

Black Lives Matter and the Revaluation of Our Criminal Justice Values

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Since the 18th century philosophers (think [Immanuel Kant](#) or [Cesare Beccaria](#)), usually responding to spikes in political unrest, have periodically returned to the search for an ideal system of criminal justice, freed of all the historic flaws of monarchical overreach, local corruption, and today many philosophers would add: racism, classism, ableism, sexism, heteronormativity and transphobia. It is to them that we owe the enduring appeal of such ideas as retribution, proportionality, and deterrence. Almost as old is the countervailing critical philosophical tradition (think [Frederich Nietzsche](#), Karl Marx and [Antonio Gramsci](#)) that starts with the realities of how the organs of criminal justice have functioned and declares the same traits to be not flaws but design elements in a system intended not for justice but hierarchical social control. Neither project is exactly contradictory to the other in a logical sense, but they often seem to be talking about different issues and past each other.

Teaching criminal law and criminal justice to law students and undergraduates through the decades of mass incarceration has been a difficult balancing act between the two. Too often I've resolved that dilemma in an admittedly unsatisfactory manner; by teaching the ideal theory to law students (who can then become prosecutors and judges) and the critical perspectives to my undergraduates. Once in a while, however, history steps in like [Napoleon on his horse](#), to make it possible to think differently and resolve profound philosophical cleavages. I believe the contemporary social movement known as Black Lives Matter is forging just such a moment for thinking and acting on criminal justice in America today.

While the #BLM movement is one of the most grassroots and diversely led in our nation's history, and its message is not reducible to a single program, two messages come through loudly and clearly. First, the current expression of criminal justice largely fails at preventing serious violence in Black communities and is responsible for an intolerable portion of it. Second, even in its non-lethal activities, criminal justice actors routinely fail to respect the human dignity of Black people.

Centering Black lives has the immediate benefit of clearing the fog that comes with talk of "public safety"; as if a society as historically racialized as the United States of America could plausibly pretend to have a color blind view of that. At the same time, these two clarion messages also point us toward the values that have gained ascendancy across our nation in recent decades and deserve to be central in any rethinking of criminal justice at large: anti-violence and dignity.

Anti-violence

Discussion of abolition (whether of police or prisons or criminal justice as a whole) often comes down to the question of violence prevention and response. How would we deal with crimes of violence like sexual assault, aggravated battery or murder? How would we deal with "violent

criminals” without the current apparatus of criminal justice or something a lot like it? There is great force to this objection. Whether we understand its negative effects in [Hobbesian](#) terms as dissolving bonds of social trust and organization, or in [Millian](#) terms of stripping people of the most fundamental securities essential to autonomy, anti-violence like anti-racism deserves to be seen as a value of primary importance in contemporary societies (indeed they are often the same thing).

To this, abolitionists have an impeccable rejoinder, as Black people, women, queer, disabled, trans, and all of the above, they represent some of the most violence vulnerable people in the contemporary United States and also the most failed by our current suite of criminal justice agencies. It is not only the [undiminished scale of police violence](#) despite steep drops in crime during the early 21st century, but also the fact that deep pockets of interpersonal violence remain unresolved in segregated and marginalized communities, that fuels demands for defunding the police and other abolitionist calls today. And it is not Black and Brown communities alone. Women in every community suffer sexual and other assaults that almost every honest expert agrees are largely unhindered by our current criminal justice practices. Indeed, one might say that only by holding an implicitly male and white perspective can criminal justice as currently practiced seem even plausibly effective as an anti-violence measure.

Taking anti-violence seriously is, in fact, as strong a reason as there is to adopt an abolitionist horizon in charting paths of reform in criminal justice. As legal scholar David Sklansky points out in a [recent book](#), violence is a late comer as a central concern of the law (criminal and other), reflecting broad changes in post-war American values. After the war on crime, which took its strongest justification from the explosion in homicide and aggravated assaults from the late mid-1960s until the early 1980s and rising again in the late 1980s and early 1990s, there should be wide consensus that the primary job of any criminal justice agencies should be to prevent violence between people and to rigorously repress violence within the practice of criminal justice. While the war needs to end because it's ineffective against violence and humiliates whole portions of our citizens, the value of anti-violence is enduring.

However as history shows, our current criminal justice institutions, criminal courts, police, prisons, probation and parole, were not invented to act on interpersonal violence, but rather to protect public and private property through disciplining and surveilling members of suspect classes (usually immigrants and later Black people). To the extent that prisons, police and probation claimed an impact on violence, it was largely by way of racist punitive myths that linked the threat of violence to the bad habits of the idle poor; thought to be eugenically predisposed to crime of all sorts. Decades of efforts to make the criminal justice system more effective in violence prevention has failed and had perverse effects including the grotesque overuse of solitary confinement, life without parole sentences, and stop and frisk policing (all extremely harmful and dubiously or negatively related to violence reduction).

Human Dignity

Our two values, anti-violence and human dignity, may best be seen as convergent. Why has the prevention of violence risen to the top of our public policy values (even if not effectively carried out)

over the past half century? The increasing salience of human dignity as a value. Since [Durkheim](#) sociologists have expected the secularization of society to leave human life, and human dignity, the primary social values. While we often remain divided as a nation about what dignity requires on specific issues (think abortion, same sex marriage, etc.) advocates on all sides of the political divide claim to be upholding human life and dignity. Our legal system, while largely failing to address systemic racism in full (hobbled by a color blind theory of equality), has made major advances in demanding public and even private respect for the dignity of queer families and disabled people. Yet our criminal justice system has been a unique and sweeping exception to this dignity trend. As Justice Sotomayor put it in a [fiery recent dissent](#) on a typical case of indignity at the hands of the police:

This case involves a suspicionless stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes, ...many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone's dignity can be violated in this manner.

Justice Sotomayor went on to recognize that this disrespect for human dignity falls most heavily on “people of color [who are] are disproportionate victims of this type of scrutiny.

While talk of procedural justice has saturated [reform](#) discourse about policing for more than a decade (with its explicit focus on respect for human dignity), the police response to the [George Floyd protests](#) in the summer of 2020 demonstrated a national failure to embrace that message when it most counted (that is when people were protesting precisely the racially marked disrespect for human dignity embodied in the murder of Floyd by a police officer). Our jails and prisons remain festering sores of indignity where anyone can lose their basic sense of humanity within hours of being jailed, and where the physically and mentally disabled are exposed to years of [hyper overcrowding and chronic neglect](#). The COVID pandemic, and the high death tolls in our jails and prisons, has ended any pretence that incarceration has progressed in its respect for human dignity since John Howard decried *The State of the Prisons*, in 1789.

Towards an Abolitionist Horizon Guided by Anti-Violence and Human Dignity

Calls to defund the police and abolish prisons and jails coming from the Black Lives Matters movement are promising opportunities for our nation as a whole to come together around two vibrant public values contemporary to our own time: anti-violence and respect for the human dignity of everyone. Our path dependent reliance on criminal justice institutions, born centuries ago, and shaped by values foreign to and even oppositional to human dignity and social conditions long gone, has reached a breaking point. These institutions, rooted in racialized myths about crime and the social transformations associated with industrialization, need to be replaced by new practices anchored in 21st century social realities and public values. That process can and should be led by the communities most failed by our current practices, Black, Brown, Queer and Trans communities that have the most experience with violence and disrespect for their humanity. In the meantime let us agree on eliminating immediately, those criminal justice practices that are

demonstrable failures in preventing violence and direct threats to human dignity including “stop and frisk policing”, militarized responses to demonstrations of opposition to police violence, and prolonged exposure to solitary confinement or overcrowded prison and jail conditions.