

# Roundtable on the Future of Justice Policy

## Examining Justice Reform and the Social Contract in the United States: Implications for Justice Policy and Practice

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### Toward a New Social Contract: Embracing the Principle of Association for the Administration of Justice

Danielle Allen

#### I. Introduction

The goal of reforming a system of public safety and the administration of criminal and civil justice would seem, on the one hand, simple to articulate. Can there be any goal other than justice itself?

Nor can one modify justice. We do not seek “healthy” justice or “fair” justice or “successful” justice. Justice itself simply is all those things if it is justice at all. That is, justice delivers well-being and supports healthy communities. It embodies and enacts principles of fairness. It successfully addresses the needs of all entangled in an act of wrong-doing—the victim, the wrong-doer, and the community. The word “justice” itself, without modification, names all these goals. Consequently, articulating the goals of a reform effort in this domain of policy is harder than in other substantive domains. Nonetheless, such an articulation is critical to achieving alignment and effort across the many constituencies pursuing reform.

The right and fair administration of justice is the backbone of legitimacy for any state or political order. In the U.S. Constitutional order, the responsibility for the administration of justice was assigned primarily and in the first instance to state governments. In the view of Alexander Hamilton, writing in the Federalist Papers, this gave the states a “transcendent advantage” over the federal government; they would win a tighter bond of allegiance from members of the polity. The “ordinary administration of criminal and civil justice,” he wrote “is the most powerful, most universal, most attractive source of popular obedience and attachment.” He continued:

“[The administration of criminal and civil justice] is that which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government.”

Yet the very foundational nature of the administration of justice to political legitimacy can also be a driver of its going badly wrong. The desire for the affection and reverence that the administration of justice can activate explains the late 20<sup>th</sup> century competition between both major political parties over several decades to be seen as tough on crime, resulting in a ratchet up of penalty in the U.S. in the period from 1970 to 2000. This competition resulted in the emergence of a decided cultural preference for the “terrors” of the administration of justice over its “benefits.”

We are past due a reform of the administration of criminal and civil justice that restores the “terrors” involved to their appropriate and minimalist place, and that recovers and focuses on the benefits to be had from right and proper approaches to public safety and the administration of justice. Regardless of whether a given reformer, or reform organization is pursuing violence prevention, policing reform, an end to cash bail and pre-trial detention, decriminalization of a variety of currently criminalized behaviors, reduction and equalization of sentences, prison abolition, restorative justice and alternative sanctions, probation and parole reform, ban-the-box policies, or re-entry supports and services, all would work more effectively with a clear and shared sense of the goal.

This paper articulates such a candidate for a shared goal, by laying out what should be the broad objectives of any legitimate constitutional democracy, and by then highlighting an overarching principle for the administration of criminal and civil justice that might become a focal point for an effort to close the adherence gap between the institutions of public safety and the administration of justice that we have and those that we need. The proposed principle is the principle of association. Then, the paper presents a rough, preliminary framework for evaluating where reform efforts are well-directed at closing the adherence gap between what we have and what we need, and where there might be reason for re-consideration of the approach. Finally, it addresses the question of how we can best pursue a legitimate system for the administration of justice in our fragmented, federalist polity.

## **II. The Purposes of Government**

### **A. The General Purposes**

In every society with a well-ordered government, that government understands itself to have responsibility for the well-being of its people, including via the administration of justice. A country’s justice infrastructure is a national asset for which the government is responsible, just as it is responsible for a national economy. The same overarching goals should guide our pursuit of a legitimate system for the administration of justice, as for any other domain of policy. Here too the overriding goal is the health and well-being of the entire population. Whereas some forms of polity limit the conception of the well-being of the population to material questions of economic or health security, in a constitutional democracy, there is a greater aspiration. While economic and health security are a necessary foundation for any human flourishing, constitutional democracies rest on the additional premise that maximal human flourishing is achieved only when people are also empowered, through protection of basic liberties and political equality, to chart their own life courses and to contribute to the shared decision-making of their polity.

In the broadest terms, the goal of every domain of substantive policy in a constitutional democracy should be to secure the foundations of material well-being (economic and physical) for the population, and also to secure negative and positive liberties, social rights, and social equality and non-discrimination for all in order to enable full empowerment and unleash full human flourishing. Negative liberties are those that identify forms of freedom from government interference—for instance, the freedoms of expression, association, and religion. Positive liberties are those that identify forms of freedom to participate in shared decision-making—for instance, the freedom to vote and run for office and peacefully protest and otherwise participate in collective decision-making. Social rights designate the right to access key pillars of human flourishing: education, health care, and the sound administration of justice. Social equality and non-discrimination identify the necessity that social practices operate in ways that reinforce and don’t undermine rights protections. Taken together, these goals are the foundation of a valid social

contract and effect the safety and happiness of the people of the society by securing their rights and establishing a sturdy foundation on which they can pursue their own flourishing, charting the life courses they define for themselves as desirable, both individually and through shared decision-making processes.

If these are the broad objectives of constitutional democracy, what overarching yet specific principle can facilitate the design of a system for public safety and the administration of justice that aligns with the broad goals articulated here for a healthy social contract? The next section addresses this question.

## **B. The Purposes of Government for the Administration of Justice: The Principle of Alienation vs. the Principle of Association**

Often the failures of our current system for the administration of justice are attributed to structural racism. While systemic racism does afflict our system of justice, the root of our difficulty is actually older, deeper, and more profound. Since antiquity, systems of punishment in the West have depended on a principle of alienation, the principle that those who commit offenses make themselves “outlaws”; they put themselves outside the boundaries of the social community and outside the penumbra of its protection.

In ancient Athens, this was expressed through a punishment known as *atimia*, literally “without dignity”, that ran a spectrum from stripping convicted wrong-doers of political and civil rights to banishing them altogether from the city-state. In ancient Rome, a similar mode of punishment for citizens was known as *infamia*, from which we derive the word infamy. This punishment, coupled with exile as a stand-alone punishment, served, as with *atimia* in Athens, to convey the alienation of the wrong-doer from the political community. As Katherine Pettus (2013) points out, these ancient punishments evolved into practices of outlawry, attainder, and ultimately felony disfranchisement in, respectively, medieval and early modern England, colonial America, and then the United States.

On the principle of alienation, the wrong-doer, by violating the law, had violated a social pact linking them to other members of society, and the reciprocal response was to declare them out of the society and out of its protection. This left individuals so punished highly vulnerable to violence at the hands of other members of their community unless they choose to remove themselves altogether from their community and go fully into exile. The possibility of exile, however, made the principle of alienation less extreme than it might otherwise seem. Through exile offenders effectively had access to a “second-chance.” They could establish themselves elsewhere, and live out their lives as free people, even building up property and developing ties to new communities. While they were alienated from their original community, they were not necessarily alienated from all community.

The ancient Athenians commonly used metaphors of disease and health to characterize the problem of wrong-doing in the community and how best to address it. An act of wrong-doing provoked the disease of anger; this disease needed therapeutic treatment. Victims needed satisfaction but also the community generally, including the wrong-doer needed healing (or to be made whole, a word that is etymologically linked to healing). Healing for the community and the wrong-doer required a restoration of healthy social bonds. Exile permitted this insofar as it both enabled the community to reconstitute itself without the trigger of anger caused by the ongoing presence of the wrong-doer in the community, and the wrong-doer had a chance to establish productive social bonds elsewhere, free from previous negative entanglements. (See Allen 2000). In a sense, the social contract was made whole within the society through the departure of the offender, and the offender had the opportunity to form social bonds elsewhere.

Practices of second-chance exile continued through the early modern and colonial periods, and even into the middle of the 19<sup>th</sup> century. The British government routinely shipped offenders to the American colonies—in an exercise of the principle of alienation. But there those offenders had a chance to establish themselves anew. This was also true with the British use of penal transport of convicts to Australia.

In short, for several millennia, the principle of alienation helped sustain a system for the administration of justice that, so long as the practice of “alienation” was linked to exile, brought benefits to all parties. While the principle of alienation sustained the “terrors” that Hamilton mentions, those terrors were held in some sort of balance with benefits, given the long-lived availability of second chances through exile.

All this changed in the middle of the 19<sup>th</sup> century.

In 1865 the British decided to end the practice of penal transport and they brought it to a full close in 1868. At just the point when British penal transport came to an end so too did enslavement as an economic practice in the U.S. The 13<sup>th</sup> amendment to the U.S. Constitution, ratified in 1865, just when Britain was ending use of exile, declared that: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” Moreover, by 1870, the United States had brought 37 states into the Union. The vast continent itself was no longer a place where offenders could head West and find fresh opportunities and a second chance. This was the watershed moment for the history of punishment in the Anglo-American world. For the first time, exile was no longer available in any meaningful way as a mechanism through which to reconcile the well-being of victims, society, and wrong-doer. In its place, incarceration began to rise to the fore.

Yet at this time of significant transition in practices of punishment, the principle of alienation that had shaped punishment for millennia was neither surfaced for discussion nor reconsidered. Instead, as incarceration began to replace exile as the central form of sanction, it became a vehicle for the ongoing societal expression of a principle of alienation of wrong-doers. Attached to incarceration instead of exile, however, the principle of alienation became increasingly damaging—more terror and far less benefit. Rather than being alienated outside the boundaries of the polity, wrong-doers were now to be alienated *inside* it. Nor did the internal alienation bring with it any compensating benefit. Alienation effected by means of incarceration brings not opportunity but only degradation. In contrast to *atimia*, outlawry, and exile, incarceration does not enable the wrong-doer. Moreover, insofar as racial caste structures in the U.S. also sustained practices of “othering” or holding as “alien” racial minorities in the U.S., penal and racial practices merged together in the form of highly racialized practices of incarceration, and intensified the operations of a social principle of internal alienation, the creation of individuals inside the polity who are no longer represented as belonging to it, a symbolic statement most powerfully conveyed through felon disfranchisement. Used this way, the principle of alienation does not cure the social contract, by untangling relationships entangled in violence; instead it embeds a broken social contract in the heart of society. As reconfigured in the 19<sup>th</sup> century through attachment to incarceration and a racialized social structure, and threaded through the penal system of the U.S., the principle of alienation has done significant damage. This principle of alienation, at the root of penal systems from antiquity through the present day, rather than race, is our fundamental problem. Our problems of systemic racism are parasitic on a deeper problem of our use of the principle of alienation to define the administration of justice.

In a world with no capacity for exile, a community of nation states with fixed and closed borders, we have to abandon the principle of alienation as a solution to the problem of wrongdoing in the community. This principle is no longer available to us. We need to identify a different pathway to solving the relational problems that emerge into visibility when acts of wrong-doing occur. Some European countries—in particular the Netherlands and Germany—have already identified the necessary alternative principle. In the modern world, a system of sanctions for wrong-doing that has the potential to repair broken social contract will rest on a principle of association, not alienation. We can no longer send wrong-doers away from the communities where the wrongs transpired. Consequently, we have to redirect our energies both to repairing the social relations that generated the wrong in the first place and to equipping wrong-doers not only to pay restitution but also simultaneously to develop and participate in healthy and productive social relationships. In the 21<sup>st</sup> century, the administration of civil and criminal justice must root out the principle of alienation and pursue instead the principle of association.

European countries like Germany and the Netherlands have sought to articulate an overarching principle for their penal regimes. According to a Vera Institute report, to the degree that Germany uses incarceration, the goal “is to enable prisoners to lead a life of social responsibility free of crime upon release, requiring that prison life be as similar as possible to life in the community (sometimes referred to as ‘the principle of normalization’) and organized in such a way as to facilitate reintegration into society.” The 1998 Penitentiary Principles Act in the Netherlands also aims for “re-socialization of prisoners” and organizes sanctions around a “principle of association” according to which “prisoners are encouraged to maintain and cultivate relationships with others both within and outside prison walls.” The principle of association recognizes that removal from the community is in itself a sanction, and that time spent in incarceration does not need further elements of penalty added to it. Instead, time spent in incarceration needs to be structured to help offenders rebuild positive social relationships. Germany offers home leave to support cultivation of positive relationships with family and community as well as job searches. Both countries also seek to limit the use of incarceration itself as a sanction, prioritizing restitution, diversion, problem-solving programs, transitional housing, and work release programs. All of these approaches to sanctioning turn around the principle of association, seeking to generate healthy and positive connections between the offender and society. They have little in common with approaches to penalty that focus on a principle of alienation, and it is this shift of the overarching principle for the system of punishment, that brings the whole array of innovative approaches to the administration of justice into view.

### **III. Mitigating the Principle of Alienation vs. Designing for the Principle of Association**

As efforts to reform approaches to public safety and the administration of justice proliferate, it is important to clarify which efforts merely mitigate the hard edges of the principle of alienation, without replacing it, and which efforts instead design for the principle of association. The goal should be to prioritize and invest energy in efforts that do the latter. Only by that route can we effect a full transformation in the administration of justice in the U.S.

Here is a first pass at a rough schema that could be used to classify reform efforts and initiate a prioritization process:

Case Life Cycle	Mitigating Principle of Alienation	Designing for Principle of Association
Violence Prevention	Gun buybacks; Statistical predictions of violence clusters.	Transfer power and resources to communities who are already providing social supports through initiatives like credible messenger programs and kinship reentry; Improve homicide clearance rates.
Policing	End stop-and-frisk; Arrest diversion programs that expand purview of police authority.	De-militarize policing; Make de-escalation a standard element or police protocol; Partner police with social services and social workers; Shift budget from policing to violence prevention and medical services.
Prosecution & Trial		No pre-trial detention; No cash bail.
Sentencing	Remove sentencing disparities (e.g. crack vs. powder cocaine); Shorten sentences; Decriminalize and/or legalize drug penalties.	End mandatory minimums; Create a system of alternatives to incarceration.
System of Juvenile Sanctions	Better educational opportunities in juvenile detention.	Community supervision and apprenticeship diversion programs, coupled with interventions targeting psychological and emotional health, and adaptive coping skills. Practices such as Multisystemic Therapy and Functional Family Therapy have undergone randomized controlled trials and have proven effective.
System of Adult Sanctions	Prison education programs.	Work release; Home leave; Alternatives to incarceration.
Parole and Probation	Permit parole to jurisdictions other than where offense committed; Differentiate between minor and substantive parole violations.	End parole and probation.
Re-Entry	Ban the Box	Felon re-franchisement

While some energy invested in mitigating the hard edges of a system that relies on the principle of alienation is surely worthwhile, it is important to prioritize those efforts that design for the principle of association. Only if we do the latter will we ever transform how civil and criminal justice are administered in the U.S., and bring our system even remotely into line with standards of justice, as applied to our contemporary circumstances.

#### **IV. Activating Federalism to Reform the Administration of Justice**

Achieving a legitimate system for the administration of justice in the U.S. as a whole is made challenging by the remarkably fragmented nature of our federal system. Health, education, and the administration of justice are all functions for which the center of gravity lies at the state level, and even the county level, rather than at the federal level. Yet routinely policy analysts look to the federal government for reform.

The advantages of federalism are plainly apparent now as we watch excessive use of force exercised by federal agents in Portland, whose names are often masked and whose lack of personal connection to the communities in which they are operating removes a check on potential excess. A state-based system to the administration of justice has the advantage of keeping policing and court processes tethered to communities in which officials can be held to account in proximate ways. We sometimes need to call on federal resources to assist in calling local authorities to account, as with the Department of Justice review of policing practices in Ferguson, Missouri, but this is easier to do than to seek to deploy state-based resources to hold federal agents to account.

Given the value, therefore, of situating the center of gravity for the administration of justice at the state level, it's time for policy analysts to design from the ground-up—engaging with local leaders ranging from mayors and county officials to activists—and to develop approaches to the administration of justice from scratch with the principle of association at their heart. To design with a focus on the principle of association is to ask the question of how we can forge healthy social compacts in all our communities. We find healthy pathways, and a genuine prospect of reform, precisely where local leaders are asking this question. Take as an example the Peace Pact, released by the African-American Mayors Association. These mayors are committing to renegotiating police contracts, policies, and cultural norms, as well as ensuring that local budgets reflect local values and priorities. Clarifying what is within their power permits the mayors, then, also to advocate for the federal changes they need to support their efforts. On this front, they endorse the House-passed George Floyd Act, with the goal of creating a national standard for policing as well as national data collection. The municipal perspective brings into visibility how the different layers of our federal system interact, and how we can assign different roles to the different layers to achieve coordinated action toward an overarching principle of, in their case, “peace,” or as articulated here, “the principle of association,” which itself has the job of delivering peace.

If we focus on the principle of association, we will want to design from the ground up rather than from the top down because all of our work in building and reforming the systems by which we administer civil and criminal justice will have the concept of healthy communities at their heart. We will need knowledge from within communities to unlock the puzzles of the sources of violence, and to discover the most powerful opportunities for cultivating and fostering healthy communities. We will need help from state and federal structures to deliver responsive institutional supports and the civil society investment that can sustain healthy communities, but the design of those supports and investments should follow the insights of those best positioned to judge whether a given state or federal intervention supports a principle of association. Those best positioned to make these judgments are those who live in the community most impacted by the intervention. Members of the impacted

community are best positioned to judge whether a given strategy increases or degrades the health of the community. A commitment to the principle of association therefore also entails a commitment to empowering the knowledge and insight of community members themselves.

## **V. Conclusion**

The problem we seek to overcome in our system for the administration of justice is its reliance on an ancient and long-lived principle of alienation as at the core of penalty. In the 21<sup>st</sup> century world such a principle has no capacity to restore health to communities or wrong-doers. Consequently we need to root it out of our institutions, and replace it with a principle that can restore health and peace in the wake of violence: the principle of association. Once we see the need for this change of fundamental orientation, the work we have to do becomes clearer. How we handle every phase of the life-cycle of a case of wrong-doing requires redesign to close the adherence gap between what we currently do and the principle of association. To develop re-designs for our systems for administering justice that adhere to the principle of association, we have to start by testing within communities themselves which sorts of institutional adjustments and civil society investments have the most promise for bringing health to communities. The policy content of the principle of association should be filled out from the experiences of community members actively working to enhance the health of their communities, for they have the most acute knowledge of the obstacles that must be overcome.



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