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RECOGNISING STATE BLAME IN SENTENCING: A COMMUNICATIVE AND RELATIONAL FRAMEWORK

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ABSTRACT. *Censure, blame and harms are central concepts in sentencing that have evolved over the years to take into account social context and experiential knowledge. Flexibility, however, remains limited as the current analysis in sentencing focuses on the offender while failing to engage with the state's contribution in creating wrongs and harms. This risks giving rise to defective practices of responsibility since the state can also contribute to their production. The following article presents a complementary and additional framework within sentencing to account for state censure, blame and harms. The framework is rooted in communicative theories of punishment that integrate a responsive understanding of censure and a relational account of responsibility.*

KEYWORDS: *censure, state, blame, harms, communicative, sentencing.*

I. INTRODUCTION

Concepts of censure, blame and harm are central to sentencing and have evolved over the years within communicative theories of punishment and sentencing practices to account for sociological and experiential knowledge. Yet, the current literature and sentencing processes limit the communicative potential of censure by focusing on the offender's characteristics and contribution towards the offence and its related harms. This framing occludes the potential of recognising the state's responsibility and contributory harms as a relevant aspect to communicate and analyse in sentencing.

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Building on communicative theories of sentencing that are rooted in liberal and communitarian frameworks, this article proposes a complementary understanding of censure that borrows from communicative theories of responsive censure and relational blame to justify an additional stand-alone analysis in the sentencing process that enables sentencers to engage with the state's contributory role and related harms as part of the sentencing process. Specifically, this complementary account or framework allows for a more nuanced and comprehensive communication of blame and harms in sentencing that not only engages with the offender's individual blame, but also recognises and engages with the state's contributory role in blameworthy practices and decisions that are criminogenic and contribute to various sets of harms. This complementary framework recognises the importance of capturing a wide range of effects and of considering the harm, individual as well as social, that results from the exercise of state power, which can remain hidden, misunderstood or in part wrongly attributed within a myopic understanding of blame and censure. The article outlines a typology of state blame and harms that can be relevant in sentencing and proposes a methodology to introduce this account within the sentencing process.

This article is divided into two parts. The first part discusses the conceptual understandings and evolution of censure, blame and harm in communicative theories of punishment and in sentencing regimes in both Canada and England and Wales.[1] It emphasises the limitations of the current communicative framework, which fails to engage with the state's relational responsibility and contributory harms in sentencing. The second part proposes a complementary framework that is justified in communicative theories of punishment and censure to account for the various forms of state blame and harms in the sentencing process. This framework allows for a more nuanced understanding of censure, blame and harms in sentencing and provides a typology of the way the state can contribute to harms. The second part also proposes a methodology based on a complementary approach to the just deserts analysis within the sentencing guidelines in England and Wales in order to structure and analyse state blame and harms separately from offender blame.

II. Censure, Culpability and Harms in Communicative Theories of Sentencing: An Evolving Approach with Limitations

Notions of censure, blame and harm are central to communicative theories of punishment and have evolved over the years within the theoretical literature as well as sentencing practices to account for sociological and

[1] Both jurisdictions were selected for their focus on sentencing theories that focus on communicative theories, including just deserts theories of punishment, within their sentencing regimes.

experiential knowledge. Despite the recognition of a more flexible approach to these concepts that infuses greater individualisation and attention to social and experiential contexts, they offer little for a comprehensive and nuanced understanding of blame that recognises and engages with state blame and its corresponding harms that relate to criminality.

A. The Dynamic and Responsive Evolution of Censure and Punishment

Early just deserts theorists in the 1970s and 1980s developed a theory of communicative sentencing through the concepts of censure and proportionality. For von Hirsch and Ashworth proportionate punishment plays a communicative and censuring function, conveying censure to the offender, to the victim and to society.[2] The normative message relating to censure treats the offender as an agent capable of moral deliberation and response but it does not *aim* at provoking a discursive response. Accordingly, censure rooted in retributive justifications[3] "serves only to give the actor the opportunity to make a response"[4] and "as an appeal to the public's sense of the conduct's wrongfulness".[5]

Duff's penance theory considers punishment a communicative enterprise in which the punishment engages with citizens and their shared values.[6] To remain silent in the face of crimes would be to undermine – by implication to go back on – its declaration that such conduct is wrong. Censure of such conduct is owed to victims, as members of the community, and as manifesting that concern for them and for their wronged condition that the declaration itself expressed. It is also owed to the society whose values the law claims to embody, showing that those values are taken seriously, and it is owed to offenders themselves since an honest response to another responsible moral agent's wrongdoing is criticism or censure of that wrongdoing.

Contrary to just deserts theory, for Duff communication involves a reciprocal and rational engagement. He highlights that communication requires someone to or with whom we try to communicate. It aims to engage that person as an active participant in the process who will receive and respond to the communication as it appeals to the other's reason and understanding. The response it seeks is one that is mediated by the other's rational grasp and its content.

[2] A. Ashworth, "Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing" in J.V. Roberts (ed.), *Mitigation and Aggravation at Sentencing* (Cambridge 2011); A. von Hirsch and A. Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford 2005).

[3] A. von Hirsch, *Doing Justice: The Choice of Punishments* (New York 1976); A. von Hirsch, "Philosophy of Punishment" (1992) 16 Crime and Justice 55, 56.

[4] Von Hirsch and Ashworth, *Proportionate Sentencing*.

[5] Ibid.

[6] R.A. Duff, *Punishment, Communication and Community* (Oxford 2001). For Duff, this includes an authoritative, communal condemnation of these wrongs and that these wrongs merit a public, communal response. In other words, those who commit them should be called to account and censured by the community.

Accordingly, in addition to being retributive, censure is also purposive as it also serves to bring offenders to recognise and repent their crimes. Censure is deserved for the past crime, but it is also forward-looking by aiming to engage the offender in achieving penance with persuasion and engagement with rational arguments. This maximises the communicative role of punishment, which serves to achieve what Duff highlights as the triple R: repentance, reform and reconciliation. In contrast with just deserts theorists, the unpleasantness of the sanction forces the offender's attention and thus can compel the actor to attend to the disapproval visited through the sanction.

Inspired by Duff's responsive censure, certain desert theorists have recently re-conceptualised censure and punishment as a more dynamic form of communication. While they suggest that the communicative dimension of punishment is not aimed at provoking a response, they nonetheless highlight that if the offender takes the opportunity to respond, this can be considered at sentencing and during the administration of the sentence.[7] Contrary to traditional desert theory, the offender is recognised as a responsive agent who partakes in a dialogue and cannot be ignored.[8] Accordingly, this approach enables authorities to review the original censuring decision over the years, in order to account for the prisoner's response to the sentence's message in relation to the offence.[9]

Finally, in additional understandings of censure, referred to as "retributarianism",[10] accounts have also argued in favour of a subjective retributive/desert-based communicative theory. They suggest that to be understood by offenders and society, it is important to account for the offender's experience of punishment,[11] instead of understanding punishment severity by relying on abstract accounts of typical individuals. This theoretical position, referred to as subjective retributivism, challenges quantitative understandings of punishment by pointing to empirical studies that suggest that punishments twice as severe in experiential terms are not necessarily twice as long.[12] The severity of sanctions can therefore vary

[7] J.V. Roberts and N. Dagan, "The Evolution of Retributive Punishment: From Static Desert to Responsive Penal Censure" in A. du Bois-Pedain and A. Bottoms (eds.), *Penal Censure: Engagements Within and Beyond Desert Theory* (Oxford 2019), ch. 8, 141, 143.

[8] H. Maslen, *Remorse, Penal Theory and Sentencing* (Oxford 2015).

[9] Roberts and Dagan, "Evolution of Retributive Punishment". Examples of responsive offence-related factors include: the way the person addresses the harm inflicted by compensating for the victim's loss; showing sincere empathy or remorse; apologising; and taking responsibility for the harm. Responsive factors unrelated to harm and culpability, such as diminishing reoffending, should be excluded from this account.

[10] H. Dancig-Rosenberg and N. Dagan, "Retributarianism: A New Individualization of Punishment" (2019) 13 Crim. L. Phil. 129

[11] A. Kolber, "The Subjective Experience of Punishment" (2009) 109 Colum. L. Rev. 182.

[12] P. Tremblay, "On Penal Metrics" (1988) 4 J. Quantitative Criminology 225; R.E. Harlow, J.M. Darley and P.H. Robinson, "The Severity of Intermediate Penal Sanctions: A Psychophysical Scaling Approach for Obtaining Community Perceptions" (1995) 11 J. Quantitative Criminology 71; M.F. Schiff, "Gauging the Intensity of Criminal Sanctions: Developing the Criminal Punishment Severity Scale" (1997) 22 Crim. Just. Rev. 175.

to account for experience[13] and include collateral consequences felt by the offender as part of the sentence.[14]

Despite the evolving conception of censure to include experiential accounts and responsive communication, theoretical and jurisprudential accounts of censure remain focused on the individual offender and the offence, largely ignoring possibilities for state censure, blame and harms.

A tentative but limited exception can be found in Canadian sentencing in contexts of state abuses. Indeed, while state blame formed part of the background of the Supreme Court's decision in *Nasogaluak*,[15] the discussion about censure was still focused on the offender's just deserts including his circumstances. The Court eventually cited Manson, who has argued in favour of taking into account constitutional rights violations by the state in sentencing, based on the communicative function of sentencing which "must be understood as providing scope for sentencing judges to consider not only the actions of the offender, but also those of state actors".[16] Indeed, the Court recognised that the sentencing process includes "consideration of society's collective interest in ensuring that law enforcement agents respect the rule of law and the shared values of our society".[17] This consideration of state abuses was nevertheless limited to cases where the impugned state conduct related to the individual offender and the circumstances of his or her offence.

Despite recognising the communicative role of sentencing that includes the state's actions, Manson and the Supreme Court have underpinned these considerations mainly on the basis that they are felt as punishment or hardship by the offender.[18] While this recognises the importance of communicating state abuses, it limits communication and censure by tying them to the offender's blame and censure rather than engaging in a separate and complementary analysis of censure that also engages with state blame and harms, as proposed in this article.

Recently, the Court of Appeal of Ontario in *Morris*[19] recognised that sentencing judges must acknowledge societal complicity in systemic racism and be alert to the possibility that the sentencing process itself may foster that complicity. While acknowledging this complicity, the Court rejected the idea that allocating responsibility for crimes as between society at large and the individual offender should play a role in fixing the appropriate

[13] For instance, banishment, imprisonment, fines, restoration and other types of sanctions may be experienced differently.
[14] B. Berger, "Proportionality and the Experience of Punishment" in D. Cole and J.V. Roberts (eds.), *Sentencing in Canada* (Toronto 2020), ch. 18, 368; A. Manson, "Charter Violations in Mitigation of Sentence" (1995) 41 C.R. (4th) 318.
[15] *R. v Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206.
[16] Ibid., at [48]; Manson, "Charter Violations in Mitigation of Sentence".
[17] Ibid., at [49].
[18] Berger, "Proportionality and the Experience of Punishment".
[19] *R. v Morris*, 2021 ONCA 680, at [85].

sentence. It also raised the lack of sentencing justifications that would recognise the allocation of societal fault as a legitimate objective in sentencing. The following discussion responds to these perceived limitations.

Part II proposes a framework that justifies the recognition of state blame and harms in sentencing by relying on responsive and dynamic communicative theories of punishment to complement the current focus on individual censure. This framework expands beyond the recognition of state abuses as experiential hardship and punishment and shifts the gaze to the state as a communicative and relational endeavour, allowing for a more thorough and nuanced understanding of censure.

B. Culpability and Its Evolving Relationship to the Offence and the Offender

Culpability as a central concept of sentencing has also evolved within punishment theory and sentencing practices, but has also focused on individual blame with little engagement with state blame.

Traditional desert theory relied heavily on criminal law doctrines of culpability that examine the individual's personal mental state at the time of the offence,[20] which includes a range of volitional and situational factors[21] as a conceivable basis for claiming reduced culpability.[22]

In recent years, some desert theorists have expanded culpability beyond substantive criminal law doctrines to look at its meaning more holistically, examining the offender's conduct both retrospectively and prospectively. As Roberts highlights, the offender's conduct before and after the offence provides "a context in which to judge … the extent to which the offender should be considered blameworthy",[23] which includes remorse as reduced culpability,[24] and previous convictions as greater culpability.[25] This new development, rooted in retributarianism,[26] suggests greater individualisation and an extension of the relevant timeframe for assessing culpability.[27]

[20] Von Hirsch, "Philosophy of Punishment", 64–65.

[21] A. Ashworth, *Sentencing and Criminal Justice*, 6th ed. (Cambridge 2015), 158.

[22] For instance, mental disability diminishes culpability on the basis that a person's capacity to comply with the law is impaired. See von Hirsch and Ashworth, *Proportionate Sentencing*, 63.

[23] J.V. Roberts, "The Recidivist Premium: For and Against" in Roberts (ed.), *Mitigation and Aggravation at Sentencing*, 155.

[24] The remorseful offender is concerned with achieving some rectification for his wrongdoing – taking a step away from his offending and thus reducing his blameworthiness. Ibid.

[25] See J.V. Roberts, "Punishing Persistence: Explaining the Enduring Appeal of the Recidivist Sentencing Premium" (2008) 48 Brit. J. Criminol. 468, arguing that within just-desert theory reoffending is a mark of increased blameworthiness. Having already been convicted and sentenced, an offender should have greater awareness and take steps to address the causes of non-compliance.

[26] Dancig-Rosenberg and Dagan, "Retributarianism".

[27] Retributivists are divided. For some, prior convictions should never be relevant elements at sentencing, since they do not relate to the specific offence under consideration: G.P. Fletcher, *Rethinking Criminal Law* (Boston 1978); M. Bagaric, *Punishment and Sentencing: A Rational Approach* (Sydney 2001). Traditional desert theory has assigned a very limited role to previous convictions under the progressive loss of mitigation doctrine: M. Wasik and A. von Hirsch, "Section 29 Revised: Previous Convictions in Sentencing" (1994) 24 Crim. L.R. 409; von Hirsch and Ashworth, *Proportionate Sentencing*.

Moreover, desert theory has increasingly developed an expansive understanding of culpability grounded in social context that recognises some minimal contributory dimension of the state's role in producing inequalities. Indeed, it increasingly relies on the advancement of interdisciplinary knowledge and empirical data to inform the understanding of culpability and provides greater space to consider individualised personal characteristics and circumstances of the offender in understanding it.

Desert theorists traditionally resisted seeing a nexus between social deprivation and diminished culpability. They maintained that social deprivation does not deny the capacity to behave otherwise.[28] Nevertheless, citing Hudson's work, von Hirsch and Ashworth acknowledge that some people are trapped in a criminal lifestyle, with scarcely more capacity for free choice than the person subjected to direct threats and that therefore they should not be held to the same normative expectations as others. Hudson warned that the notions of free will and culpability need to be reconsidered: "Legal reasoning seems unable to appreciate that the existential view of the world as an arena for acting out free choices is a perspective of the privileged, and that potential for self-actualization is far from apparent to those whose lives are constricted by material or ideological handicaps."[29]

There is an increasing understanding that human choice is a complex interactive process that involves both a distinctively human capacity for moral reasoning and strong instincts and inclinations.[30]

Based on such reflections, desert theorists acknowledge that social deprivation can constrain an offender's choice to an extent, and they highlight that the evidence on how socio-economic differences interact with the communities and institutions in which they live remains uncertain and varying in degree.[31]

This approach to culpability has increasingly been adopted by Canadian courts, particularly in sentencing cases of Indigenous and racialised offenders. In *Ipeelee*, the Supreme Court of Canada specified that systemic and background factors, such as a history of colonialism, can be relevant mitigating factors, because they may explain in part the Indigenous offender's conduct.[32] It argued that "systemic and background factors may bear on culpability, to the extent that they shed light on his or her level of moral

[28] Von Hirsch and Ashworth, *Proportionate Sentencing*, 63; Ashworth, *Sentencing and Criminal Justice*; M.S. Moore, "The Moral Worth of Retribution" in F. Shoemann (ed.), *Responsibility, Character and the Emotions* (Cambridge 1988), 179; S.H. Kadish, *Blame and Punishment* (New York 1987).

[29] B. Hudson, "Punishing the Poor: A Critique of the Dominance of Legal Reasoning in Penal Policy and Practice" in A. Duff, S. Marshall, R.E. Dobash and R.P. Dobash (eds.), *Penal Theory and Practice* (Manchester 1994), 292, 302. This analysis was referred to by just deserts theorists von Hirsch and Ashworth in *Proportionate Sentencing*.

[30] A. Bottoms, "Five Puzzles in von Hirsch's Theory" in A. Ashworth and M. Wasik (eds.), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Oxford 1998), ch. 3, 53, 81–82.

[31] Ashworth, *Sentencing and Criminal Justice*, 159.

[32] *R. v Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at [73]; *R. v Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207, at [38].

blameworthiness".[33] The Court echoed desert theory by referring to voluntariness, and it suggested that while socio-economic deprivation faced by many Indigenous offenders rarely – if ever – attains a level where their actions could be considered involuntary and therefore undeserving of criminal sanctions, it can nonetheless be said that their constrained circumstances may diminish their moral culpability. Similarly, two recent Canadian appellate court judgments, *Anderson* and *Morris,* have recognised the link between anti-Black racism and constrained choices which are relevant to understanding individual blame in relation to the offence.[34]

Recognising the impact of colonialism and social deprivation on the offender suggests that the state has a contributory role in producing criminality. Nevertheless, within the current sentencing framework, there is no stand-alone communicative endeavour that analyses state blame in its own right, and therefore this additional understanding of blame is glossed over[35] by a narrow focus on the offender's culpability.

C. The Evolution of Recognised Harms and Their Attribution to the Offender

Another dominant concept in sentencing is the notion of harm that has traditionally been linked to the gravity of the offence – understood as the "injury done or risked by the act"[36] attributable to the offender. Within sentencing theory, harm is tied to the offender's individual blame, even at times when the state also bears a role in the creation of some of these harms.

Early desert scholars developed a framework termed the "living standard approach", which scales levels of harm to assess the effect of the typical case of particular crimes on the living standard of victims.[37] This conception of harm is abstract and refers to offence gravity within a specific time-period accepted in society.[38]

Some desert-based accounts have expanded harm to infuse individualised and experiential conceptions. Indeed, the literature on victim impact statements (VIS) (referred to as victim personal statements (VPS) in England and Wales) argues that these statements advance proportionality

[33] *R. v Ipeelee*, 2012 SCC 13, at [73].
[34] *R. v Anderson*, 2021 NSCA 62, at [101]; *R. v Morris*, 2021 ONCA 680, at [76], [136], [154].
[35] This limit has been noted by S. Lawrence and D. Parkes, "*R v Turtle*: Substantive Equality Touches Down in Treaty 5 Territory" (2020) 66 C.R. (7th) 430 and E. Arbel, "Rethinking the 'Crisis' of Indigenous Mass Imprisonment" (2019) 34 C.J.L.S. 437, 439, which highlights that describing Indigenous mass incarceration as a crisis, without meaningfully identifying state responsibility for that state of affairs, results in deepening and strengthening Canada's colonial narrative. The effect is to distance, and even disappear legal responsibility for ongoing colonial violence.
[36] A. von Hirsch and N. Jareborg, "Gauging Criminal Harm: A Living-standard Analysis" (1991) 1 O.J.L.S. 1; Ashworth, *Sentencing and Criminal Justice*.
[37] Ibid.
[38] The standard was not implemented as such in sentencing regimes as it raises several questions and uncertainties, notably about the way to measure accurately one's quality of life and relative to that of others.

by providing more accurate accounts of harm than those relating to the traditional objective standard.[39] In recent years, courts in both England and Wales and Canada have implemented VIS legislation that incorporates such accounts.[40] Courts are clear that a sentencer must not make assumptions, unsupported by evidence, about the effects of an offence on the victim.[41]

Similarly to the discussion on culpability, the state's contribution is rarely explicitly mentioned. Although harms to victims are increasingly understood within an experiential approach, they continue to be attributed solely to the offender. One notable exception is found in England and Wales, where discussions about state blame are less developed than in Canada, but the VPS regime in England and Wales recognises that the sentence can be moderated to some degree where it aggravates the victim's distress.[42] Although the rationale behind this exception is not explicitly articulated by the courts, it seems to recognise a dimension of state blame as part of victim harm from the state. Sections III, IV and V below propose justifications and ways to expand this analysis by developing a framework that conceptualises state blame and additional types of harms in sentencing.

Conceptions of harm have also expanded to include community harms that result from the offence, with the use of community impact statements in Canada and England and Wales. In England and Wales, the reception of state blame and contextual focus is much more limited, and these statements have focused on attributing the harms described to the offender. Similarly, in Canada, courts are also very clear that the community impact must relate to the offence committed by the offender,[43] but there is increasing space within those statements to describe harm in broader contextual and experiential terms. In *Theriault*, the court recognised that "a community's history and lived experience will provide valuable insight that serves to contextualize the harm, loss or impact of an offence, in a manner that might not be otherwise appreciable to a person who is not from the community".[44] Although in

[39] A. Bottoms, "The 'Duty to Understand': What Consequences for Victim Participation?" in A. Bottoms and J.V. Roberts (eds.), *Hearing the Victim: Adversarial Justice, Crime Victims, and the State* (Cullompton 2010), ch. 2, 17; E. Erez, "Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment *and* Enhancement of Justice" (1999) Crim. L.F. 545; M. Manikis, "Victim Impact Statements at Sentencing: Towards a Clearer Understanding of their Aims" (2015) 65 U.T.L.J. 85; J.V. Roberts and M. Manikis, "Victim Impact Statements at Sentencing: The Relevance of Ancillary Harm" (2010) 15 Can. Crim. Law Rev. 1. The aims of VIS and VPS are similar. VPS's remit is wider than the VIS' as this statement is relevant even prior to sentencing. See J.V. Roberts and M. Manikis, *Victim Personal Statements: A Review of Empirical Research* (London 2011).

[40] *R. v Friesen*, 2020 SCC 9, at [79]; *R. v Perkins, Bennett and Hall* (2013) EWCA Crim 323, [2013] Crim. L.R. 533; Part III 28 of the Current Consolidated Criminal Practice Direction [2009] 1 W.L.R. 1396.

[41] *R. v Perks* [2001] 1 Cr. App. R. (S.) 19.

[42] *R. v Roche* [1999] 2 Cr. App. R (S.) 105.

[43] Section 722.3(2) uses this narrow lens, which has been reaffirmed in several decisions, including *R. v Ali*, 2015 BCSC 2539, and *R. v Theriault*, 2020 ONSC 5784.

[44] *Theriault*, 2020 ONSC 5784, at [18].

this decision there was a tentative focus on wider historical dimensions suffered by a Black community, the analysis still focused on the offender's blameworthiness, resisting integrating the way the state has also contributed to these harms.[45]

The following framework suggests that content on state contribution should be considered relevant at sentencing. Paying attention to state blame and discussing its related harms allows for a nuanced and responsive communicative experience of censure that respects citizens' agency while limiting inaccurate and incomplete communication of blame by solely attributing blame to the offender.

III. A Communicative, Responsive and Relational Approach to Censure and the Recognition of State Blame and Harms

This section proposes a separate and complementary framework to individual responsibility, grounded in responsive and relational communicative theories of punishment to justify the recognition of state blame and associated harms in sentencing. It articulates a typology of blame and harms that can account for the state's relational contribution to the wide range of effects and harms that can result from the exercise of its power within the criminal process. Finally, it proposes a methodology based on the sentencing guidelines in England and Wales that can be of assistance in incorporating this additional lens as a complementary step in sentencing.

A. A Relational Account of Responsibility

A relational account of responsibility rooted within a communicative theory of punishment argues that sentencing should not only focus on the offender's responsibility but also on the state's contributory responsibility and its production of harms. This understanding of responsibility allows the court to recognise, analyse and discuss this contributory state blame within sentencing, while recognising the offender's role in the crime.

As a preliminary underlying premise of relational accounts that involve state blame is a recognition that the state can be held responsible and blamed in the same way as individual wrongdoers when morally imperfect, and committing wrongful excesses and injustice.[46] Specifically, by jointly committing and adhering to a basic constitution or unifying structure, an organisation's members can generate a single, relatively autonomous corporate agent which, when faced with normatively significant choices, is capable of making irreducible judgments about what is right and wrong.

[45] Ibid., at [19].

[46] F. Tanguay-Renaud, "Criminalizing the State" (2013) 7 Criminal Law and Philosophy 255, which convincingly justifies state fitness and blame, and relatedly C. List and P. Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford 2011); N.W. Barber, *The Constitutional State* (Oxford 2010).

Accordingly, both the state as a whole or its members as individuals have a mind of their own and can be fit, responsible agents.

Duff's communicative theory offers preliminary reflections on state blame and considers that the state should be free of blame as a precondition of its standing to punish.[47] More specifically, his analysis focuses on social deprivation, suggesting that the state, understood as the representative of the polity, can lose its standing to punish when it has contributed to the offender's social deprivation. He argues that social deprivation suggests the state/polity has failed to treat the offender as a citizen, which removes its standing and ability to blame and punish. Duff's account, however, is not clear about when such a stage is reached and seems to hint that certain offences might be excluded from this reasoning.[48] Although this is an important contribution to the conversation about acknowledging state blame in matters that relate to punishment, his approach can result in no one taking blame, which raises issues within a communicative theory that relies on communication and censure to treat members of the community, including victims and offenders, equally and with respect.

A relational account provides justification for an approach that recognises mutual opportunities for blame rather than avoiding any blame. Tadros has discussed this relational account in the context of poverty that is criminogenic. He argues that instead of losing jurisdiction, when two agents have done wrong, "what each ideally ought to do is both to hold the other person responsible for what he has done and at the same time to hold himself responsible for his own wrongdoing. He ought to enter into relations of responsibility with the other wrongdoer but at the same time to treat himself as an object of self-criticism".[49]

Tadros's relational theory also finds justification within a communicative theory of punishment highlighting that failing to hold individuals responsible for their crimes may constitute another form of injustice by giving rise to a situation where there is a failure to provide an adequate public response to a wrong that has been done to the victim and other community members. The lack of censure signals a particular message about treating the offender, victims and other members of society as moral agents. Tadros's account of relational blame also suggests that standing can be repaired by "entering into a practice of responsibility where we subject ourselves to criticism at the same time as subjecting others to it".[50]

[47] R.A. Duff, "Law, Language, and Community: Some Preconditions of Criminal Liability" (1988) 18 O.J.L.S. 189; R.A. Duff, "Blame, Moral Standing, and the Legitimacy of the Criminal Trial" (2010) 23 Ratio 123.

[48] Duff, *Punishment, Communication and Community*; M. Matravers, "Who's Still Standing? A Comment on Antony Duff's Preconditions of Criminal Liability" (2006) 3 J. Moral Phil. 320, 327–28. It is not clear how serious the exclusion or disadvantage suffered by the alleged offender must be to impact the state's standing.

[49] V. Tadros, "Poverty and Criminal Responsibility" (2009) 43 J. Value Inquiry 391, 400.

[50] Ibid., at 401.

Understanding responsibility as relational and communicative justifies extending censure beyond individual blame to encompass the state for its share in the creation of certain harms. Engaging with censure of all wrongdoers, including the state and the offender, would consider these agents as equal members of the citizenry, and all would be treated with the respect that is due to moral agents by not denying their own equal moral status.[51] Failure to do so would, arguably, amount to "defective practices of responsibility"[52] and fail in maintaining moral relationships of citizenry and treating everyone as moral agents of equal and great moral concern. Practices of responsibility should be entered into to communicate to wrongdoers the moral principles that they ought to be governed by, and so to ensure that they come to recognise fully the moral status of their fellow citizens and to ensure that their actions are guided appropriately.

Sentencing as a communicative forum has shown limited flexibility over the years for the different conceptions of censure, blame and harms to be discussed and accounted for in the process. Allowing for an analysis complementary to that of the offender's blame and that turns the gaze onto the state would enable the state to enter more accurate and nuanced relations of responsibility with the offender.

B. Responsive Censure and State Blame

Censure as communication gives meaning to the declaration that certain kinds of conduct are public wrongs, and this declaration is owed to victims, as members of the community, and as a manifestation of concern for them and for their wronged condition. It is also owed to society whose values the law claims to embody, showing that those values are taken seriously. Finally, it is also owed to offenders themselves since an honest response to another's wrongdoing respects the wrongdoer as a responsible moral agent.

1. Responsive censure from offenders and the polity

Communicative theories of censure and punishment, including just deserts and penance theories, recognise that a response to criminal wrongdoing that conveys disapprobation needs to give the individual the opportunity to respond in ways that are typically those of an agent capable of moral deliberation: to recognise the wrongfulness of the action; to feel remorse; to express regret; to make efforts to desist in the future – or else, to try to give reasons why the conduct was not actually wrong.[53] Similarly,

[51] Ibid., at 402.
[52] Ibid., at 401.
[53] Von Hirsch and Ashworth, *Proportionate Sentencing*.

Maslen argues that communication needs to be responsive – one is not involved in dialogue if one ignores the other participant's response.[54]

Duff's communicative penance theory elaborated a typology of responses that offenders might bring forward in the communicative endeavour which considers censure as dialectical. "Offenders differ both in the nature and seriousness of their crimes, and in their reactions to those crimes and to the punishments they receive."[55] Accordingly, offenders can be (1) morally persuaded, (2) shamed, (3) already repentant and (4) defiant.

Although Duff does not engage with any response(s) where offenders may invoke state blame, the categories of responses created by Duff can potentially include such situations. Indeed, blaming the state can take different forms. Some offenders will respond by invoking state blame and either (1) negate their own responsibility in relation to the offence, (2) recognise their own responsibility but highlight that it is diminished, (3) recognise their own responsibility in a different way than the state's or (4) not provide any information that relates to their own responsibility. The first category that consists of negating one's own responsibility can be classified as "defiant", while the others can fit within any or all of Duff's categories.

Even if sufficiently malleable to incorporate some aspects of state blame, Duff's categories remain focused on the offender's response vis-à-vis his own blame. Building on a communicative and responsive theory of punishment, a complementary framework to Duff's would recognise offenders and members of the polity as responsive agents who provide separate accounts for the state's role in creating various harms that can be analysed independently of their own blame. The complementary category of responses can be referred to as "blaming the state" and would incorporate a response that attributes blame and harms to the state but is analysed independently of the offender's own blame. The typology of blame and harms developed below provides a substantive account of the different types of state blame and harm that can be brought forward as part of the response.

2. Expanding responsive censure beyond the sentence

Roberts and Dagan have developed an understanding or account of responsive censure which suggests that the appropriate degree of censure to the case can be more dynamic than simply a snapshot of the condemnation.[56] This suggests that an offender's actions after the crime, including conduct post-conviction and during the administration of the sentence, can affect the degree of censure that is warranted. This account also highlights a need to create opportunities for the offender and the polity to respond and to create an obligation on the state to consider the response beyond the

[54] Maslen, *Remorse, Penal Theory and Sentencing*.
[55] Duff, *Punishment, Communication and Community*, 116.
[56] Roberts and Dagan, "Evolution of Retributive Punishment".

sentencing process in cases where a sentence might last for a longer period of time – notably years and even a lifetime. Repeated interactions between the state, the polity and the offender are referred to as responsive or dynamic censure and can be implemented with late sentence reviews, like those proposed by Roberts and Dagan.[57]

The proposed framework suggests expanding the notion of responsive censure also to engage the state's contributory role in the creation of harms. It argues that state action that produces harms during the administration of the sentence, and that is not part of punishment, can be relevant within a framework that understands censure more expansively and aims to signal and engage with state blame and contributory harms.[58]

IV. A Typology of State Blame and Harms

The justificatory framework presented above discussed some of the rationales behind an additional and complementary framework that focuses on the state and analyses state blame and harms in their own right – separate from an element that diminishes or affects the offender's individual blame. This proposed framework recognises the importance of capturing a wide range of effects and of considering harm, individual as well as social,[59] that results from the exercise of state power, which can remain hidden, misunderstood or in part wrongly attributed within a myopic understanding of blame and censure.

This section proposes a four-fold typology of state blame and harms that recognises the various forms that these concepts can take in a framework that focuses on the state. Not all forms of blame or harms are present in every case, and multiple forms can co-exist. Distinctions between them can provide analytical nuances so as thoroughly to engage and conceptualise the forms of state blame and its related harms.

The typology distinguishes between predominantly systemic and criminogenic types of state blame/harms (types 1 and 2) and individualised dimensions of blame/harms that the state produces in the specific criminal case (types 3 and 4). For each type, illustrations are provided of the ways these forms of blame/harms can feature in certain sentencing cases.

These forms of state blame/harms are important to recognise as part of a communicative sentencing framework that values responsive censure and relational practices of blame with its citizens who are considered equal rational agents, particularly as they enable more thorough and nuanced censuring.

[57] Ibid.

[58] Unlike that in Roberts and Dagan's account, this view of censure is more expansive than one that focuses on retributive grounds. The proposed analysis would therefore be extraneous to the principle of proportionality. See M. Manikis, "The Principle of Proportionality in Sentencing: A Dynamic Evolution and Multiplication of Conceptions" (2022) Osgoode Hall Law J. (forthcoming).

[59] P. Hillyard and S. Tombs, "Beyond Criminology?" in D. Dorling, D. Gordon, P. Hillyard, C. Pantazis, S. Pemberton and S. Tombs (eds.), *Criminal Obsessions: Why Harm Matters More than Crime*, 2nd ed. (London 2008), ch. 1, 6.

A. Type 1: The State's Systemic Criminogenic Contribution by the Creation and Maintenance of Societal Inequalities

There are different ways by which the state can contribute to the creation of crime. One contributory source is predominantly systemic and consists of state policies that promote various forms of inequalities that are known to perpetuate criminogenic conditions, which are conditions in which it is more likely that crimes will be committed.

A documented philosophical account was made by Tadros on the issue of the state's contribution to economic injustice.[60] He argues that the state is blameworthy through complicity in situations where the economic injustice it perpetrates by distributive injustice creates criminogenic conditions. Although the state does not know which specific person will commit crimes, it does know that the crime rate will increase in conditions of economic inequality.

This account of state contribution can be applied to situations where other forms of social inequalities are at play and are themselves criminogenic and known to the state. They include inequalities that are rooted in state colonialism, gender/patriarchal structures, anti-racism, anti-Semiticism, anti-Muslimism, and other power imbalances that are known by the state to be criminogenic and produce related harms through documented studies on inequalities.[61] Further, the state's contribution can also be evident within society's ableist culture that sees a lack of access to mental health support, as well as to drug and alcohol addiction programmes. Some examples are provided in this section to illustrate this type of state blame and related harms.

Notable situations where the approach taken here would be relevant are cases of gender-based violence, including sexual assault and domestic violence, particularly within marginalised communities. In those instances, the state's contribution to the creation of inequalities, including those that are intersectional based on gender, colonialism and socio-economic conditions, should be discussed and analysed separately in judgments to highlight clearly the state's role in creating conditions known to be criminogenic and the extent of related harms. This approach would allow for a more thorough and nuanced communicative response instead of promoting a one-way message that attaches it to the offender's culpability.

An example where this type of state blame/harm would have been relevant to communicate is the case of *LP*,[62] where an Indigenous person with a long

[60] Tadros, "Poverty and Criminal Responsibility".

[61] In the context of race and colonialism, see A. Owusu-Bempah and S. Wortley, "Race, Crime, and Criminal Justice in Canada" in S. Bucerius and M. Tonry (eds.), *The Oxford Handbook of Ethnicity, Crime, and Immigration* (London 2014), ch. 10, 282, 297, highlighting that "it must be stressed that any overrepresentation of blacks and Aboriginals in street-level crime and violence can be explained by their historical oppression and current social and economic disadvantage". This recognises the state's role in perpetuating anti-Black racism and colonialism within institutions and social structures.

[62] *R. v LP*, 2020 QCCA 1239.

history of violent domestic abuse recidivated against his partner while heavily intoxicated. In its decision, the Quebec Court of Appeal gave priority to objectives of denunciation and deterrence on the basis that consideration needs to be given to the "increased vulnerability of female victims in cases of abuse, with particular attention to the circumstances of Indigenous female victims".[63] The interpretation of victim vulnerability favoured an approach that emphasised the offender's individual blame and harms suffered by the victim instead of engaging in a wider censuring approach that also examined the state's contribution to victim vulnerability and harms.

More specifically, the disproportionate rate of domestic violence and harms suffered by Indigenous women was attributed to the individual offender without a stand-alone focus on the state's criminogenic contribution to this wider issue. While the Court referred to reports and evidence that, arguably, point to systemic blame, notably the way social and economic marginalisation of Indigenous people is criminogenic,[64] it used these reports to suggest that the blame should be focused on the individual offender. This was also the case when the Court identified colonialism as additional state criminogenic conduct, including the insufficiency of institutional response to all forms of interpersonal violence suffered by Indigenous women and girls, notably from law enforcement.[65]

Although the statements above seem to point to the state's contribution in creating criminogenic inequalities and harms, the Court in *LP* ultimately avoided framing it as such, and instead considered these harms as "suffered at the hands of her spouse",[66] relevant to the offender's blame and proposing imprisonment as a response. Further, the offender's drinking problems were attributed to himself, while an additional and separate analysis of state blame which focused on the state's criminogenic contribution to colonialism would have allowed a more nuanced and relational understanding of blame and state induced harms that have contributed to alcoholism within Indigenous communities.[67]

A separate and additional analysis that examines the role of the state and its contributory harms would have provided space to engage with the root causes, namely past and ongoing colonialism by focusing on historical and

[63] Ibid., at [76]. Section 718.201 of the Criminal Code recognises an increase of vulnerability to domestic violence in the circumstances of Indigenous female victims.

[64] Ibid., at [85]: the Court referred to the report, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Ottawa 2019), which highlights the way that social and economic marginalisation of Indigenous people is associated with criminogenic conditions.

[65] This includes the state's institutional criminogenic conduct that results in women and girls being less believed and less protected by offering them fewer social and safety nets. Some of the state blame/harm discussed that relate to law enforcement are best classified in the typology found in section IV.

[66] *R. v LP*, 2020 QCCA 1239, at [101].

[67] A. Ross, J. Dion, M. Cantinotti, D. Collin-Vézina and L. Paquette, "Impact of Residential Schooling and of Child Abuse on Substance Use Problems in Indigenous Peoples" (2015) 51 Addictive Behaviors 184.

current policing strategies, and the lack of services, shelters and support for victims, instead of piling the blame and harms on the offender.

B. Type 2: The State's Systemic and Criminogenic Contribution through Criminalisation Policies and Practices that Target or Affect Marginalised Groups

This type of state blame and related harms, while also systemic, is more specific and direct, since the state's criminogenic contribution is made by specifically resorting to criminal law policies and practices that aim or affect marginalised groups, which generate their own types of harms.

This second type includes two possible scenarios, notably (1) the state's criminogenic conduct through its criminalisation policies and practices that directly and intentionally target and harm members of marginalised groups, as well as (2) the state's criminogenic conduct through its criminalisation policies and practices, which the state knows are more likely to criminalise and impact members of marginalised groups.

State blame is more reprehensible in the first scenario since knowledge and intentional targeting are directly involved. Historical examples in England and Wales and Canada can fall into the first subcategory, including the criminalisation of sodomy,[68] of self-liberated people of African descent,[69] and of certain Indigenous cultural practices.[70] Current examples also include the criminalisation of refugees through migration policies,[71] and the crime of gender fraud in England and Wales.[72] They can also include law enforcement policies, such as those that allow stop and frisk, that knowingly target certain groups.

In the second scenario, although the state does not know which specific person will commit crimes and does not intentionally target marginalised groups, it does know, through documented research, that marginalised individuals are more likely to be criminalised for committing these

[68] In English criminal law, this was introduced by the Buggery Act of 1533, making buggery punishable by hanging, a penalty not lifted until 1861. Indeed, Blackstone's *Commentaries on the Laws of England*, vol. 4 (Oxford 1769), ch. 15, 215, highlights that the crime of sodomy has often been defined only as the abominable and detestable crime against nature. It was only in 1967 that sexual acts between two adult males were made legal in England and Wales. Similar crimes existed in Canada and such acts became legal in 1969.

[69] The association of Black skin with criminality has deep roots and can be seen from the way self-liberated people of African descent were considered thieves and criminals for having escaped as property. R. Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Black Point 2017); M.C. Dugas, "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders" (2020) 43 Dal. L.J. 103.

[70] L. Monchalin, *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada* (Toronto 2016).

[71] E.J. Criddle, "The Case Against Prosecuting Refugees" (2020) 115 N.W.U.L.R. 717.

[72] *R. v Saunders* 12/10/91 (unreported, Doncaster Crown Court, Judge Crabtree); *R. v Barker* 5/3/12 (unreported, Guildford Crown Court, Judge Moss); *R. v McNally* [2013] EWCA Crim 1051, [2014] Q.B. 593; *R. v Newland* 15/9/15 (unreported, Chester Crown Court, Judge Dutton); *R. v Lee (Mason)* 16/12/15 (unreported, Lincoln Crown Court, Judge Heath); *R. v Staines* 24/3/16 (unreported, Bristol Crown Court, Judge Cotter).

specific crimes, since the state's implementation practices are informed by criteria that produce and maintain inequalities. Current examples also include the criminalisation of drug-related simple possession and use, which disproportionally criminalise the poor and individuals with addictions.[73] This second scenario also includes related state practices that disproportionately enforce criminalisation upon certain groups. For instance, the phenomena of over-policing, over-prosecutions[74] and harsher punishment[75] that disproportionately affect certain marginalised communities would need to be accounted for within a sentencing process that sees its role as communicative.

Although distinct, it is useful to highlight the way that the two systemic types of state blame/harms discussed so far can be interrelated and integrated in a sentencing decision that recognises responsive censure, relational state blame and its contributory harms. Gender fraud is provided as an example in this section to illustrate these first two systemic types of state blame/harms.

In *Newland*,[76] a case of gender fraud, the sentencing judge strictly discussed and analysed Newland's individual blame, which consisted of "pretending to be a man" in order to have a sexual relationship with a woman, removing the victim's freedom to choose with whom she decides to engage sexually. Like most decisions, it fails to discuss the state's contributory role in the creation of criminogenic conditions rooted in inequalities (type 1), as well as the state's criminogenic role in producing policies and practices that target certain groups by criminalising, prosecuting and punishing them on the basis of specific conduct related to their situation/condition (type 2). A sentencing decision that would recognise the typologies of state blame and its related harms, as proposed in this section, would discuss the state's contributory role in the creation of criminogenic conditions rooted in gender-related inequalities (type 1). More specifically, in *Newland,* it would refer to the way the state has historically and contemporarily treated and explained trans- and gender-nonconforming people by

[73] See e.g. National Council of Welfare (Canada), *Justice and the Poor* (Ottawa 2000); M.-E. Sylvestre, N. Blomley and C. Bellot, *Red Zones: Criminal Law and the Territorial Governance of Marginalized People* (Cambridge 2020), who also evidence the ways that state-imposed territorial restrictions have an impact on marginalised populations, including the homeless, drug users, sex workers and protesters who depend on these public spaces. See e.g. *R. v A(M)*, 2020 NUCJ 4.

[74] National Council of Welfare (Canada), *Justice and the Poor*.

[75] See e.g. T. Cardoso, "Bias Behind Bars: A Globe Investigation Finds a Prison System Stacked Against Black and Indigenous Inmates", *The Globe and Mail*, available at https://www.theglobeandmail.com/canada/article-investigation-racial-bias-in-canadian-prison-risk-assessments/ (last accessed 22 April 2021). For prisons and women, see L. Kerr, "How Sentencing Reform Movements Impact Women" in J. Roberts and D. Cole (eds.), *Sentencing in Canada: Essays in Law, Policy, and Practice* (Toronto 2020), ch. 13, 250. For the disproportionate dimensions related to mandatory minimum sentences on certain groups, see P. Paciocco, "Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing" (2014) 81 Can. Crim. L. Rev. 241 and M. Manikis, "The Recognition of Prosecutorial Obligations in an Era of Mandatory Minimum Sentences of Imprisonment and Over-representation of Aboriginal People in Prisons" (2015) 71 Supreme Court Law Rev. 277.

[76] *R. v Newland* 15/9/15 (unreported, Chester Crown Court, Judge Dutton).

resorting to stereotypes and tropes[77] that have contributed to severe inequalities on a broader societal level and to discriminatory practices.[78] The state's actions in this respect have contributed to a reality where individuals are often pushed to hide and to fail to disclose specific aspects about their gender by fear of alienation, discrimination and violence.[79] They also contribute to conduct where individuals may appear to lie about their gender in order to live safely in a society as equal citizens.

Another type of state blame/harm that this sentencing decision would have analysed within the framework proposed here would be the state's criminogenic role through criminalisation policies and practices that target and affect marginalised groups (type 2). More specifically in this context, the state's contribution, by creating/implementing specific criminal justice policies that criminalise gender-related differences (potentially to promote gender conformity) and by creating additional obligations towards people who might not conform or might question gender, also gives rise to important harms. Indeed, an important difference in whom/what is criminalised by the state can be seen in the way that lying about aspects of one's identity and characteristics does not usually give rise to a criminal offence, even if the person would not have consented to sex had they known about the specific attribute.[80] Such lying about background, status, criminal record, disability and sexual orientation, which in contrast to gender, is not considered to vitiate consent under the law in England and Wales. Discriminatory treatment of this kind by the state highlights the way that gender is chosen by the state as a characteristic that, if "lied"[81] about, is considered a crime. The state's criminogenic involvement in creating and enforcing this condition targets and harms marginalised individuals who often have to face the stigma of a prosecution, resulting in additional public shame and blame that perpetuate intolerance and inequality[82] along with typically lengthy

[77] J. Serano, *Whipping Girl* (Berkeley 2007), discusses the various existing tropes around transgender women, some of which, including "the deceptive transexual trope", resonates in the context around gender fraud.

[78] Indeed, the level of inequalities and violence suffered by gender non-conforming and trans individuals is much higher than that of those suffered by the general population. For instance, in the UK context, S. Whittle, L. Turner and M. Al-Alami, *Engendered Penalties: Transgender and Transexual People's Experiences of Inequality and Discrimination* (London 2007), 21, found that "in every sphere of life" transgender people "are subject to high levels of abuse and violence". Included are the context of employment or the workplace, access to public housing, public healthcare access, leisure and public education; see also N. Hudson-Sharp and H. Metcalf, "Inequality Among Lesbian Gay Bisexual and Transgender Groups in the UK: A Review of Evidence" (2016) National Institute of Economic and Social Research, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/539682/160719_REPORT_LGBT_evidence_review_NIESR_FINALPDF.pdf (last accessed 9 February 2022).

[79] Ibid.

[80] A. Sharpe, *Sexual Intimacy and Gender Identity Fraud: Reframing the Legal and Ethical Debate* (Abingdon and New York 2018).

[81] The concept of lie in this context is rooted in a heteronormative/binary understanding of gender that also can be questioned. See ibid.

[82] Ibid., at 173. Sharpe highlights the media's negative portrayal of the lives of transgender people caught up in our criminal justice system and more generally.

and disproportionate periods of incarceration, as well as related consequences that include being listed on a sex offender registry.[83] The state's conduct also harms communities and victims who may suffer from stigma and the shame of being perceived as non-conforming or questioning referred to as the "undoing of heterosexuality".[84]

A sentencing decision that considers these types of state blame and related harms would offer a more nuanced and complete understanding of the context that gave rise to the offence while communicating the state's relational contribution. This form of responsive censure allows for qualifying and situating the level of blame attributed to the state, which is more blameworthy when knowledge and targeting are involved. This relational account enables the state to treat itself as an object of self-criticism and respond in a meaningful way to this conversation about blame.

C. Type 3: The State's Contribution in Producing Harms that Result from the Sentence

The specific type of state blame/harm elaborated in this section refers to the state's role in creating foreseeable or known harms that result from a sentence. Foreseeable harm is considered less blameworthy than harms the state knew would be occurring. As will be seen below, these harms can be towards the offender, but also the offender's family/relationship, as well as the victim.

This type suggests that nuances must be drawn between justified punishment/sentence and these additional harms. Although consequentialist (utilitarian) theories of punishment have not explicitly examined the state's role in producing additional harms through the process of punishment, they have recognised that punishment itself was harmful to those punished and therefore it was only considered justified to the extent that it produced benefits and satisfaction, in aggregate, that outweigh its harms.[85] In this sense, the additional harm produced was not part of the legitimate punishment.

Currently, some of the sentencing literature and cases, discussed above, have conflated the notion of punishment with some of these additional harms by conceptualising them as subjective experiences of punishment.

[83] See *R. v Saunders* 12/10/91 (unreported, Doncaster Crown Court, Judge Crabtree); *R. v Barker* 5/3/12 (unreported, Guildford Crown Court, Judge Moss); *R. v McNally* [2013] EWCA Crim 1051, [2014] Q.B. 593; *R. v Newland* 15/9/15 (unreported, Chester Crown Court, Judge Dutton); *R. v Lee (Mason)* 16/12/15 (unreported, Lincoln Crown Court, Judge Heath); *R. v Staines* 24/3/16 (unreported, Bristol Crown Court, Judge Cotter).

[84] As highlighted by Sharpe, *Sexual Intimacy and Gender Identity Fraud*, 43, cases of gender fraud reveal an understanding of harm that seems to be "inextricably tied up with the 'undoing' of heterosexuality".

[85] J. Bentham, "An Introduction to the Principles of Morals and Legislation" in J. Burns and H.L.A. Hart (eds.), *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (London 1982); J.S. Mill, *On Liberty* (New York 1974); C. di Beccaria, *Of Crimes and Punishments*, translated by J. Grigson (New York 1996), 49.

However, lumping foreseeable harms of punishment as subjective experiences of punishment detracts from the conversation about potential state blame and the creation of harms different from those that are considered justified punishment. As highlighted by H.L.A. Hart, punishment requires key elements, including the intentional administration of consequences considered unpleasant to an offender for his offence by an authority constituted by a legal system against which the offence is committed.[86] Any additional harm perpetrated by the state that does meet these key legitimising elements is therefore conceptually different from punishment and needs to be recognised as such and with appropriate nuances.

Current sentencing theory and practice have also conceptualised these harms as "collateral consequences" of punishment. The concept is wide-ranging and typically includes the harms suffered by the offender while serving a sentence, as well as post-sentence that result from punishment.[87] Some illustrations can be seen within the research literature on the effects of certain sentences, particularly short terms of imprisonment and conditions of probation untailored to the individual, in creating such harms and conditions for further offending.[88] Indeed, in certain contexts, when the state commits someone to short-term custody rather than to probation with tailored conditions, or when conditions of probation are not tailored to the individual, these can cause long-term social and economic disruptions to the person's life, understood as harm(s) discussed in this section (type 3), and may also sow the seeds of reoffending. The state can therefore be held in part responsible for that future reoffending (type 2), and additional harm(s) to the individual (type 3). Further, this category can also include the production of harm(s) post-sentence that affect in great proportion individuals that have served sentences and relate to wider social inequalities discussed under type 1, namely the lack of access to mental health support, drug and alcohol support and affordable accommodation, which is particularly problematic post custody.

[86] H.L.A. Hart, "Prolegomenon to the Principles of Punishment" (1959–60) 60 Proceedings of the Aristotelian Society N.S. 1; L. Zedner, "Penal Subversions: When Is a Punishment Not Punishment, Who Decides and On What Grounds?" (2016) 20 Theoretical Criminology 3, 6.

[87] The harms can include the various forms of unequal treatment during the serving of the sentence, as well as civil disqualifications suffered by the offender following a sentence. E.g. Office of the Correctional Investigator (Canada), A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries – Final Report (2014), available at https://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx (last accessed 9 February 2022), highlights among other aspects Black offenders are more likely to be placed in maximum security than the general population, despite being rated as at lower risk to re-offend, and are overrepresented in disciplinary segregation.

[88] Empirical studies have shown for instance that post-prison community supervision untailored to the individual can give rise to reoffending and return to prison. D.J. Harding, J.D. Morenoff, A.P. Nguyen and S.D. Bushway, "Short- and Long-term Effects of Imprisonment on Future Felony Convictions and Prison Admissions" (2017) 42 P.N.A.S. 114; further the literature has discussed the collateral costs of short-term jail incarceration in M. Pogrebin, M. Dodge and P. Katsampes, "Collateral Costs of Short-term Jail Incarceration: The Long-term Social and Economic Disruptions" (2001) 5 Corrections Management Quarterly 64.

Recently, the terminology of collateral consequences has been expanded to include harms suffered by the offender's family and relationships,[89] which can also include those suffered by the victim. Condry and Minson have highlighted the lack of nuance that results from referring to all these harms as "collateral harms", because collateral refers to harms that are not the primary intention of the punishment but are secondary consequences that follow, either in parallel or sequentially, which is not the case for the harms suffered by families or relationships. The authors propose a new and more nuanced conceptual and analytic terminology of "symbiotic harms"[90] that attends to the context of family members. Their account would be better integrated in the sentencing framework proposed in this article than current sentencing regimes, since the framework's complementary focus on harms produced by the state allows for more discursive space to capture these nuances.

More broadly, the language of collateral consequences has also been criticised for detracting from conversations about the state's role and contributions in creating specific types of harms. Indeed, Perice[91] has provided a genealogy of this terminology that suggests that it was first used by the US military in the Vietnam War to describe the US-caused deaths of civilians to deflect atrocity by enabling groups of people to be categorised as unwanted, surplus or unnecessary. With this strategy, collateral damages become "not simply a by-product, but part of the assumed and accepted consequence of any progressive action".[92] The language normalises the damages and can therefore be used by the state to minimise, and detract from, conversations about state blame and its role in perpetuating such harms. Similarly, the language of collateral consequences in sentencing also detracts from a more thorough conversation about the state's role in creating these harms.

The typology of state blame/harms proposed in this section suggests a conceptually different understanding of these harms currently referred to as collateral consequences and punishment. Accordingly, this framework underpinned by responsive censure and relational blame would require the state to recognise its responsibility in producing these harms and provide justifications and responses for any of its measures that inflicts additional harm that is not justified as punishment, as part of individuals' prima facie moral right not to be harmed by the state.[93] Further, this

[89] R. Condry and S. Minson, "Conceptualizing the Effects of Imprisonment on Families: Collateral Consequences, Secondary Punishment, or Symbiotic Harms?" (2021) 25 Theoretical Criminology 540.

[90] Accordingly, "symbiotic points to the interdependent and mutual characteristics of relationships, where individuals are dependent upon and receive reinforcement, whether beneficial or detrimental, from each other" (ibid., at 12).

[91] G.A. Perice, "The Culture of Collateral Damage: A Genealogy" (2007) 10 Journal of Poverty 109.

[92] Condry and Minson, "Conceptualising the Effects of Imprisonment", 8.

[93] W. Bulow, "The Harms Beyond Imprisonment: Do We Have Special Moral Obligations towards the Families and Children of Prisoners?" (2014) 17 Ethical Theory and Moral Practice 775; Zedner, "Penal Subversions", 20.

dynamic understanding of censure, which includes state censure, would require for these harms to be considered and engaged with more thoroughly across longer periods of time, including during the administration of the sentence.

Finally, state-produced harms due to the sentence caused to the victim are also included in this typology. As discussed in the previous section, sentencing regimes have started recognising the relevance of these types of harms in sentencing but have yet to provide an underlying framework that justifies their consideration. In England and Wales, the VPS regime generally prohibits victims' opinions in sentencing, "except (i) where the sentence passed on the offender is aggravating the victim's distress".[94] The proposed analytical framework provides the space to justify the importance of conversations that recognise the various ways the state engages its responsibility in creating harms towards the communities it serves, which includes victims. It recognises that the harms suffered by victims are not solely by the offender, and indeed the state can also have a role in creating various harms that should be examined and engaged with.

D. Type 4: State Blame/Harms that Stem from Abusive State Actors that Disregard Fundamental Human Rights

A typology of state blame/harms should also include the consideration of the state's role in producing harms that result from its violation of individual rights. More specifically, this would encompass a wide range of violations of human rights, including the rights in the context of a detention, arrest, search and seizure, abusive conditions of pre-trial detention, and the right to counsel.[95]

As discussed above, courts in Canada have tentatively recognised these types of harms at sentencing, but they are predominantly understood as forming part of the experience of punishment instead of being considered as part of an independent analysis that shifts the focus on the state's responsibility and harms.[96] The framework developed in this article provides an underpinning for a separate analysis and enables courts to engage more thoroughly with the appropriate nuances that relate to blame and the consideration of harms caused by abusive state conduct.

V. Incorporating State Blame/Harms as Part of Responsive Censure

The following section raises some potential reflections for the implementation of state blame/harms in sentencing. Since the focus of this article is to

[94] *R. v Perks*, [2001] 1 Cr. App. R. (S.) 19.
[95] Illustrations of these types of breaches are discussed in Manson, "Charter Violations in Mitigation of Sentence".
[96] Ibid.; *R. v Nasogaluak*, 2010 SCC 6.

provide justifications and a typology of state blame/harms, the discussion in this section does not plan to recommend the framework's specific implementation. The reflections in this section present possibilities and are cognisant that sentencing regimes might have sentencing methods that look very different and that some of the propositions have limitations. The first part begins by presenting a potential methodology, inspired by the sentencing guidelines in England and Wales that sentencers can follow to implement the analysis of state blame/harms in sentencing. This is followed by a discussion about the types of evidence that can be used to bring information about state blame. Finally, this section ends with a discussion of the possible impact of including this type of information in sentencing.

A. A Methodology for Recognising and Accounting for State Blame

Although state actions are increasingly relevant in sentencing to understand the offender's actions and moral culpability, this article outlines justifications for a complementary and separate analysis that focuses on the state's contributory role and harms in sentencing decisions and during the implementation of the sentence so as to engage with a more nuanced censure.

A methodology for considering state blame/harms in sentencing would entail an analysis that focuses on the state's role and harms separately from the offender's blame. As highlighted by Tadros, within a conception of relational responsibility, recognising state blame/harms does not take away from the state's ability also to recognise individual blame. This approach might also respond to concerns expressed in *Hamilton*: "if societal ills are given prominence in assessing personal culpability, an individual's responsibility for his or her own actions will be lost."[97] The proposed separate analysis for state blame/harms would therefore be given separate consideration with different sentencing rationales from those of the analysis that focuses on personal culpability.

A way to achieve separate consideration would be to incorporate a step-based methodology[98] as in England and Wales, where step 1 of the sentencing process is primarily concerned with assessing harm and culpability as part of a just deserts framework. Step 2 completes this analysis by including a list of non-exhaustive factors related to a more flexible desert-based conception of blame, previously discussed, which includes remorse, age and mental disorder. These first two steps enable an initial sentence to be crafted that has the effect of communicating the blame that relates to the individual offender and adheres to the dual components of the principle of proportionality, namely the gravity of the offence and

[97] *R. v Hamilton*, 2004 O.J. No. 3252, 72 O.R. (3d) 1 (ONCA).
[98] J.V. Roberts, "Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues" (2013) 76 Law and Contemporary Problems 1.

the level of blame of the offender. Regimes that have incorporated a flexible desert-based understanding of culpability, which also consider aspects of state blame as diminishing culpability, would undertake this part of the analysis in the second step, allowing for a communicative understanding of individual blame.[99]

Steps 3, 4 and 5 pursue the process by including factors that are primarily rooted in various utilitarian theories of punishment, such as remand time, dangerousness and assistance to the prosecution. State blame/harms as an additional and relevant analytical component of sentencing could feature as an additional separate step, such as step 3 or 6 since it is rooted within a hybrid/utilitarian rationale that aims to communicate and recognise various forms of state blame/harms. Indeed, this added step would require the sentencer to consider whether the state has engaged one of its forms of blame/harms discussed within the typology, and if so, would provide a relevant documented discussion about how this has taken place and sentencing responses that take it into account. It would allow for a more comprehensive communicative endeavour that not only assigns blame to an individual but also to the state when need be, with a clear formulation of the type of blame and harms that have taken place.

Another methodological possibility for the implementation of this framework includes the development of a review process, such as the one discussed by the proponents of dynamic censure, that would allow for a responsive dialogue between citizens and the state.[100] In addition to authorities' reviewing the original censuring decision for the purposes discussed by retributive theorists Roberts and Dagan, the review would also include an analysis of the state's response and evolving efforts in light of its relational blame and related harms.

B. Communicating Evidence of Crime Production and Associated Harms

The consideration of state blame/harms in sentencing could be brought forward by various evidentiary means that would depend on the type of blame/harms that are being adduced. Indeed, it would require a mix of relevant approaches that include empirical research conducted by experts, particularly to illustrate systemic forms of blame/harms, as well as statements and testimonies to bring forward experiential knowledge by offenders, victims and communities on harms suffered from the state.

[99] For further discussion about rooting the principle of proportionality within this framework, see Manikis, "The Principle of Proportionality in Sentencing".

[100] Roberts and Dagan, "Evolution of Retributive Punishment". Examples of responsive offence-related factors include: the way the person addresses the harm inflicted by compensating for the victim's loss; showing sincere empathy or remorse; apologising; and taking responsibility for the harm. Responsive factors unrelated to harm and culpability should be excluded from this account, since they may rely on utilitarian aims such as diminishing reoffending.

As discussed above, although they focus on individual blame, current sentencing systems have expanded their evidentiary tools in sentencing and adopted flexible approaches to illustrate certain systemic and experiential information. For instance, certain reports already contain some information about systemic racism and colonial oppression by the state, and these can be made more thoroughly documented and expanded to include other forms of state inequalities, including the various forms of gender-based violence perpetrated by the state, depending on each case.[101] These reports would be made by researchers with the relevant expertise in state-based oppression and can be presented by any party. For instance, the role of defence counsel in bringing such evidence forward is worth highlighting. Indeed, in countries where there is no sentencing council in place, it would be useful for counsel to bring forward expert evidence either through expert testimony or reports. A more accessible means to make such information available would be through a Sentencing Commission or Council that has a mandate to collate data and would be equipped to furnish parts of these reports and to examine the effects of policies on minorities.[102] Further, testimonial evidence, as well as victim and community impact statements that are already considered relevant in both jurisdictions under analysis, can be expanded to include voices and experiences of harms suffered by the victims and communities in the hands of the state. In this way, the harms suffered by victims and communities would not be attributed solely to the offender, but relational blame would also be attributed to the state.

C. Potential Impact of Recognising State Blame and Harms

Duff's communicative theory does not conceive and measure punishment purely in quantitative terms. It also recognises the communicative value of processes themselves and its fulfilment by exchanging explanations. Accordingly, the recognition of state blame/harms within a communicative framework does not have to translate to a specific and precise numeric understanding of punishment. Qualitative considerations that focus on the exchange about state blame/harms, along with ways to respond to it, such as the way a sentence can be served and administered, can be just as communicative if not more so than focusing on a numeric sentence. This suggests that this framework can have an important impact in sentencing through its communicative message the sentencer conveys about state

[101] See e.g. the use of *Gladue* reports as well as Race and Culture Assessment reports for sentencing in Canada so as to provide context-specific information about Indigenous people and African-Canadians. P. Maurutto, "The Use of Pre-sentence and *Gladue* Reports" in Cole and Roberts (eds.), *Sentencing in Canada*, ch. 5, 96; Dugas, "Committing to Justice".

[102] It would be similar to the statutory duty under the Coroners and Justice Act 2009, s. 128(1)(c) and (d), for the Sentencing Council in England and Wales to monitor the operation and effects of its guidelines, including upon minority defendants.

blame to society, which can be done with dynamic responses from the offender, the victim and the relevant communities.[103]

In addition to the communicative impact of the sentencing process, the sentence itself can serve to convey a message about state blame/harms. For instance, sentencing regimes may decide to communicate state blame/harms by reducing the sentence.[104] In England and Wales, extraneous factors unrelated to individual blame and harm can be found in steps 3 and 4, which can give rise to sentencing reductions, notably for providing assistance to the prosecution and having made a guilty plea.[105] Such an approach on its own, however, runs the risk of reducing communication to a quantification exercise that risks limiting conversations about the types of state blame/harms discussed above, and occluding nuances can prevent crafting sentences that seek to respond more effectively to state blame/harms.

Indeed, parts of a sentence may not be adequately crafted with mere mitigation/reduction, and a more appropriate or comprehensive response might need to be tailored to the type of state blame/harms that is engaged in a given context. In contexts where the types of state blame/harms are predominantly systemic, sentencing responses might need to engage the state through actions that seek to minimise or partially redress state blame/harms.[106] For instance, part of a sentence might need to recognise and highlight the context of inequalities in a given location,[107] the lack of services in certain communities,[108] state apologies, institutional enforcement policies that have given rise to discriminatory practices, and highlight specific measures that might serve to improve the state's relationship with a specific community.[109] It might also recognise that sentencing mechanisms within a certain community might be more equipped to render an appropriate sentence, or it might consult with members of a community to craft an

[103] P. Raynord and G. Robinson, "Why Help Offenders? Arguments for Rehabilitation as a Penal Strategy" (2009) 1 European Journal of Probation 3, providing theoretical justifications for the state's duty of care vis-à-vis criminal justice stakeholders, and on the importance that stakeholders, including offenders, victims and/or communities, need not be in conflict.

[104] For instance, Bagaric has called for categorical sentencing discounts for Indigenous offenders: M. Bagaric, "Indigenous Incarceration: Time for a Pragmatic Solution – Sentencing Discounts and Retrospective Reductions in Prison Terms" (2019) 43 Crim. L.J. 157.

[105] See e.g. Sentencing Council, "Robbery: Definitive Guideline" (2016), available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Robbery-definitive-guideline-Web.pdf (last accessed 22 April 2021).

[106] It is worth bearing in mind that, if the state's contribution is systemic, its response in sentencing can be limited since it is only one dimension of the wider responses the state should be engaging in wider society to respond to harms.

[107] *R. v Turtle*, 2020 ONCJ 429. The impact of colonialism and the practical unavailability of an intermittent sentence of imprisonment were recognised due to the inaccessibility of the nearest jail to the Pikangikum First Nation Territory's remote community.

[108] For instance, in issues of domestic violence, evidence about the lack of shelters in a specific community could be part of the response.

[109] For instance, a discussion of the ways that the state (e.g. the police) could repair the relationship with the Black community might include the provision of explanations by police to individuals: see the discussion in *R. v Shallow*, 2019 ONSC 403. This could include training offered to police about what they say and how they engage with members of the community.

appropriate sentence.[110] Recognising that another sentencing body has jurisdiction to punish can be a response that advances the conversation and recognises the state's loss of standing to punish. This might also take place in the context of state blame/harms, discussed above, that consist of the most severe forms of blame, namely the state's targeting of certain groups in its criminalisation policies. Part of the relational response might be to recognise that, in such egregious scenarios of state blame, the state loses its standing to punish on the basis that the crime itself is the state's targeting of certain groups.

In contexts where state blame/harms are linked to the additional effects of punishment, it may be that the relevant authorities, including sentencers or sentencing reviewers, might analyse and decide to craft a sentence that diminishes or removes foreseeable additional harms that can ensue from the sentence. Examples can include the proposition of correctional/institutional programmes offered to reduce state harms such as requiring the provision of culturally relevant programmes in light of the evidence presented.[111] It might also be decided that a Black offender, for instance, would not be placed in a maximum-security institution unless there were a specific change of circumstance that could be examined through a sentencing review, as discussed above. A sentencer might also decide that a sentence would be dependent upon a certain programme or service being available, which would require a response by the state that this sentence could be made possible. Such aspects of the sentence would necessarily require an approach that responds to state blame and harms beyond a reduction/mitigation of sentence. Sentencing reviews might need to become part of the way sentences are administered, considering that forms of state harms are not always foreseeable, yet can occur during the administration of the sentence.

Finally, in individualised cases of state abuse by one of its agents, including the police and prison guards, adequate responses would depend on the type of wrong and level of blame and can typically include reductions of the sentence and apologies.

Whilst it is true that judges alone "could not remedy societal issues",[112] they can start by addressing blame in a more relational way that identifies the types of blame/harms that are also attributable to the state in a given case. In this way, a sentence becomes an important mechanism of communication that can also include ways to diminish or address some of the dimensions of state blame outside and within the sentencing system.

[110] M.-E. Sylvestre and M.-A. Denis-Boileau, "*Ipeelee* and the Duty to Resist" 51 U.B.C. Law Rev. 548; e.g. *R. v Turtle*, 2020 ONCJ 429.
[111] See *R. v Anderson*, 2020 NSPC 10.
[112] *R. v Reid*, 2016 ONSC 8210, at [26]–[27].

VI. Conclusion

Communicative and responsive theories of censure coupled with a relational account of responsibility provide justificatory underpinnings for the development of a complementary framework to individualised blame in sentencing that recognises state responsibility as a relevant aspect to communicate and analyse in sentencing.

The framework understands sentencing as a communicative tool that allows for a more rich and accurate conversation about concepts of blame and harms that are important to a responsive and dynamic conversation that treats citizens as equals and with respect. This complementary analysis allows for a more thorough conversation between various participants that engage wider understandings of responsibility, which can increase the legitimacy of the process by recognising the various forms of blame that are part of a given case. Participants of the conversation can use some existing evidentiary mechanisms, including cultural assessment reports, as well as victim and community impact statements.

The framework also provides a methodology of sentencing, influenced by the sentencing guidelines in England and Wales, to integrate this framework and distinguish between factors that are relevant to the analysis of individual blame and those that are extraneous to and independent of the analysis yet remain relevant in the system.

As part of the development of a complementary and stand-alone framework that turns the focus on the state, a typology of state blame/harms allows the relevant nuances to be drawn to enhance a dynamic communication among citizens, including the offender, victims and the community. This typology is divided into predominantly systemic and individualised accounts of blame/harms and is illustrated with examples found in both Canada and England and Wales. The nuances drawn within this typology enable a more precise communication to make greater sense of the different forms of state blame/harms. It also provides some comparison, when possible, between these state wrongs/harms and suggests that some might be more egregious than others, which might warrant different forms of responses. Finally, this framework discusses the various ways that state blame/harms can be integrated into sentencing as relevant and tailored responses to the level of state blame and type of harm.