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# “Cancel Culture” and Criminal Justice

STEVEN ARRIGG KOH<sup>†</sup>

*This Article explores the relationship between two normative systems in modern society: “cancel culture” and criminal justice. It argues that cancel culture—a ubiquitous phenomenon in contemporary life—may rectify deficiencies of over- and under-enforcement in the U.S. criminal justice system. However, the downsides of cancel culture’s structure—imprecise factfinding, potentially disproportionate sanctions leading to collateral consequences, a “thin” conception of the wrongdoer as beyond rehabilitation, and a broader cultural anxiety that “chills” certain human conduct—reflect problematic U.S. punitive impulses that characterize our era of mass incarceration. This Article thus argues that social media reform proposals obscure a deeper necessity: transcendence of blame through criminal justice reform and, ultimately, collective emphasis on reintegration after human wrongdoing.*

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<sup>†</sup> Associate Professor of Law and R. Gordon Butler Scholar in International Law, Boston University School of Law. This Author is grateful to Atinuke Adediran, Chaz Arnett, Darryl Brown, LaToya Baldwin Clark, Jeff Bellin, Paulo Barrozo, Stephen Cody, Jonathan Feingold, Hiba Hafiz, Genevieve Lakier, Irina Manta, Shaun Ossei-Owusu, David Pozen, Sandra Redivo, Daniel Richman, Diane Ring, Shalev Roisman, Blaine Saito, and Katharine Young for their contributions to this Article. He is also thankful for the research assistance of Mateo Dayo, Evelyn Jackson, Joshua Luger, Brendan Murphy, Travis Salters, Spencer Thompson, and Emily Van Auken, as well as for the initial contributions of the students in Section 2 at Boston College Law School (Spring 2021).

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## INTRODUCTION

The term “cancel culture” is ubiquitous in contemporary American life. It intersects with critical national discourse regarding free speech and censorship,<sup>1</sup> race and gender issues,<sup>2</sup> political engagement,<sup>3</sup> and employee rights,<sup>4</sup> and has unsettled university campuses nationwide.<sup>5</sup> And yet its meaning, structure, and nature are amorphous. Dictionary.com defines it as “the popular practice of withdrawing support for . . . public figures and companies after they have done or said something considered objectionable or offensive.”<sup>6</sup> Consider the following cases identified as such:

- An Asian American family at a restaurant in Carmel Valley, California, is celebrating an aunt’s birthday when a white diner at another table, Michael Lofthouse, starts yelling anti-Asian obscenities at them and gives them the middle finger. Once the footage goes viral and Lofthouse is publicly identified, he announces he is stepping down as CEO of tech company Solid8.<sup>7</sup>
- During a standup comedy routine, Hannibal Burrell reminds his audience that Bill Cosby has been accused of rape. The clip goes viral and Cosby’s new television show, soon to air on NBC, is canceled.<sup>8</sup> Cosby is eventually

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1. The Editorial Board, *America Has a Free Speech Problem*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html> (citing a poll that eighty-four percent of Americans said it is a “very serious” or “somewhat serious” problem that some Americans do not speak freely in everyday situations because of fear of retaliation or harsh criticism).

2. Lili Loofbourow, *The Cancel Culture Trap: Can Black Lives Matter Accomplish What Me Too Couldn’t?*, SLATE (July 27, 2020, 5:45 AM), <https://slate.com/news-and-politics/2020/07/black-lives-matter-me-too-cancel-culture-blacklash.html>; Alia Dastagir, *The Problem with Asking the Public To Cancel Woody Allen*, USA TODAY (Mar. 2, 2021, 8:13 AM), <https://www.usatoday.com/story/life/health-wellness/2021/02/25/woody-allen-dylan-farrow-accusations-cancel-culture-me-too-movement/6800198002/>.

3. Matthew Ormseth, *Decrying ‘Cancel Culture,’ State Senator Seeks To Make Political Affiliation a Protected Class*, L.A. TIMES (Feb. 16, 2021, 5:56 PM), <https://www.latimes.com/california/story/2021-02-16/decrying-cancel-culture-state-senator-seeks-to-make-political-affiliation-a-protected-class>.

4. Nick Martin, *At-Will Employment Is the Real Cancel Culture*, NEW REPUBLIC (June 17, 2020), <https://newrepublic.com/article/158194/at-will-employment-real-cancel-culture>.

5. *A Letter on Justice and Open Debate*, HARPER’S MAG. (July 7, 2020), <https://harpers.org/a-letter-on-justice-and-open-debate/>; John McWhorter, *Academics Are Really, Really Worried About Their Freedom*, THE ATLANTIC (Sept. 1, 2020) <https://www.theatlantic.com/ideas/archive/2020/09/academics-are-really-really-worried-about-their-freedom/615724/>.

6. *Cancel Culture*, DICTIONARY.COM (July 31, 2020), <https://www.dictionary.com/e/pop-culture/cancel-culture/>.

7. Isabel Togoh, *Tech CEO Michael Lofthouse Steps Down After Being Filmed Hurling Racist Insults at an Asian Family*, FORBES (Apr. 14, 2022, 2:05 PM), <https://www.forbes.com/sites/isabeltogoh/2020/07/12/tech-ceo-michael-lofthouse-steps-down-after-being-filmed-hurling-racist-insults-at-an-asian-family/?sh=6918112d1f5e>.

8. Colleen Shalby, *NBC Cancels Bill Cosby Project in Wake of Sexual Assault Allegations*, PBS: NEWSHOUR (Nov. 19, 2014, 5:03 PM), <https://www.pbs.org/newshour/nation/nbc-cancels-bill-cosby-project-wake-sexual-assault-allegations#:~:text=NBC%20canceled%20plans%20to%20go,of%20a%20Cosby%20comedy%20special;Lesley%20Goldberg%20&%20Mikey%20O%27Connell,%20TV%20Land%20Pulls%20%27Cosby%20Show%27%20Repeats>, HOLLYWOOD REP. (Nov. 19, 2014, 3:21 PM), <https://www.hollywoodreporter.com/tv/tv-news/tv-land-pulls-cosby-show-750530/>.

prosecuted for and convicted of sexual assault, though his conviction is later overturned on appeal.<sup>9</sup>

- *Jeopardy!* contestant Kelly Donohue trends on Twitter after making a three-fingered hand gesture that viewers believe to be linked to white supremacy. Nearly 600 former *Jeopardy!* contestants sign a public protest letter, decrying hate and asking the show why the gesture was not edited out. Subsequent investigations reveal that Kelly was actually gesturing the number three to symbolize his third consecutive win on the show.<sup>10</sup>

Such examples highlight various forms of the cancel-culture phenomenon. First, cancel culture may sanction individuals for past conduct through collective online shame, triggering negative real-world consequences. Second, it may highlight past wrongdoing and trigger formal criminal prosecution regarding conduct—such as sexual assault—that has historically been under-prosecuted.<sup>11</sup> And finally, due to its imprecise process, it may misperceive wrongdoing altogether.

At the same time, we are living through a tumultuous era for U.S. criminal justice. In our era of mass incarceration, the disproportionate prosecution of communities of color has severely damaged generations of American lives.<sup>12</sup> And yet the U.S. criminal justice system systematically fails to provide accountability for police violence,<sup>13</sup> individuals who have perpetrated sexual assault,<sup>14</sup> and those who have engaged in anti-Asian violence.<sup>15</sup> Meanwhile, some scholars call for restorative justice or criminal abolition, emphasizing reintegration over retribution.<sup>16</sup>

In this context, public discourse views cancel culture through two distinct, opposing lenses: either it is a noble form of “accountability culture,” or it is a dangerous brand of “mob justice.” This Article uses a criminal legal framework

9. Joe Flint & Suzanne Vranica, *Bill Cosby's Return to TV Is Canceled*, WALL ST. J. (Nov. 19, 2014, 3:48 PM), <https://wsj.com/articles/netflix-shelves-bill-cosby-comedy-special-after-sexual-assault-accusations-1416380591>; Elahe Izadi, *Hannibal Buress Unwittingly Reignited the Bill Cosby Firestorm. Here's How He Dealt with the Aftermath*, WASH. POST (Apr. 26, 2018, 5:12 PM), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/04/26/hannibal-buress-unwittingly-reignited-the-bill-cosby-firestorm-heres-how-he-dealt-with-the-aftermath/>; Graham Bowley & Julia Jacobs, *Bill Cosby Freed as Court Overturns His Sex Assault Conviction*, N.Y. TIMES (Oct. 14, 2021), <https://www.nytimes.com/2021/06/30/arts/television/bill-cosby-release-conviction.html>.

10. Ben Smith, *I'll Take 'White Supremacist Hand Gestures' for \$1000*, N.Y. TIMES, <https://www.nytimes.com/2021/05/16/business/media/jeopardy-hand-gesture-maga-conspiracy.html?referringSource=articleShare> (Aug. 11, 2021).

11. See Kari Hong, *A New Mens Rea for Rape: More Convictions and Less Punishment*, 55 GEO. L.J. 259, 262 (2018).

12. See generally PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017) (reviewing the extent to which the U.S. criminal justice system is institutionally constructed to control African American men).

13. See generally Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017).

14. See generally Hong, *supra* note 11.

15. See generally Angela R. Gover, Shannon B. Harper & Lynn Langton, *Anti-Asian Hate Crime During the COVID-19 Pandemic: Exploring the Reproduction of Inequality*, 45 AM. J. CRIM. JUST. 647 (2020).

16. See generally, e.g., Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019); Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635 (2021).

to show that this dichotomy fails to grasp the function and structure of cancel culture as a normative system in modern society. It argues that cancel culture is an old phenomenon (public shaming) channeled through a new modality (social media). As such, cancel culture may rectify over- and under-enforcement in the U.S. criminal justice system. But the downsides of cancel culture's structure reflect deeper, problematic U.S. punitive impulses that characterize our era of mass incarceration.

While cancel culture is largely unexplored in legal scholarship,<sup>17</sup> criminal legal scholarship is ripe to contribute valuable insights on the phenomenon. Legal scholars and philosophers have long considered law as one of many normative systems in modern society,<sup>18</sup> while criminal law scholars analyze the structure and administration of a public system of punishment for perceived wrongful conduct.<sup>19</sup> This Article clarifies how cancel culture functions both in the shadow of this U.S. criminal justice system and as a distinct sanction. Indeed, half of Americans view cancel culture as a form of accountability,<sup>20</sup> though sixty-nine percent of Americans believe it unfairly punishes people for past actions.<sup>21</sup> In light of such perceptions, a criminal law framework is suited to evaluate cancel culture because of its acuity in addressing questions of fair notice,<sup>22</sup> evidence,<sup>23</sup> proportionality,<sup>24</sup> and shaming penalties.<sup>25</sup> Deeper

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17. See generally, e.g., Renee Nicole Allen, *From Academic Freedom to Cancel Culture: Silencing Black Women in the Legal Academy*, 68 UCLA L. REV. 364 (2021).

18. See generally JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (1975); see also Andrei Marmor & Alexander Sarch, *The Nature of Law*, STAN. ENCYC. OF PHIL. (Aug. 22, 2019), <https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/> ("Law . . . is . . . a normative social practice: it purports to guide human behavior, giving rise to reasons for action. An attempt to explain this normative, reason-giving aspect of law is one of the main challenges of general jurisprudence.").

19. Legal scholarship more generally is also poised to make important contributions to the national debate over cancel culture, given the uneasy historical relationship between shame and the law. See, e.g., Eric Posner, *A Terrible Shame*, SLATE (Apr. 9, 2015, 11:14 AM), <https://slate.com/news-and-politics/2015/04/internet-shaming-the-legal-history-of-shame-and-its-costs-and-benefits.html> ("The law has always had an ambivalent relationship with shame. On the one hand, shaming is the very antithesis of the law. . . . However, legal systems have also frequently tried to harness the power of shame.").

20. Katherine Schaeffer, *How Americans Feel About 'Cancel Culture' and Offensive Speech in 6 Charts*, PEW RSCH. CTR. (Aug. 17, 2021), <https://www.pewresearch.org/fact-tank/2021/08/17/how-americans-feel-about-cancel-culture-and-offensive-speech-in-6-charts/>.

21. Gabriela Schulte, *Poll: 69 Percent Say Cancel Culture Unfairly Punishes People for Past Actions, Statements*, THE HILL (Nov. 9, 2021), <https://thehill.com/hilltv/what-americas-thinking/580747-poll-69-percent-say-cancel-culture-unfairly-punishes-people-for>.

22. See generally, e.g., Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547 (2015); Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335 (2005).

23. See generally, e.g., Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197 (2007); Doron Teichman, *Convicting with Reasonable Doubt: An Evidentiary Theory of Criminal Law*, 93 NOTRE DAME L. REV. 757 (2018).

24. See generally, e.g., Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005); Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835 (2012).

25. See generally, e.g., Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075 (2006); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999); Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880 (1991).

questions include the collateral consequences of permanent, publicly accessible records of wrongdoing;<sup>26</sup> disparities in enforcement, particularly given the race and gender of the defendant and victim;<sup>27</sup> reintegration and restorative justice;<sup>28</sup> and the broader relationship between criminal justice and culture.<sup>29</sup>

Part I of this Article argues that cancel culture is not, at its core, new. Much of what the public perceives to be novel is in fact an old phenomenon of public shaming. What has changed is the medium for such shaming—social media—which has rechanneled shaming in three critical respects: amplification, acceleration, and democratization. Part II argues that cancel culture may be “gap filling,” rectifying over- and under-enforcement in our contemporary era of mass incarceration. It then considers cancel culture’s potentially problematic process, structure, and societal effects. Specifically, it argues that many of the perceived problems with cancel culture—notice and evidentiary issues, proportionality, a “thin” conception of the individual as beyond rehabilitation, and broader cultural anxiety—reflect deeper U.S. punitive impulses. Part III considers reform proposals, arguing that many of the perceived remedies do not cut to the heart of unaddressed wrongdoing. Finally, this Article argues that an awareness of the problematic aspects of retributivism—disproportionate, permanent sanctions—demands a renewed focus on restoration and reintegration.

This Article thus engages with several areas of legal scholarship. First and most importantly, it intersects with contemporary debates over criminal justice in an era of mass incarceration, particularly prosecutorial decision-making and democratic legitimacy. Second and relatedly, it informs scholarship on the alienation of certain communities from the administration of contemporary criminal justice.<sup>30</sup> Third, it builds upon prior debates regarding legal and normative aspects of online shaming, as well as related debates

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26. See, e.g., JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 214 (2015) (discussing the problem of U.S. criminal record exceptionalism, wherein records of arrest or conviction are permanently, publicly, and electronically stored, leading to lifelong collateral consequences).

27. See generally, e.g., Samuel R. Gross, *David Baldus and the Legacy of McCleskey v. Kemp*, 97 IOWA L. REV. 1905 (2012).

28. See generally, e.g., Lanni, *supra* note 16; Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors’ Perspective*, 88 FORDHAM L. REV. 2287 (2020); Joanna Shapland, *Forgiveness and Restorative Justice: Is It Necessary? Is It Helpful?*, 5 OXFORD J.L. & RELIGION 94 (2016).

29. See DAVID GARLAND, *THE CULTURE OF CONTROL* 4 (2001) (noting that contemporary criminal justice lacks any settled culture, agreement, or clear sense of big picture regarding criminal justice). See generally, e.g., Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933 (2016); Steven Arrigg Koh, *Core Criminal Procedure*, 105 MINN. L. REV. 251 (2020) (considering the function of criminal procedural rights in cross-border criminal law enforcement).

30. Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1495 (2016) (“[A]lienation begins between black Americans and the criminal system but then fans out beyond the criminal system into the relationship between black Americans and the state and society as a whole—inflaming the country’s racial tensions and creating problems of democratic governance with far-reaching and unpredictable political effects.”). See generally, e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017) (exploring the estrangement that communities of color feel from police reform and showing the limits of procedural justice reform efforts).

over freedom of expression.<sup>31</sup> Fourth, it echoes debates in transnational and international criminal law regarding “impunity gaps,” or cases of individuals who have engaged in serious criminal wrongdoing but are never held accountable for such crimes.<sup>32</sup> And finally, as noted above, it examines cancel culture as a concrete example of the interrelationship between legal and non-legal systems in modern society.

To be clear, I am not arguing that cancel culture should be solely analyzed through a criminal legal lens. The phenomenon may be interpreted through sociological,<sup>33</sup> anthropological,<sup>34</sup> economic,<sup>35</sup> and other frameworks.<sup>36</sup> And it intersects with other legal debates such as freedom of speech.<sup>37</sup> Nor am I arguing that cancel culture and criminal justice are the same. Cancel culture is, of course, distinct from criminal justice in many regards—one is a social-media-based system of referral and shaming, and the other is a state-driven, institutionalized public prosecutorial system leading to incarceration or execution. Instead, the purpose is to bring a novel criminal law perspective to view cancel culture as a system of collective condemnation operating alongside formal prosecution, questioning cancel culture’s substance, procedure, and sanction.

### I. WHAT IS “CANCEL CULTURE”?

What is “cancel culture”? First named in 2016,<sup>38</sup> the term transitioned from populating no Google search data in spring 2018 to reaching unprecedented

31. See Posner, *supra* note 19 (discussing “internet shaming”); Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2037–40 (2018). See generally, e.g., Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 MD. L. REV. 1029 (2016) (discussing online shaming and social norms); DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2016) (analyzing cyber harassment within the realm of civil rights law, and the social norms that must be leveraged to protect victims).

32. See, e.g., Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 352 (2019) (discussing impunity gaps in international and transnational criminal law); see also generally Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 90 FORDHAM L. REV. 737 (2021); Steven Arrigg Koh, *Othering Across Borders*, 70 DUKE L.J. ONLINE 171 (2021).

33. Hervé Saint-Louis, *Understanding Cancel Culture: Normative and Unequal Sanctioning*, FIRST MONDAY (July 6, 2021), <https://journals.uic.edu/ojs/index.php/fm/article/view/10891/10177>.

34. Ligaya Mishan, *The Long and Tortured History of Cancel Culture*, N.Y. TIMES STYLE MAG. (Dec. 3, 2020), <https://www.nytimes.com/2020/12/03/t-magazine/cancel-culture-history.html>.

35. Helen Lewis, *How Capitalism Drives Cancel Culture*, ATLANTIC (July 14, 2020), <https://www.theatlantic.com/international/archive/2020/07/cancel-culture-and-problem-woke-capitalism/614086/>.

36. See generally, e.g., Rocco Chiou, *We Need Deeper Understanding About the Neurocognitive Mechanisms of Moral Righteousness in an Era of Online Vigilantism and Cancel Culture*, 11 AM. J. BIOETHICS NEUROSCI. 297 (2020).

37. See, e.g., *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021) (holding in favor of a student on First Amendment grounds who was sanctioned by her school after criticizing it and its cheerleading squad on Snapchat); see also generally Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

38. Rachel E. Greenspan, *How ‘Cancel Culture’ Quickly Became One of the Buzziest and Most Controversial Ideas on the Internet*, INSIDER (Aug. 6, 2020, 5:30 AM), <https://www.insider.com/cancel-culture-meaning-history-origin-phrase-used-negatively-2020-7#:~:text=The%20phrase%20was%20popularized%20only,actions%20or%20statements%20became%20popular.>



popularity in 2021.<sup>39</sup> Over the course of the last year, its meaning has evolved considerably: given the speed with which social media networks use, refine, and debate terminology, the verb “to cancel” is a moving definitional target. In the lay conception, the process of cancelation unspools in three steps. First, some individual’s prior conduct, generally perceived as offensive, is *posted on social media* through a video, post, picture, or news report.<sup>40</sup> Second, reports of such conduct *go viral*, trending on social media. Amidst this virality, the individual who engaged in the conduct is identified. Finally, *the collective judgment* of that individual leads to concrete consequences in that person’s life; this may include loss of a job, harassment, and even criminal prosecution. Today, the cancel-culture process is omnipresent in our cultural discourse and a *de rigeur* response to public events.<sup>41</sup> For example, in the wake of the Capitol riot of January 6, 2021, Twitter users and others immediately began naming the offenders, leading to the firing of many such rioters before the commencement of any federal prosecution.<sup>42</sup>

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39. Google Trend for “Cancel Culture” over the Past Five Years, GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=today%205-y&geo=US&q=cancel%20culture> (last visited Dec. 5, 2022); see also, e.g., Kelsey McKinney, *Slate Podcast Host Mike Pesca Suspended Following Internal Discussion About Use of Racial Slur*, DEFECTOR (Feb. 22, 2021, 5:14 PM), <https://defector.com/mike-pesca-slate-suspended> (reporting on Mike Pesca’s, host of Slate’s podcast “The Gist,” suspension from the company for comments in a Slack conversation in which he argued for the usage of the N-word by white people in some contexts); Aja Romano, *The Second Wave of “Cancel Culture”*, VOX (May 5, 2021, 1:00 PM), <https://www.vox.com/22384308/cancel-culture-free-speech-accountability-debate>. Notably, 2018 is also the year that Facebook created its “anger” button, which “incentivized the spread of divisive, sensational content and misinformation.” The Journal, *The Facebook Files, Part 4: The Outrage Algorithm*, WALL ST. J. (Sept. 18, 2021, 11:30 AM), <https://www.wsj.com/podcasts/the-journal/the-facebook-files-part-4-the-outrage-algorithm/e619fbb7-43b0-485b-877f-18a98ffa773f>. Examples of cancel culture now abound in everyday life. See, e.g., Ginia Bellafante, *Why Did the Dean of the Most Diverse Law School in the Country Cancel Herself?*, N.Y. TIMES (Apr. 1, 2021), <https://www.nytimes.com/2021/03/26/nyregion/CUNY-law-school-mary-lu-bilek-racism.html?referringSource=articleShare>; Ryan Parker & Aaron Couch, *‘The Mandalorian’ Star Gina Carano Fired Amid Social Media Controversy*, HOLLYWOOD REP. (Feb. 10, 2021, 6:38 PM), <https://www.hollywoodreporter.com/news/the-mandalorian-star-gina-carano-fired-amid-social-media-controversy>; John Bowden, *Man Caught on Video Yelling at Asian Family: “Trump’s Going To F--- You!”*, THE HILL (July 7, 2020, 2:56 PM), <https://thehill.com/homenews/news/506227-man-caught-on-video-yelling-at-asian-family-trumps-going-to-f-you>; Lyz Lenz, *How a University of Iowa Reply-All Email Became Ground Zero for the Cancel Culture Wars*, VANITY FAIR (Apr. 29, 2021), [https://www.vanityfair.com/news/2021/04/how-a-reply-all-email-became-ground-zero-for-the-cancel-culture-wars?utm\\_source=pocket-newtab](https://www.vanityfair.com/news/2021/04/how-a-reply-all-email-became-ground-zero-for-the-cancel-culture-wars?utm_source=pocket-newtab); Dustin Stephens, *Cancel Culture, a New Wedge Issue*, CBS NEWS (May 2, 2021, 10:10 AM), <https://www.cbsnews.com/news/cancel-culture-a-new-wedge-issue/>.

40. See MARTHA MINOW, *SAVING THE NEWS* 12 (2021) (noting how social media may spread news in communities lacking a local newspaper). Often, social media highlights disparities between certain communities and the culture discourse within traditional news agencies. See MICHAEL SCHUDSON, *SOCIOLOGY OF THE NEWS* 14 (2003) (“The news . . . is produced by people who operate, often unwittingly, within a culture system, a reservoir of store cultural meanings and patterns of discourse.”).

41. Shaming and canceling occurred, for example, during the COVID-19 lockdowns. See, e.g., Amanda Hess, *The Social-Distancing Shamers Are Watching*, N.Y. TIMES (May 11, 2020), <https://www.nytimes.com/2020/05/11/arts/social-distance-shaming.html> (“The internet has long been identified as a breeding ground for public shame, but the coronavirus has advanced the game.”).

42. AJ Willingham & Carma Hassan, *People at the US Capitol Riot Are Being Identified and Losing Their Jobs*, CNN (Jan. 9, 2021, 2:35 PM), <https://www.cnn.com/2021/01/07/us/capitol-riots-people-fired-jobs-trnd/index.html>. To some degree, the online mobilization was responsive to the widespread observation that such rioters—who were almost all white—had faced no consequences for their actions, whereas if the same rioters

This Part defines cancel culture as an old phenomenon (public shaming) channeled through a new modality (social media). It then identifies how cancel culture fills accountability gaps alongside the functioning of our contemporary criminal justice system.

#### A. OLD WINE IN NEW BOTTLES: PUBLIC SHAMING THROUGH SOCIAL MEDIA

What is the best way to conceive of cancel culture? First, cancel culture is an old phenomenon: shaming and ostracization are age-old, interrelated social forces. Both have always been integral to human societies<sup>43</sup>—take, for example, Cain’s punishment after killing Abel,<sup>44</sup> Roman persecution of Christians or heretics,<sup>45</sup> or Napoleon’s exile.<sup>46</sup> Up until the eighteenth century, murderers in England were permanently branded on their cheeks until public authorities determined that it made such individuals more—not less—likely to become recidivists.<sup>47</sup> U.S. history is littered with the tragic examples of the Salem Witch Trials,<sup>48</sup> lynchings,<sup>49</sup> McCarthyism,<sup>50</sup> boycotts,<sup>51</sup> and HIV/AIDS stigma.<sup>52</sup> While, as a formal matter, punishment and public shaming

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were black (and particularly if it had been a Black Lives Matter protest), it would have resulted in more arrests, police violence, and police killings. See e.g., John Eligon, *Racial Double Standards of Capitol Police Draws Outcry*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/us/capitol-trump-mob-black-lives-matter.html>; Kurtis Lee, Jaweed Kaleem & Laura King, *‘White Supremacy Was on Full Display.’ Double Standard Seen in Police Response to Riot at Capitol*, L.A. TIMES (Jan. 7, 2021), <https://www.latimes.com/world-nation/story/2021-01-07/la-na-washington-capitol-police-attack-race>.

43. See, e.g., Kleinfeld, *supra* note 29, at 948; JACOBS, *supra* note 26, at 209 (“In ancient times, a criminal conviction was ‘written’ on the offender’s body by branding or mutilation.”); MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 234–35 (2004) (“Shame punishments, historically, are ways of marking a person, often for life, with a degraded identity.”); Posner, *supra* note 19 (“Shaming has always been extraordinarily important—often, even more important than the formal legal system.”). Other contemporary examples include Nazi Germany and China under Mao Zedong. See JON RONSON, *SO YOU’VE BEEN PUBLICLY SHAMED* 83 (2015).

44. Amy Tikkanen, *Abel*, ENCYC. BRIT., <https://www.britannica.com/biography/Abel-biblical-figure> (Aug. 22, 2022).

45. Matt Stefon et al., *Christianity*, ENCYC. BRIT. (Oct. 18, 2022), <https://www.britannica.com/topic/Christianity>.

46. Jacques Godechot, *Napoleon I*, ENCYC. BRIT. (May 1, 2021), <https://www.britannica.com/biography/Napoleon-I/Downfall-and-abdication>.

47. JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* 60 (1989).

48. Mishan, *supra* note 34.

49. Keri Leigh Merritt & Chris Richardson, *History, Civil Rights and the Original Cancel Culture*, THE HILL (Aug. 4, 2020, 4:30 PM), <https://thehill.com/opinion/civil-rights/510497-history-civil-rights-and-the-original-cancel-culture>.

50. Henry Olsen, *McCarthyism Is Back. This Time, It’s Woke.*, WASH. POST: OP. (July 15, 2020, 6:15 PM), <https://www.washingtonpost.com/opinions/2020/07/15/mccarthyism-is-back-this-time-its-woke>.

51. Jordan Runtagh, *When John Lennon’s ‘More Popular Than Jesus’ Controversy Turned Ugly*, ROLLING STONE (July 29, 2016, 1:03 PM), <https://www.rollingstone.com/feature/when-john-lennons-more-popular-than-jesus-controversy-turned-ugly-106430/>; Carson Blackwelder, *Dixie Chicks Talk Cancel Culture 17 Years After Being Blacklisted*, GOOD MORNING AM. (Mar. 16, 2020), <https://www.goodmorningamerica.com/culture/story/dixie-chicks-talk-cancel-culture-17-years-blacklisted-69617700>.

52. See generally Steven Arrigg Koh, *From “Stigma” and “Coping” to Social Repositioning: A New Perspective on HIV/AIDS, Identity, and Human Rights*, in *SYMBOLIC TRANSFORMATION: THE MIND IN*

were uncoupled in 1905,<sup>53</sup> in modern society the nature of punishment has transformed into something more subtle and pervasive.<sup>54</sup> In the United States specifically, criminal punishment in the mass incarceration era has moved away from normative goals, such as retribution and rehabilitation, and has instead trended toward banishment, wherein the system has decided that the offender is “other” and must be excluded.<sup>55</sup> Contemporary forms of U.S. criminal banishment include life imprisonment without parole or equivalent sentences, collateral consequences tantamount to civil death, and the death penalty, all of which disproportionately affect marginalized communities.<sup>56</sup>

Cancel culture channels this shaming through a new modality: social media. Social media leads to *acceleration*, *amplification*, and *democratization* of the social forces that normally lead to ostracization.<sup>57</sup> First, social media *accelerates* public shaming through rapid dissemination of stories, such that in a matter of hours any individual may be identified as having engaged in perceived wrongdoing. Second and relatedly, this rapid identification is *amplified*, in that it may proliferate to become known to millions of people around the country and the world. Third and finally, social media *democratizes* the power to shame, given that any individual with a social media account may engage in canceling.<sup>58</sup>

This definition clarifies popular debate over the nature of cancel culture. In popular conception, one area of ambiguity is the *target*—some define cancel culture as only targeting celebrities, whereas others describe cancel culture as potentially sanctioning anyone. Another open question is *the nature of the sanction*. Cancel culture can lead to online protest of the individual,<sup>59</sup> real-world

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MOVEMENT THROUGH CULTURE AND SOCIETY 284 (2010); João Florêncio, *AIDS: Homophobic and Moralistic Images of 1980s Still Haunt Our View of HIV—That Must Change*, THE CONVERSATION (Nov. 27, 2018, 9:30 AM), <https://theconversation.com/aids-homophobic-and-moralistic-images-of-1980s-still-haunt-our-view-of-hiv-that-must-change-106580>; Victor Maldonado, *Billy Porter Revealed Both That He’s HIV Positive and How the Diagnosis Still Bears a Stigma*, NBC NEWS: THINK (May 20, 2021, 12:52 PM), <https://www.nbcnews.com/think/opinion/billy-porter-revealed-both-he-s-hiv-positive-how-diagnosis-ncna1268045>.

53. Michael Ray, *Pillory*, ENCYC. BRIT. (June 18, 2021), <https://www.britannica.com/topic/pillory-penology>; BRAITHWAITE, *supra* note 47, at 59.

54. See generally MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1975).

55. Kleinfeld, *supra* note 29, at 949–50; see also Koh, *supra* note 32, at 171 (considering the role of the “other” in U.S. transnational and international criminal law policy).

56. Kleinfeld, *supra* note 29, at 949–74.

57. Stephens, *supra* note 39 (arguing that cancel culture is similar to the political correctness movement of thirty years ago).

58. See MINOW, *supra* note 40, at 3–4 (noting that the majority of Americans now receive their news via algorithms and on screens).

59. See e.g., Molly Roberts, *The Rise and Fall of Alison Roman*, WASH. POST: OP. (May 13, 2020, 10:11 AM), <https://www.washingtonpost.com/opinions/2020/05/13/rise-fall-alison-roman/> (detailing how the chef Alison Roman’s critique of Chrissy Teigen and Marie Kondo, two women of color, started a conversation about cultural appropriation in Roman’s recipes, which led to her permanent leave of absence from her *New York Times* Cooking column).

harassment,<sup>60</sup> loss of a job,<sup>61</sup> or even bodily harm or death.<sup>62</sup> An additional area of ambiguity is the *conduct* that is subject to cancel culture. On one extreme are criminal acts; at the other extreme is conduct that is not only legal but innocuous.<sup>63</sup> Another recurring question is the *role of social media*. Social media is often perceived as a critical first step to canceling,<sup>64</sup> however, individuals or topics—such as Dr. Seuss books—nowadays are sometimes perceived as being “canceled” even without social media.<sup>65</sup> A final question is *who decides the sanction*. Social media communities are both distinct and overlapping, like a large tree with divergent branches connected to the same core trunk. In this sense, certain sectors of social media communities may identify and isolate a particular target for sanctioning (e.g., a tech individual fired for making a lewd joke about the word “dongle” at a conference);<sup>66</sup> at other times, a broader swath of the community may engage (e.g., the Cosby allegations).<sup>67</sup>

Furthermore, while rightwing conservatives increasingly brandish cancel culture as a liberal sanctioning device, canceling happens to individuals on both sides of the political aisle. National Football League quarterback Colin

60. See e.g., Taylor Mooney & Justin Sherman, *How “Cancel Culture” Changed These Three Lives Forever*, CBS NEWS (Aug. 13, 2020, 6:51 AM), <https://www.cbsnews.com/news/cancel-culture-changed-lives-forever-cbsn-originals/> (detailing how CFO Adam Smith’s company received bomb and death threats after he posted a video of himself protesting Chick-fil-A and telling an employee “I don’t know how you live with yourself and work here”).

61. See e.g., Cindy Boren, *A Timeline of Colin Kaepernick’s Protests Against Police Brutality, Four Years After They Began*, WASH. POST (Aug. 26, 2020, 11:20 AM), <https://www.washingtonpost.com/sports/2020/06/01/colin-kaepernick-kneeling-history/>; Jonah E. Bromwich, *Amy Cooper, Who Falsely Accused Black Bird-Watcher, Has Charge Dismissed*, N.Y. TIMES (Feb. 16, 2021), <https://www.nytimes.com/2021/02/16/nyregion/amy-cooper-charges-dismissed.html>; Petula Dvorak, *Flipping Off President Trump Has Changed Juli Briskman’s Life—and Exposed Our Divisions*, WASH. POST (Nov. 14, 2017), [https://www.washingtonpost.com/local/flipping-off-president-trump-has-changed-juli-briskmans-life—and-exposed-our-divisions/2017/11/07/19efab02-c3f6-11e7-afe9-4f60b5a6c4a0\\_story.html](https://www.washingtonpost.com/local/flipping-off-president-trump-has-changed-juli-briskmans-life—and-exposed-our-divisions/2017/11/07/19efab02-c3f6-11e7-afe9-4f60b5a6c4a0_story.html).

62. See Derrick Bryson Taylor, *Caroline Flack, Who Hosted ‘Love Island,’ Dies by Suicide at 40*, N.Y. TIMES (Feb. 15, 2020), <https://www.nytimes.com/2020/02/15/arts/caroline-flack-dead.html> (reporting the suicide of Caroline Flack, former Love Island host and a fixture in British tabloids, following harsh media coverage of assault allegations against her); see also Jess Campbell, *Have We Taken Cancel Culture Too Far in 2020?*, GQ (Jan. 15, 2020), <https://www.gq.com.au/success/opinions/have-we-taken-cancel-culture-too-far-in-2020/news-story/0f12503dbf60071a63d7ffd5e29bccc7> (describing the circumstances surrounding two suicides: that of the man misidentified as the kitten torturer in a viral video and that of a young man who, after protesting a children’s reading event hosted by a drag queen, received incessant online attacks). A video depicting the torture and deaths of two kittens went viral, leading to an international search for the perpetrator. Campbell, *supra*. One man was wrongfully accused of the crimes and, following weeks of internet harassment, took his own life. *Id.* Another shocking suicide linked to cancel culture is that of twenty-one-year-old Wilson Gavin, who protested a drag queen reading to children at an Australian library. *Id.* The video of the protest went viral and online attacks ensued. *Id.* He eventually committed suicide. *Id.*

63. The Cosby and Donohue cases mentioned in the Introduction are examples along this spectrum.

64. See, e.g., *supra* notes 8–9 and surrounding text (describing the Cosby case).

65. Tristin Hopper, *Here Are the ‘Wrong’ Illustrations That Got Six Dr. Seuss Books Cancelled*, NAT’L POST (Mar. 3, 2021), <https://nationalpost.com/entertainment/books/here-are-the-wrong-illustrations-that-got-six-dr-seuss-books-cancelled>.

66. Jon Ronson, *How One Stupid Tweet Blew Up Justine Sacco’s Life*, N.Y. TIMES (Feb. 12, 2015), <https://www.nytimes.com/2015/02/15/magazine/how-one-stupid-tweet-ruined-justine-saccos-life.html>.

67. A separate issue, for further research, is the degree to which the national discourse on social media excludes individuals who do not have access to social media.

Kaepernick's NFL career effectively ended when a photo of him kneeling during the national anthem went viral.<sup>68</sup> American writer Will Wilkinson triggered a social media firestorm and then was fired from his job at Niskanen Center after tweeting: "If Biden really wanted unity, he'd lynch Mike Pence."<sup>69</sup> In 2017, a photo went viral of Virginia resident and government contractor Juli Briskman giving the middle finger to President Trump's motorcade.<sup>70</sup> She was fired from her job shortly thereafter.<sup>71</sup> And Kathy Griffin, comedian and actress, was fired from her longtime position as cohost of CNN's New Year's Eve broadcast after she posted an image holding a mask of a severed head that resembled that of former President Donald Trump.<sup>72</sup> After President Biden's inauguration, she even tweeted, "SO AM I UNCANCELLED NOW?"<sup>73</sup>

## B. CANCEL CULTURE AS GAP FILLING

How does cancel culture relate to criminal justice? Cancel culture is *gap filling*, often redressing issues of under- and over-enforcement in our criminal justice system.

Our era of mass incarceration is rightly perceived as prosecuting too many people, too often, for too much conduct.<sup>74</sup> It is also self-evidently true that our criminal justice system does not prosecute all conduct that society considers harmful or immoral. Thus, our criminal justice system exhibits structural *accountability gaps*, opening the door for social media sanction. This concept is analogous to what criminal legal scholars call "impunity gaps," or cases of

68. Boren, *supra* note 61.

69. Robby Soave, *Cancel Culture Comes for Will Wilkinson*, REASON (Jan. 22, 2021, 12:13 PM), <https://reason.com/2021/01/22/niskanen-center-will-wilkinson-lynch-mike-pence-tweet-cancel-culture/>.

70. Dvorak, *supra* note 61.

71. Michelle Singletary, *She Posted a Photo of Herself Giving Trump the Finger. She Lost Her Job. Was Her Firing Fair?*, WASH. POST (Nov. 9, 2017, 7:18 AM), <https://www.washingtonpost.com/news/get-there/wp/2017/11/09/she-posted-a-photo-of-herself-giving-trump-the-finger-she-lost-her-job-was-her-firing-fair/>.

Briskman noted that a male employee was not fired after posting lewd comments on his Facebook page. *Id.* The incident prompted national debate about the fairness of her firing, including public commentary from Harvard Law School professor Benjamin Sachs, who argued in a *Washington Post* op-ed that her firing should have been illegal. Benjamin Sachs, *It Should Be Illegal To Fire the Cyclist Who Gave Trump the Finger*, WASH. POST (Nov. 8, 2017, 11:20 AM), <https://www.washingtonpost.com/news/posteverything/wp/2017/11/08/the-cyclist-who-flipped-trump-off-got-fired-that-should-be-illegal/> ("Given Trump's repeated decision to insert politics into private-sector workplace disputes, it's time for courts to offer heightened protection for private-sector employees' political activities. If the president can tweet about workers, then workers must be able to tweet about, remark on and—yes—flip off the president. And protecting these rights means that employers must not be able to fire workers who engage in these political acts.").

72. Herman Wong, *CNN Cuts Ties with Kathy Griffin Amid Controversy over Comedian's Gruesome Anti-Trump Photo*, WASH. POST (May 31, 2017, 1:49 PM), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/05/30/kathy-griffin-apologizes-for-severed-donald-trump-head-photo-after-backlash>.

73. Kathy Griffin (@KathyGriffin), TWITTER (Jan. 20, 2021, 12:09 PM), <https://twitter.com/kathygriffin/status/1351939816884035585>.

74. See generally Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. 253 (2015).

individuals who have engaged in serious transnational or international criminal wrongdoings but are never held accountable for such crimes.<sup>75</sup>

These gaps take two forms: one of criminalization of *substantive conduct* and the other of *enforcement disparities*. Regarding the former, consider a hypothetical: if our criminal justice system were somehow perfectly aligned with our cultural norms concerning the definition and enforcement of all wrongful conduct, our society’s collective sensibility would likely be one of “let the criminal justice system handle it.” But of course, such a perception is not the case in contemporary America and is beyond achievability given the diversity and evolution of cultural norms in our large, pluralist democracy. For starters, our system criminalizes a small percentage of conduct that is harmful or immoral: as every first-year law student learns, for example, the vast majority of omissions fail to meet the actus reus requirement, despite the fact that a failure to act may cause or perpetuate certain harms.<sup>76</sup> And the American criminal justice system criminalizes conduct that is likely neither harmful nor immoral, such as marijuana possession.<sup>77</sup> Furthermore, as a formal matter, criminal justice inevitably fails to achieve the “correct” result in many cases.<sup>78</sup>

In the United States, hate speech is a major category of non-criminalized conduct. As is well known, U.S. judicial interpretation of the First Amendment is broader and more protective than similar protections in European countries, for example.<sup>79</sup> This includes, in particular, hate speech protections.<sup>80</sup> While the history and rationales for such protections are the site of rich scholarly discourse,<sup>81</sup> one consequence of such jurisprudence is a gap between the freedom to express and the harm or offense that results from such expression. Just as, formally speaking, omissions generally do not give rise to criminal sanction, neither do many forms of harmful speech.

Moving from formalism to realism, the contemporary pattern of criminal law enforcement reveals even deeper disparities between criminal justice and our lay norms. In practice, disproportionate impact on certain communities—especially communities of color—persistently calls into question the

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75. Koh, *supra* note 32, at 352 (discussing impunity gaps in international and transnational criminal law); *see also generally* David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. U. J. INT’L HUM. RTS. 30 (2009) (discussing the impunity gap in the United States).

76. JENS DAVID OHLIN, *CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE* 119–40 (2d ed. 2018) (defining the act requirement in criminal law). For example, a witness who fails to intervene during the perpetration of a robbery cannot be prosecuted merely for such omission. *Id.* at 119.

77. A review of such criminalization debates is beyond the scope of this Article. *See, e.g.*, Lauren-Brooke Eisen & Inimai Chettair, *39% of Prisoners Should Not Be in Prison*, TIME (Dec. 9, 2016, 5:01 AM), <https://time.com/4596081/incarceration-report/> (arguing that people convicted of low-level drug offenses should not be incarcerated).

78. *See generally* Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065 (2015) (examining the principle that it is “better that ten guilty persons escape, than that one innocent suffer.”).

79. *See* Harold Hongju Koh, *On American Exceptionalism*, 55. STAN. L. REV. 1479, 1483 (2003).

80. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

81. *See generally, e.g.*, Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953 (2018).

effectiveness of this system. As is well documented, people of color—especially black and brown Americans—are disproportionately harassed by the police,<sup>82</sup> arrested,<sup>83</sup> prosecuted,<sup>84</sup> sentenced at higher incarceration rates,<sup>85</sup> and more likely to receive the death penalty.<sup>86</sup> At the same time, a related critique is one of *under-enforcement*: individuals who are white, wealthy, or otherwise powerful are less likely to be held accountable for their crimes.<sup>87</sup>

Civil legal enforcement mechanisms may also fail to close these accountability gaps. Prospective civil plaintiffs may face insurmountable barriers to bringing successful claims for harms suffered; often, they are beset by substantive and procedural barriers, qualified immunity protections, or other access-to-justice issues.<sup>88</sup> Frequently, these challenges are interconnected. For example, Joanna Schwartz has recently described civil rights “ecosystems,” wherein the frequency and success of claims against the government are determined by an interconnected and interactive set of actors (e.g., plaintiffs’ attorneys, judges, juries, and defense counsel), legal rules and remedies (e.g., § 1983 doctrine and defenses), and informal practices (e.g., litigation, settlement, and indemnification decisions).<sup>89</sup> And other enforcement mechanisms, such as Title IX mechanisms on campuses, are beset with interrelated questions of under-enforcement and procedure.<sup>90</sup>

Into this gap steps social media and cancel culture as a complementary system of collective condemnation.<sup>91</sup> Whereas our criminal justice and other

82. See generally BUTLER, *supra* note 12; Carbado, *supra* note 13 (discussing the use of Fourth Amendment jurisprudence to empower police to take violent actions against the Black community); Alice Ristoph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182 (2017) (reviewing the use of current Supreme Court seizure doctrine as justification for police violence).

83. See generally BUTLER, *supra* note 12.

84. See, e.g., Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. JUST. (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.

85. See generally, e.g., BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

86. See, e.g., *Race and the Death Penalty*, ACLU (Feb. 26, 2021), <https://www.aclu.org/other/race-and-death-penalty>.

87. See, e.g., Henry F. Fradella & Ryan G. Fischer, *Factors Impacting Sentence Severity of Intimate Partner Violence Offenders and Justification for the Types of Sentences Imposed by Mock Judges*, 34 LAW & PSYCH. REV. 25, 31 (2010); see also generally Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006).

88. See Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 318 (2020); see also generally Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001).

89. Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1598 (2020). (“My point is not that courts should stop interpreting the law, legislators should stop making law, or scholars should stop imagining how the law could be improved. But each should recognize their decisions and proposals will not operate in a vacuum and should be skeptical of their ability to craft generally applicable rules that achieve particular policy ends.”).

90. See, e.g., Katharine Silbaugh, *Reactive to Proactive: Title IX’s Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1050 (2015).

91. Of course, myriad other forms of legal enforcement and non-legal condemnation constrain behavior. A person engaging in offensive speech, for example, may be civilly sued for defamation in limited circumstances. See generally Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596 (2010). Changes to internal policies within a police department may ameliorate certain incentives in

systems are slow,<sup>92</sup> cancel culture may immediately fill the void to sanction offensive and even criminal conduct. Within days, hours, or even minutes, an online community of millions may make a collective determination as to an individual's guilt for engaging in perceived offensive behavior.

Cancel culture fills accountability gaps in two regards. First, it refers individual cases of wrongdoing to the criminal justice system, constituting a new mode of democratic participation in the administration of criminal justice in the face of prosecutorial control. Second, it independently shames individuals who are beyond the criminal justice system's reach.

### 1. *The Referral Function*

In 2014, comedian Hannibal Buress in a stand-up routine identified Bill Cosby as a rapist.<sup>93</sup> In his act, Buress lamented Cosby's commentary about black men, their dress, and the way they should act, and suggested that since Cosby had long been accused of rape, he was not poised to criticize.<sup>94</sup> Buress encouraged the audience to Google search "Cosby" and "rape" to see for themselves.<sup>95</sup> This reignited the discussion around the rape allegations against Cosby, leading to victims coming forward, criminal investigation, and, eventually, Cosby's conviction.<sup>96</sup>

The Cosby case highlights cancel culture's *referral function*. While cancel culture is typically depicted as a stand-alone system of public censure,<sup>97</sup> it interrelates with our existing criminal justice system by publicly illuminating conduct warranting criminal investigation or prosecution. In this way, it fills the aforementioned accountability gap in enforcement by engaging the criminal justice system, which may or may not then respond effectively.

What about the cases of over-enforcement? As noted above, our mass incarceration era is characterized by its disproportionate impact on communities of color. Often, this may elude the structure of cancel-culture referral: social media more easily highlights and refers perceived individual, wrongful human conduct than it does structural over-enforcement in the carceral system. But cancel culture may be effective in referring the legal actors responsible for over-

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law enforcement. *See generally* Shaun Ossei-Owusu, *Police Quotas*, 96 N.Y.U L. REV. 529, 541 (2021). And interpersonal relations may curb certain action—for example, changing social norms will constrain behavior. *See* Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1604 (2000). The broader universe of such interaction is beyond the scope of this Article, which focuses specifically on how cancel culture relates to or resembles criminal justice.

92. Posner, *supra* note 19 ("Our plodding legal system often fails to do justice because of high standards of proof, the expense of lawyers, and the weakness of the laws . . . [S]haming allows us to avoid the messy business of legislation in the first place; moral norms are enforced directly, so one doesn't need to wait for the political system to lurch into motion.")

93. Anna Silman, *Hannibal Buress Called Bill Cosby a Rapist*, VULTURE (Oct. 20, 2014), <https://www.vulture.com/2014/10/hannibal-buress-called-bill-cosby-a-rapist.html>.

94. *Id.*

95. *Id.*

96. *Id.*

97. *See* Lewis, *supra* note 35 (describing being canceled as an economic, rather than a criminal, sanction).



enforcement—overwhelmingly police officers—who violate certain criminal prohibitions, particularly in cases concerning victims of color. For example, without the existence of smart phones and social media, it is less likely that anyone outside of Minneapolis would have heard about the killing of George Floyd. Instead, the detailed, viral footage fostered widespread public demand that officer Derek Chauvin be tried and convicted of George Floyd’s murder.<sup>98</sup> The same may be said of vigilantism; consider the Ahmaud Arbery case. On February 23, 2020, Ahmaud Arbery was shot and killed by two white men while on a short jog in his neighborhood in Glynn County, Georgia.<sup>99</sup> Arbery was killed months before George Floyd’s death on May 25, 2020, but his case only garnered national attention and closure after Floyd’s murder sparked nationwide protests.<sup>100</sup> It was only later that year that an anonymous leak on his case, which had been inactive, went viral, eventually leading to the arrest and prosecution of the perpetrators.<sup>101</sup> These individuals were also subject to immediate public scrutiny: there was widespread outrage on social media, including criticism from both President Trump, who labeled the footage very disturbing, and then-presidential candidate Joe Biden, who likened the shooting to a lynching.<sup>102</sup>

While cancel culture may refer such cases to the criminal justice system, the system itself may not redress the actual wrongs. Bill Cosby’s conviction was ultimately vacated on due process grounds, to the outrage of #MeToo advocates and the general public.<sup>103</sup> Many fear that the development in Cosby’s case may have a chilling effect on victims of sexual assault coming forward.<sup>104</sup> Or take for example the case of Tamir Rice, a twelve-year-old black American boy killed by a police officer within seconds of police arriving at a park where Rice was holding an airsoft gun.<sup>105</sup> A grand jury in Cleveland did not bring charges against

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98. Nicholas Bogel-Burroughs & Tim Arango, *What To Know About the Trial of Derek Chauvin*, N.Y. TIMES (Mar. 8, 2021), <https://www.nytimes.com/live/2021/derek-chauvin-trial-explained#derek-chauvin-jurors-dismissed>.

99. Richard Fausset, *Before Breonna Taylor and George Floyd, There Was Ahmaud Arbery*, N.Y. TIMES (Feb. 28, 2021), <https://www.nytimes.com/2021/02/28/us/ahmaud-arbery-anniversary.html>.

100. See Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Feb. 28, 2021), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html>; Evan Hill, Ainara Tienfenthaler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES, <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> (Jan. 24, 2022).

101. Fausset, *supra* note 100; Sarah Mervosh, *Ahmaud Arbery Video Was Leaked by a Lawyer Who Consulted with Suspects*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/08/us/ahmaud-arbery-video-lawyer.html>.

102. Mervosh, *supra* note 101.

103. Maryclaire Dale, *Bill Cosby Freed from Prison, His Sex Conviction Overturned*, AP NEWS (June 30, 2021), <https://apnews.com/article/bill-cosby-conviction-overturned-5c073fb64bc5df4d7b99ee7faddb5a>.

104. Elizabeth Blair, *Bill Cosby’s Release Could Have a Silencing Effect on Victims, Advocates Say*, NPR (June 30, 2021, 7:00 PM), <https://www.npr.org/2021/06/30/1011859393/bill-cosbys-release-could-have-a-silencing-effect-on-victims-advocates-say>.

105. Ashley Fantz, Steve Almasy & Catherine E. Shoichet, *Tamir Rice Shooting: No Charges for Officers*, CNN (Dec. 28, 2015, 7:22 PM), <https://www.cnn.com/2015/12/28/us/tamir-rice-shooting/index.html>.

the two officers even though public outcry and a report from a judge argued that probable cause existed for multiple charges ranging from murder to dereliction of duty.<sup>106</sup>

Cancel culture's referral function thus constitutes a new mode of democratic participation in the administration of criminal justice in the face of prosecutorial control. This phenomenon intervenes in ongoing scholarly debate regarding the prosecutor's role vis-à-vis the polity, particularly in a time when plea bargains have replaced criminal jury trials, thereby reducing lay, public participation in the criminal process.<sup>107</sup> One thread of existing scholarship favors stronger connections between prosecutorial mechanisms and the community, in response to what some view as a democratic deficit in prosecutorial decision-making.<sup>108</sup> Others have argued against such democratic proposals.<sup>109</sup> While such scholarship has not yet considered the role that social media may play in influencing the administration of criminal justice, social media's visibility and immediacy may push prosecutorial actors toward charging in cases when they otherwise might not.<sup>110</sup> The advent of accelerated, amplified, and democratized social media may influence the administration of criminal justice through online referral.

## 2. *The Shaming Function*

On July 4, 2020, an Asian American family at a restaurant in Carmel Valley, California, was celebrating an aunt's birthday when Michael Lofthouse, the CEO of Bay Area tech company Solid8, started yelling anti-Asian insults at them.<sup>111</sup> Part of the incident was captured on cellphone video, including Lofthouse giving the family the middle finger, then yelling obscenities that included "Fuck you Asians," "You fucking Asian piece of shit,"

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106. *Id.*

107. See generally Jeffrey Bellin, *Plea Bargaining's Uncertainty Problem*, 101 TEX. L. REV. (forthcoming 2023); Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019).

108. See, e.g., Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. L. REV. 1455, 1456–57 (2017) (laying out a framework for conceiving democratic criminal justice); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 71 (2011) (arguing that prosecution has become divorced from the community and focused particularly on creating community awareness of how the community's resources are spent).

109. See, e.g., Brenner M. Fissell, *Local Offenses*, 89 FORDHAM L. REV. 837, 843–45 (2020) (discussing legislative drafting of criminal codes at a local level and discussing the drawbacks of communal participation as a response to democratizing criminal justice efforts); John Rappaport, *Some Doubts About Democratizing Criminal Justice*, 87 U. CHI. L. REV. 711, 717 (2020) (providing a general critique of the democratic approach to criminal justice).

110. See Gold, *supra* note 108 (discussing required cost disclosures); Kevin Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2339 (2008) (discussing restructuring the grand jury); Rappaport, *supra* note 109, at 718 (summarizing democratizers' policy proposals as either substantive law reforms, structural incentives for procedural justice, citizen advisory and oversight committees, and jury reform, and discussing what he views as the flawed theoretical premise these proposals rest upon).

111. David K. Li & Rima Abdelkader, *Video Shows Man Thrown Out of California Restaurant for Racist Tirade Against Family*, NBC NEWS (July 8, 2020, 12:10 PM), <https://www.nbcnews.com/news/asian-america/video-shows-man-thrown-out-california-restaurant-racist-tirade-against-n1233117>.

and “Trump’s gonna fuck you.”<sup>112</sup> Once the footage went viral, Lofthouse announced he was stepping down as CEO of Solid8.<sup>113</sup>

This incident of anti-Asian racism illustrates cancel culture’s *shaming function*, wherein social media communities fill accountability gaps by identifying and stigmatizing individuals who have engaged in perceived offensive conduct—often when such cases are outside of the reach of the criminal justice system.

Legal scholarship in the mid-2010s addressed incidents of online shaming when they were more isolated.<sup>114</sup> Since that time, online shaming has ripened into cancel culture, a more ubiquitous, developed, and persistent system of sanction. Most often, cancel culture shames because the perceived offensive conduct falls beyond the reach of the criminal justice system. In such cases, enforcement may be foreclosed by a statute of limitations, lack of evidence, or lack of any statutory basis for indictment. Criminal justice and other legal regimes are “culture-bearing,” a site of cultural negotiation of the concepts of “wrongdoing and community, social order and violence, identity, the power of the state, and the terms of collective ethical life.”<sup>115</sup> When such systems cannot (and likely will not) function, social media shames the offenders as a means of norm enforcement.

As noted above, such shaming may respond to hate speech, or harmful speech. Consider cancel culture’s origins, which began in public collective memory in 2013.<sup>116</sup> The early example from that year involved Justine Sacco, a white woman, tweeting from the airport before leaving for South Africa: “Going to Africa. Hope I don’t get AIDS. Just Kidding. I’m white!”<sup>117</sup> At the time, coverage of this incident observed it as a quirk of social media: the *New York Times*, for example, ran an article in 2015 titled *How One Stupid Tweet Blew Up Justine Sacco’s Life*.<sup>118</sup> Since that time, cancel culture has developed into a system where some are shamed for engaging in legally protected speech; the responsive online speech that “cancels” is also legally protected.

Often, cancel culture may play both a shaming and referral function. For example, in May 2020, New Yorker Amy Cooper made a 911 call in which she

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112. *Id.*

113. Togoh, *supra* note 7.

114. *See, e.g.*, Klonick, *supra* note 31, at 1046–50 (reviewing cases of online shaming in depth).

115. Kleinfeld, *supra* note 29, at 940.

116. Arguably, forms of online-driven cancel culture can be traced earlier. *See, e.g.*, Suzanne Goldenberg, *Fake Reporter Unmasked at White House*, *GUARDIAN* (Feb. 10, 2005, 7:04 PM), <https://www.theguardian.com/world/2005/feb/11/usa.suzannegoldenberg> (noting that a fake White House correspondent quit his job at a rightwing news site after liberal bloggers discovered he worked under a pseudonym and that his real name was linked to gay pornographic web domains).

117. Ronson, *supra* note 66. By the time she arrived in Cape Town eleven hours later, she was the top trending Twitter topic, had already been fired from her job, received direct messages of condolence from friends, and had her arrival recorded by a Twitter user who had physically gone to the Cape Town Airport for that purpose. *Id.*

118. *Id.* In its article, the *Times* reviewed the details of the case and observed that it was one of a rising trend of isolated incidents wherein individuals are shamed or fired as a result of social media. *Id.*

claimed that a black man, Christian Cooper, was threatening her life when he asked her to put her dog on a leash in Central Park.<sup>119</sup> Amy Cooper then lost her job, her home, and, according to her lawyer, her public life.<sup>120</sup> The animal rescue group where she had adopted the dog two years earlier temporarily took it back.<sup>121</sup> She ultimately was charged with filing a false police report in connection with her phone call, and the video capturing it all resulted in her being canceled online.<sup>122</sup>

In both its referral and shaming functions, cancel culture may serve normatively beneficial ends. In particular, it may elevate the causes and concerns of marginalized groups who have called for accountability but often confront barriers to enforcement.<sup>123</sup> Thus, cancel culture may play a role in shaping our culture due to its identification and sanction of harmful or immoral conduct long overlooked.

## II. CANCEL CULTURE'S PROBLEMATIC PROCESS

While cancel culture may beneficially fill accountability gaps, missing is any framework by which to assess its drawbacks. Thus, this Part offers a criminal law and procedure framework focusing on the problematic aspects of cancel culture's sanctioning function: inadequate notice, imprecise factfinding, disproportionate punishment, neglect of rehabilitation, and fostering cultural anxiety over human conduct. This Part will also briefly engage in a comparative cultural analysis to underscore the deeper, worrying American punitive impulse that characterizes our era of mass incarceration.

### A. THE STRUCTURE OF CONTEMPORARY CONDEMNATION

#### 1. Notice

Which human conduct warrants cancelation? An initial problem is that canceled individuals are sometimes unaware that their action will trigger such sanction. For example, through social media, American dentist Walter Palmer was identified as the hunter who in 2015 killed Cecil the Lion, and yet the conduct for which he was publicly shamed was not illegal.<sup>124</sup> In Palmer's case, the evidence existed in the form of pictures and travel documents confirming

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119. *Id.*

120. Jan Ransom, *Amy Cooper Faces Charges After Calling Police on Black Bird-Watcher*, N.Y. TIMES (Oct. 14, 2020), <https://www.nytimes.com/2020/07/06/nyregion/amy-cooper-false-report-charge.html>.

121. *Id.*

122. *Id.*

123. Cancel culture may also benefit various other fronts unrelated to social and identity issues. For example, it has proven effective in rebuking establishment media and corporate power. RONSON, *supra* note 43, at 9–10 (reviewing early cases of social media effectively sanctioning the *Daily Mail* newspaper and LA Fitness).

124. *How the Internet Descended on the Man Who Killed Cecil the Lion*, BBC: NEWS (July 29, 2015), <https://www.bbc.com/news/blogs-trending-33694075>.

that Palmer killed the lion and traveled for the purposes of a trophy hunt.<sup>125</sup> Social media communities quickly called for Palmer to be prosecuted and extradited to Zimbabwe;<sup>126</sup> however, prosecutors in both the United States and Zimbabwe could not find crimes warranting either,<sup>127</sup> because Palmer had a legal hunting permit and killed Cecil on unprotected land.<sup>128</sup> Therefore, the charges brought against Palmer's hunting guide and the man who occupied the land on which Cecil was killed<sup>129</sup> were also dismissed.<sup>130</sup>

Criminal law helps us understand this as a question of *notice*. Inherent in the principle of legality is the notion of fair notice, such that individuals may be apprised that what they are doing is wrong and conform their conduct accordingly.<sup>131</sup> But criminal law scholarship has also demonstrated how notice has gone awry in our modern criminal justice system. For example, as Bill Stuntz has persuasively argued, a central dynamic in contemporary criminal justice is broadly defined criminal statutes and prosecutors with tremendous power to bring cases within that framework.<sup>132</sup> As a result, individual legal enforcement actors—specifically, prosecutors—have tremendous discretion in interpreting and enforcing such violations.

Something analogous occurs with cancel culture's notice. Let us consider potential examples of anti-Asian bias. A Dallas company headed by three white women faced backlash for its culturally appropriative, revamped Mahjong set that removed Chinese characters from the game.<sup>133</sup> Chef Alison Roman was criticized for culturally appropriating recipes and lost her *New York Times*

125. Jani Hall, *Cecil the Lion Died amid Controversy—Here's What's Happened Since*, NAT'L GEOGRAPHIC (Oct. 15, 2018), <https://www.nationalgeographic.com/animals/article/cecil-african-lion-anniversary-death-trophy-hunting-zimbabwe>.

126. Matthew Weaver & Mahita Gajanan, *Cecil the Lion Hunter Walter Palmer Faces Calls for Prosecution*, GUARDIAN (July 29, 2015, 14:59 EDT), <https://www.theguardian.com/world/2015/jul/29/cecil-the-lion-calls-for-prosecution-us-dentist-walter-palmer>.

127. Michael E. Miller, *Zimbabwe Charges Farmer over Killing of Cecil the Lion, but Not American Dentist*, WASH. POST (Aug. 19, 2015, 2:28 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/08/19/zimbabwe-charges-farmer-over-killing-of-cecil-the-lion-but-not-american-dentist/>.

128. *Id.*

129. *Id.*

130. Nomsa Maseko, *Cecil's The Lion's Killer To Escape Prosecution*, BBC NEWS (Oct. 12, 2015), <https://www.bbc.com/news/av/world-africa-34510256>; see also RONSON, *supra* note 43, at 132–33 (describing a journalist's triggering Twitter critique of a *Vanity Fair* columnist who had shot a baboon on safari in Tanzania).

131. See *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”); Theodore J. Boutros, Jr. & Blaine H. Evanson, *The Enduring and Universal Principle of “Fair Notice”*, 86 S. CALIF. L. REV. 193, 195 (2013).

132. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

133. Jessie Yeung, *Mahjong Design ‘Refresh’ Reignites Debate over Cultural Appropriation*, CNN (Jan. 12, 2021), <https://www.cnn.com/style/article/mahjong-tiles-cultural-appropriation-intl-hnk-scli-dst/index.html>. The company claimed that its variant was an evolution of American mahjong, which morphed to have rules distinct from the Chinese version and became important to different cultures. *Id.*

Cooking column after calling Chrissy Teigen and Marie Kondo, two women of color, sellouts.<sup>134</sup> And U.S. soccer star Megan Rapinoe was criticized for tweeting ten years ago that a teammate looked Asian with closed eyes.<sup>135</sup> Arguably, all three examples violate the broad norm of "do not engage in racist behavior toward the Asian American and Pacific Islander community." But whether any individual conduct in fact triggers such violation is left in the hands of social media communities, who may have varying interpretations of whether a violation of this norm occurred.<sup>136</sup>

## 2. Evidence and Procedural Fairness

How do we know an individual has in fact engaged in conduct warranting cancelation? Another downside of cancel culture is its imprecise factfinding. The accumulation of social media posts, photos, or video clips may produce an inaccurate record of events. Specifically, cancel culture presents the *problem of misidentification* and the *problem of mischaracterization*.

First, take the problem of misidentification. Social media users who engage in canceling quickly make collective judgments, and may identify the wrong person as having engaged in the offending conduct. For example, in the wake of revelations from Mary Trump, niece of former President Donald Trump, that a man named Joe Shapiro took Trump's SAT for him, social media quickly identified a man by that name as the responsible individual.<sup>137</sup> The media bombarded his widow with accusations and requests for comment, and she had to quickly rectify that her husband was not the same Joe Shapiro who had taken Trump's SAT.<sup>138</sup> Sometimes this misidentification can even be deliberate. For example, Shaun King, well-known civil rights and Black Lives Matter activist, stated in the wake of Jacob Blake's death that if the Kenosha Police Department did not publicly identify the names of the officers responsible for Blake's shooting, he would start listing the names of every police officer in the department to trigger backlash against each one.<sup>139</sup>

The problem of mischaracterization is equally perilous. Photos of individuals supposedly disobeying 2020 COVID-19 social distancing rules, for

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134. See, e.g., Roberts, *supra* note 59.

135. Molly Sprayregen, *Activists Are Trying To Cancel Megan Rapinoe over a Tweet She Sent 10 Years Ago*, LGBTQ NATION (June 24, 2021), <https://www.lgbtqnation.com/2021/06/activists-trying-cancel-megan-rapinoe-tweet-sent-10-years-ago/>.

136. See Klonick, *supra* note 31, at 1054 (discussing online shaming and social norms).

137. John Santucci, *Widow of Trump's Friend Pushes Back Against Mary Trump SAT Allegation, Calls It False*, ABC NEWS (July 9, 2020, 2:10 AM), <https://abcnews.go.com/Politics/widow-trumps-friend-pushes-back-mary-trump-sat/story?id=71678433>.

138. *Id.* Mary Trump confirmed that the media had identified the wrong Joe Shapiro and expressed remorse that his widow was thrust into the spotlight to defend him. Mica Soellner, *Mary Trump: There Is Another Joe Shapiro Who Took the President's SAT Exam*, WASH. EXAM'R (July 15, 2020, 9:03 AM), <https://www.washingtonexaminer.com/news/mary-trump-there-is-another-joe-shapiro-who-took-the-presidents-sat-exam>.

139. Ewan Palmer, *Shaun King Says He May Name Innocent Kenosha Police Officers Until Jacob Blake Shooter Identified*, NEWSWEEK (Aug. 26, 2020, 11:16 AM), <https://www.newsweek.com/shaun-king-kenosha-police-jacob-blake-twitter-1527779>.

example, were demonstrated to be deceptive regarding depth of field.<sup>140</sup> And sometimes, the rush to judgment precedes video and other evidence. For example, after being arrested during a traffic stop, driver Sherita Dixon-Cole told the jail guard that she had been sexually assaulted by the arresting officer, Daniel Hubbard.<sup>141</sup> After she made this accusation and the story went viral, the Texas Department of Public Safety reviewed Hubbard's body camera footage, which revealed no wrongdoing.<sup>142</sup> The case led Texas to amend its false report statute to expand criminal liability to making a false report to a detention officer or jailer.<sup>143</sup> And as noted above, many mistakenly believed *Jeopardy!* contestant Kelly Donohue made a hand gesture symbolizing white supremacy when, in fact, he was merely celebrating his third win on the show.<sup>144</sup> The *New York Times* described the case thus:

So the [question] is how the beating heart of nerdy, liberal fact-mastery can pump blood into wild social media conspiracy, and send all these smart people down the sort of rabbit hole that leads other groups of Americans to believe that children are being transported inside refrigerators[,] [a]nd . . . how they could remain committed to that point of view in the absence of any solid evidence.<sup>145</sup>

These are indeed *evidentiary* questions. In the courtroom, strict rules govern the presentation of evidence because lay jurors may be incapable of engaging in their factfinding role absent a prior narrowing of what they may consider. Specifically, we fear that the jury, inexperienced in examining evidence, may base its verdict on pure emotion or another improper rationale.<sup>146</sup> Therefore, judges have broad discretion to exclude relevant yet inflammatory or confusing evidence to prevent jurors from being misled.<sup>147</sup> These concerns are heightened in criminal cases, wherein juries' factfinding results in incarceration or even execution.<sup>148</sup> Cancel culture concretely exemplifies these

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140. Hess, *supra* note 41 (“Defenders of the crowds have quickly evolved into photographic forensic analysts, scouring metadata, analyzing shadows and becoming conversant in the effects of telephoto lenses.”).

141. Matthew Ablon, *Woman Who Accused Texas Trooper of Sexual Assault Won't Be Charged*, KWTX (May 20, 2018, 9:24 PM), <https://www.kwtx.com/content/news/Texas-DPS-responds-to-accusations-against-trooper-in-DWI-stop-483176441.html>.

142. *Id.*

143. Patrick Clarke, *Bipartisan Texas Bill Closes Loophole in False Report Statute After Woman Gets Away with Debunked Rape Claim Against Trooper*, THE WAXAHACHIE DAILY LIGHT (Oct. 15, 2019, 4:27 PM), <https://www.waxahachietx.com/news/20191015/bipartisan-texas-bill-closes-loophole-in-false-report-statute-after-woman-gets-away-with-debunked-rape-claim-against-trooper> [https://web.archive.org/web/20201223041807/https://www.waxahachietx.com/news/20191015/bipartisan-texas-bill-closes-loophole-in-false-report-statute-after-woman-gets-away-with-debunked-rape-claim-against-trooper].

144. Smith, *supra* note 10.

145. *Id.*

146. Act of Jan. 2, 1975, Pub. L. 93-595, § 1, 88 Stat. 1926, 1932 (Notes of Advisory Committee on Proposed Rules for Rule 403); LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 267 (2004).

147. See FED. R. EVID. 403.

148. The deeper point here is not to say federal criminal evidentiary rules are always good or always bad, nor to categorically laud or critique social media factfinding. The point is to be thoughtful about how evidentiary

abstract evidentiary rationales: we may observe in real time the effects of lay factfinding in online communities.<sup>149</sup>

Furthermore, cancel culture lacks other formal doctrines of procedural fairness. Take age- and time-related considerations, for example. Various U.S. criminal jurisdictions have developed juvenile justice systems that, relatively speaking, favor rehabilitation over imprisonment because youth differ developmentally from adults.<sup>150</sup> And criminal statutes of limitations imposing time limits on prosecution advance a variety of purposes, including promoting repose, placing defendants on an equal footing, and encouraging prompt enforcement of the law.<sup>151</sup> By contrast, no time limit cabins online accountability due to the permanence of online records. As a result, individuals may be held to account based on conduct that occurred when they were teenagers.<sup>152</sup>

### 3. *Proportionality*

Which consequences of cancel culture should an offender suffer? And for what conduct? Another concern with cancel culture is the severity of its sanction, which may include death threats, public shame, or the prospect of never being employed again.

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rules function. The benefit of strict evidentiary rules is that they ensure some procedural fairness and obviate some of the irrationalities of the human factfinder. But the downside of such rules is that relevant and material evidence may be excluded on policy grounds that would otherwise lead to better results. Inversely, more lax evidentiary rules may paint a more inclusive picture of events and yet also give rise to imprecision and indiscriminate judgment.

149. Furthermore, the intersection of strict evidentiary rules and lax social media rules intermix in complex ways. In the case of cancel culture's referral function, the lax social media rules of evidence will intersect with formal evidentiary rules in the subsequent prosecution. In the case of shaming, lax rules govern the entirety of the factfinding, leading to sanction. Indeed, as Eric Posner and Martha Nussbaum have noted, a problem with shaming penalties is that they may be unreliable, targeting the wrong people given, in part, the absence of due process. NUSSBAUM, *supra* note 43; POSNER, *supra* note 19 ("[P]eople can easily be shamed even though they did nothing wrong or not be shamed even though they did do something wrong."). In so doing, they deter not bad behavior but instead unpopular behavior. NUSSBAUM, *supra*, at 234.

150. See Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 20 (2009) (identifying various paths of rehabilitation and retribution that currently animate the juvenile justice system, and suggesting an "individual prevention" model); see also generally Esther Hong, *The Other Federal Prosecutors* (unpublished manuscript) (on file with author) (describing the function of the federal juvenile justice system). In practice, of course, the juvenile justice system is much more problematic. See Slobogin & Fondacaro, *supra*, at 4–8 (identifying the problematic misalignment between research on the causes of juvenile crime and the dominant punitive approach to juvenile justice).

151. See Koh, *supra* note 32, at 364; Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 460, 471, 483, 492 (1997).

152. For example, journalist Alexi McCammond, poised to start her position as editor-in-chief of *Teen Vogue*, recently resigned after company controversy over anti-Asian tweets she made as a teenager. Katie Robertson, *Teen Vogue Editor Resigns After Fury over Racist Tweets*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2021/03/18/business/media/teen-vogue-editor-alexi-mccammond.html>.



Consider the example of Anjali Ramkissoon, a fourth-year medical resident in Miami who got into a drunken altercation with an Uber driver.<sup>153</sup> In the video, she is seen attempting to hit the driver, climbing into the car, and throwing objects out of it while yelling, swearing, and demanding that he drive her home without an Uber reservation.<sup>154</sup> She was fired from her job and has not since been rehired—a lifelong penalty for conduct that, in the absence of social media, would almost certainly have passed unnoticed and, in the criminal justice system, would likely not have resulted in significant sanction.

These questions are a central preoccupation of criminal law, particularly regarding the concept of *proportionality*. Proportionality is particularly prevalent in capital cases and Eighth Amendment questions concerning the extent to which excessive fines contravene constitutional boundaries in sentencing.<sup>155</sup> Beyond capital cases, some scholars find that the Supreme Court has skirted the opportunity to clearly define proportionality in modern jurisprudence, even though the concept has strong roots in Anglo-American legal thought.<sup>156</sup> And other scholars have shown that shaming penalties give rise to dehumanization and social demotion once an individual's negative personal trait becomes visible to a public audience.<sup>157</sup> To make matters worse, shaming penalties may be irreversible, given their public and stigmatizing nature, cutting against the grain of the movement to cabin the publicity of criminal sanctions.<sup>158</sup> Relatedly, scholars have focused on the problem of “collateral consequences,” in which individuals convicted of felonies endure lifelong stigma that leads to difficulty getting jobs, ineligibility for public benefits such as public housing, and disenfranchisement.<sup>159</sup> “Ban the box” initiatives and other policy

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153. Lance Dixon, *Uber Spat Caught on Video Leads to Miami Doctor's Firing*, MIAMI HERALD (Apr. 22, 2016, 8:29 PM), <https://www.miamiherald.com/news/local/community/miami-dade/downtown-miami/article-73411022.html>.

154. *Id.*

155. *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (internal quotation marks omitted) (“[T]he concept of proportionality is central to the Eighth Amendment . . . and we view that concept less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society.”); *Solem v. Helm*, 463 U.S. 277, 284 (1983) (“The Eighth Amendment . . . prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.”); *see also generally* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571 (2005).

156. Frase, *supra* note 155, at 573–74, 579.

157. Massaro, *supra* note 25, at 1886.

158. *Id.* at 1883. A related fear is “stigma spillover,” wherein the shaming affects the family, friends, or other associates of the individual stigmatized. *Id.* at 1932 n.250.

159. *See, e.g.*, Michael Pinar, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 463–64 (2010) (arguing lawmakers failed to see the secondary effects of stricter criminal justice policies overall and especially on people of color when expanding powers in the 1980s and 1990s); Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 234–35 (2018) (arguing that the legal system is beginning to recognize that for many people convicted of a crime, the greatest effect is not imprisonment, but being marked as a criminal and subjected to legal disabilities); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators”*, 93 MINN. L. REV. 670, 740 (2009) (arguing for a notice requirement regarding consequences of criminal convictions);

proposals have emerged to purge individuals of their criminal records.<sup>160</sup> Still, these consequences are exacerbated in communities of color, who are disproportionately convicted of felonies for the same conduct that would not trigger a felony conviction for whites;<sup>161</sup> they are also sentenced to longer terms of imprisonment<sup>162</sup> and have more difficulty getting hired to the same jobs even without such convictions.<sup>163</sup>

On social media, sanction may be highly disproportionate. When something is posted to the internet and a wrongdoer is identified, that person is routinely subjected to judgment or even punishment for an act that is minor or that the offender may have already repented for. And the aforementioned social media structure of acceleration, amplification, and democratization means that a broader community of individuals quickly contributes to the administration of such a sanction. Furthermore, once an online record of such wrongdoing exists, it is there forever, meaning the consequences reverberate for the remainder of an individual's life.

#### 4. *The Conception of the Wrongdoer: Beyond Rehabilitation*

How does cancel culture conceptualize wrongdoers? Most of the time, it advances a "thin" conception of the wrongdoer as beyond rehabilitation. Not only does cancel culture prescribe disproportionate sanctions; it also publicly shames the sanctioned as *morally deserving* of such treatment, casting such individuals as fatally flawed, without hope of reformation or reentry. In fact, far from it; under this conception, individuals who have violated these norms should be punished severely and permanently.

Even a casual glance on social media shows incredibly extreme shaming language centered on moral desert. Take the case of the Covington School students, whom the media wrongly portrayed as aggressors in a confrontation with a group of indigenous demonstrators, and who were met with open calls for shaming and physical violence.<sup>164</sup> Or, in the wake of the Capitol riots, actor Alec

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JACOBS, *supra* note 26, at 3 (noting that the most serious consequence of an arrest is typically the resulting collateral consequences).

160. Tammy La Gorce, *As 'Ban the Box' Spreads, Private Employers Still Have Questions*, N.Y. TIMES (Nov. 22, 2017), <https://www.nytimes.com/2017/11/22/business/small-business-criminal-record.html>.

161. *See generally* THE SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

162. *Id.*

163. Jhacova Williams & Valerie Wilson, *Black Workers Endure Persistent Racial Disparities in Employment Outcomes*, ECON. POL'Y INST. (Aug. 27, 2019), <https://www.epi.org/publication/labor-day-2019-racial-disparities-in-employment/>.

164. *See, e.g.*, Kathy Griffin (@kathygriffin), TWITTER (Jan. 20, 2019, 5:05AM), <https://twitter.com/kathygriffin/status/1086927762634399744> ("Name these kids. I want NAMES. Shame them. If you think these fuckers wouldn't dox you in a heartbeat, think again."). "To dox" is to publish private or identifying information on the internet. *Dox*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/dox> (last visited Dec. 5, 2022). Nicholas Sandmann, one of the students, recovered a settlement from *The Washington Post*, NBC, and

Baldwin, who posted to Twitter: “Put Ted Cruz in the stocks and throw rotten fruit and buckets of horse piss at him. Then ride him on a rail. Then tar and feather him. And film it. For Netflix.”<sup>165</sup> Or consider one Twitter user discussing Bill Cosby in a meme stating, “if he dies, he dies.”<sup>166</sup>

This online norm of harshly punitive shaming language—by those on both the left and right of the political aisle—may be “the start of a great renaissance of public shaming” that conceives of the wrongdoer as beyond rehabilitation.<sup>167</sup> As noted above, public shaming has long been a central feature of any society, exerting the same, if not more, influence on broader norms than the criminal justice system.<sup>168</sup> And yet formal modes of public shaming, such as the pillory—commonly depicted as a wooden frame on a fixed platform in the town square through which an individual would place their head and hands—were eliminated federally in 1839 and in all states by 1905.<sup>169</sup> In the late 1990s and early 2000s, several prominent scholars debated the propriety of shaming penalties in our criminal justice system as an alternative to prison or parole, but ultimately even the movement’s leading advocates largely abandoned it.<sup>170</sup>

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CNN for their coverage of the events. Oliver Darcy, *CNN Settles Lawsuit with Nick Sandmann Stemming from Viral Video Controversy*, CNN (Jan. 7, 2020, 6:06 PM), <https://www.cnn.com/2020/01/07/media/cnn-settles-lawsuit-viral-video/index.html>.

165. See Alec Baldwin (@AlecBaldwin), TWITTER (Jan. 7, 2021). Cf. Kelechi (@kelechnekoff), TWITTER (Sept. 25, 2018, 7:18PM), <https://twitter.com/kelechnekoff/status/1044727981137174528> (“Anyone feeling sorry for Bill Cosby right now, has rapey tendencies.”); Kathy Griffin (@kathygriffin), TWITTER (May 25, 2018, 10:15 AM), <https://twitter.com/kathygriffin/status/1000016781078089728?lang=en> (telling Harvey Weinstein to “[r]ot in prison you piece of shit”); *How the Internet Descended on the Man Who Killed Cecil the Lion*, *supra* note 124 (describing tweets calling Walter Palmer a bloodthirsty trophy hunter and joking that he shoots his dental patients with bows and arrows); RONSON, *supra* note 43, at 8 (“These fucked up academics deserve to die painfully . . .”); RONSON, *supra*, at 120 (“Kill her.”).

166. El Galan de la Chingada (@nanztop), TWITTER (Apr. 27, 2018, 9:34 AM), <https://twitter.com/nanztop/status/989860438841098240>.

167. RONSON, *supra* note 43, at 10.

168. Posner, *supra* note 19 (“Shaming has always been extraordinarily important—often, even more important than the formal legal system.”).

169. Ray, *supra* note 53.

170. Massaro, *supra* note 25, at 1884 (“The revival of shaming springs from profound and widespread dissatisfaction with existing methods of punishment.”). In this regard, the literature breaks down into two categories. The first mooted the propriety of shaming penalties but ultimately concluded them to be too problematic. This body of work was largely triggered by *What Do Alternative Sanctions Mean?*, in which Dan Kahan argues that shaming penalties would likely deter and incapacitate as, or nearly as well as, short terms of incarceration without imposing nearly so much cost on society or suffering on offenders. Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594 (1996). This triggered a flurry of critical responses from scholars such as Martha Nussbaum and Jim Whitman. See NUSSBAUM, *supra* note 43, at 233 (“Kahan does not seek to remove humiliation from shame penalties . . . [s]o his proposal is vulnerable to the dignity objection directly.”); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1059 (1998) (“[W]e should think of shame sanctions as wrong because they involve a species of lynch justice, and a peculiarly disturbing species of lynch justice at that—a species of official lynch justice.”). Kahan however, in his 2006 article, *What’s Really Wrong with Shaming Sanctions*, recanted this argument. Kahan, *supra* note 25, at 2077 (observing that in the expressive dimension of punishment, the public expects punishments not only to protect them from harm or inflict pain on offenders, but also to express moral disapprobation). Shaming penalties occasionally recur in legal scholarship, though not with the same collective attention as in the aforementioned period. See generally, e.g., JENNIFER JACQUET, IS SHAME NECESSARY?: NEW USES FOR AN OLD TOOL (2015).

Today, while judges occasionally hand down shaming penalties, shaming is not a formal part of mainstream criminal law enforcement, which more often turns on probation, fines, and incarceration.<sup>171</sup> More to the point, the broad consensus among scholars and policymakers is that our system of mass incarceration is overly punitive, exhibiting a “decline of the rehabilitative ideal.”<sup>172</sup> One nascent trend in recent years has been a more robust push for rehabilitation of criminal defendants, as opposed to incarceration or shaming. For example, the 2018 First Step Act looks at sentencing reform and other areas of the criminal justice system in order to refocus the American penal system on rehabilitation.<sup>173</sup>

In sum, criminal law theory clarifies that cancel culture shaming is a largely *retributivist* form of punishment,<sup>174</sup> focusing on moral desert, as opposed to *rehabilitative*. As every first-year law student knows, criminal law scholarship has long focused on justifications for punishment—retribution, deterrence, incapacitation, restoration, etc. In the world of cancel culture, the trend is away from rehabilitation and almost completely in the mode of retribution.<sup>175</sup> It aims not merely to punish individuals for censured conduct, but to punish the *whole individual* permanently for certain conduct, even conduct that is not so flagrant.

#### B. “MOB VENGEANCE” AND CULTURAL ANXIETY

What is the broader effect of this imprecise and punitive process? Cancel culture has a deleterious societal impact, fostering broader collective anxiety about “mob vengeance.”<sup>176</sup> As a society, we increasingly live in fear of the next

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171. See, e.g., *United States v. Gementera*, 379 F.3d 596, 598 (9th Cir. 2004) (requiring a defendant convicted of mail theft to stand outside post office wearing sign that read “I stole mail. This is my punishment,” as a condition of release from incarceration); *Goldschmitt v. State*, 490 So. 2d 123, 126 (Fla. Dist. Ct. App. 1986) (affirming probation requirement that driver convicted of driving under the influence must place a bumper sticker on his car that reads “CONVICTED D.U.I. – RESTRICTED LICENSE”); RONSON, *supra* note 43, at 82–83 (describing a Houston judge’s predilection for public shaming penalties and criticism by the ACLU).

172. GARLAND, *supra* note 29, at 8 (citing FRANCIS ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981)) (“If asked to describe the major changes in penal policy in the last 30 years, most insiders would undoubtedly mention ‘the decline of the rehabilitative ideal.’”).

173. See generally, e.g., Shon Hopwood, *The Effort To Reform the Federal Criminal Justice System*, 128 YALE L.J. 791 (2019); Ames Grawert, *What Is the First Step Act — and What’s Happening with It?*, BRENNAN CTR. FOR JUST. (June 23, 2020), <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it>.

174. The other major theory of punishment relevant to cancel culture is deterrence, which is either specific (disincentivizing the offender from recidivism) or general (disincentivizing others from engaging in the same conduct). To some degree, cancel culture exhibits this form of punishment as well. Further on, this Article will also discuss the classic Kantian critique of such punishment: that it uses others as a means to an end. But the popular sentiment of cancel culture is more retributivist, focusing on the moral desert of offenders. See *infra* Part II.B.

175. GARLAND, *supra* note 29, at 8–9 (describing the decline of the rehabilitative ideal and the reemergence of explicitly retributive and deliberately harsh retributive sanctions); JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION* 190–91 (2017).

176. See, e.g., Jessica Napoli, ‘Mr. Bean’ Star Rowan Atkinson Compares Cancel Culture to a ‘Medieval Mob’, FOX NEWS (Jan. 5 2021, 4:19 PM), <https://www.foxnews.com/entertainment/rowan-atkinson-cancel-culture>; Aja Romano, *Why We Can’t Stop Fighting About Cancel Culture*, VOX (Aug. 25, 2020, 12:03 PM),

viral video that may “hijack” our collective attention. Celebrities and laypeople express anxiety about it.<sup>177</sup> Our art foreshadowed,<sup>178</sup> and now grapples with it.<sup>179</sup> The fear of such mob vengeance may be most viscerally felt by younger individuals in our society, who fear the related effect of “call-out culture,” wherein they are labeled a certain “-ism” due to certain posts on social media. Some argue that as a result, teenage rates of anxiety, depression, and even suicide are skyrocketing.<sup>180</sup>

Such anxiety has an intersectional component.<sup>181</sup> While it is difficult to quantify, it may be the case that cancel culture singles out women and minorities more readily for online public ridicule.<sup>182</sup> For example, Danielle Citron has found that women are, in particular, disproportionately the targets of what are effectively hate crimes in cyberspace.<sup>183</sup> Many of the examples provided above have included women and minorities as the targets of particularly aggressive canceling—not white or wealthy individuals. It is no coincidence that more

<https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate>; McWhorter, *supra* note 5.

177. See, e.g., Taylor Swift, *30 Things I Learned Before Turning 30*, ELLE (Mar. 6, 2019), <https://www.elle.com/culture/celebrities/a26628467/taylor-swift-30th-birthday-lessons/> (“I learned that I have friends and fans in my life who don’t care if I’m #canceled.”); Joseph Guzman, *Jay-Z Blasts Cancel Culture*, THE HILL (Apr. 29, 2021), <https://thehill.com/changing-america/enrichment/arts-culture/550920-jay-z-blasts-cancel-culture> (“These kids, it’s unbelievable. Imagine having a microphone and you’re asked about social justice questions at 18 years old? It’s like, ‘What? I’m meant to know the answer, and if I don’t answer the correct way, if I don’t say everything right, even if my intentions are right, and I don’t say the same right thing, it’s going to be everywhere.’”).

178. See generally, e.g., PHILIP ROTH, *THE HUMAN STAIN* (2000) (concerning a professor who resigns after using racially insensitive language); *Black Mirror: White Christmas* (Netflix broadcast Dec. 16, 2014) (portraying a convicted sex offender who is visually and auditorily “blocked” from others’ perception in a near-future society where human vision and hearing is technologically enhanced).

179. See, e.g., ICE CUBE, *Trying To Maintain*, on *DEATH CERTIFICATE* (Paramount Recording Studios 1991); EMINEM, *Tone Deaf*, on *MUSIC TO BE MURDERED BY* (Rec. One, Effigy, The ICU 2020); *Lil Nas X Apologizes for Satan Shoe*, YOUTUBE (Mar. 28, 2021), <https://www.youtube.com/watch?v=ESf8Un3g9zM>. See generally ADRIENNE MAREE BROWN, *WE WILL NOT CANCEL US: AND OTHER DREAMS OF TRANSFORMATIVE JUSTICE* (2020).

180. See generally Jonathan Haidt & Jean Twenge, *Is There an Increase in Adolescent Mood Disorders, Self-Harm, and Suicide Since 2010 in the USA and UK? A Review* (2019) (unpublished manuscript) (on file with New York University); Jonathan Haidt & Jean Twenge, *Social Media Use and Mental Health: A Review* (2019) (unpublished manuscript) (on file with New York University).

181. Some have argued that gender inequality in the film industry caused further damage to Winona Ryder’s career by exacerbating the wrongdoing of her shoplifting than it would have done to the careers of her male costars, such as Johnny Depp, for the same conduct. Scott Mendelson, *The Grim Reasons Winona Ryder Disappeared from Hollywood*, FORBES (Sept. 7, 2018, 1:00 PM), <https://www.forbes.com/sites/scottmendelson/2018/09/07/grim-truth-winona-ryder-hollywood-keanu-reeves-johnny-depp-stranger-things/?sh=1f9b780e51f3> (arguing that gender inequality caused her shoplifting scandal to threaten her career to a greater degree than such an incident would have done to the career of a man in Hollywood).

182. See Claire Lowe, *Why Cancel Culture Is Immensely Worse for Women*, HUMS., <https://vocal.media/humans/why-cancel-culture-is-immensely-worse-for-women> (last visited Dec. 5, 2022).

183. CITRON, *supra* note 31, at 14; RONSON, *supra* note 43, at 8, 119, 208–09 (describing anti-female slurs and the proliferation of imagery of violence against women on Twitter).

recently, women and minorities vocalized fear of online harassment in the wake of news that Elon Musk was buying Twitter.<sup>184</sup>

Criminal law theory helps us understand many of these trends.<sup>185</sup> Public shaming triggers stigma and anxiety, which may only diminish once an individual is distanced from the group.<sup>186</sup> Furthermore, as is generally recognized, "[j]ustice by the mob is not the impartial, deliberative, neutral justice that a liberal-democratic society typically prizes."<sup>187</sup> The frequent dynamic is that a perceived act of wrongdoing triggers a widespread condemnatory response for which no individual takes responsibility.<sup>188</sup> The masses typically respond instinctively and harshly, emphasizing their own virtue through condemnation of another.<sup>189</sup> On one hand, we may perceive such collective attention as necessary to redress flagrant conduct, triggering effective, general deterrence—arguably the theory of punishment best suited to such widespread and permanent public censure.<sup>190</sup> On the other hand, general deterrence brings with it the classic Kantian critique that it is immoral to use an individual as a means to an end.<sup>191</sup> We fear that we may be publicly censured to deter others from engaging in similar conduct, but we also fear that our actions may be misconstrued (evidentiary), violating some norm that we are unfamiliar with (notice), leading to public shaming, harassment or condemnation (proportionality), and a permanent stigma that we are beyond reformation (retributivist, anti-rehabilitative). Consider this account of one journalist describing the historical growth of Twitter shaming:

After a while, it wasn't just transgressions we were keenly watchful for. It was misspeakings. Fury at the terribleness of other people had started to consume us a lot. And the rage that swirled around seemed increasingly in disproportion to whatever stupid thing some celebrity had said. It felt different to satire or journalism or criticism. It felt like punishment. In fact, it felt weird and empty when there wasn't anyone to be furious about. The days between shamings felt like days picking at fingernails, treading water.<sup>192</sup>

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184. See Pranshu Verma, *Elon Musk Wants 'Free Speech' on Twitter. But for Whom?*, WASH. POST (May 6, 2022, 7:00 AM), <https://www.washingtonpost.com/technology/2022/05/06/twitter-harassment/>.

185. This is especially the case given that contemporary U.S. criminal justice policy has been plagued by both politicization and populism, as opposed to expertise and evidence-based research. GARLAND, *supra* note 29, at 13.

186. Massaro, *supra* note 25.

187. NUSSBAUM, *supra* note 43, at 234.

188. Posner, *supra* note 19.

189. *Id.*

190. JACOBS, *supra* note 26, at 222 ("A sentencing scheme that seeks to maximize general deterrence would threaten criminal law violators with public exposure and community censure."); BRAITHWAITE, *supra* note 47, at 81 ("Shame not only specifically deters the shamed offender, it also generally deters many others who also wish to avoid shame and who participate in or become aware of the incident of shaming.")

191. See generally IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (2012).

192. RONSON, *supra* note 43, at 88–89.

Notice the parallel between this journalistic cultural insight and “net-widening,” wherein scholars Martha Nussbaum and Steven Schulhofer have identified pervasive criminal penalties that put more people under social control:

[T]he reform (such as early parole, juvenile courts, et cetera) is initially packaged as a way to divert low-level, less dangerous offenders to a regime that is less harsh than prison. [But soon thereafter] a shift occurs: the allegedly “lighter” penalty . . . is used, instead, for people who would probably have gotten light probation or would not have been prosecuted at all. . . . So instead of being diverted out of prison the shamed person is diverted into social control and penalties they otherwise would have escaped.<sup>193</sup>

At the extreme, this freezing out of particular human conduct may also foster polarization—a mix of solidarity within social groups, but broader division between groups.<sup>194</sup> First, theorists of sociological labeling note that criminal labeling may push stigmatized offenders into closer association, reinforcing antisocial attitudes and values.<sup>195</sup> In other words, if such individuals’ egos are not permanently shattered, they may instead feel heightened alienation from societal norms, thereby accelerating recidivism.<sup>196</sup> Second, if individuals are concerned that their activity may be perceived as offensive, they will feel tremendous pressure to adhere to more rigid and extreme norms. This was the thrust of Dan Kahan’s aforementioned critique of shaming penalties.<sup>197</sup> In turn, certain communities align almost entirely around certain viewpoints. This is a symptom of social media usage’s broader tendency to invoke outrage.<sup>198</sup>

#### C. A COMPARISON OF LAW AND CULTURE: THE CASE OF EUROPE

A comparative lens clarifies and fortifies how these problematic aspects of cancel culture echo throughout our contemporary American system. I will take Western Europe as my point of comparison. Of course, I do so recognizing that to compare any legal system is to generalize,<sup>199</sup> and that any discussion of the

193. NUSSBAUM, *supra* note 43, at 236–37.

194. See Steven Arrigg Koh, *When Should Prosecutors Indict?* (unpublished manuscript) (on file with author).

195. JACOBS, *supra* note 26, at 219 (citing HOWARD BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963)); BRAITHWAITE, *supra* note 47, at 81 (“[Stigmatization] can be counterproductive by breaking attachments to those who might shame future criminality and by increasing the attractiveness of groups that provide social support for crime.”); see also generally EDWIN LEMERT, *SOCIAL PATHOLOGY: A SYSTEMATIC APPROACH TO THE THEORY OF SOCIOPATHIC BEHAVIOR* (1951); EDWIN SCHUR, *LABELLING DEVIANT BEHAVIOR* (1971).

196. NUSSBAUM, *supra* note 43, at 236.

197. Kahan, *supra* note 25, at 2079.

198. Rani Molla, *Social Media Is Making a Bad Political Situation Worse*, VOX (Nov. 10, 2020, 1:10 PM), <https://www.vox.com/recode/21534345/polarization-election-social-media-filter-bubble>; see also THE SOCIAL DILEMMA (Exposure Labs 2020).

199. See, e.g., JACOBS, *supra* note 26, at 160 (“While there are some national differences, European countries criminal records policies have much in common.”); GARLAND, *supra* note 29, at vii (“In our attempts to make sense of social life, there is an unavoidable tension between broad generalization and the specification of empirical particulars.”); Jonathan Simon, *Fear and Loathing in Late Modernity: Reflections on the Cultural Sources of Mass Imprisonment in the United States*, 3 PUNISHMENT & SOC’Y 21, 31 (2001) (“Crimes in the USA

relationship between culture and law inevitably raises questions about their definitions and interrelationship.<sup>200</sup> And yet meaningful and important work on comparative criminal law and culture has a long and robust history;<sup>201</sup> it thus makes sense to continue the project of comparative criminal law from the emerging angle of cancel culture and social media.

European popular debates regarding cancel culture reflect the phenomenon's American flavor. France's engagement with cancel culture more specifically illustrates this. Two opposing sentiments exist there regarding cancel culture. One emphasizes that cancel culture is American and has "infected" French culture.<sup>202</sup> In fact, many well-known and respected French intellectuals wrote a public manifesto in French newspaper *Le Monde*, stating that the "import of Anglo-Saxon communitarian ideologies, intellectual conformism, fear, and political correctness are a real threat to our universities."<sup>203</sup> In response, antiracist academics signed a counterletter to promote "international solidarity," criticizing the manifesto's agreement with French Minister of Education, Jean-Michel Blanquer, that "indigenist, racist, and 'decolonial' ideologies imported from North America" were responsible for leading an eighteen-year-old French student to violently attack a high school

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and genetically altered foods in Europe function as two of the preferred risks of . . . global/postmodern societies."). As Josh Kleinfeld rightfully notes, that some say one cannot speak broadly of "American" or "European" criminal justice systems has a superficial appeal but is ultimately lacking. Certain broad trends characterize the United States (a federalized jurisdiction that permits the death penalty in some states, brought together by the U.S. Constitution and Supreme Court) in comparison to Europe (a supranational jurisdiction that forbids the death penalty, brought together by the European Union, European Court of Human Rights, and other transnational institutions). See Kleinfeld, *supra* note 29, at 945–46 ("European and American criminal law are two complex and internally divergent sets, but also . . . sets with some common characteristics, and cross-cultural generalization is useful provided one goes about it with reasonable care.").

200. See generally Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839 (2011); see also GARLAND, *supra* note 29, at vii ("In our attempts to make sense of social life, there is an unavoidable tension between broad generalization and the specification of empirical particulars."). I also recognize that culture is a contested concept in the sociological literature. See, e.g., Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in READINGS IN THE PHILOSOPHY OF SOCIAL SCIENCE 213 (1994); see also generally Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273 (1986).

201. See generally, e.g., Mirjan Damaska, *Structure of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975); Luis Chiesa, *Comparative Criminal Law*, in THE OXFORD HANDBOOK OF CRIMINAL LAW 1089 (Markus D. Dubber & Tatjana Hörnle eds., 2014); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2005); MARIANNE WADE & ERIK LUNA, *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* (1st ed. 2012); see also JACOBS, *supra* note 26, at 221 ("In Europe, offender rehabilitation is the reigning purpose of sentencing."); GARLAND, *supra* note 29, at vii (comparing and describing the culture of crime control in the United States and United Kingdom).

202. See Norimitsu Onishi, *Will American Ideas Tear France Apart? Some of Its Leaders Think So*, N.Y. TIMES (Feb. 10, 2021), <https://www.nytimes.com/2021/02/09/world/europe/france-threat-american-universities.html>; Mattia Ferraresi, *Cancel Culture Comes to France*, WALL ST. J. (Feb. 6, 2020), <https://www.wsj.com/articles/cancel-culture-comes-to-france-11581004454>; *About a Hundred Academics Warn: "On Islamism, What Threatens Us Is the Persistence of Denial"*, LE MONDE (Oct. 31, 2020), [https://www.lemonde.fr/idees/article/2020/10/31/une-centaine-d-universitaires-alertent-sur-l-islamisme-ce-qui-nous-menace-c-est-la-persistence-du-deni\\_6057989\\_3232.html](https://www.lemonde.fr/idees/article/2020/10/31/une-centaine-d-universitaires-alertent-sur-l-islamisme-ce-qui-nous-menace-c-est-la-persistence-du-deni_6057989_3232.html) [hereinafter *About a Hundred Academics Warn*].

203. *About a Hundred Academics Warn*, *supra* note 202.



teacher in October 2020.<sup>204</sup> Even President Emmanuel Macron weighed in, designating as problematic “certain social science theories entirely imported from the U.S.”<sup>205</sup>

Why might European countries like France be so hostile to cancel culture? Comparative criminal law scholars have long described the harshness of American punitive culture vis-à-vis Europe.<sup>206</sup> As Joshua Kleinfeld has noted, American punishment conceptualizes offenders as immutably morally deformed people instead of as ordinary people who have committed crimes.<sup>207</sup> Given this, criminality is a permanent feature and not merely the momentary deviance of an otherwise moral person.<sup>208</sup> As a result, American punishment culture expressively denies offenders’ claims to membership in the community and to the moral humanity in virtue of which a human being is rights-bearing.<sup>209</sup> By contrast, European culture advances a conception of criminality as always mutable and never devaluing, wherein actors are ultimately distanced from their acts. One reason advanced for this difference is that, historically, Europe’s system of criminal punishment diverged starkly by class, with the lower classes being disproportionately punished. As a result, Europeans arguably have greater collective sensitivity to individual dignity and disparities in criminal sentencing,<sup>210</sup> and their punishment reflects even the worst offenders’ claims to social membership and rights.<sup>211</sup>

We see such jurisdictional contrast in myriad aspects of the American criminal justice system. America is distinctive in its use of the death penalty, life imprisonment without parole, consecutive prison terms, and inferior prison quality. Additionally, scholars have noted that American punitive culture is characterized by “the eternal criminal record,”<sup>212</sup> whereas Europe lacks online sex offender registries and employer access to criminal records.<sup>213</sup> Indeed,

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204. Alana Lentini et al., *Open Letter: the Threat of Academic Authoritarianism—International Solidarity with Antiracist Academics in France*, OPENDEMOCRACY (Nov. 5, 2020, 10:08 AM), <https://www.opendemocracy.net/en/can-europe-make-it/open-letter-the-threat-of-academic-authoritarianism-international-solidarity-with-antiracist-academics-in-france/>.

205. Emmanuel Macron, President of Fr., Speech at Les Mureaux: Fight Against Separatism – the Republic in Action (Oct. 2, 2020), <https://www.diplomatie.gouv.fr/en/coming-to-france/france-facts/secularism-and-religious-freedom-in-france-63815/article/fight-against-separatism-the-republic-in-action-speech-by-emmanuel-macron>.

206. See, e.g., OHLIN, *supra* note 76.

207. See, e.g., Kleinfeld, *supra* note 29, at 941.

208. *Id.* at 1006.

209. *Id.* at 933–1036.

210. NUSSBAUM, *supra* note 43, at 247.

211. Kleinfeld, *supra* note 29, at 933; JACOBS, *supra* note 26, at 221 (“In Europe, offender rehabilitation is the reigning purpose of sentencing.”).

212. See generally JACOBS, *supra* note 26.

213. See generally James B. Jacobs & Dimitra Blitsa, *Sharing Criminal Records: The United States, the European Union and Interpol Compared*, 30 LOY. L.A. INT’L & COMP. L. REV. 125 (2008) (studying the laws surrounding U.S., international, and European criminal records policies); James Jacobs & Dimitra Blitsa, *Paedophiles, Employment Disqualification, and European Integration* (N.Y.U. Sch. of L., Working Paper No. 11-73, 2011), <https://ssrn.com/abstract=1940060> (examining European movements for greater public access to

federal and state criminal record repositories contain criminal records for approximately twenty-five percent of the U.S. population, a grim aspect of "U.S. criminal record exceptionalism."<sup>214</sup> By contrast, in Europe, individual criminal histories are created by, and available only to, the police; access is not available to non-police agencies, media, or the general public.<sup>215</sup> Furthermore, article 6 of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, a 1981 Council of Europe treaty, forbids the automatic processing of criminal convictions—as well as, more generally, personal data such as racial origin, health, or sexual life—absent appropriate safeguards.<sup>216</sup>

This is not just a difference in criminal justice systems; it also appears in European legal regulation of *online* spaces. Whereas the United States has yet to seriously discuss the downsides of online effects on people's livelihood, the European Union has advanced a legal "right to be forgotten." First outlined in the Data Protection Directive, the right to be forgotten was disclosed as a draft in 2012, then adopted by the European Parliament in 2014 and implemented into E.U. law in 2016.<sup>217</sup> As now outlined in article 17 of the General Data Protection Regulation of the European Union, the right to erasure provides for a formal process and reasoning for individuals to petition data controllers (companies) to erase specific data about them without undue delay.<sup>218</sup> The European Court of Justice has held that this only applies to E.U.-facing websites; however, companies should try to restrict or discourage E.U. users from accessing that information on non-E.U.-facing websites.<sup>219</sup> The right to be forgotten in the context of cancel culture can mostly be understood as an opportunity for individuals in the European Union to have sites such as Google delist search results from their past that impede their life, so long as they can reasonably articulate their request through article 17 of the General Data Protection Regulation.<sup>220</sup> This broadly tracks Europe's "memoryless" approach to criminal

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sex offender crimes); James Jacobs & Elena Larrauri, *Are Criminal Convictions a Public Matter? The USA and Spain*, 14 PUNISHMENT & SOC'Y 3 (2012) (comparing U.S. and Spanish felon record confidentiality); James B. Jacobs & Elena Larrauri, *European Criminal Records & Ex-Offender Employment*, in OXFORD HANDBOOK TOPICS IN CRIMINOLOGY AND CRIMINAL JUSTICE (2012) (ebook).

214. JACOBS, *supra* note 26, at 1, 159.

215. *Id.* at 159–61.

216. Council of Europe, Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Jan. 28, 1981, E.T.S.; JACOBS, *supra* note 26, at 159–61.

217. See *The History of the General Data Protection Regulation*, EUR. DATA PROT. SUPERVISOR, [https://edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation\\_en](https://edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en) (last visited Dec. 5, 2022); see also Directive 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 12.

218. ALAN CHARLES RAUL, *THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW* (Alan Charles Raul ed., 6th ed. 2019).

219. Adam Satariano, 'Right To Be Forgotten' Privacy Rule Is Limited by Europe's Top Court, N.Y. TIMES (Sept. 24, 2019), <https://www.nytimes.com/2019/09/24/technology/europe-google-right-to-be-forgotten.html>.

220. Directive 2016/679, *supra* note 217, at 3.

history, which focuses more on criminal acts, whereas the American approach heavily emphasizes criminal history for purposes of sentencing.<sup>221</sup>

Cancel culture reflects the opposite ethos: a harsh punishment system that attacks individuals as immutably morally deformed, resulting in a permanent online record of wrongdoing.

### III. THE FUTURE OF CANCEL CULTURE: FROM RETRIBUTION TO REINTEGRATION

Can we retain the benefits of this online system of referral and shaming while redressing its problematic process? This Part will address a few publicly mooted social media reforms, revealing that such reforms overlook the interrelationship between law and culture. As argued above, much of the canceling phenomenon is attributable to accountability gaps in criminal justice. Thus, under this view, some of cancel culture's problems will only be resolved once these deeper societal problems are addressed. This Part argues that democratically-oriented criminal justice reforms that redress over- and under-enforcement may ameliorate some of cancel culture's excesses, and, furthermore, that cancel culture itself may be—counterintuitively—part of the solution by shedding public light on unresolved accountability issues. But it will also show that the deepest underlying problem is contemporary American retributivist impulses. To redress this, we must renew collective focus on restoration and reintegration.

#### A. THE PARTIAL PROMISE OF SOCIAL MEDIA REFORM

Popular reform proposals focus on the law and structure of social media itself.<sup>222</sup> They do so under the theory that social media has warped our national conversation—as is well known, canceling did not happen on the first day of social media use, but evolved to become more aggressive over time.<sup>223</sup> Thus, certain legal and structural fixes may ameliorate some of cancel culture's extremes.

Legislative proposals may induce social media companies to remove more online content. One question is how, if at all, to change § 230 of the Communications Decency Act of 1996,<sup>224</sup> by removing immunity for social media companies.<sup>225</sup> In particular, the Justice Department proposed changes that

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221. Kleinfeld, *supra* note 29, at 977–79 (“In America, we *prosecute* crimes, but we *sentence* criminals.”). For example, recidivism in Germany, France, and Italy does not trigger any mandatory sentences. *Id.* at 979.

222. Ezra Klein, *A Different Way of Thinking About Cancel Culture*, N.Y. TIMES (Apr. 18, 2021), <https://www.nytimes.com/2021/04/18/opinion/cancel-culture-social-media.html> (discussing the function of Twitter’s “trending box” and the way it highlights certain stupid or offensive conduct).

223. RONSON, *supra* note 43, at 88 (“In the early days of Twitter there were no shamings.”).

224. 47 U.S.C. § 230 (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

225. See MINOW, *supra* note 40, at 108 (“Although some still defend Section 230 as a spur to free speech, job creation, small business development, and consumer reviews, scholars and lawmakers from a variety of viewpoints and political positions in the United States have considered altering or eliminating Section 230

would strip platforms of § 230 immunity if social media companies host content that falls into specific categories<sup>226</sup>—for example, hosting content that is “particularly egregious” (such as child exploitation), or violates a federal criminal law.<sup>227</sup> The proposal further suggests that § 230 immunity should not apply to suits brought by certain government agencies such as the Federal Trade Commission, thereby allowing the federal government to sue platforms directly for content posted by their users.<sup>228</sup> Policymakers such as Senator Hawley have focused reforms on barring platforms from § 230 immunity with moderation practices that appear to be political censorship.<sup>229</sup> And House Democrats have introduced the “Protecting Americans from Dangerous Algorithms Act,” under which a platform whose algorithms promote extremist content related to acts of terrorism or civil rights violations would lose § 230 immunity.<sup>230</sup> Such lawsuits against social media companies could moderate cancel culture—for good or bad—because the companies may be incentivized to reduce litigation risk by censoring posts or removing users who engage in any online conduct with real-world consequences.

Other proposed changes are not legal, but structural. One option is to have users broadly monitor content online. The most salient example is the possibility of a “dislike” or “downvote” button on Facebook and other social media sites; however, this has largely failed in trial runs and has been criticized by academics<sup>231</sup> and journalists who have experimented with it.<sup>232</sup> A second option is effective moderators, though this also carries adjudicative

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immunity.”); Klonick, *supra* note 37, at 1603–15; *see also generally* Benjamin Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces*, 56 HARV. J. ON LEGIS. 141 (2019) (arguing that § 230’s current interpretation is too broad and prevents necessary regulation); Daisuke Wakabayashi, *Legal Shield for Social Media Is Targeted by Lawmakers*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html>.

226. Zoe Bedell & John Major, *What’s Next for Section 230? A Roundup of Proposals*, LAWFARE (July 29, 2020, 9:01 AM), <https://www.lawfareblog.com/whats-next-section-230-roundup-proposals>.

227. *Id.*

228. *Id.*

229. *Id.*

230. Libby Baney, Matthew Rubin & Sarah-Lloyd Stevenson, *Online Communications and Content: How Section 230 Reform Has Catapulted into Relevancy*, JD SUPRA (Oct. 27, 2020), <https://www.jdsupra.com/legalnews/freedom-of-digital-speech-tracking-83454>; Rebecca Kern, *Democrats Unveil Bill To Hold Tech Liable for Extremist Content*, BLOOMBERG L. (Oct. 20, 2020, 3:20 PM), <https://news.bloomberglaw.com/tech-and-telecom-law/democrats-unveil-bill-to-hold-tech-liable-for-extremist-content>.

231. Justin Cheng, Cristian Danescu-Niculescu-Mizil & Jure Leskovec, *How Community Feedback Shapes User Behavior*, PHYSICS & SOC’Y (2014), <https://cs.stanford.edu/people/jure/pubs/disqus-icwsm14.pdf>.

232. *See, e.g.*, Rachel Withers, *The Dangerous Thrill of Downvoting “Bad Comments” on Facebook*, SLATE (May 8, 2018, 3:58 PM), <https://slate.com/technology/2018/05/the-facebook-upvote-and-downvote-experiment-is-a-bust.html> (“With its anonymity and reliance on mob rule, it’s the perfect feature for trolls and bots, lefties and conservatives—the whole menagerie of internet creatures—to silence opinions through effective organizing and well-policed echo chambers.”); Kalhan Rosenblatt, *Twitter Is Testing Downvotes. Experts Are Split on How They Would Affect the Platform.*, NBC NEWS (July 22, 2021, 3:40 PM), <https://www.nbcnews.com/tech/social-media/twitter-testing-downvotes-experts-are-split-how-it-ll-affect-n1274744> (noting that Twitter has recently been experimenting with a downvoting system that academics fear could have negative impacts such as increasing online abuse and weaponizing the downvote as a tool to silence marginalized groups).

risks.<sup>233</sup> For example, some view Reddit as a more desirable forum for public discourse, given that moderators remove particularly offensive conduct from various communities according to the stated process within such communities.<sup>234</sup> But moderation brings with it the inevitable questions of notice and proportionality of sanction, not to mention the question of who adjudicates.<sup>235</sup> For example, President Trump was permanently banned from Twitter and indefinitely banned from Facebook and Instagram for posts that incited the violence of the January 2021 Capitol riot—a move alternatively praised or criticized, largely along partisan lines.<sup>236</sup>

While such social media reform may be beneficial, it is only a partial fix obscuring the deeper human and cultural impulses animating its use. Thus, the next and more meaningful category of reform focuses on the intersection between cancel culture and accountability.

#### B. THE NEED FOR DEMOCRATIC RESPONSIVENESS & CRIMINAL JUSTICE REFORM

As described above, cancel culture is gap filling, promoting accountability in the absence of criminal or civil sanction. If this theory is correct, then cancel culture will become less common and punitive when accountability gaps are closed.

One way to close such gaps is through criminal justice reform, by addressing cases of over- and under-enforcement of criminal law. If such accountability gaps are redressed, cancel culture may step in less often to shame or refer. What should such reforms look like? Recent scholarship has pushed for fewer criminal offenses, more declination and diversion, community policing, and prosecutorial and other criminal legal actors being embedded in local communities.<sup>237</sup> Furthermore, recent reform efforts have focused on body cameras and race-related trainings within police departments themselves.<sup>238</sup>

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233. See generally Klonick, *supra* note 37; Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution To Adjudicate Online Free Expression*, 129 YALE L.J. 2418 (2020).

234. Virginia Heffernan, *Our Best Hope for Civil Discourse Online Is on . . . Reddit*, WIRED (Jan. 16, 2018, 6:00 AM), <https://www.wired.com/story/free-speech-issue-reddit-change-my-view/>. Some proposals may even include artificial intelligence for moderation, though this could lead to greater censorship of online communities. Lee Rainie, Janna Anderson & Jonathan Albright, *The Future of Free Speech, Trolls, Anonymity and Fake News Online*, PEW RSCH. CTR. (Mar. 29, 2017) <https://www.pewresearch.org/internet/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/>; *A Positive Platform*, STUDIO PROJECT, <https://www.studio-output.com/news/a-positive-platform/> (last visited Dec. 5, 2022) (noting that AI may help to flag profiles of individuals experiencing mental health and depression).

235. See generally Klonick, *supra* note 37.

236. Hannah Denham, *These Are the Platforms That Have Banned Trump and His Allies*, WASH. POST (Jan. 14, 2021, 6:11 PM), <https://www.washingtonpost.com/technology/2021/01/11/trump-banned-social-media/>.

237. Joshua Kleinfeld, Laura I. Appleman, Richard A. Bierschbach, Kenworthy Bilz, Josh Bowers, John Braithwaite, Robert P. Burns, R.A. Duff, Albert W. Dzur & Thomas F. Geraghty, *The White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1698–1700 (2017).

238. See generally Roseanna Sommers, Note, *Will Putting Cameras on Police Reduce Polarization?*, 125 YALE L.J. 1304 (2016); Shira Ovide, *Can Body Cameras Improve Policing?*, N.Y. TIMES (Dec. 7, 2020), <https://www.nytimes.com/2020/12/07/technology/body-cameras-police.html>.

Others have addressed the need to better address issues like police violence and sexual assault.<sup>239</sup> A criminal justice system better calibrated to such democratic ideals would mean that someone like Bill Cosby could not stay at large for years before trending on social media. Cancel culture itself may play a role in mapping this space: if cancel culture is a vehicle for advancing accountability around such causes, we may live through a period in which social media highlights these inequities.<sup>240</sup> For example, the discourse around anti-Asian racism in the wake of the Atlanta spa shootings helped foster awareness of the relationship between anti-Asian racism, hate crimes, and criminal justice.<sup>241</sup> Or it may create movements like MeToo, wherein victims can seek more systemic justice reforms.

Social media may also provide a forum for discussing criminal justice reform and deeper rationales for punishment. For example, both qualified immunity doctrine and hate crime legislation have been mooted in online public discourse.<sup>242</sup> As another example, in the wake of the Derek Chauvin sentencing, some argued on Twitter that he deserved forty years<sup>243</sup> or a life sentence.<sup>244</sup> But others, such as prominent *New York Times* journalist and professor Nikole Hannah-Jones, argued that the sentence was enough, stating, "very few people deserve to die in prison, and we must hold consistent beliefs even when the crime is the most egregious and appalling."<sup>245</sup>

But social media will always function more quickly than the slower mechanisms of criminal law enforcement. In that regard, social media must

239. See generally, e.g., Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211 (2017); Steven Arrigg Koh, *Policing & The Problem of Physical Restraint*, 64 B.C. L. REV. (forthcoming 2023); MARTHA NUSSBAUM, *CITADELS OF PRIDE* (2022).

240. See, e.g., Maura Hohman, *What Is #ShareTheMicNow? Stars Share Trade Social Media Accounts with Black Activists for the Day*, TODAY (June 10, 2020, 1:15 PM), <https://www.today.com/tmrw/what-share-mic-now-june-10-t183880> (describing Share the Mic Now, an initiative wherein black women used the Instagram handles of white women on June 10, 2020).

241. Monica Hesse, *'It's Race, Class and Gender Together': Why the Atlanta Killings Aren't Just About One Thing*, WASH. POST (Mar. 18, 2021, 10:03 PM), [https://www.washingtonpost.com/lifestyle/style/hesse-atlanta-asian-women/2021/03/18/183b3f00-8749-11eb-8a8b-5cf82c3dffe4\\_story.html](https://www.washingtonpost.com/lifestyle/style/hesse-atlanta-asian-women/2021/03/18/183b3f00-8749-11eb-8a8b-5cf82c3dffe4_story.html) (noting that the shooter chose locations where he could target lower-wage Asian women, suggesting he targeted people who fell into a specific group when he could have stopped at many other adult businesses, had this really been solely about sex addiction).

242. See, e.g., Madeleine Carlisle, *The Debate over Qualified Immunity Is at the Heart of Police Reform*, TIME (June 3, 2021, 6:35 PM), <https://time.com/6061624/what-is-qualified-immunity/>; Beatrice Jin, *Biden Signed a New Hate Crimes Law—but There's a Big Flaw*, POLITICO (May 20, 2021, 12:43 PM), <https://www.politico.com/interactives/2021/state-hate-crime-laws/>.

243. George Takei (@GeorgeTakei), TWITTER (June 25, 2021, 3:31 PM), <https://twitter.com/GeorgeTakei/status/1408508178627760130> ("I want 40 years for Chauvin. George Floyd's family already got a life sentence handed to them when Chauvin murdered him."); Bishop Talbert Swan (@TalbertSwan), TWITTER (June 26, 2021, 11:39 AM), <https://twitter.com/TalbertSwan/status/1408812068158029825> (citing the case of Kelontre Barefield who was sentenced thirty-four years for killing a police dog in the following tweet: "If #GeorgeFloyd was a DOG instead of a BLACK MAN, #DerekChauvin would've received the maximum 40 years").

244. Ahmed Ali (@MrAhmednurAli), TWITTER (June 25, 2021, 4:06 PM), <https://twitter.com/MrAhmednurAli/status/1408516904487170054> ("Derek Chauvin deserved a life-sentence").

245. Nikole Hannah-Jones (@nhannahjones), TWITTER (June 25, 2021, 4:31 PM), <https://twitter.com/nhannahjones/status/1408523204780507143>.

become an instrumentality to promote more equitable and democratically oriented criminal law enforcement. Consider how this has evolved in recent years. After the Boston Marathon bombing in 2013, federal law enforcement established a precedent in Boston's Logan airport by asking all departing passengers to share any photos or videos of the incident before leaving Massachusetts.<sup>246</sup> Following the January 2021 Capitol riots, the FBI created a website specifically to receive digital media identifying rioters. The FBI shared this information through public news conferences and tweets, both informing people of the ways to upload information and sharing pictures asking for more information.<sup>247</sup> Such media has been integral to the January 6th prosecutions, and is ongoing.<sup>248</sup> At its best, a better reporting function in a more democratically oriented criminal justice system threads the needle with the evidentiary issues identified above. Social media first casts a broad net, wherein a diverse array of information may be introduced and publicly mooted; professional criminal investigators then may focus on the relevant and probative evidence that can clear the high bar of evidentiary rules.<sup>249</sup>

### C. DEEP STRUCTURAL REFORMS IN AN ERA OF MASS INCARCERATION

But most fundamentally, the deeper reform is to transcend our national retributive impulse of aggressive punitiveness and condemnation.<sup>250</sup> At its core, cancel culture reflects and may exacerbate a contemporary American tendency to punish and shame people as permanently and immutably immoral. Just as the criminal record is “considered one of the most important markers of character” in our large, anonymous American society,<sup>251</sup> today the public record of individuals on social media constitutes another such permanent marker. To some degree, the virality and incentives of social media may lead individuals

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246. *Boston Marathon Eyewitness Gives FBI Photo of Man Fleeing Scene*, ABC NEWS (Apr. 17, 2013), <https://abcnews.go.com/blogs/headlines/2013/04/boston-marathon-eyewitness-gives-fbi-photo-of-man-fleeing-scene>.

247. Amanda Macias, *FBI Requests Help from Public To Identify U.S. Capitol Rioters*, CNBC (Jan. 7, 2021, 11:46 AM), <https://www.cnbc.com/2021/01/07/fbi-asks-public-to-identify-individuals-that-took-part-in-riots-at-the-capitol.html>.

248. *Ten Months Since the Jan. 6 Attack on the Capitol*, U.S. DEP'T OF JUST. (Nov. 9, 2021), <https://www.justice.gov/usao-dc/ten-months-jan-6-attack-capitol> (“Citizens from around the country have provided invaluable assistance in identifying individuals in connection with the Jan. 6 attack. The FBI continues to seek the public’s help in identifying more than 350 individuals believed to have committed violent acts on the Capitol grounds, including over 250 who assaulted police officers.”).

249. There is, of course, considerable risk in the opposite direction: at its worst, social media may exacerbate the breadth and scope of contemporary criminal justice.

250. MARTHA MINOW, *WHEN SHOULD LAW FORGIVE?* 146–47 (2019) (discussing the need for forgiveness while preserving the rule of law); PFAFF, *supra* note 175, at 212 (“The ultimate solution . . . is significant culture change: a move away from insisting that the costs of crime consistently trump any costs associated with enforcement, and away from an assumption that all crimes require a punitive response.”).

251. See JACOBS, *supra* note 26, at 4.

to be more punitive online.<sup>252</sup> President Obama, sensing this shift, spoke out against it in 2019:

I do get a sense sometimes now among certain young people, and this is accelerated by social media, there is this sense sometimes of: “The way of me making change is to be as judgmental as possible about other people, and that’s enough.” Like, if I tweet or hashtag about how you didn’t do something right or used the wrong verb, then I can sit back and feel pretty good about myself, cause, “Man, you see how woke I was, I called you out.”<sup>253</sup>

In other words, this social media “call out” may be limited to online spaces, without triggering genuine cultural transformation. Since the onset of COVID-19, social media use has increased while human interaction has decreased.<sup>254</sup> As a result, there is a growing tendency to view other human beings as we would social media accounts—individuals who can be blocked, unfollowed, or harshly condemned without consequences. To achieve true awareness of, and engagement with, one another—as opposed to performativity or endless retribution—we need to resist the increasing degree to which we as individuals feel abstracted from one another.

The central framing question is thus one that echoes in contemporary criminal law literature: how can cancel culture move from being *disintegrative* to being *reintegrative*? One strand of retribution is disintegrative shaming, focused on “labeling deviance,” wherein a person is branded with stigma and little effort is ever after paid to “de-labeling” the individual.<sup>255</sup> Historically, tattoos, brands, and signs marked and permanently displayed a person’s deviant identity to the public.<sup>256</sup> As Martha Nussbaum has noted, shaming implicates human dignity, because it may humiliate and degrade the whole person.<sup>257</sup> Shame punishments express that “you are a defective type of person”: when public individuals laugh at a convict in the pillory, they focus on the person’s spoiled identity, not on their particular act.<sup>258</sup> Otherwise, we may be

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252. The dominant framework by which this Article has evaluated cancel culture considers social media as a modality channeling public shame. But to what degree is the modality itself contributing to such shame? While it is too soon to tell precisely, revelations in late 2021 have suggested that social media is not merely an empty channel: the modality itself has tended toward provocation of outrage and polarization. In particular, the recent Facebook “whistleblower” revelations from Frances Haugen, who testified before Congress in October 2021, has shown social media companies’ awareness of the deleterious impact of their platforms toward outrage and shaming, and on the mental health of young women in particular. Dan Milmo, *Frances Haugen: ‘I Never Wanted To Be a Whistleblower. But Lives Were in Danger’*, THE GUARDIAN (Oct. 23, 2021, 9:02 PM), <https://www.theguardian.com/technology/2021/oct/24/frances-haugen-i-never-wanted-to-be-a-whistleblower-but-lives-were-in-danger>. Future research must investigate the cumulative impact of this modality on the proliferation of shame.

253. Emily S. Rueb & Derrick Bryson Taylor, *Obama on Call-Out Culture: ‘That’s Not Activism’*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2019/10/31/us/politics/obama-woke-cancel-culture.html>.

254. Ella Koeze & Nathaniel Popper, *The Virus Changed the Way We Internet*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html>.

255. BRAITHWAITE, *supra* note 47, at 55.

256. *Id.* at 230.

257. NUSSBAUM, *supra* note 43, at 230.

258. *Id.*



permanently caught in a divisive dynamic of perpetuating ranks and hierarchies, whereby one category of people is labeled as deviant, whereas the others set themselves up as “normal.”<sup>259</sup>

The better approach is reintegrative shaming, which focuses not on cancel culture’s permanent stigmatization of offenders, but on fostering subsequent community reacceptance.<sup>260</sup> This approach emphasizes that an offender’s shame and repentance are preferable to stigmatization in the face of “one-sided moralizing,”<sup>261</sup> which may create a “class of outcasts” by stigmatizing and thus dividing the community.<sup>262</sup> But reintegrative shaming may foster interconnectedness and—if handled well—create a space for a more enduring subsequent relationship.<sup>263</sup> Framing wrongdoing as wrongful conduct—not as signifying an offender’s deeper, immutable trait—can thus resemble the aforementioned European form of punishment rather than the recent American punitive history leading to mass incarceration.<sup>264</sup> For example, one thread of potential interest is the promotion of “call-in culture,” which emphasizes private, respectful conversations about what the person said or did, and how it is wrong and affected someone. This is preferable to calling the person out publicly, embarrassing them, and shaming them for their behavior.<sup>265</sup>

For those individuals who have been called out, over social media or otherwise, we must create a cultural space for reintegration. Currently, there is no clear way for individuals who have violated certain social norms to show sincere repentance and achieve reintegration into society—ask the typical social media user, and they will articulate in tremendous detail how and why certain individuals have been canceled. And yet they will have little recall about how individuals have been reintegrated after that time. Restorative justice begins not with retributivist questions of the perpetrator, broken laws, or desert, but instead focuses on the victims: who has been hurt, what their needs are, and who is obligated to meet such needs.<sup>266</sup> And while restorative justice, like retributive justice, aims to “even the score,” it does so not through deprivation of liberty but

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259. *Id.* at 232.

260. BRAITHWAITE, *supra* note 47, at 55; NUSSBAUM, *supra* note 43, at 240 (“He favors punishments that focus on the act rather than the person, and that ask the person to make atonement for an act, as a prelude to being forgiven and reintegrated into the community.”).

261. BRAITHWAITE, *supra* note 47, at 81.

262. *Id.* at 55.

263. *Id.* at 73.

264. Kleinfeld, *supra* note 29, at 944.

265. Jessica Bennett, *What If Instead of Calling People Out, We Called Them In?*, N.Y. TIMES (Feb. 24, 2021), <https://www.nytimes.com/2020/11/19/style/loretta-ross-smith-college-cancel-culture.html>.

266. Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 2, 258 (2006); Green & Bazelon, *supra* note 28, at 2300 (“One of the principal advantages of restorative justice is that, when victims voluntarily choose it, it better serves victims’ interests by respecting their agency, allowing them to avoid the burdens of the adjudicative process, and, most importantly, offering them a resolution that they believe will better serve their interests than criminal punishment of the offender.”).

by encouraging offenders to take responsibility, right their wrongs, and address the causes of their behavior.<sup>267</sup>

Some legal spaces have emphasized restorative justice and the fostering of sincere regret. For example, international criminal law has continuously mooted the possibility of truth and reconciliation commissions over adversarial prosecutions.<sup>268</sup> And in the early days of the Obama Administration, some pushed for a truth and reconciliation commission to remediate Bush-era human-rights abuses, hoping that it would foster a genuine sense of accountability, contrition, and restoration.<sup>269</sup> Mindful of this history, one promising avenue for reintegration could be to create online restorative spaces.<sup>270</sup> For example, one option mooted in the *New York Times* is to modify online content moderation in the form of a restorative justice mediation circle, helping users who post harmful content to learn and change.<sup>271</sup> Researchers at the University of Michigan, for example, hosted a chat between members of the LGBTQ community and certain members of the r/Christianity subReddit who had been banned over anti-LGBTQ postings. Results were mixed, though at least one user was readmitted to the subReddit after expressing contrition. Notably, the user stated to the *New York Times* reporter: “It’s the element of shame. I’m somebody who feels guilt being confronted and it allowed me to see I was the one at fault.”<sup>272</sup> But the *Times* also rightfully noted a classic critique of restorative justice: it is difficult to imagine the number of resources necessary to bring together offenders and the offended in a meaningful way at a large scale.<sup>273</sup>

Furthermore, we must find some limit to our desire to permanently ostracize individuals who have engaged in perceived wrongdoing. In criminal

267. Umbreit et al., *supra* note 266, at 257.

268. See Desmond Tutu, *Truth and Reconciliation Commission, South Africa*, ENCYC. BRIT. (Feb. 4, 2019), <https://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa>.

269. Philip Rucker, *Leahy Proposes Panel To Investigate Bush Era*, WASH. POST (Feb. 10, 2009), <https://www.washingtonpost.com/wp-dyn/content/article/2009/02/09/AR2009020903221.html>.

270. See generally OFF. OF JUST. PROGRAMS, EFFECTIVENESS OF RESTORATIVE JUSTICE PROGRAMS (2017), <https://www.ojp.gov/pdffiles1/ojdp/grants/250995.pdf>. Restorative justice is not the only anti-shaming reform to resemble criminal justice. For example, the online gaming community has experimented with a system to adjudicate individuals who have violated gaming rules, in addition to other structural components such as “opt-in” versus “opt-out” functionality and removing abusers with public justification. See Laura Hudson, *Curbing Online Abuse Isn’t Impossible. Here’s Where We Start*, WIRED (May 15, 2014, 6:30 AM), <https://www.wired.com/2014/05/fighting-online-harassment/>. Additionally, more in the direction of permanent “branding” is a reputation system on Microsoft Live, which publicly displays the status of your account. It will display a red “avoid me” label for users who routinely receive negative feedback. According to the description in the link below, as you move down in reputation rankings, you are more likely to be assigned to games with others who share your reputation level, thus isolating the harmful behavior. *Enforcement*, MICROSOFT, <https://enforcement.xbox.com/en-us/home/reputation> (last visited Dec. 5, 2022).

271. Charlie Warzel, *Could Restorative Justice Fix the Internet?*, N.Y. TIMES: OP. (Aug. 20, 2019), <https://www.nytimes.com/2019/08/20/opinion/internet-harassment-restorative-justice.html>.

272. *Id.*

273. Compare *id.* (“Most daunting is the issue of scale. There’s simply no way to replicate the amount of time and effort involved with Ms. Blackwell and Mr. Loewinger’s experiment across the web.”), with Lanni, *supra* note 16, at 639 (“Ensuring equal access to restorative justice may require large-scale implementation of restorative justice programs that may compromise quality and attention to local community concerns.”).

justice, the most important predictor of rehabilitation is legitimate employment, while an indelible criminal record obstructs such employment.<sup>274</sup> As noted above, America currently functions on a framework of permanent moral condemnation, wherein criminal records are used to permanently categorize and stigmatize people.<sup>275</sup> This is particularly the case today, where criminal records are electronically stored and the criminal background check is “a routine feature of American life.”<sup>276</sup> Just as a public, permanent criminal record undermines rehabilitation,<sup>277</sup> so too might a permanent social media account of an individual’s wrongdoing. We need to move to a place where an individual is sanctioned but does not suffer collateral consequences after the fact, whether incarceration or public shaming. For example, a recent editorial by Michael Eric Dyson has similarly argued that the better sanction for Amy Cooper, the white woman who called the police on Central Park birdwatcher Christian Cooper, would have been education instead of firing.<sup>278</sup>

To be clear, I am not advancing a granular, substantive standard of proportionality for certain offenses, nor am I arguing for absolving all wrongdoing. When it comes to individuals who have engaged in particularly heinous conduct—including racist and sexist conduct, for example—serious consequences should ensue. My point is to begin the conversation of what proportionality *should* be, especially for individuals who have not engaged in particularly flagrant conduct. Such discussion rarely exists; instead, the default position is often a maximalist one, calling on individuals to be banished for conduct that almost certainly does not warrant it, or alternatively decrying online accountability as “mob rule.” A better approach must balance accountability with reintegration.

#### CONCLUSION

Cancel culture and criminal justice are interrelated normative systems in modern society. In one regard, cancel culture represents a new modality of collective condemnation and may often rectify deficiencies of over- and under-enforcement in our criminal justice system. However, the downsides of cancel culture—disproportionate sanctions leading to collateral consequences, a “thin”

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274. JACOBS, *supra* note 26, at xii; *id.* at 2 (“The criminal record is a kind of negative curriculum vitae or résumé.”).

275. *See id.* at 4 (“[C]riminal records today are widely used to assess, sort, and categorize people in such diverse contexts as immigration, employment, housing, university admissions, voting, possessing firearms, serving on a jury, and qualifying for social welfare benefits.”).

276. *Id.* at 5.

277. *Id.* at 223 (“Rehabilitation is clearly incompatible with publicly accessible criminal records.”).

278. Michael Eric Dyson, *Where Is the Forgiveness and Grace in Cancel Culture?*, N.Y. TIMES (Dec. 28, 2021), <https://www.nytimes.com/2021/12/28/opinion/desmond-tutu-america-justice.html> (“Although she received some form of restorative justice, an even better approach would have been her keeping her job while her employer demanded that she read and study more about race, Black masculinity, white privilege and social injustice. The loss of her job as an act of retributive justice left all these structural issues aside and merely shamed her without transforming her or using her circumstances to throw light on similar cases.”).

conception of the wrongdoer as beyond rehabilitation, and broader cultural anxiety that “chills” certain human conduct—ultimately reveal it to be a reflection of deeper U.S. punitive impulses. While social media reforms may mitigate cancel culture’s excesses, the more fundamental change in law and society must focus on the values of restoration and reintegration.

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