more depraved after punishment than before.\textsuperscript{281}

Wherever the truth lies, these commentators would argue that punishment treats the offender as free, responsible, and rational.\textsuperscript{282} To be free, rational, and responsible is to be human. Punishment recognizes the offender’s power to choose to behave otherwise and his obligation as an equal citizen to be accountable for his actions to others.\textsuperscript{283} Punishment thus demonstrates respect for offenders even if it leads to no improvement in their natures.\textsuperscript{284}

Retributive metaphors also often speak of punishment as “cleansing pollution.”\textsuperscript{285} These metaphors are not simple modes of expression but templates that mold and reflect our thinking about retributive ideals.\textsuperscript{286} Punishment is understood both as cleansing the criminal-as-filth from the community and as purifying the criminal himself of the polluted part of his nature.\textsuperscript{287} The community has an

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answered by empirical investigation, whether this practice is an efficient means to that end.

\textsuperscript{278} See supra text accompanying notes 94-99 (explaining forced psychological therapy for sexual assailants by teaching them empathy for, and co-suffering with, their victims).

\textsuperscript{279} This deterrence theory is clearly articulated in early law and economics analyses of the criminal law. See, e.g., Posner, supra note 220, at 1193; Jeffrey L. Harrison, Repentance, Redemption and Transformation in the Context of Economic and Civil Rights, in Civic Repentance 3, 21 (Amitai Etzioni ed., 1999). (“A person who has been conditioned to change his or her behavior may be rehabilitated but not have repented in the sense of having undergone a moral transformation”).

\textsuperscript{280} See Parenti, supra note 190, at 163-210 (noting lessons in cruelty taught in prisons); Tonry, supra note 195, at 173 (arguing severe punishment often does not deter future crimes); Gary LaFREE, Losing Legitimacy: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA 155 (1998) (“Punishment is less likely to have an impact on the future behavior of ... the punished offender ... in societies in which political and legal institutions have little legitimacy.”).

\textsuperscript{281} See sources cited supra note 280.

\textsuperscript{282} See Primoratz, supra note 98, at 79.

\textsuperscript{283} See id. at 790-80.

\textsuperscript{284} Id.

\textsuperscript{285} Solomon, supra note 32, at 141.

\textsuperscript{286} Id. at 140.

\textsuperscript{287} Id. at 141.
obligation to reinforce its moral norms by punishing violators. The community’s failure to punish offenders leaves the community tainted. Punishing the offender does more than wash away this community stain; it also ritually cleanses the criminal in a way that sets the stage for (even if it is not alone sufficient for) his rejoining the community. Thus “rehabilitation”—which, remember, should be part of any sound retributive response—"refers not so much to the alteration of a personality as to the reinstatement of a person to his pre-criminal status, the restoration of rights and privileges as a (no longer polluted) citizen."

Suffering has similarly long been viewed in Western religions and in American legal culture as a necessary, but not sufficient, step toward redemption. That suffering must be followed respectively by submission to God’s law (in the religious tradition) or to the fundamental law constituting our Nation (in our political tradition). But such submission is possible only when suffering has cleansed our natures of the stain of our indulgence in evil. Law professor George Fletcher explains the link between American notions of political and religious suffering this way:

288. See supra text accompanying notes 232-33; infra text accompanying notes 291-303. Relying on the Bible as authority for this ancient concept, one commentator noted: [T]he community is required to see that the commands are enforced and that violations are punished. If for any reason the individual is not held accountable for his or her crime, the entire community becomes guilty. This is what happened in the Book of Joshua, when Achan’s unpunished crime caused the Israelite Army’s defeat at Ai ... This is also why the entire Israelite community must seek out and execute Sabbath violators, blasphemers, and seriously disobedient and rebellious children ... By failing to do so, they became accomplices with the criminals and equally guilty with them.


I am not suggesting that I or Noel Freedman believe that an individual’s suffering is deserved as a sign of God’s anger for the violation of Divine Law, a position that would be inconsistent with my defense of human imposed retributive punishment. The suffering that most of us face at one time or another in our lives is often simply the result of bad luck. Freedman’s point is simply that the Bible can be read as teaching the lesson that the whole community is harmed by crime and obligated to punish the offender as a prerequisite to effective community healing.

290. Solomon, supra note 32, at 141.
291. See FLETCHER, supra note 142, at 18-34.
292. Id.
293. Id.; Taslitz, Two Concepts, supra note 23, at 48-64 (portraying punishment as retribution against evil).
There are some strains in the Jewish tradition that link the letting of blood with returning the soul to God.... The connection between blood and salvation becomes much stronger, however, in the Christian interpretation of its Jewish legacy. The theme of blood spilling from the body becomes powerful in the crucifixion and reaches its apotheosis in the faith that a great battle, an Apocalypse, must precede the Second Coming of the Messiah. The spilling of blood in a great battle is understood instinctively as the suffering that must precede redemption. As John Brown was led to the gallows on the eve of the Civil War, having unsuccessfully sought to stimulate a slave revolt, he handed one of his guards a note, "I John Brown am now quite certain that the crimes of this guilty land will never be purged away but with blood."  

Fletcher's sentiment here can be understood in expressive retributivist terms as follows: imposing suffering on an offender adequate to expunge his message of domination over his victim restores them both as equal persons. Only then is the community safe to re-embrace the offender because only then are he and his law-abiding fellows redeemed in a community of equals. Fletcher's reference to the Civil War can thus be seen as saying that the massive hundreds of years long diminishment of African-Americans by white Southern slaveholders and their white Northern accomplices required

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294. FLETCHER, supra note 142, at 19. This is, of course, Fletcher's reading of the Jewish and Christian traditions as he believes they are popularly understood in America and not necessarily the official teaching of any particular Jewish or Christian sect. See, e.g., CHRISTIANITY IN JEWISH TERMS 203-38 (Tikva Fryner Kensky, et al. eds., 2000) (analyzing the complexity of Jewish and Christian theological views on the significance of suffering). Nevertheless, other well-known academics in various fields have echoed sentiments similar to Fletcher's. See Solomon, supra note 32, at 141 (discussing Christian conception of suffering as cleansing); ANDREW DELBANCO, THE DEATH OF SATAN: HOW AMERICANS HAVE LOST THE SENSE OF EVIL 125-35 (1995) (describing Abraham Lincoln as viewing the Civil War as cleansing the evil of a tragic South and a complicitous North, though Lincoln was not vengeful by disposition).
those offenders’ suffering to be equally grave, thereby renouncing the false message of Black inferiority and cleansing the Nation’s soul.\textsuperscript{295}

This focus on redemption from suffering can also be expressed in other secular terms consistent with a liberal society. One notion of liberalism is “perfectionist liberalism,” derived from the work of legal philosopher Joseph Raz.\textsuperscript{296} Raz believes that fostering human autonomy, a central goal of a liberal state, requires creating a certain kind of moral community.\textsuperscript{297} The criminal law can be one among other useful devices in creating such a community. While perhaps not so conceived by Raz, his theory is reminiscent of Civil War republican ideals of promoting a citizenry of virtuous character. Such ideals are arguably embodied in the Reconstruction Amendments to the federal Constitution.\textsuperscript{298} “Republicanism” in the American story is in the view

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\textsuperscript{295} See supra sources cited note 288, 291, 294. Robert Solomon reminds us, however, that criminal punishment is sometimes the least effective way to achieve retribution, properly understood. See Solomon supra note 32, at 142. Retribution is guided by the metaphors of debt, balance, and cleansing community. See id. at 140-43. All three imply ideas of relationship among the victim, the offender, and the avenger. See id at 143. Debts can be repaid in various ways, balance requires being “tuned in” to another, and blood can be seen as adding to existing bloody pollution. See id. Punishment is not always the best way to rebuild relationships, cleanse taint, and reach balance, though “punishment is necessary if society is to endure.” Id.


\textsuperscript{297} See Hampton, supra note 296, at 141-42.

\textsuperscript{298} Compare Taslitz, Racist Personality, supra note 23, at 765-85 (noting the Reconstruction Amendments’ embrace of a virtuous character morality); Andrew E. Taslitz, Hate Crimes, Free Speech, and the Contract of Mutual Indifference, 80 B. U. L. REV. 1282 (2000) (arguing that the post-Reconstruction Constitution condemns a citizenry indifferent to certain forms of extreme physical, psychological, and economic human suffering) [hereinafter Mutual Indifference]; Taslitz, Slaves No More!, The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings, 15 GA. ST. L. REV. 709, 719-34 (1999) (arguing that the post-Reconstruction Constitution’s Bill of Rights is designed to promote an informed, active citizenry) [hereinafter Slaves No More!] with Hampton, supra note 296, at 142: Still, there are some who worry that perfectionist liberalism may not really qualify as liberalism given the way in which it licenses that state to concern itself in such a thorough-going manner with the choices of its citizenry. Accordingly, the ease with which this conception of liberalism accommodates retributive punishment by the state may be thought by some to show the extent to which this conception of the state has anti-liberal components. I cannot pursue these worries here, except to say that there is little point to quarreling over whether or not this view is really a form of liberalism if, in fact, it happens to be the right view of the state!
of many scholars not distinct from “liberalism;” rather, the two are best understood as fused to create a distinctive American political culture. Persons who seek to diminish others by racial insults, sexist intimidation, or other forms of group-subordinating speech seek to limit the autonomy of their victims and to undermine the core American commitment to equal respect. Such offenders are, therefore, seen not as good souls engaging in misguided racially-insulting acts but as “racists,” persons whose character is itself in part morally evil. To impose suffering on them in the hope of changing their nature, thus redeeming their “souls,” is to respect them as rational and worthy beings who are capable of, and whom we must strive toward, rejoining the community of virtuous citizens. But even if punishment fails to make the offender more virtuous, his suffering solidifies political society’s wider commitment to just social norms, instilling important anti-subordination values in much of the rest of the citizenry.

The danger, however, is that the very punishment that denounces offenders’ immoral character may foster a sense that they

And given its commitment to autonomy, it (arguably) includes the most important liberal idea—one that is also deeply connected to the retributive justification of punishment.

299. See, e.g., Taslitz, Racist Personality, supra note 23, at 766, n.157 (“While republican ideals are often said to have been quickly eclipsed by liberal ones—which value individual autonomy over collective need — many view citizens of the early republic as having attempted an uneasy fusion of liberal and republican thinking”); EARL J. HESS, LIBERTY, VIRTUE, AND PROGRESS: NORTHERNERS AND THEIR WAR FOR THE UNION vii-x (2d ed. 1997) (arguing that republican rhetoric played a critical motivating role for both Northerners and southerners immediately before, during, and immediately after the Civil War).

300. Cf. Taslitz, Racist Personality, supra note 23, at 58-65 (cataloguing ways in which hate crimes limit their victims’ life options).

301. See id. at 755.

302. See Hampton, supra note 296, at 141 (“Most supporters of retribution, myself included, see it as a response that respects the autonomy of the law-breaker...”). Even if there is no free will, analogous arguments for an expressive character retributivism can be made. See Taslitz, Two Concepts, supra note 23, at 10.

303. See Taslitz, Racist Personality supra note 23, 765-77 (noting the punishment of hate crimes offenders reaffirms social norms of equal respect); Vidmar, supra note 49, at 49 (criminal punishment generally helps to reaffirm social norms). See generally, PETER BERKOWITZ, VIRTUE AND THE MAKING OF LIBERALISM (1999) (arguing that even such classical liberal thinkers as Hobbes, Locke, Kant, and Mill recognized that a society based on the presumption of the equal dignity of all persons requires a virtuous citizenry).
are outside the human community, that they are "monstrous." Monsters are neither capable of nor worthy of redemption. Nor are they in any sense of "equal" human worth. Accordingly, there are few, if any, emotional and political obstacles to degrading monsters. The demonization of criminals is especially likely now because of recent changes in American society. Increasing diversity of racial, ethnic, religious, and political groups and radical economic and social changes threaten Americans' sense of themselves as a common people with shared values. Criminal punishment therefore acquires a greater urgency as a means for affirming the values that we do share. Punishment promotes social solidarity. But our strongest values are revealed when we fully understand the motives and circumstances surrounding the offender's crime. As discussed earlier in this article, a commitment to equal human worth requires this sort of in-depth inquiry into an offender's circumstances, motive, and character to determine whether his actions are fully culpable.

In addition, there are powerful social pressures against individualized culpability assessments. Such assessments may, for example, uncover conscious or unconscious racial bias in legislation, law enforcement, and prosecution, that many of us do not want to face. Our publicly stated values require us to reject such bias.

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304. See Kennedy, supra note 63, at 829, 858-68 (noting this danger).
305. See id. at 858-68.
306. See id. (detailing psychological mechanisms connecting images of criminal monstrosity to harsher sentencing).
307. See id. at 865-68.
308. See id. at 868-87. (arguing "moral panics" in the 1980s and 1990s about allegedly random violence, a crack cocaine epidemic, and child kidnapping and sexual abuse are connected to fears of social breakdown and lead to harsher prison sentences as a way of scapegoating a perceived criminal class for causing this social chaos).
309. See id. at 835-48 (relying on the thought of Emile Durkhem); Vidmar, supra note 49, at 46-49 (summarizing empirical work supporting a similar conclusion).
310. See supra text accompanying notes 170-74; Kennedy, supra note 63, at 857.
311. See Kennedy, supra note 63, at 850-55; Taslitz, Myself Alone, supra note 100, at 14-24.
312. See Kennedy, supra note 63, at 850-55 (explaining contextual sentencing processes may reveal the role of racial discrimination in investigating and prosecuting crime or in causing it); Tonry, supra note 195, at 104-23 (noting increased racial disparities in incarceration were a foreseeable and likely foreseen consequence of the War on Drugs).
313. See Kennedy, supra note 63, at 850-53 (stating that there is at least "some truth" in the account of sentencing guidelines creation as a failed but good faith effort to reduce racial disparities).
Many commentators argue, however, that middle class whites privately accept racially disparate law enforcement because it promotes a sense of white safety and diverts the social cost of more aggressive police activity away from the white community.\footnote{See, e.g., David Cole, No Equal Justice: Race and Class in the American Criminal Justice System (1999) (asserting an extended defense of this argument).}

A growing fear of crime, often fostered by lawmakers for political reasons (i.e., to garner support and win elections) also encouraged the imposition of ever-higher criminal penalties.\footnote{See, e.g., William J. Chambliss, Power Politics, and Crime 1-56 (1999) (summarizing political advantages of the War on Crime and the techniques used to market it).} Yet a detailed inquiry into an offender's character and circumstances generally promotes a sense of mercy that neither politicians nor the public wish tugging at their consciences.\footnote{See Kennedy, supra note 63, at 855-59; Cole, supra note 314.} Furthermore, the war on crime has led to such an overburdened criminal justice system that the cost of individualized culpability assessments becomes intolerable.\footnote{See Taslitz, Myself Alone, supra note 100, at 14-30 (describing assembly-line justice as the antithesis of individualized justice); Chambliss, supra note 315, at 1-9 (explaining the massive growth of prisons involved in the criminal justice system in the last few decades); Tonry, supra note 195, at 81-124 (attributing much of this growth to the Drug War).}

There is thus a tension between different expressive purposes: harsh, standardized punishments to promote the community's sense of safety and belief in a racially neutral justice system, versus more individualized assessments that more effectively promote social solidarity.\footnote{See Kennedy, supra note 63, at 855-59.} The tension is resolved if all criminals are portrayed as monsters.\footnote{See id. at 855-65.} In such a case, individualized assessments are unnecessary because we already know the extent of each offender's evil nature.\footnote{See id. at 858. Professor Kennedy wrote further that when harsh punishments are based on a conception of the crime problem as more serious than it truly is, and when the costs of punishment fall primarily on minority groups, a sense of solidarity is promoted only among the white majority. See id. at 859. "The sense of racial division furthered by such punishment might fuel further anxieties about the degree to which all members of our diverse society truly share some common moral ground...." Id at 859. The result: Even more severe sentencing practices in a self-defeating quest for social solidarity. See id.} Thus we can have such modern phenomena as sentencing guidelines, which reduce unique individuals to an offense...
severity and prior record score. This resolution of cultural tensions seeks social solidarity built on a lie, at the price of core tenets of proportionality and respect for equal human dignity on which retributive justice rests.

Austin Sarat has argued that these sorts of dangers can be amplified by aspects of the victims’ rights movement. That movement has in some ways blurred the distinction between personal and public retributive justice, thus also between torts and crimes. Victims seek to feel that they have a more direct, personal role in defeating the offender. In capital cases, the victims’ recounting of

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322. On how sentencing guidelines in practice impair equal human dignity, Professor Kennedy notes:

The role of race in criminal sentencing is inherently contestable in the sense that it is difficult to either prove or disprove whether racial discrimination is taking place in any given case, contestable because there is no objective baseline for comparing cases of disparate treatment. A contextual sentencing process is thereby a contestable sentencing process, and contestability continues to matter because racial disparities continue to plague the justice system. A contestable sentencing process is a site for continued and insoluble controversies about racial justice, and these controversies exacerbate anxieties about the solidarity of our society. Solidarity-related concerns about contestability have helped push sentencing in our society in a more determinate and less contextual direction....

Kennedy, supra note 63, at 855.

323. See SARAT, supra note 53.

324. See id. at 37 (“It blurs the line between public and private justice, between the justice of the state acting against those who defy its order and the justice of the victim calling for vengeance against those who are responsible for private pain and suffering.”). Sarat does not address the tort/crime distinction, but the blurring of that distinction follows from his objections to the increasing fuzziness of the public justice/private justice distinction.

325. See id. at 43 (“The demand for victims’ rights and the insistence that we hear the voices of victims are just the latest ‘style’ in which vengeance has disguised itself”). But see George Fletcher, With Justice For Some: Victims’ Rights In Criminal Trials (1995) (arguing that the victims’ rights movement merely seeks to protect the dignity of victims in the same way that criminal procedural rights protect the dignity of offenders). I am not opposed to all aspects of the Victims’ Rights Movement, some of my own writing advocating victims’ rights. See, e.g., Taslitz, Rape And Culture, supra note 26 (1999) (recommending procedural reforms to ensure that rape victims’ stories are heard fairly); Taslitz, Racist Personality, supra note 23 (stating, in part, a plea for recognition of the full scope of harms inflicted on the victims of hate crimes). But I am opposed to the movement’s excesses and its failure to consider the potential infringement on suspects’ rights stemming from the movement’s reform proposals. See Robert P. Mosteller, Victims’ Rights And The United States
their suffering to juries may especially blur these lines. Relying on
the traditional distinction between personal "vengeance" and
impersonal public "retribution," Sarat labels this phenomenon "the
return of revenge" to the criminal law. He worries, as do others,
that victims are poor at meting out proportionate justice, that passion
will overcome reason. Moreover, argues Sarat, "vengeance is the
ultimate measure of loyalty to those who cannot avenge
themselves." He continues: "The goal of victims and those who
take up their cause is to repersonalize criminal justice so that the
sentencer has to declare an alliance with either the victim or the
offender. Criminal sentencing thus becomes a test of loyalty." If
the state is seen as loyal to victims only if it sides with their calls for
vengeance, that is a powerful incentive for the sentencer to avoid a
dispassionate calculation of a proportionate punishment.

Empirical data and experience show that Sarat is not always
correct. Sometimes the state seeks harsher punishment than does the
victim, notably in instances where victims oppose imposition of the
death penalty. Nevertheless, the dangers he identifies are real and
cautions against too ready a reliance on criminal punishment. There
may be group-subordinating expressive crimes—violent hate crimes

Moreover, I here recognize that the risk of victim-oriented reforms serving as a cloak for
excessive vengeance must always be weighed in the balance.

326. See Sarat, supra note 53, at 44-50. Even Professor Fletcher, an advocate of
victims' rights, agrees with this point. See Fletcher, supra note 325, at 200-01.
327. See Sarat, supra note 53, at 58.
328. See id. at 44-50.
329. See id. at 36.
330. Id. at 41.
331. See id. at 50 ("Revenge is blunted as anger and moral outrage encounter the
impersonal solemnity of public justice. And, just as surely as revenge and retribution clash,
public justice is forced to become less solemn."). As I have mentioned earlier, I do not think
that the personal revenge/public retribution distinction is a sharp one because both stem from
similar emotions. See supra notes 48-52 and accompanying text. Public "retribution" is never
in practice as solemn and impersonal as some courts and theorists pretend. Nor need private
vengeance necessarily be any more disproportionate than public retribution. See Barton,
supra note 53, at 60-61. Nevertheless, I agree that the risk of a disproportionate punishment is
greater where the victims' own desires guide judge's and jury's choices of criminal
punishment.

332. See, e.g., Rick Bragg, On Eve of His Execution, McVeigh's Legacy Remains Death
and Pain, N.Y. Times, at A22 (June 10, 2001) (reporting that some victims of the Oklahoma
City bombing opposed the execution of Timothy McVeigh).
being a central example—for which only criminal punishment can bring society close to achieving the proper level of retribution.\footnote{333. See Taslitz, Racist Personality, supra note 23, at 746-65.} But for lesser offenses, aspiring regulators of harmful speech might justifiably worry that it is better to achieve some measure of retribution through the tort system than to risk the potential excesses of criminal justice.

2. The Politics of Grading Retribution

As I noted earlier, different offenses evoke different degrees of retributive anger. In some instances, the affront to our dignity is de minimis, not requiring legal intervention at all.\footnote{334. See Hampton, supra note 88, at 1693 (using example of retribution for taking another’s parking space).} In other instances, even where legal intervention is called for, most observers might find the stigma and potential imprisonment resulting from criminal punishment too extreme for the offense committed.\footnote{335. See id. at 1690. An analogous example in the Fourth Amendment area may help to make the point. In United States v. Atwater, 121 S. Ct. 1536 (2001), the majority held that an arrest for the minor traffic violation of driving without a seat belt was reasonable under the Fourth Amendment. Although imprisonment is not the ultimate punishment for this offense, I suspect that most Americans would find custodial arrest for this crime an excessive “penalty” in itself.} The problem is that how much retributive anger an offense evokes is partly influenced by culture, and different cultural subgroups may have different ideas about what punishment is merited.\footnote{336. See Vidmar, supra note 48, at 44-46.} Of course, a desired punishment may be critiqued as too lenient or too harsh on moral grounds. But as a practical political matter, cultural conceptions embraced by most Americans, not some moral theory purportedly independent of culture, will often prevail.\footnote{337. See id.; Hampton, supra note 88, at 1698-1702.}

It is plausible that many white citizens might recognize that minority group members may be deeply insulted and angered by racial, ethnic, or similar insults. But they also may see that injury as one to individuals or groups but not to the polity as a whole. Restated, the majority might understand a minority’s retributive anger but not share in it. If so, the majority would see the injuries inflicted by
harmful speech as private, not public, to be appropriately addressed, therefore, solely by the tort system.\textsuperscript{338}

At least some members of minority groups may grade the need for retribution differently than does the majority. Mari Matsuda notably calls for the use of both tort and criminal law mechanisms to regulate hate speech, including certain forms of group defamation.\textsuperscript{339} She explains her rationale concerning "sterile" or "cold" hate speech—speech with hateful content but "cunningly devoid of explicit hate language"\textsuperscript{340}—thus:

I am inclined to criminalize the cold-blooded version of anti-Semitic literature. Given the historical record, this "cold" version is just as hateful, for all its tone of distorted rationality, as the "hot" name-calling versions. To call the Holocaust a myth is to defame the dead, as Elie Wiesel has so eloquently put it. It is a deep harm to the living... The element of hatred and degradation is present in the monetary conspiracy theory and holocaust hoax literature. Like the swastika, these texts take their hateful meaning from their historical context and connection to violence. To anyone who knows that context, they cause legitimate distress.\textsuperscript{341}

Matsuda does not explain why criminal, rather than only civil, remedies are needed as a response to Holocaust deniers. Current law and the weight of commentary outside the circle of critical race theorists would probably oppose any legal regulation of "cold" group defamation like Holocaust denial.\textsuperscript{342} Part of these commentators' reasoning is the belief that race, ethnicity, or religion-based group

\begin{small}
\textsuperscript{338} See, e.g., WORDS THAT WOUND, supra note 150, at 49 (Professor Matsuda, while arguing for both tort and criminal remedies, describes only the private injuries suffered by individual and group victims of hate speech rather than also broader injuries to the polity as a whole).

\textsuperscript{339} See id. at 42.

\textsuperscript{340} Id.

\textsuperscript{341} Id.

\textsuperscript{342} See, e.g. KATHLEEN M. SULLIVAN & GERALD GUNThER, FIRST AMENDMENT LAW 89-94 (1999) (describing the various views and concluding that current Supreme Court doctrine precludes "most regulation of racist or other group-directed hate speech...").
\end{small}
insults are no more offensive or painful than many other kinds of perceived insults that are necessarily part of "robust" discussion in the free marketplace of ideas. That position in turn suggests that these thinkers implicitly conceive of the retributive needs generated by hate speech as de minimis, adequately addressed by emotionally powerful counter-speech (of course, these thinkers might also entirely deny that retribution is ever an appropriate justification for speech regulation). Matsuda, by contrast, writes with righteous anger about the deeply hurtful nature of group-subordinating speech, which she characterizes as a grievous wrong necessitating criminal sanctions as an adequate retributive remedy.

Another important justification for criminal punishment would be to articulate the retributive injuries of group defamation as both private and public. The injury might be conceived as in part to our nation's deepest political commitment to the value of equality, meriting a public retributive response in the form of criminal sanctions. Only such a public response adequately recognizes the equal status of the insulted groups as fully belonging to the polity. An appeal to higher and more universal values is also more likely to aid in coalition building, and to inspire citizens outside the insulted group to action.

Matsuda's tone, however, can be read by unreceptive readers as portraying the injury as one to self-interested groups rather than to wider social and political values: "Tolerance of hate speech," she

343. See, e.g., James B. Jacobs & Kimberly Potter, Hate Crimes: Criminal Law & Identity Politics 82-84 (1998) (arguing that, even recognizing the insulting messages in hate crimes, they nevertheless do no more physical or psychological harm, and are no more culpable, than similar crimes not motivated by hate).

344. See id. at 128-29; Delgado & Stefancic, Must We Defend Nazis?, supra note 106, at 95-104 (cataloguing "paternalistic" arguments against hate speech). None of these paternalistic theorists explicitly address retributive needs, but I say that they "implicitly" do so because the content and tone of their arguments suggest that minimizing the proper role of retribution would be their response to my argument here.

345. See Taslitz, Racist Personality, supra note 23, at 765-85 (making this argument as to hate crimes).

346. See id. at 758-65.

347. See generally Mark Tushnet, Taking The Constitution Away From The Courts (1999) (asserting the political case for legislative supremacy in constitutional rule-making, including the benefits from interest group debate); Girardeau Spann, Race Against The Court (1993) (arguing that political coalition-building is a more promising avenue for minority rights than the courts).
explains, "is not tolerance borne by the community at large. Rather, it is a psychic tax imposed on those least able to pay." Matsuda could have continued to explain that such a skewed distribution of costs, when tolerated by the state, sends a message of minority group inferiority that undermines the central values of our polity—a public injury appropriate for criminal sanction. She does hint at such a position but does not state it explicitly.

She also notes that the liberty interests of white sympathizers who wish to hire, marry, adopt, socialize, or jog with people of color may be harmed by hate speech. But this too can be read by the unsympathetic as an appeal to two groups' self-interest: "people of color" and "already sympathetic whites." She shames many other whites for their guilty "relief that they are not themselves the target of the racist attack," rendering them unwilling accomplices with the Klan.

In my view, Matsuda is correct about the nature of the group injuries involved. But an individual or group injury analysis at best justifies tort regulation. She must further explain the public nature of the injury, of which many such explanations might be crafted, to justify criminal sanctions. Furthermore, as a matter of realpolitik, she must help well-meaning if not-yet-sympathetic whites to empathize with, rather than simply pity, minority groups' suffering. Telling stories of individual and group pain, as she does, is one way to encourage empathy, but that message is undercut by language that too

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348. WORDS THAT WOUND, supra note 50, at 36. Matsuda feeds this impression by limiting legal regulation of hate speech to situations where it is directed against a historically oppressed group. See id. at 36. I express no view on this last point. Nor do I mean to criticize Matsuda's analysis, much of which I accept. Furthermore, based on the totality of her writings, I believe that achieving equal respect for all is her professional project. My points are twofold: first, as a tactical matter, she must more clearly articulate why the injuries of hate speech should be seen as public, not private, meriting criminal rather than only civil justice system regulation; second, as a theoretical matter of moral and political theory, she must also justify why criminal sanctions are appropriate.

349. She does make the point that state tolerance of hate speech sends a message of exclusion, but again does so by describing the harms of that message as predominantly private ones. See id. at 25.

350. See id.

351. Id.

352. See Taslitz, Mutual Indifference, supra note 298, at 1300-03 (explaining how pity is a distancing emotion, "Poor thing: thank God it can't happen to me!", while empathy brings people closer).
easily allows opponents to cast the debate in terms of purportedly selfish "identity politics." If Matsuda believes that tort regulation is insufficient absent criminal sanctions, she and her supporters have more work to do to make her theoretical and practical political case.

3. Freedom of Speech

The need for retribution cannot alone justify legal regulation of speech. The state has competing moral concerns, among them protecting the free expression of ideas. Many theorists offer competing justifications for protecting free speech, leading to differences in whether, or the extent to which, they would protect group-subordinating expression or even consider it to be "speech" within the meaning of the First Amendment. The choice of legal regulation is not necessarily, however, a dichotomous one between total suppression of harmful expression or the absence of regulation. A state might conclude that full retribution for such expression requires criminal punishment. Nevertheless, the state might fear that criminal punishment creates an unacceptably high risk of deterring protected speech that the lesser fear of a tortious response would not create. The state's refraining from the full measure of retributive punishment might also symbolically reflect its recognition that free speech concerns are involved but do not merit complete protection because of overriding equality concerns. Alternatively, the state might conclude that speech regulation must not only be limited in the nature of the remedy (civil or criminal) but in the time, place, and manner of the restriction.

353. See JACOBS & POTTER, supra note 343, at 10, 130-132 (defining "identity politics" as when individuals relate to one another solely as members of competing groups who recognize the strategic advantages of being labeled "disadvantaged" or "victimized"); Taslitz, Racist Personality, supra note 23, at 780-85 (debunking the view that minority opposition to hate speech constitutes "identity politics" in the sense that Jacobs and Potter use the term).

354. See Hampton, supra note 85, at 1679, 1694, 1700.


356. See Hampton, supra note 85, at 1679, 1694, 1700.

357. See id. at 1700.

358. See, e.g., Taslitz & Styles-Anderson, Still Officers of the Court, supra note 26, at 781, 824 (1996) (explaining that mere time, place, and manner restrictions should be more easily justifiable as ways to regulate speech); DANIEL A. FARBER, THE FIRST AMENDMENT 176-77 (1998) (noting Court's limited review of time, place, and manner restrictions on speech, albeit usually where the regulation is content neutral).
certain forms of sexist speech at the workplace but not elsewhere.\textsuperscript{359} Though more controversial, campus hate speech codes limit their scope to a particular institution, leaving students free within broad limits to say what they wish in whatever way they wish in other settings or in their private conversations.\textsuperscript{360}

4. The Costs of Regulation

Finally, all speech regulation imposes costs on the regulators. Elected representatives may face a backlash against “political correctness” among their constituents that will become more intense where criminal rather than only civil penalties are involved.\textsuperscript{361} Criminal conduct of any sort is hard to detect. Expanded use of resources by law enforcement—an increase in police officers and prosecutors—may be required.\textsuperscript{362} Overburdened courts could still face an even larger caseload.\textsuperscript{363} In a world of limited resources, regulators might conclude that the costs of criminal rather than civil regulation do not outweigh the benefits, though some regulation may be worthwhile.

There is another sort of cost to be taken into account as well. Legal regulation can help to mold moral and political values.\textsuperscript{364} Criminal law, because it is meant to be reserved for the most serious breaches of social values, plays an especially powerful role in

\textsuperscript{359} See infra notes 416-34 and accompanying text (summarizing content of federal sexual harassment laws).

\textsuperscript{360} See generally, HATE SPEECH ON CAMPUS (Milton Itevmann & Thomas W. Church eds., 1997). For an insightful alternative view, taking the position that regulation of campus speech is rarely wise, see MARTIN P. GOLDING, FREE SPEECH ON CAMPUS (2000).

\textsuperscript{361} Cf. JACOBS & PORTER, supra note 343, at 5, 130-32 (arguing hate crimes legislation is allegedly divisive, promoting majority backlash).

\textsuperscript{362} See, e.g., CHAMBLISS, supra note 315, at 50-56 (summarizing massive increase in resources resulting from harsher policies toward crime). Amy Kaslow, Clinton’s Crime Bill Draws Barbs From Cops and Felons, CHRISTIAN SCI. MONITOR, THE U.S., National Section at 3, August 17, 1994 (noting the resources to police and prisons rise as caseloads rise).

\textsuperscript{363} See Gary Spencer, State’s Pending Caseloads Reduced in 1994, N.Y.L.J. May 2, 1995 at 1. (describing overburdened New York courts, with rising caseloads but emphasizing somewhat successful efforts to reduce back log); Jeff Palmer, Abolishing Plea Bargaining: An End to the Same Old Song and Dance, 26 AM. J. CRIM. L. 505, 513 (1999) (“[C]riminal caseloads commonly doubled from one decade to the next while judicial resources increased only slightly.”) (quoting Albert W. Alschuler, Plea Bargaining and Its History, 13 L. & Soc’Y REV. 211, 236 (1979)).

\textsuperscript{364} See Taslitz, What Feminism Has To Offer, supra note 122, at 179-87 (discussing law’s “constitutive function”).
changing political morality. Austin Sarat has argued that our administration of the death penalty is an excellent example of how criminal punishment, improperly conceived, can deeply harm the American national character:

[S]tate killing contributes to some of the most dangerous features of contemporary America. Among them are the substitution of a politics of revenge and resentment for sustained attention to the social problems responsible for much violence today; the use of crime to pit various social groups against one another and to generate political capital; what has been called an effort to “govern through crime”; the radicalizing of danger and, in doing so, the perpetuation of racial fear and antagonism; the erosion of basic legal protections and legal values in favor of short-term political expedience. ... [T]he time may be at hand to condemn state killing for what it does to, not for, America and what Americans most cherish.

Sarat’s point seems to be that the retributive satisfaction gained from the death penalty is outweighed by the harm it does to our national soul.

Similarly profound and unexpected ill consequences like those stemming from the imposition of the death penalty are unlikely to result from regulating group-subordinating speech. Such regulation sends a message of racial and other group commonality and equal worth. Nevertheless, this regulatory endeavor is a relatively new one, and we must tread cautiously to avoid creating a national character increasingly comfortable with the regulation of speech. Such comfort raises the risk of deterring legitimate modes of expression. If we do err, better not to do so with the force of the criminal justice

365. See Abel, supra note 1, at 201 (explaining criminal law’s expressive function); Sara Sun Beale, Federalizing Hate Crimes: Symbolic Politics, Expressive Law or Zeal for Criminal Enforcement?, 80 B.U.L. REV. 1227, 1254-64 (2000) (summarizing status of research on whether criminal punishment or the mere adoption of un-enforced criminal laws can shape cultural values).


367. See supra text accompanying notes 178-85.
system. Moreover, the criminalization of group-subordinating speech would add to the over-criminalization of our society generally, indirectly contributing to the sorts of unwanted changes in national character that Sarat bemoans as having stemmed from the death penalty. Tort regulation reduces this risk.

3. Tentative Conclusions

This article has thus far argued, first, that legal regulation of group-subordinating speech can serve retributive justice in a way that civil society generally cannot. Second, such regulation is best undertaken by the civil, rather than the criminal, justice system. These arguments do not in themselves justify legal regulation, for there can be contextual countervailing concerns sometimes more important than satisfying retributive needs. Nevertheless, where legal regulation is appropriate, it also may have the additional benefit of promoting a form of respect for others—respect as belonging—that Professor Abel has ignored. Explaining why this is so is the task of the next section of this article.

C. Respect As Belonging

Professor Abel defines respect as according persons and groups appropriate status. Status hierarchies always take place, however, in relationship to or among specified communities. A criminal law professor has a certain status among other criminal law professors, a clergyman among his congregation, and a soldier among his fellow

368. See supra text accompanying notes 189-99. (discussing over-criminalization); see also notes 297-353 (noting the connection between law and culture).

369. See Abel, supra note 1, at 201-02.

370. See e.g., Abel, supra note 1, at 229 (“[Status] conflict is especially bitter within religions” (emphasis in original); Abel, Speaking Respect, supra note 3, at 58-124 (detailed analysis of status conflict among social groups).
warriors. Status specifies a place or position in a particular community and thus marks you as belonging to that community.\textsuperscript{371}

Status hierarchies may also take place across groups or communities.\textsuperscript{372} But when this happens, it assumes ranking in a broader, superordinate community.\textsuperscript{373} Lawyers and politicians, for example have lower status, while medical doctors enjoy higher status in the broader community of the American people.\textsuperscript{374}

There is one community, however, that assumes equal status among all its members: the community of American citizens.\textsuperscript{375} Whether this assumption is fictional, Americans believe they are each entitled to certain equal rights and obligations simply by virtue of being American citizens. Nonetheless, there are many Americans that do not always believe the same about other citizens.\textsuperscript{376} Our modern notion of citizenship reaches beyond political rights and obligations, such as the right to vote and the ability to serve in the military, to rights and obligations on the job, in schools, and in our neighborhoods.\textsuperscript{377} When we are treated in the realm of citizenship as less than full equals with our co-citizens, however, we experience exclusion from the American polity because that polity is defined by equal treatment in these areas.\textsuperscript{378} This exclusion marks us as less worthy, and thus of lower status, than other Americans.\textsuperscript{379} Like all

\begin{itemize}
\item \textsuperscript{371} See infra text accompanying notes 393-93 (stating respect turns on two inter-related concepts: status and belongingness).
\item \textsuperscript{372} See ABEL, SPEAKING RESPECT, supra note 3, at 58-124; cf. Vidmar, supra note 49, at 34-37 (arguing punishment partly concerns the relative status of victim and offender in a larger group).
\item \textsuperscript{373} See ABEL, SPEAKING RESPECT, supra note 3, at 58-124.
\item \textsuperscript{374} See KENNETH L. KARST, supra note 142, at 1-27 (articulating this point, albeit emphasizing belonging more than status in the yin-yang of respect).
\item \textsuperscript{375} See id. at 58-124.
\item \textsuperscript{376} See id. at 1-27.
\item \textsuperscript{377} See Andrew E. Taslitz, Slaves No More!, supra note 298, at 709, 757-58 (1999) ("Citizens have different rights in their different roles, locations, and activities. Rights govern what happens in schools, the workplace, the home, environmental protection, higher education, the professions, and the political process"); See generally MICHAEL SCHUDSON, THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE (1998) (stating a more detailed development of a similar point in connection with his theory of the "monitorial citizen.").
\item \textsuperscript{378} See KARST, supra note 142, at 1-27; Andrew E. Taslitz, Respect and Justice: The Fourth Amendment from the Bottom Up (draft) (on file with the author) (summarizing psychological research on the sense of exclusion); TASLITZ, RAPE AND CULTURE, supra note 26 (describing the connection between unequal treatment and exclusion).
\item \textsuperscript{379} See KARST, supra note 142, at 26-27.
\end{itemize}
other social phenomena, this exclusion can take place at both the individual and the group level. Both the sense of exclusion and the resulting loss of status are experienced as disrespect, evoking outrage among the offended groups. The law has always played an especially critical role in defining who belongs to the polity and who does not. Professor Kenneth Karst has explained it thusly:

When the instrument for excluding a group is the law, the hurt is magnified, for the law is seen to embody the community's values.... When a city segregates the races on a public beach, the chief harm to the segregated minority is not that those people are denied access to a few hundred yards of surf. Jim Crow was not just a collection of legal disabilities; it was an officially organized degradation ceremony, repeated day after day in a hundred ways, in the life of every black person within the system's reach.

The chief accomplishment of Brown v. Board of Education, therefore, was in rejecting state-sanctioned messages of African-American exclusion from full and equal participation in the polity.

In certain contexts, group-subordinating harmful speech is understood as assaulting aspects of equal citizenship, though the speech is generated by private parties rather than by the state. Racist or sexist speech that is harassing or intended to cause harm at a workplace is seen, for example, as interfering with an equal opportunity to compete fairly in the job market, an opportunity central

380. See TASLITZ, RAPE AND CULTURE, supra note 26, at 134-37.
381. See Taslitz, Bottom Up, supra note 378; Andrew E. Taslitz, Stories of Fourth Amendment Disrespect: From Elian to the Internment (draft) (on file with the author) (explaining minority community outrage at unequal treatment by the police).
383. See KARST, supra note 142, at 20.
386. See id.
to American citizenship.\textsuperscript{387} Mari Matsuda pointed out previously that when the state ignores such assaults, it is painfully perceived as sanctioning them, at least in the view of the injured groups.\textsuperscript{388} By contrast, legislation condemning these words that wound sends a powerful message that the state as the voice of the polity welcomes the affected groups as equal members of the American community.\textsuperscript{389}

Legislation also has ancillary benefits. Coalitions must be built in order to pass legislation, thus promoting inter-group communication.\textsuperscript{390} Working together toward a common goal itself sends messages of mutual respect.\textsuperscript{391} Furthermore, trials pursuant to statutory compensation schemes provide for the airing of debate and re-affirmation of positive values in a public forum in much the same way as does debate in civil society.\textsuperscript{392} Legal solutions thus further respect as belonging in a way that other solutions do not while contributing to the broader social transformation that Professor Abel suggests is predominantly the role of civil society.\textsuperscript{393}

\textsuperscript{387} See Crouch, supra note 199, at 25-84, 206-20 (summarizing law, history, and rationale of federal regulation of sexual and racial workplace harassment); Taslitz, Slaves No More!, supra note 298, at 757-58 (arguing workplace treatment is central to modern notions of American citizenship).

\textsuperscript{388} Words That Wound, supra note 50, at 25, 49-50.

\textsuperscript{389} See Delgado & Stefancic, Must We Defend Nazis?, supra note 106, at 66-68.


\textsuperscript{391} See Iris Marion Young, Justice And The Politics Of Difference 167-68 (1990) (discussing the advantages of coalition-building among the oppressed).

\textsuperscript{392} See Taslitz, Rape And Culture, supra note 26, at 137-41 (making similar point but for criminal rape trials).

\textsuperscript{393} Political scientist Iris Marion Young argues that state action via law, rather than an appeal to civil society, is most often necessary to counter private economic activity, frustrating the aspect of justice that promotes "self-development"—persons using and expanding satisfying skills in socially recognized settings in a way that enables them to express their feelings and perspectives on social life in contexts where others can listen. See Iris Marion Young, Inclusion And Democracy 31-32, 180-88 (2000). But Young is perhaps too sanguine about the virtues of civil society's adequately promoting another sort of justice, "self-determination"—the ability to participate in collective regulation to prevent "domination," institutional processes limiting autonomy. See id. at 32-33, 180-88. The project of critical race and feminist theorists writing about hate and demeaning sexist speech can partly be seen as an effort to establish the ways in which it limits individual, group, and collective autonomy. See generally Delgado & Stefancic, Must We Defend Nazis?, supra note 106; Words That Wound, supra note 50; Taslitz, Rape And Culture, supra note 26, at 137-41.
D. Market Failure

Professor Abel's faith in civil society also seems to be a variant of the classical theory that the free marketplace of ideas can cure systemic social ills. More speech, more equally distributed, can help oppressors to understand the errors of their ways. Though not all oppressors will change, many will apologize. Others will credibly persuade their audience of no ill motive, striving to be more careful of what they say in the future. Reason will prevail from this exchange.

To achieve more speech, Professor Abel urges the oppressed to come forward in their local face-to-face communities—schools, workplaces, neighborhoods, voluntary associations, and cultural venues. Yet he notes that this can work only if the subordinated recognize the harm, believe things can change, are supported by collectivities, and are protected from retaliation. “Gossip, cooperation and obstruction, deference and contempt, inclusion and ostracism” can then function as informal mechanisms, not to resolve conflict but to equalize status. Moreover, the entire process must be controlled by the victims in order to empower them.

This is a tall order to achieve in many instances absent some measure of state regulation. The very local face-to-face communities of which Professor Abel speaks are often populated largely by members of dominant communities. Those members may see no

394. See Farber, supra note 358, at 4-5 (summarizing the “free marketplace of ideas” rationale for free speech protection).
395. See Abel, supra note 1, at 217-18 (arguing that inter-group conversations allow speakers to learn sensitivity and to learn how to avoid future offense).
396. See id. (proposing apology as a frequent alternative remedy to legal regulation).
397. See id.
398. See id. at 218.
399. See id. at 217.
400. See id. at 218.
401. See id.
402. Professor Young recognizes that one of the dangers of the turn to civil society is that it:

may exacerbate problems of inequality, marginalization, and inhibition of the development of capabilities, for persons and groups with greater material and organizational resources are liable to maintain and even enlarge their social advantages through their associational activity.
wrong to correct, or only pay lip service to doing so. Majority members often find minority members' complaints to reflect hypersensitivity. Furthermore, free speech ideals prod leaders, if they do permit complaints to be voiced, to let all sides have their say. They do not always side with the disempowered, preferring precisely the liberal neutrality that Professor Abel urges them to jettison. When institutions do side with the subordinated, the kind of backlash against political correctness sets in that Professor Abel worries will be caused by legal regulation.

Furthermore, racist and sexist attitudes are hard for many people to see in themselves, or their views seem to them perfectly justified by the evidence and thus not racism at all. For example, they might point to evidence of the disproportionate number of black males in prison to prove that blacks are presumptively more dangerous than whites. Those sorts of attitudes are deeply ingrained, are part of our sense of self, and thus often remarkably slow to change.

YOUNG, supra note 393, at 186. Young further notes that "an effective way for more powerful or privileged actors to promote their political interests is to try to control the agenda of public discussion." Id. at 178.

403. See DELGADO & STEFANCIC, MUST WE DEFEND NAZIS?, supra note 106, at 83-85.
404. Cf. Donald Lively, Reformist Myopia and the Imperative of Progress: Lessons for the Post-Brown Era, 46 VAND. L. REV. 865, 881 (1993) ("The case for racist speech management is troubling ... for its lack of perspective ... [Racist hate speech...is a relatively marginal source of stigmatization and subordination. Reformist fixation on expression suggests that anger...has consumed judgment, clouded vision ... ").
407. See SUSAN FALUDI, BACKLASH (1990); Abel, supra note 1, at 213, 218 (noting backlash fears).
409. See TONYR, supra note 195, at 49-124 (explaining the disproportionate percentage of black males in prison as partly a foreseeable result of the drug war); ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA 91 (2000) ("The racial stereotyping of blacks encouraged by the images and implicit comparisons to whites on local news reduces the latter's empathy and heightens animosity... ").
None of these observations mean that the free market in speech always fails as a remedy. To the contrary, many collectivities in civil society, especially in schools and workplaces, are making serious efforts to increase anti-subordinating speech and to raise the likelihood that captive audiences—students and employees—will be receptive.411 But this brings me to my next point: law often sets the stage for discussions of anti-subordination principles in civil society to be productive.

E. The Role of Legal Regulation In Aiding Reasoned Debate In Civil Society

Several years ago, I was required to participate in a role-playing exercise as part of mandatory sexual harassment prevention training at Howard University. I was part of a group of three men. One was supposed to loudly and lewdly ogle a passing woman. The second was to do so but in a quieter fashion. My role was to chastise both men and discourage them from similar behavior in the future. We did the role-play surrounded by a gender-mixed circle of about 20 Howard employees.

Although I did and do consider myself a feminist, I found this role-play difficult. I had been raised to see open male sexual interest in women as a mark of manhood. Though I intellectually rejected that training, it was less easy to do so emotionally. I felt somehow demanned to chastise men behaving in such a manner. Though their behavior made me uncomfortable and though I believe that I myself would never act in a similar fashion, it was harder still to speak up in a confident, persuasive way that did not lead to an exchange of insults. The exercise reminded me of how hard it would be for the woman in those circumstances to speak at all, much less in a way that would have had an impact on the oglers.412 The anti-harassment trainer made me repeat the exercise three times until I got it “right,” though today I cannot remember how I finally won her approval. The exercise

411. Professor Abel’s entire article can be seen as support for this proposition. See generally Abel, supra note 1.

412. Cf. CATHARINE MACKINNON, ONLY WORDS (1993); WORDS THAT WOUND, supra note 50, at 29 (“[R]acist speech decreases the total amount of speech that reaches the market by coercively silencing members of those groups who are its targets.”).
prompted a heated but productive discussion among all present. While no voices were squelched, the trainer made it quite clear that the institution’s position was that both ogling and inaction in the face of it were unacceptable—precisely the sort of institutional support for the dominated of which Professor Abel approves.\textsuperscript{413} The exercise prompted similar discussions, seminars, and symposia throughout the University.

Similar training occurs widely throughout the nation in schools, corporate headquarters, and government agencies.\textsuperscript{414} In each case, liberal neutrality is abandoned with each entity defending messages of treating women with equal respect rather than primarily as sources of male sexual titillation. These entities do not do this training as a selfless act of public moral education. They do the training because if they fail to do so, the entity administrators fear being sued.\textsuperscript{415}

Title VII of the Civil Rights Act of 1964 makes it an “unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”\textsuperscript{416} This language is not limited to economic or tangible discrimination and expresses a “congressional intent to ‘strike at the entire spectrum of disparate treatment of men

\begin{footnotes}
\item[413.] See Abel, supra note 1, at 218.
\item[414.] See Douglas McLeod, Civil Rights Liabilities Draw Preventative Measures, ADR, BUS. INS., June 11, 2001 at 18 (“Public risk managers ... facing a wider array of civil rights exposure than ever before ... are combating the losses ... with more-aggressive and sometimes up-to-date versions of long-established practices: employee training...” on sexual harassment being one important example); Anitha Reddy, A Training Solution That Clicks; Firms Use Computers To Educate Workers on Harassment, Other Legal Issues, FINANCIAL SECTION, Aug. 12, 2001 at H01 (discussing firms implementing on-line anti-sexual harassment training).
\item[415.] Ellen McLaughlin & Carol Merchasin, Training Becomes Important Step to Avoid Liability, NAT. L. J. BIO, January 29, 2001, at Bio (“Training a work force on a company’s anti-discrimination/harassment policy has thus become arguably the most important tool for an employer that wants to protect itself from Title VII liability and punitive damages.”); Dean Schaner, Sexual Harassment Liability in the Post-Faragher Era; How to Define, Prevent, and Fight a Claim, TEX. LAW., Feb. 7, 2000, at 35 (counseling employers to “[a]dopt and implement a comprehensive and effective anti-harassment system to prevent, investigate and remedy harassment,” including “mandatory anti-harassment training for both supervisors and rank-and-file employees.”).
\end{footnotes}
and women’ in employment.”417 That spectrum includes creating a discriminatorily hostile or abusive environment.418 To avoid the creation of such environments, the Equal Employment Opportunity Commission adopted guidelines in 1980 specifying that “sexual harassment” fits within Title VII’s definition of “discrimination.”419 Such harassment includes verbal or physical conduct of a sexual nature that has the “purpose or effect of unreasonably interfering with an individual’s work performance or create[s] an intimidating, hostile, or offensive working environment.”420 The high Court requires the discriminatory conduct to be “sufficiently severe or pervasive as to alter [the conditions of the victim’s] employment and create an abusive working environment.”421 These regulations unquestionably reach much speech, yet the Court has suggested that the regulations pass First Amendment muster.422

In Kolstad v. American Dental Ass’n,423 the United States Supreme Court held that an employer may not be vicariously liable for punitive damages for the discriminatory employment decisions of managerial agents where those decisions were contrary to the employer’s good-faith efforts to comply with Title VII. The Court’s holding stemmed from its conclusion that Title VII aims “not to provide redress but to avoid harm.”424 Specifically concerning sexual harassment, the Court noted that “Title VII is designed to encourage

418. Vinson, 477 U.S. at 65.
419. See 29 C.F.R. § 1604.11 (1980) (including sexual harassment as a basis of a Title VII action).
420. Id. (emphasis added).
421. See Vinson, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).
424. Id. at 530. If the Court means what it says, that may be viewed as an implicit rejection of my argument that fostering compensation in part to achieve retribution is, as a policy matter, the best way to justify sexual harassment legislation.
the creation of anti-harassment policies and effective grievance mechanisms."

Similarly, in *Burlington Industries, Inc. v. Ellerth*, the Court held that under Title VII, an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse tangible job consequences, may recover against the employer without showing that the employer is negligent or otherwise at fault for the supervisor's actions. But the employer may have an affirmative defense, proven by a preponderance of the evidence, that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior. The employer would also have to show that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided or to otherwise avoid harm. The Court followed this same rule in the companion case of *Faragher v. City of Boca Raton*.

It is no surprise, therefore, that employers would seek to take advantage of the benefits of these holdings by developing continuing, comprehensive, and emotionally powerful educational programs for their employees. The fear of civil liability has thus prodded employers to encourage anti-subordinating speech in one important area of civil society.

The Title VII example does not mean that legal regulation of harmful speech necessarily makes sense in other areas. When we move beyond fora central to modern conceptions of citizenship and beyond intimidating or harassing speech, the dangers of regulation impinging on legitimately protected speech may rise. But the

425. *Id.* at 531.
428. See *supra* notes 414-15 and accompanying text.
429. See *supra* notes 414-15 and accompanying text.
430. Regulation of group defamation is one potential illustration. During the ante-bellum period, for example, Southern slaveholders argued for suppressing abolitionist speech on the theory that it defamed slaveholders as a group. See *Michael Kent Curtis, Free Speech, The "Darling Privilege"* 198-99 (2000). That history arguably raises worries that group defamation laws in particular might be used to suppress precisely the kinds of speech needed to foster values of equality. See also *Samuel Walker, The Rights Revolution: Rights and Community in Modern America* 95-114 (1998) (suggesting that group defamation laws would have been used against the civil rights movement). My point here is only that regulating group defamation is a harder case to make than regulating harassing speech or face-to-face racial insults, though there are difficult and contextual questions raised by all these
example does demonstrate that law can play an important role in laying the foundation necessary for the "more speech" remedy to group-subordinating messages to work in civil society.

Indeed, the cumulative effect of civil rights legislation concerning speech can be to change the atmosphere in civil society to be more receptive to counter-hegemonic voices.\(^{431}\) As Professor Charles Lawrence explained several years ago, *Brown v. Board of Education*,\(^{432}\) outlawing intentional or de jure state-sanctioned segregation by race in public elementary schools, because of its inconsistency with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, can be read as primarily serving to make group-subordinating messages less acceptable in civil society. *Brown*, he said,

held that segregated schools were unconstitutional primarily because of the message segregation conveys—the message that Black children are an untouchable caste, unfit to be educated with white children. Segregation serves its purpose by conveying an idea. It stamps a badge of inferiority upon Blacks, and this badge communicates a message to others in the community, as well as to Blacks wearing the badge, that is injurious to blacks. Therefore, *Brown* may be read as regulating the content of racist speech.\(^{433}\)
It is partly because of decisions like *Brown* and the spate of civil rights legislation it spawned that ordinary citizen attitudes have started to change. 434

II. INADEQUATELY ACKNOWLEDGED BENEFITS OF CIVIL SOCIETY

These cautions having been noted, there are at least three important reasons beyond those noted or emphasized by Professor Abel to turn to civil society as an important component in regulating group-subordinating speech.

A. There May Be No Other Alternative

First, regulation of much harmful speech is probably prohibited by current First Amendment doctrine. The United States Supreme Court held decades ago in *Beauharnais v. Illinois*,435 that group defamation could be regulated with few exceptions. Commentators, however, generally agree that today the Court would hold otherwise.436 *Beauharnais* has been implicitly overruled by decisions such as *Cantwell v. Connecticut*,437 overturning the criminal conviction of a Jehovah’s Witness for inciting a breach of the peace by playing a phonograph record in public, which attacked all organized religious systems as instruments of Satan, in particular, the Roman Catholic Church. In addition, the Court held in *R.A.V. v. St. Paul*,438 that St. Paul’s Bias-Motivated Crime Ordinance was unconstitutionally applied by prosecuting under its umbrella several teenagers who burned a cross in the front yard of an African-American family. After *R.A.V.*, criminal prosecutions for using racist fighting words are

436. See GREENAWALT, supra note 430, at 60-61.
unlikely. If group defamation and a wide array of racial insults cannot result in liability, then much group-subordinating speech is beyond the reach of the law. Similarly, more subtle forms of subordinating speech, such as media news coverage focusing on Blacks as dangerous or the absence of adequate black-representation among characters on prime-time television, face an even stronger argument of First Amendment protection. Where certain speech compels First Amendment protection, only more-speech remedies are viable options.

Second, modern courts generally strain to interpret civil rights laws narrowly, and this is equally likely to be true of newer civil rights legislation aimed at speech:

The post-civil rights era is marked by the narrowing of legal justice for racial minorities. In particular, nonwhite racial groups are experiencing a withering of legal justice under anti-discrimination laws. Over the last fifteen years, court decisions interpreting and applying civil rights laws have tended to define racial justice in crabbed and inverted ways. Those decisions and recent procedural reforms conceive of and administer justice in ways that clash with the ideals, perceptions, and concrete experiences of many members of racial communities, thereby dissociating law (not completely, but significantly) from racial justice.

Numerous explanations have been offered for this retrenchment. Richard Delgado attributes the problem to the law’s “homeostatic” function. Law is naturally conservative; it relies on precedent and background assumptions, and seeks interpretations

439. See, e.g., Farber, supra note 398, at 112 (arguing that most hate speech regulation is constitutionally problematic after R.A.V.).
440. See Lively, supra note 404, at 885 (discussing cultural racial stereotypes on television).
441. See Yamamoto, supra note 18, at 139.
442. Id. at 139.
consistent with those assumptions. Legal change is, thus, generally incremental. It is just enough reform to look good to large segments of the public, to preserve the system from collapse, and to make everyone feel proud, but not enough reform to wreak radical change. Because of that, the nature of legal training is likely to perpetuate historically dominant cultural tales that have previously penetrated the law and are a brake on rapid change in the master narratives.444

Another explanation offered has been the increasingly conservative tilt of the current Supreme Court toward a color blindness that fails to differentiate "between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination."445

Professor Yamamoto, while embracing both these explanations, offers four additional reasons. First, the Supreme Court views race as skin color rather than culture.446 The result, in the words of Angela Harris, is that anti-discrimination law permits "discrimination against traditionally subordinated groups, so long as it is recharacterized as being based on 'culture' rather than race."447 Second, anti-discrimination law fails to recognize the nature of the justice grievances among communities of color.448 Third, new more "efficient" procedural reforms, increasing sanctions for unreasonable filings and encouraging alternative dispute resolution, lessen court access "for those already at society's margins, especially racial and other minorities asserting novel claims or theories that challenge existing social and political arrangements."449 Fourth, civil rights law, as law more generally, often seeks to compare incommensurables, thus reducing the harm from group subordination to monetary damages as if that harm were no different from whiplash. But money damages

444. See id; GIRARDEAU SPANN, RACE AGAINST THE COURT (1993) (articulating a similar point concerning the Supreme Court's constitutional decisions about race); Lisa C. Ikemoto, Traces of the Master Narrative in the Story of African-American/Korean American Conflict: How We Constructed Los Angeles, 66 S. CAL. L. REV. 1581 (1993) (using a similar approach as a partial explanation for white supremacy).
446. See YAMAMOTO, supra note 18, at 139.
447. ANGELA P. HARRIS, WHAT WE TALK ABOUT WHEN WE TALK ABOUT RACE (forthcoming 2002).
448. See YAMAMOTO, supra note 18, at 139-40.
449. Id. at 240.
alone often "may not redress human indignity, alter relationships or restructure offending institutions."  450

Whatever the explanation, if civil rights laws have their limits, then subordinated groups must take matters into their own hands too. Debate in civil society is one way to go about this task and is an excellent adjunct to the law.

B. The Dignity And Power Of Protest

Critics of speech regulation sometimes argue that it discourages minorities from talking back to the aggressor. "Nat Hentoff, for example, writes that anti-racism rules teach black people to depend on whites for protection, while talking back clears the air, emphasizes self-reliance, and strengthens one’s self-image as an active agent in charge of one’s destiny."  451 The paternalism of these critics ignores the point that talking back and legal regulation are not inconsistent. Both strategies can and should be pursued simultaneously. Thus, I argued that legal regulation may be necessary sometimes to make talking back possible.

But the critics are right to argue that talking back has important psychological and sociological benefits. Professor Abel points out that even legal regulatory regimes fail if no one speaks up to report a violation or file a claim. 452 But there are two other benefits not yet clearly delineated in this symposium.

First, part of what permits group-insulting stereotypes to prosper is that the authentic voices of the disempowered are not routinely heard in public discourse. If you never meet, hear, or see on television an educated black male, there is no direct evidence to counter stereotypical views of African-American men as ignoramuses.

450. Id. at 240. Yamamoto's point does not undermine my argument that compensation furthers personal retribution. Rather, his point rightly emphasizes that monetary compensation alone may not be sufficient to remedy the wrongs done or to change standard practice in the future.


452. See Abel, supra note 1, at 217.
If you never encounter images of strong women, you buy into ideas of
women as weak. If you never see a generous, working class Jew, you
accept images of Jews as wealthy, penny-pinching manipulators. Not hearing the voices of the disempowered sends the message that they are unworthy or incapable of speaking. In Professor David Richards' words,

[Structural injustice’s] invisibility has been constructed by the massive suppression of the voices and views of the persons afflicted by such injustice, thus making culturally possible the credibility of cultural stereotypes that dehumanize them. The denaturalization of such profound injustice requires the voice of W. E. B. DuBois (against American racism) or a Franz Boas (against European anti-Semitism and American racism) or a Betty Friedan (against American sexism) or a Walt Whitman (against homophobia). Such voices ... challenged ... the stereotypes that have afflicted [these groups] ... and broke the silence in a voice empowered by the sense of oneself as a moral person, claiming one's basic human rights as a creative moral agent.

Second, each person has a right to forge his own sense of unique identity, rooted partly in the salient groups to which he belongs. Respect is demanded by each of us for the differences that define us. Speaking proudly about what is different about us and insisting on the value of that difference helps to re-affirm and re-create our social and personal identity. The invention of the self in protesting against silencing and dehumanization thus serves a deep-seated moral need and reminds the rest of us “of the deepest principles

453. See David Richards, Free Speech And The Politics Of Identity 240-48 (1999); accord Cass Sunstein, Republic.com 51-88 (2001) (stating internet encourages extremism by allowing us to tune in only on views with which we already agree).
454. See Richards, supra note 453, at 240-41.
455. See Tasielit, Racist Personality, supra note 23, at 746-58.
456. See id. at 746-58.
457. See Richards, supra note 453, at 244-46.
and values of respect for universal human rights of our constitutional traditions.

C. Institutionalizing and Expanding the Anti-Subordination Messages of the Law

The anti-rape movement that began in the 1970s serves as a model for my final point: private organizations can be formed to extend into civil society positive speech changes instigated by the law.

Among the accomplishments of the anti-rape movement were the adoption of rape shield laws and the end of corroboration requirements. Rape shield laws initially prohibited inquiry in most cases into a victim's past sexual conduct or alleged sluttish reputation, preventing such conduct or reputation from being allowed to prove either that the victim must therefore have consented to sex in the current case, or that sluts are liars. These statutes limited speech—

458. Id. at 246. I agree with Richard Delgado and Jean Stefancic that "talking back" to racial insults or other racist remarks is sometimes dangerous and rarely educative for the insulter himself. See DELGADO & STAFANCIC, MUST WE DEFEND NAZIS?, supra note 106, at 103-04. Those are arguments for legal regulation. But that does not alter the fact that protest, where possible, can be ennobling. See, e.g., DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992) (even when civil rights struggles are likely to fail, the struggle itself can be uplifting). Furthermore, there is a broader audience, and if protest reaches that broader audience, well-meaning if initially ill-informed whites may sometimes be moved to change their views and perhaps even their actions. The bottom line point is that both legal regulation and civil society may have respective roles to play in responding to group-subordinating speech.

459. See generally NANCY A. MATTHEWS, CONFRONTING RAPE: THE FEMINIST ANTI-RAPE MOVEMENT AND THE STATE (1994); PEGGY REEVES SANDAY, A WOMAN SCORNED: ACQUAINTANCE RAPE ON TRIAL (1996); CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASS ROOTS REVOLUTION AND ITS IMPACT (1992). I am not suggesting that the history of this movement demonstrates that its efforts came anywhere near to bringing justice to rape trials. To the contrary, I have argued elsewhere that rape law reforms and their accompanying movements have at best had a modest effect in improving the operation of rape trials. See TASLITZ, RAPE AND CULTURE, supra note 26, at 6-11. Nevertheless, my suggestion here is that even less progress would have been likely absent the institutionalization of the rape reform movement. Moreover, my analysis of the movement's limitations is that it spawned a series of evidentiary reforms that left the courtroom speech of accused rapists substantially unregulated while effectively silencing the courtroom speech of rape victims. See generally TASLITZ, RAPE AND CULTURE, supra note 26. I have suggested reforms to equalize the allocation of storytelling resources among rape defendants and victims. See id.

460. See id. at 153-54.

461. See SPOHN & HORNEY, supra note 459, at 25-29.
barring the voices of prior sexual conduct witnesses—to countermand stereotypical messages about how "good women" behave and about what sorts of women can be raped. More recent shield laws go further. Current Federal Rule of Evidence 412 prohibits, subject to a few narrowly defined exceptions, not only evidence of prior sexual behavior but also of the victim’s "sexual predisposition." The Advisory Committee Note makes clear that this language bars evidence of the victim’s sexual dreams or thoughts, mode of dress, speech, or lifestyle. The Note explains that “[a]dmission of such evidence would contravene Rule 412’s objectives of shielding the victim from potential embarrassment and safeguarding the victim against stereotypical thinking.” Eliminating rules requiring corroborating witnesses in rape but not other cases, and of instructions cautioning jurors to be leery of rape allegations, also served to sever the courts from complicity in endorsing stereotypical messages.

In cities throughout the nation, organizations such as Philadelphia’s Women Organized Against Rape, “WOAR,” sprung up to institutionalize the law’s new war against sexist messages playing a role in rape cases. WOAR representatives attended trials and monitored judges to expose behavior inconsistent with the new paradigm. Their presence also sent a message of sisterly solidarity to the victims at these trials.

WOAR assigned counselors to provide advice and moral support to victims throughout the court process. WOAR insisted on, and received, support from prosecutors’ offices, working closely with newly formed specialized rape units. WOAR maintained a constant presence in these offices, monitoring prosecutors as well for evidence of stereotyped decisionmaking or disrespectful treatment of women. WOAR encouraged Take Back The Night marches, sexual assault

462. See Taslitz, Rape and Culture, supra note 26, at 63, 137-41; Steven Fridland, et. al., Evidence Law and Practice 96-103 (2000).
463. See Fed. R. Evid. 412.
464. See Advisory Committee note, Fed. R. Evid. 412.
465. See id. (emphasis added).
466. See id.
467. My summary of WOAR’s efforts in this section is drawn from my own experience working with them as a prosecutor in Philadelphia. For more general information on the activities of WOAR-like institutions, see sources cited supra note 459.
speak-outs, and support groups. WOAR also published literature about the rape culture and its contribution to sexual violence.

WOAR, in short, serves as a model for how laws stemming from social change movements can offer the impetus and the resources to institutionalize those movements. While institutionalized entities lose some of the passion and radicalism of the initial movement, they have the money, the personnel, and the staying power necessary for the long haul. These entities provide the encouragement and protection needed for victims to assertively come forward in the way that Professor Abel recommends. And these entities strengthen the linkages between law and civil society so that each can be more effective in pursuing its respective ends.

IV. CONCLUSION

Professor Abel has wisely stressed the virtues of civil society as a way to combat the ills of group-subordinating speech. I sought in this article, however, to remind readers of the virtues of legal regulation: satisfying group and societal retributive needs, reaffirming social norms, encouraging debate in civil society, and correcting market failures. I also sought to caution that these goals are probably better achieved by the civil, rather than the criminal, justice system. In addition, I emphasized some virtues of the turn to civil society either ignored by Professor Abel or not elaborated upon by him: (1) civil society’s availability as often the only option for regulation under the current legal regime; (2) civil society’s ennobling promotion of dignity in the sheer act of protest; (3) civil society’s ability to change the hearts and minds of well-meaning but ill-informed members of the majority; and (4) civil society’s virtue in ensuring that the law on the books and the law in action correspond. I did not seek to justify regulating any particular form of group-subordinating speech. That is a contextual question not answerable in so general an article. Nor have I addressed the question of the constitutionality of legal

468. See generally sources cited supra note 459.
469. See Abel, supra note 1, at 217.
470. Cf. Young, supra note 393, at 180-88 (noting the linkages between law and civil society.).
regulation of particular forms of harmful speech. My bottom line point is instead a simple one: law and civil society must be understood as complementary, not mutually exclusive, responses to the problem of group-subordinating speech.

471. For a fascinating and persuasive recent book-length effort to address the constitutional questions, see ALEXANDER TSEIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS (forthcoming 2002).