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PROFESSOR PILLSBURY AND THE BOUNDARIES OF DESERVED PUNISHMENT

*Kevin Lapp**

INTRODUCTION

When I joined the faculty at Loyola Law School of Los Angeles a decade ago, I had the immense fortune to be placed in a fourth-floor office down the hall from Professor Sam Pillsbury. During the time we shared as colleagues, I was repeatedly the beneficiary of Professor Pillsbury's generosity and wisdom on matters as diverse as teaching, grading, mentoring, substantive law, and living with a wonky lower back. I wasn't the only one so lucky. Over more than three decades at Loyola, Professor Pillsbury taught, guided, challenged, and inspired faculty and students alike. Indeed, a full account of his profound influence on the law, lawyers, and the legal profession is incomplete without a recognition of the thousands he taught, the policymakers he influenced, the prisoners and correctional staff he counseled, and more. Hopefully, this festschrift communicates the depth and breadth of Professor Pillsbury's contributions to our world.

In line with his being a singular individual, Professor Pillsbury often did atypical things for a legal scholar. He regularly talked about the relevance of emotion, feelings, and relationships to the law. He acknowledged and took seriously faith-based values and views. He was confessional, admitting his positionality.¹ And he approached topics holistically, seeking a deep truth and justice rather than a policy victory. His work demonstrates a concern for both victims and defendants, prosecutors and defense counsel, judges, juries, and the public, and considers the obligations of both individuals and society in service of a just system.

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1. Few legal academics have subtitles in their work, as Professor Pillsbury does, that read: "Writing as a White Man." SAMUEL H. PILLSBURY, *IMAGINING A GREATER JUSTICE: CRIMINAL VIOLENCE, PUNISHMENT AND RELATIONAL JUSTICE* 273 (2019).

The result is a body of scholarship that is sophisticated, provocative, and deeply human. Throughout his career, Professor Pillsbury made major contributions to the fields of criminal law, emotion and the law, and juvenile justice. A central theme in much of Professor Pillsbury's scholarship was punishment. Never one to shy from the core, difficult questions, Professor Pillsbury interrogated why people deserve to be punished, and the limits on how much they should be punished. Distinct, but related, to these questions are the (also distinct, but related) themes of forgiveness and redemption, which also recur in Professor Pillsbury's work.

In this Essay, I explore Professor Pillsbury's ideas about punishment, forgiveness, and redemption. While Professor Pillsbury has written many pieces touching on these ideas, I will focus on three, written over the course of almost thirty years. The first is a law review article published in 1992 entitled *The Meaning of Deserved Punishment*. The second is ostensibly a book review, published in 2009, about forgiveness and criminal law. The third is what might be considered a capstone piece, his 2019 book *Imagining a Greater Justice*. Together, they are a powerful call to action in defense of moral values, dignity, peace, community, and justice.

I. DESERVED PUNISHMENT

The question of when and why punishment is deserved has always been at the heart of criminal justice debate. By the late 1980s, when Professor Pillsbury began focusing on these questions in print, reforms at the federal, state, and local level were increasing American penal severity at almost every possible opportunity. The country's enthusiasm for policing, prosecuting, and prison as punishment resulted in a massive criminal justice apparatus with a globally unprecedented incarceration rate.² By the 1990s, American criminal justice predominantly reflected the idea that every wrongdoer deserved punishment, preferably prison, and they deserved more of it than they had ever gotten before. At the same time, access to reformatory services for those in prison declined. In addition, probation and parole supervision transformed from support systems in service of social reintegration to disciplinary surveillance focused on detecting violations and

2. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (10th Anniversary ed. 2020); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017).

reincarceration. Underneath this embrace of severe carceral accountability was the belief that most offenders, especially the violent ones, were beyond reform and unfit for community life.

Into this punitive frenzy came Professor Pillsbury's nuanced and sincere voice. In a 1992 law review article entitled *The Meaning of Deserved Punishment*, Professor Pillsbury laid out his account of why and when we should punish.³ In it, we see key themes and approaches that would distinguish Professor Pillsbury's work over the years to come. First, he demanded that we value humans and relationships as we impose punishment for wrongdoing. Second, he emphasized the importance of emotion to the law's punitive project.

Professor Pillsbury began the article by recognizing the foundational debate over free will and determinism. After a brief survey of the basics—on one side is the belief that persons choose to act according to reasons, on the other is the view that all human action is determined or caused by some combination of genetics, environment, and probability acting upon individuals—Professor Pillsbury took the possibility of free choice as his starting point. From there, he concluded that “our commitment to responsibility for choice is fundamental.”⁴

Punishment is deserved, explained Professor Pillsbury, when an actor rationally chooses their action, free of coercion, and that action is one we consider wrong. The centrality of an individual's choice to act as the basis of punishment is why we generally reject excuses for criminal acts based on asserted causes like genetic inheritance or unchosen environmental influences.⁵ That is not the same as rejecting entirely the influence of such factors. But our reasons for punishing are grounded in the belief that people chose to act as they did.

This view on punishment for chosen acts, he admitted, “largely defends the law's current approach to criminal responsibility.”⁶ But to Professor Pillsbury, punishment is deserved not based on the traditional justifications of retribution, incapacitation, or deterrence. Rather, “our deep commitment to responsibility stems from our effort to find meaning in life.”⁷ By imposing responsibility for chosen actions, we connect individual actions to collective moral values and establish

3. Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719 (1992).

4. *Id.* at 726.

5. *Id.* at 729.

6. *Id.* at 720.

7. *Id.* at 721.

and maintain moral order in an otherwise meaningless universe. The cosmos is indifferent to whether you signal before changing lanes or punch a stranger in the face. Punishment for transgressions affirms our principles and our collective commitment to them. Anyone who has ever felt enraged or despondent that a wrongdoer went unpunished will understand the point.

Additionally (and possibly more importantly for Professor Pillsbury), responsibility connects us by affirming the obligations we owe to each other. A crime like assault indelibly connects the offender and the victim. But it also threatens the stability of the community as a whole. It injures not just the victim, but our collective peace and commitment to respect. Through punishment, we assert the togetherness of our societal project. Responsibility in some form, as Professor Pillsbury put it, “is our only way of forcefully telling each other about the moral status of our actions.”⁸

Punishment, therefore, is not about revenge or incapacitation, but is a defense of moral value. It takes the victim’s moral status and the offender’s decision to act seriously, and necessarily imposes consequences for the decision to act wrongly.

This is all convincing, at least at a philosophical level. Without punishment, wrong actions and the selfishness, disrespect, and violence they inflict would flourish and undermine our community and its values. In the spirit of a good festschrift piece, however, I must note a quibble and a request.

First, the quibble. The foundation of Professor Pillsbury’s account of deserved punishment is an individualized form of culpability for individual choices. As mentioned above, the law excludes most causal excuses and capacity excuses, something that Professor Pillsbury admitted “does not concern [him].”⁹ Work on the sociology of offending and offenders complicates this approach. Many factors tip the scales toward violence for certain individuals in certain communities. Research has shown, for example, that poverty and childhood maltreatment correlate with adult criminal offending.¹⁰ These unchosen nudges toward violence undermine a system built on individual responsibility for choice. As sociologist Bruce Western puts it, “[t]he

8. *Id.* at 741.

9. *Id.* at 751.

10. *See, e.g.*, Cathy Spatz Widom, *The Cycle of Violence*, 244 *SCIENCE* 160 (1989); Robert J. Sampson, *Crime in Cities: The Effects of Formal and Informal Social Control*, 8 *CRIME & JUST.* 271 (1986).

social facts of violence sit uneasily with the individualized culpability decided by the criminal justice system.”¹¹ This is not to say that offenders raised in urban poverty or who were mistreated as children are destined to offend as adults. Nor would such an upbringing absolve someone of all responsibility. But their apparent contributions to violent offending matter to deserved punishment.

Further, selling America’s punishment machine in the currency of morality becomes less convincing when we confront its well-known scale and discriminatory impact, especially on the poor and people of color. Endless research demonstrates that policing and prosecuting choices bring the criminal justice system to bear on some people more frequently, and more forcefully, than others.¹² Professor Pillsbury recognizes these distortions, and unflinchingly criticizes them as a failure of implementation rather than design. I wish I were as confident in his conclusion.

Now is the perfect time to note that Professor Pillsbury has a knack for frustrating critics. He does so by keeping his field of view wide and following first principles wherever they lead. This repeatedly leads him to address each “but what about...?” just after it forms in the reader’s mind. With punishment, Professor Pillsbury insisted that “while we hold offenders responsible for who they are and what they do, we must do the same for ourselves.”¹³ Agreeing that environment contributes to crime, and that society determines environment, at least in part, Pillsbury concluded that “society bears some responsibility for crime.”¹⁴ This does not change individual responsibility for chosen actions. But it “create[s] general obligations to minimize harmful influences on character formation” that might contribute to choices to commit crime.¹⁵ That doesn’t directly address the concern about the contributing influences to offending that arguably matter to

11. BRUCE WESTERN, *HOMEWARD: LIFE IN THE YEAR AFTER PRISON* 63 (2018); *see also* Michael Tonry, *Can Deserts Be Just in an Unjust World?*, in *LIBERAL CRIMINAL THEORY: ESSAYS FOR ANDREA VON HIRSCH* 141, 152 (Andrew P. Simester et al. eds., 2014) (claiming that many offenders offend for reasons for which no plausible case can be made that they are morally responsible and calling for “empathy for the complex circumstances of the lives of deeply disadvantaged people”).

12. *See* PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* (Angela J. Davis ed., 2018).

13. Pillsbury, *supra* note 3, at 752.

14. *Id.* at 751.

15. *Id.*

punishment. But it does shine a light on our collective responsibility for wrongdoing.

Now for the request. *Deserved Punishment* tells us little about *how* we should punish and *how much* we should punish. These secondary questions are critical because they measure the extent of the wrong and the permissible reach of the government's punitive apparatus. Under-punishment does not sufficiently assert the moral values transgressed by wrongful actions, and therefore risks their flourishing. Over-punishment goes beyond deserved punishment and into the destructive world of revenge. Mass incarceration and its terrible impact on the punished and their communities demonstrate that how we punish reflects moral values as much as, if not more than, why we punish. Prison isn't, after all, the only way to punish, even for violent offenders.

As a result, I wanted more from Professor Pillsbury about how much we should punish. Professor Pillsbury's scholarship, and this Essay, will come to this question presently.

Before moving on, I want to highlight Professor Pillsbury's contribution to the field of law and emotion. *Deserved Punishment* includes a short section on responsibility and emotion. In it, Professor Pillsbury argued that "[t]he animator of responsibility is human emotion."¹⁶ When actions or words anger us, that is a signal that they offend moral principles and deserve a response. Professor Pillsbury calls this attention to the role of emotion an "inescapable part of moral assessment."¹⁷

While the discussion in *Deserved Punishment* is brief, Professor Pillsbury gave the subject full law-review length examination in *Emotional Justice: Moralizing the Passions of Criminal Punishment*.¹⁸ In that piece, Professor Pillsbury showed that the traditional "insistence upon the injustice of all emotion stems from a misconception of emotion and its influence upon criminal punishment."¹⁹ In its place, Professor Pillsbury proposed "a moral-emotive principle called moral caring which values, and evaluates, the offender's exercise of morality."²⁰ According to Professor Pillsbury, moral caring combines "moral

16. Pillsbury, *supra* note 3, at 738.

17. *Id.* at 739.

18. Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989).

19. *Id.* at 655-56.

20. *Id.* at 657.

outrage—anger at the offender’s responsible disrespect for others—and empathy, caring for the offender’s positive moral character.”²¹ Anger without empathy leads to cruelty. Empathy without anger fails to hold wrongdoers to account. Acknowledging and combing the two leads to deserved punishment.

This attention to the role of positive and negative emotions runs through Professor Pillsbury’s work in a way that sets it apart from so much criminal law scholarship. That he was doing it in the 1980s and early 1990s put him well ahead of the legal scholarly times. It can be hard to appreciate trailblazers when the trail they blazed has become so established, but Professor Pillsbury was breaking ground here. In the early 1990s, few scholars had treated seriously the roles of emotions like anger, revenge, and empathy in determining criminal responsibility. Those who had were more likely to be philosophers than law professors, and women rather than men.

When Professor Pillsbury published *Deserved Punishment* in 1992, legal theorists had just begun to challenge the assumption that the law was or should be dispassionate and rational, and argue that emotion mattered a great deal to legal reasoning.²² Scholarly interest percolated in the late 1990s.²³ In 1999, Susan Bandes edited a critical anthology on the role of emotions in law and justice entitled *The Passions of Law*. The essays in it (which included a contribution from Professor Pillsbury) demonstrated that law “is imbued with emotion.”²⁴ Still, Eric Posner would write in 2001 that “[t]he role of emotions is much neglected in legal theory” and that “legal theory is unprepared to answer” questions about the relationship between emotion and law.²⁵

Twenty years later, the literature on emotion and the law is much more robust.²⁶ Professor Pillsbury’s early work in this domain propelled the field forward, and remains underappreciated and underexplored.

21. *Id.*

22. See Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1988).

23. See, e.g., Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996).

24. THE PASSIONS OF LAW 2 (Susan Bandes ed., 1999).

25. Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1977 (2001).

26. Robin West, *Law’s Emotions*, 19 RICH. J.L. & PUB. INT. 339 (2016); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 L. & HUM. BEHAV. 119 (2006).

In *Deserved Punishment*, Professor Pillsbury provided an account of why we punish infused with the moral value of dignity and the importance of emotion and relationships. He showed us how the criminal justice conversation could be elevated if more people engaged with a values approach. But our shortcomings as humans, and the political economy of American criminal justice,²⁷ also lead us to police and punish unfairly and vindictively. In the next section, I look at Professor Pillsbury's ideas about the place of forgiveness in criminal law, which promises to moderate those tendencies.

II. FORGIVENESS

To say that someone deserves punishment for a wrong is not to say that they should be forever condemned for that wrong. In the now famous words of Bryan Stevenson, “[e]ach of us is more than the worst thing we’ve ever done.”²⁸ At some point, the punishment must come to an end. For a few, that end comes with death in prison. But for most people, a prison sentence runs out and they are released back into the community. A period of parole supervision may follow. For those who avoided incarceration in the first instance, a term of probation will likely be their sentence.²⁹ These terms of community supervision, like terms of incarceration, have an end point.

But release from prison or supervision does not put an end to the consequences imposed by the state for crime. Local, state, and federal law contain a bewildering and vast number of disabilities imposed on individuals after they have completed their judicially determined sentences.³⁰ They include well-known consequences like sex offender registration, disenfranchisement, and the loss of the right to possess a firearm. Criminal convictions can also result in the loss of eligibility for public benefits, such as housing assistance, financial aid, welfare, and occupational licenses. Parents with criminal convictions can lose their parental rights, and noncitizens can be deported because of a criminal conviction.

27. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

28. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 17 (2014).

29. At the end of 2020, nearly four million people were on probation or parole in the United States. Danielle Kaeble, *Probation and Parole in the United States, 2020*, BUREAU OF JUST. STAT. (Dec. 16, 2021), <https://bjs.ojp.gov/library/publications/probation-and-parole-united-states-2020> [<https://perma.cc/3DBZ-248D>].

30. MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY, AND PRACTICE* (2021).

Most post-sentence disabilities apply whether the consequence relates to the underlying offense or not, and regardless of any identifiable risk. Some of these post-sentence disabilities last for only a certain period of time, while others for the rest of a person's life.

Not included in this collection of formal extra-sentence consequences is the private discrimination that those with criminal records face.³¹ This can include being denied an apartment by a landlord, or a job interview from a prospective employer, or a loan from a potential creditor, or a second date from a potential romantic interest who learns of a person's criminal record. Computerized databases and easy internet access to criminal records has only exacerbated the impact.³² Many records can remain discoverable online years after the underlying arrest or conviction, and even after a judge has ordered a record expunged or sealed.

The point being: the enthusiasm for punishment and enduring consequences shows that American society doesn't forget offenses, and doesn't forgive offenders. Rather, it holds a variety of legal and private grudges against offenders. These grudges count as punishment under any commonsense understanding of the work. Moreover, they impede successful reintegration into the community and serve as a constant reminder that the individual is, for most purposes (as far as society is concerned), defined by their past offense.

In the late 1990s, a steady nationwide drop in the crime rate combined with policy and budget pressure on a system dedicated to mass conviction and mass incarceration to make federal, state, and local governments more open to reforms. These included decriminalizing some behavior (like personal marijuana use), diverting more people from court processing to community-based interventions, and reducing the length of prison sentences. Some reform efforts sought to create a place for forgiveness within American criminal justice.³³

Professor Pillsbury joined the forgiveness conversation in 2008 with a review essay of two books on forgiveness.³⁴ One was written by a philosopher, Charles L. Griswold's *Forgiveness: A Philosophical*

31. See Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013).

32. Kevin Lapp, *American Criminal Record Exceptionalism*, 14 OHIO ST. J. CRIM. L. 303 (2016).

33. See Symposium, *Forgiveness in the Law*, 27 FORDHAM URB. L.J. 1348 (2000); Margaret Colgate Love, *When the Punishment Doesn't Fit the Crime: Reinventing Forgiveness in Unforgiving Times*, HUM. RTS., Summer 2011, at 2.

34. Samuel H. Pillsbury, *Learning from Forgiveness*, 28 CRIM. JUST. ETHICS 135 (2009).

Exploration (2007), and the other by a professor of law, philosophy, and religious studies, Jeffrie G. Murphy's *Getting Even: Forgiveness and Its Limits* (2004). In the review, Professor Pillsbury built on his ideas in *Deserved Punishment*, considering here when criminal law might withhold justified punishment.

Professor Pillsbury opened the review by admitting that "American criminal justice is harsh, indeed uniquely so in the developed world," leading many to call it "cruel and *unforgiving*."³⁵ He admitted from the start that, as a legal scholar and former prosecutor, he had been "skeptical about the idea that forgiveness—or its close relative, mercy—should directly inform criminal punishment."³⁶ But as an ordained minister who was talking to incarcerated individuals and their family members, he felt "pulled in the opposite direction."³⁷ As any scholar would, Professor Pillsbury worked out his thinking on forgiveness in print, to the benefit of us all.

Without getting bogged down in philosophical niceties, we learn from the essay that forgiveness is, at its essence, the forgoing of resentment toward a wrongdoer. It involves a change of heart on the part of the forger. The process of forgiving is considered a relational one. According to the philosopher Griswold, it is earned by the wrongdoer through actions.³⁸ Forgiveness requires several, including taking responsibility, repudiation, regret, compassion for the victim, and a commitment to change. Even then, an individual cannot be compelled to forgive. It remains, at the opposite end of the spectrum from the individual's choice to offend, the victim's choice to forgive.

Forgiveness is a necessary value for a couple of reasons. First, as Professor Pillsbury showed in prior work, emotion animates the impulse to punish. And wrongs trigger strong emotions. Intense, persistent anger on behalf of victims and society directed at offenders makes for punishments that easily become out of proportion with the underlying wrong. Legal grudges in the form of collateral consequences pile more on top. Forgiveness can relieve the resentment that fuels our easy embrace of disproportionate, unrelenting reprisal.

Second, none of us can confidently pass certain judgment on the character or moral worth of another person. The number of exonerations of those convicted of crimes, and the unknown number of guilty

35. *Id.* at 135.

36. *Id.* at 136.

37. *Id.*

38. CHARLES L. GRISWOLD, FORGIVENESS: A PHILOSOPHICAL EXPLORATION 212 (2007).

pleas made by innocent defendants, should give pause to any defense of punishment that foreswears the possibility of error.³⁹ Moreover, people change. Forgiveness accommodates our imperfections as judges and the reality of reform.

Amidst Professor Pillsbury's astute observations about these books on forgiveness, he explained how he saw its relevance to criminal punishment. First, he distinguished legal forms of responsibility (criminal punishment) from relational forms of responsibility (of which forgiveness is a form).⁴⁰ Legal responsibility imposes predetermined rules and sanctions in (ideally) an "impersonal, dispassionate, and directive fashion."⁴¹ The state determines legal responsibility.

Relational responsibility, by contrast, is a private affair that "seeks to restore full and just relations between persons" for whom a past wrong has created a dispute.⁴² It is "personal, emotional, interactive, and has a relational end."⁴³ It is driven not only by past actions, but also by concerns about future relations. Reconciliation and a restoration of the wrongdoer to good standing in the community are its goals.

American sentencing has long emphasized legal responsibility over relational responsibility. But Professor Pillsbury insists that they are not mutually exclusive. We need not choose between them, but can (and should) do both. Believing that "sentencing as a form of legal responsibility has important relational aspects to it," Professor Pillsbury urged that our sentencing practices incorporate forgiveness's relational values, too.⁴⁴

Because he views the state as the punisher, and "criminal punishment is not about forgiveness," Pillsbury is dubious of forgiveness directly informing criminal punishment.⁴⁵ Pillsbury's doubts are well-taken. While some offenses, committed by some offenders are, for

39. Since 1973, almost 200 people who were convicted and sentenced to death have been exonerated. *Innocence*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence> [https://perma.cc/ZW8M-T7L9]. The problem of wrongful convictions is not limited to death penalty cases. Hundreds of convicted people serving prison sentences have been exonerated by DNA evidence. *Exonerate the Innocent*, INNOCENCE PROJECT, <https://innocenceproject.org/EXONERATE/> [https://perma.cc/F8BE-JWBZ]. Moreover, Alexandra Natapoff has convincingly explained why the greatest number of wrongful convictions may be misdemeanants. See ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME (2018).

40. Pillsbury, *supra* note 34, at 143.

41. *Id.* at 144.

42. *Id.*

43. *Id.*

44. *Id.* at 137.

45. *Id.*

certain case-specific reasons, more forgivable than others, forgiveness is probably best thought of as separate from, not part of, the legal sentence. Nevertheless, Professor Pillsbury argued that “the values and processes celebrated in forgiveness may inform punishment decisions, even for serious criminality.”⁴⁶ He concluded that the modern law of criminal punishment can take some important lessons from the virtue of forgiveness:

1. Feelings matter in moral decision-making;
2. Compassion for others generally should be preferred to hate or anger;
3. The personal interaction between victim and wrongdoer required for forgiveness can be transformative; and
4. We should be cautious about conclusively judging an individual’s character based on a single act.⁴⁷

Professor Pillsbury applied these lessons to our most severe sentencing practices, including the death penalty, mandatory death-in-prison sentences (more commonly called life without parole sentences), and California’s third-strike penalty of 25 years to life for recidivists. He found them each problematic because they are motivated by anger and fear, forswear the possibility of change, and are “negatively relational, in that their basic aim is to end ordinary social relations with the convicted.”⁴⁸

At the risk of splitting hairs, this sounds more like mercy (withholding harsh treatment) than forgiveness (foregoing resentment). But Professor Pillsbury’s point was not to bake forgiveness into criminal sentencing. Rather, “forgiveness teaches . . . that we should not trust a legal process which presumes or mandates permanent exclusion from civil society without giving offenders a meaningful opportunity to present themselves as unique human beings capable of good.”⁴⁹ In short, we cannot conclusively condemn and give up on anyone.

I offer here some thoughts on how Professor Pillsbury’s conclusion about the role of forgiveness in sentencing might extend beyond

46. *Id.*

47. *Id.* at 142.

48. *Id.* at 150.

49. *Id.* at 154.

civic death sentences to the myriad collateral consequences of criminal convictions.

While collateral consequences “can be a criminal defendant’s most serious punishment, permanently relegating a person to second-class status,”⁵⁰ many courts have held that they are not punishment.⁵¹ As a result, they are not subject to the Eighth Amendment proportionality limits on punishment. This is hard to comprehend for anyone not familiar with legal terms of art. Collateral consequences are disabilities and restrictions imposed by law that are tremendous roadblocks to a successful, meaningful return to free society.

These punishments (my word, not the law’s) and exclusions from the community disincentivize the acceptance of responsibility, remorse, and a change of heart that Professor Pillsbury and others expect of individuals before they can receive forgiveness. It thus presents a cart-before-the-horse problem. Sometimes, forgiveness might need to come first.

Additionally, I want to resist Professor Pillsbury’s conclusion that the state cannot and should not be in the forgiveness business.⁵² I believe that the state can, and should, do forgiveness. Forgiveness is not foreign to law generally. As Martha Minow showed in her book, *When Should Law Forgive?*, notable examples of the law forgiving include bankruptcy, a legal system for resolving debts held by someone unable to pay them, amnesties which forgive unlawful entry and presence in the United States and provide a path to citizenship, and post-Civil War pardons for Confederate soldiers who fought against the Union.⁵³

The state forgives in criminal law as well. Pardons are one notable and long-standing example of forgiveness in criminal law.⁵⁴ But the state can and should do more. Margaret Colgate Love has convincingly argued that “the larger criminal justice agenda must include a strategy for dealing with long-term legal and social discrimination

50. JENNY M. ROBERTS, NAT’L ASS’N OF CRIM. DEF. LAWS., *COLLATERAL DAMAGE: AMERICA’S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME* 12 (2014).

51. See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012); Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 233 (2018).

52. Pillsbury, *supra* note 34, at 154.

53. MARTHA MINOW, *WHEN SHOULD LAW FORGIVE?* (2019).

54. *Id.* at 116 (“[A]mnisties and pardons are thus long-standing legal mechanisms for letting go of unjustified accountability.”); Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015).

based on criminal record as a matter of efficiency and fairness.”⁵⁵ She has outlined several possible mechanisms for avoiding or mitigating collateral consequences in service of successful reintegration and public safety.⁵⁶ Professor Joy Radice examined one method of state forgiveness: New York’s fifty-year history of offering certificates of rehabilitation to ex-offenders. Such a certificate removes any legal prohibition or disability resulting from a conviction. Professor Radice commended the program and proposed widespread adoption of administrative mechanisms for removing statutory barriers to reentry.⁵⁷ Stephanos Bibas has likewise urged victim-offender mediation, sentencing discounts, and other mechanisms that could encourage offenders to express remorse, victims to forgive, and communities to reintegrate offenders.⁵⁸

There is one additional benefit to orienting the state toward forgiveness. As Professor Pillsbury recognizes, there are “moral costs of strong, persistent resentment toward a wrongdoer. The virtue of forgiveness is based in part on the potential good of renouncing resentment toward wrongdoers and the general good of compassion for others.”⁵⁹ Research has shown that forgiveness is good for the forgiver, repairing strained relationships and enhancing physical, emotional, and spiritual well-being.⁶⁰ It seems possible that a society less oriented toward vengeance and more oriented to forgiving could also reap benefits.

Whatever mechanisms are deployed, consistent with the moral regard Professor Pillsbury demands we show offenders and the recognition of the harms we cause as we (so enthusiastically) punish, the state has an obligation to enable forgiving offenders who have completed their sentence.

55. Margaret Colgate Love, *Forgiving, Forgetting, and Forgoing: Legislative Experiments in Restoring Rights and Status*, 30 FED. SENT’G REP. 231, 231 (2018).

56. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753 (2011).

57. Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715 (2012).

58. Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329 (2007).

59. Pillsbury, *supra* note 34, at 151.

60. MINOW, *supra* note 53, at 5–6 (“Letting go of a grievance may offer more to the one who forgives than to the one who receives forgiveness.”).

III. RELATIONAL JUSTICE

The difference in scope between essays and law reviews on one hand, and books on the other, is vast. In a book, an author can go both deep and wide, incorporating discussion that would otherwise get a “beyond the scope of this Article” footnote. To our great benefit, Professor Pillsbury went deep and wide on punishment in his 2019 book *Imagining a Greater Justice: Criminal Violence, Punishment and Relational Justice*. In this challenging text, Professor Pillsbury travels far beyond criminal law and the courtroom to confront and humbly offer solutions to the vexing problem of violence in America.

Like all of his scholarship, the book was praised for its “inclusion of the perspectives of all the actors in the system” and “all those affected by criminal law and procedure, not only offenders.”⁶¹ This broad, sympathetic approach produces work that may not find enthusiastic support from ideologues. It’s too fair-minded. Yet, this quality of Professor Pillsbury’s work is one of its greatest features. He is a genuine scholar, exploring ideas and searching for prescriptions that are true at their core.

Imagining a Greater Justice sets out a response to criminal violence that comprehends the grief suffered by victims and the destruction violence does to communities and relationships, while also respects the offender’s humanity and makes possible healing and redemption. That’s what my family in Texas would call a tall glass of water.

Part One of the book details the devastation of violence on victims, their family and friends, and their community. Violence simultaneously creates and destroys relationships, between victims and offenders, and between victims and the community. Professor Pillsbury notes that our primary response has been legal punishment, which we have imposed imperfectly.

In Part Two, Professor Pillsbury offers his idea of deserved punishment, expanding on the notion of moral regard that was discussed above. Here, in contrast to the victim-focused and victim-sensitive early parts of the book, Professor Pillsbury provides a pointed critique of America’s punitive criminal justice system. While punishment is necessary, and while punishment often feels good, it too often does

61. Mary Graw Leary, *A Vision of Criminal Violence, Punishment, and Relational Justice*, 17 OHIO ST. J. CRIM. L. 227, 228 (2019).

not do good. A chapter detailing the dehumanizing realities of incarceration makes the point, which could be buttressed with dozens more.

After confronting the reader with the lived experience of violence for both victims and offenders, Professor Pillsbury offers a reproofing yet benevolent concept that he calls “relational justice” in Part Three. Building on the previous two parts, Professor Pillsbury goes beyond doctrine, theory, and data to show us how the current system comes up short. Its main shortcoming is its failure of imagination. It has for too long relied on law and punishment to address violence. But that has been (and will continue to be) an incomplete response. We cannot punish violence out of existence, and cannot punish our way to peace, reconciliation, or redemption. In addition to the punishment imperative, we have a responsibility to help victims heal, which includes healing relationships between the offender and the victim, and between the victim and society. This effort to “address the relational harms and wrongs of violence” is the core of Professor Pillsbury’s idea of relational justice.⁶²

As if this were not demanding enough, Professor Pillsbury pushes on. The same moral regard that must necessarily be shown to victims must also be shown to offenders as we punish them. Because we must “value the offender as a person,” he explains that we must attend to their needs as well, so that we can achieve the ultimate goal of reconciliation and social reintegration.

There is so much in this great book that deserves discussion. I want to focus here on Professor Pillsbury’s call for redemption of offenders.⁶³ In the main, legal scholars are allergic to ideas like redemption that are closely linked to religion. Professor Pillsbury has no such allergy. And while he recognizes the religious component to redemption, he insists on a secular approach.⁶⁴

So what is redemption? It is related to forgiveness, but distinct. In fact, redemption is much more than forgiveness. We can forgive offenders (forgo justified resentment) and still continue to punish them. Redemption, by contrast, is “society’s decision to welcome the changed person back into free society.”⁶⁵ Mere release from prison, or the mere end of a formal period of supervision, “should not be

62. PILLSBURY, *supra* note 1, at 195.

63. *Id.* at 244.

64. *Id.* at 256.

65. *Id.* at 244.

confused with a welcome back to community.”⁶⁶ A person who is out of prison but cannot vote, or cannot find a job, or cannot access public benefits—who encounters not open doors and aid but obstacles and disdain—remains in many ways an outcast. To welcome someone back to the community requires something else entirely.

Professor Pillsbury calls for redemption because justice demands it, but also because he sees it as an anti-violence tool. Since violence often stems from not-belonging, “an invitation to belonging [is] one of our most powerful weapons against violence.”⁶⁷

As with forgiveness, redemption is a relational process. And it is not available to all. It is only for “the changed person.” Merely serving out your sentence will not entitle someone to redemption. Instead, “[f]or a prisoner to be redeemed, he must show that he is reformed. . . . He must show that he has changed.”⁶⁸ This requires actions by the offender (as well as the redeemer). Pillsbury devotes a long section to the changes the offender must make before redemption becomes available. It is heavily therapeutic, and sounds a lot like the requirements for forgiveness. The individual must sincerely take responsibility for actions they recognize as wrong. They must expand their “circle of regard” and own their past actions and pain.

Professor Pillsbury emphasizes repeatedly that it is a “long road to redemption.”⁶⁹ For some, this is undoubtedly true. But I’m not sure that it has to be a long road. Surely some offenders quickly take sincere responsibility for their actions and condemn their past acts. Not everyone needs decades in prison, or years of therapy, to change their hearts and minds. Some need, first and foremost, space from their criminogenic or traumatic surroundings or relief from addictions to drugs. They also might just need to have the tools and resources for change available to them. As Professor Pillsbury recognizes, despite the prevalence of trauma in the lives of offenders, “effective trauma therapy is rarely available in jails or prisons.”⁷⁰

As an enthusiastic supporter of a more redemptive society, I am nevertheless cautious about this notion of earned redemption. The demands that Professor Pillsbury lays out are significant demands for anyone who has wronged someone, let alone those who are more

66. *Id.* at 262.

67. *Id.* at 245.

68. *Id.*

69. *Id.*

70. *Id.* at 250.

likely to have lived lives marked by trauma and poverty. As Bruce Western's study of those released from prison shows, "[p]eople who go to prison are much more likely to have problems with addiction, mental illness, and physical disability than the general population."⁷¹ They have less education and hail from communities comparatively lacking in resources. As a result, "[t]he people we ask to make the largest changes in their lives often have the least capacity to do so."⁷²

Besides the already noted lack of available supportive resources inside prisons, there are questions about how an offender would show change through actions while isolated in prison. To demand personal transformation from prisoners in a dehumanizing system that denies them opportunities to change, and then to withhold welcome after release for failure to change, is difficult to square with moral regard for those individuals.

Professor Pillsbury recognizes that if redemption is conditioned on offender change, then society has an obligation to facilitate that change.⁷³ Locking people away without reformatory services will not suffice, because abandoning someone to years in prison, possibly in isolation, without counseling and skill training makes such change impossible. This means that, unlike forgiveness, with redemption, the state has a clear and necessary role to play.

Disappointingly, the section of the book on society's role as a redeemer is much shorter than that on the offender's responsibilities, and less specific. An America dedicated to rebuilding destroyed relationships and welcoming offenders back into the community requires a fundamental reimagining of American criminal justice. It would require doctrinal change, for sure, but much, much more. It demands that we change the way we police, change the processes in our criminal courts, change crime and punishment legislation, change the focus of probation and parole, change the landscape of collateral consequences, and change our hearts about ex-offenders.

By these observations, I do not want to understate the enormity of the task, or to detract from the value of Professor Pillsbury's book. His dual focus on victim's healing and offender redemption distinguishes it from so much legal scholarship on the problem of violence.

71. WESTERN, *supra* note 11, at 60.

72. *Id.*

73. PILLSBURY, *supra* note 1, at 255.

And his fertile imagination helps us see that a more just response to crime is not just possible, but indispensable.

IV. CONCLUSION

For over thirty years, Professor Pillsbury centered the challenge of treating victims and offenders with decency and compassion in his work. In a country powerfully reluctant to prioritize healing relationships, to show mercy, and to move past wrongs, we need more voices like Professor Pillsbury's. I hope that, despite his retirement from the academy, he has not put away his pen.

