Discontinuities in Criminal Law

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The law values fairness, proportionality, and predictability. Accordingly, in the context of criminal law, punishments should be carefully calibrated to reflect the harm caused by an offense and the culpability of the offender. Yet, while this would suggest the dominance of "smooth" input/output relationships—for example, such that a minuscule increase in culpability would result in a correspondingly small increase in punishment—in fact, the law is laden with "bumpy" input/output relationships. Indeed, a minuscule change in input (be it of harm, culpability, or any number of other measures) may result in a drastic change in output, creating significant discontinuities.

Leading scholars have argued that smooth input/output relationships, which feature careful gradation and calibration, better accord with dominant theories of punishment than do bumpy relationships, which lack fine-tuning. Accepting as a starting premise that smooth input/output relationships are to be preferred in the criminal law, this Article focuses on the significant doctrinal and practical impediments to smoothing out these relationships. This analysis reveals challenges to smoothing out relationships between inputs and outputs, as well as the difficulties associated with addressing discontinuous relationships among inputs and outputs. Specifically, it exposes the law's classification of inputs and outputs itself as contestable and responsible for a range of hard-to-resolve discontinuities. In doing so, this Article begins the task of laying the groundwork for further analysis and possible reforms.

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Introduction

One way to think about legal processes is as a series of inputs and outputs.[1] Inputs, such as culpability or harm, are processed by the law through its interpreters and emerge as outputs, such as verdicts or sanctions. Criminal law scholars have argued that "smooth" input/output relationships, which feature careful gradation and calibration, better accord with dominant theories of punishment than do "bumpy" relationships, which lack fine-tuning.[2] Indeed, if one gives priority to concerns of fairness and predictability, there is an intuitive appeal to punishments that are calibrated according to the degree of culpability or harm, or both, and a corresponding distaste for discrepancies or discontinuities that result when a minuscule change in input results in a drastic change in output.[3]

Bumpy relationships between inputs and outputs may seem particularly unfair when line drawing creates all-or-nothing results that fail to account for how close or distant a person's behavior was to the line in question. For example, in a jurisdiction that enhances a person's punishment for selling illegal drugs within 1,000 feet of a school, the person who sold drugs 999 feet from a school is subject to the same sentencing enhancement as the person who sold drugs directly in front of the school, whereas the person who sold drugs 1,001 feet from the school is not subject to any enhanced penalty.[4]

Smoothing out the criminal law to avoid such all-or-nothing results would better account for distinctions in culpability and harm and would foster core principles of fairness and proportionality. However, close scrutiny reveals that this smoothing project, while aspirational, presents substantial, perhaps even insurmountable, challenges.

Building on significant scholarly accounts of the problems associated with bumpy input/output relationships, this Article will examine conceptual, doctrinal, and practical obstacles to smoothing out these discontinuities. Accepting as a starting premise that smooth input/output relationships are to be preferred in the criminal law, it focuses on the significant impediments to smoothing

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1 *See, e.g.*, Adam Kolber, *Smooth and Bumpy Laws*, 102 Cal. L. Rev. 655, 657 (2014).

2 *See, e.g.*, Adam Kolber, *The Bumpiness of Criminal Law*, 67 Ala. L. Rev. 855, 857 (2016); Youngjae Lee, *Reasonable Doubt and Moral Elements*, 104 J. Crim. L. & Criminology 1, 26 (2016); Talia Fisher, *Conviction without Conviction*, 96 Minn. L. Rev. 833, 838 (2012); Leo Katz, Why the Law Is So Perverse 139 (2011).

3 *See, e.g.*, Antony Cutler & David Nye, Justice and Predictability 43 (1983).

4 For further discussion of this illustrative example, see Kolber, *The Bumpiness of Criminal Law*, *supra* note 2.

out these relationships. It reveals further that the law's classification of inputs and outputs is itself contestable and responsible for a range of hard-to-resolve discontinuities. Part I exposes the challenge of calibrating punishment outputs across distinct physical spaces, especially in light of the chasm—doctrinal and experiential—between custodial and noncustodial punishments. Part II examines the role of stigma, which may far outlast a person's formal punishment, thus skewing otherwise fine-tuned input/output relationships. Part III scrutinizes the input of reasonableness, demonstrating how the legal categorization of behaviors as reasonable, unreasonable yet understandable, and neither reasonable nor understandable is at once dispositive and highly contestable.

I. Bumpy Input/Output Relationships and the Problem of Spatial Discontinuities

As any Gilbert and Sullivan devotee knows, a core principle of the criminal law is to "let the punishment fit the crime."[5] Yet, as has been well documented, the inputs and outputs of criminal law are not always closely calibrated, creating bumpy/input-output relationships. Fine-tuning these relationships would require that formal punishment sanctions—which this Article terms "punishment outputs"—can be smoothed out.

The two most common punishment outputs are fines and carceral sentences.[6] Severity of sentence in both of these contexts is generally measured in linear terms—i.e., the amount of money owed or the length of sentence served. In both of these instances, the project of smoothing out is straightforward: both time and money are divisible into almost infinite amounts, such that one could easily imagine a smooth relationship between continuous inputs and either of these punishment outputs. Indeed, we routinely draw lines across time,[7] dividing time into years, months, or days. The same is true with respect

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5 Arthur Sullivan & W.S. Gilbert, A More Humane Mikado, The Mikado (1885).

6 While incarceration is most common in the United States, fines are most common in many European countries. *See, e.g.*, Ram Subramanian & Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States*, Vera Evidence Brief (Vera Inst. Just. New York, N.Y) Oct, 2013. In 2010, 70% of those convicted in the United States received a custodial sentence, whereas, in that same year, "day fines were used in approximately 79 percent of cases in Germany." *Id.* In comparison, in the Netherlands, "courts are required to give special reasons whenever a custodial sentence is ordered instead of a fine." *Id.*

7 For a notable exception, see Maureen O'Hare, *Norway's 'Time-Free Zone' was a Publicity Stunt*, CNN (Jun. 26, 2019), www.edition.cnn.com/travel/article/

to the quantity of a good, such as money. So long as it can be divided into component parts, quantity can be fine-tuned to avoid discontinuity.

Other punishment outputs, however, are far more challenging to fine-tune. Discontinuities across space, exemplified by incarceration, present a particular challenge. One could imagine a horizontal line representing a "liberty continuum." On the far-left side is a vertical line representing maximal liberty, and on the far-right side is a line representing maximal loss of liberty—perhaps solitary confinement.[8] Every line drawn to the right of the far-left line takes away some fraction of a person's liberty. These lines represent distinct spaces and might include incarceration under less stringent conditions in minimum and medium-security prisons, jails, and halfway houses. An effort to smooth out further might include an open prison model,[9] home confinement, and GPS surveillance that imposes restrictions on where an individual may travel.[10]

Despite the ability to draw more lines to fine-tune punishment outputs,[11] some sharp cliffs may remain, most notably the difference between custodial and noncustodial punishment, which this Article terms the "carceral/non-carceral binary." One either serves time in a carceral facility or not, and this distinction has significant doctrinal and practical implications.

Doctrinally, custodial punishment is exceptional. In the United States, for example, the government is responsible for providing material benefits—including the provision of food, shelter, and health care—beyond those to which non-incarcerated persons are entitled, because of the relationship between the

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norway-sommaroy-island-publicity-stunt/index.html (explaining that, while some locals genuinely were in favor of this reform, it was also driven by the tourism industry as a publicity stunt).

8 While beyond the scope of this Article, depending on one's definition of liberty, one might situate life without the possibility of parole further still to the far-right side and capital punishment at the very end of this continuum.

9 One example is Suomenlinna Island in Helsinki, Finland. *See* Dorian Larson, *Why Scandinavian Prisons Are Superior,* The Atlantic, (Sept. 24, 2013), www.theatlantic.com/international/archive/2013/09/why-scandinavian-prisons-are-superior/279949/.

10 A person's sentence might include a combination of these sanctions (e.g., house arrest in addition to GPS monitoring).

11 Certain aspects of a carceral sentence could be adjusted to better align inputs and outputs. One could calibrate the amount of time a person is incarcerated or tweak the conditions under which a person serves a prison sentence, which could affect the severity of the sentence. One could also consider personal characteristics of an individual to adjust that person's prison sentence based on the anticipated subjective experience of incarceration. Adam Kolber, *The Subjective Experience of Punishment*, 109 Colum. L. Rev. 182 (2009).

state and the incarcerated person. But courts have held that, so long as these provisions meet a minimal standard, a prisoner has no recourse even if prison conditions are in many respects awful. For example, the Supreme Court has upheld the constitutionality of double celling prisoners in a cell constructed for one person.[12] Courts are extremely deferential to prison administrators, and prisoners are unable to challenge their custodial conditions under the Eighth Amendment's Cruel and Unusual Punishment Clause unless they can demonstrate deliberate indifference of prison officials.[13]

Practically, there are huge costs associated with spending any amount of time in jail or prison, and these costs are not incurred when one is subject to home confinement. Studies comparing outcomes of those detained in custodial facilities pretrial and those not detained pretrial have found that even minimal periods of detention are correlated with worse criminal justice outcomes.[14] Moreover, the conditions in many prison systems routinely fall well below even minimal constitutional standards. In the United States, for example, entire state systems have been under court order because they were unconstitutionally overcrowded.[15] Without a redesign of existing structures and institutions, therefore, it is difficult to imagine dissolving the carceral/non-carceral binary in practice.

Concerns about discontinuous punishment outputs are directly relevant to conversations about prison reform, and they may have a particular salience for the prison abolition movement.[16] If one accepts that carceral sentences are meaningfully different in kind (doctrinally, practically, or both) from non-carceral sentences,[17] a continuum of punishment outputs would be impossible

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12 Rhodes v. Chapman, 452 U.S. 337 (1981).

13 Wilson v. Seiter, 501 U.S. 294 (1991); U.S. Const. amend. VIII (prohibiting the imposition of "cruel and unusual punishments").

14 Leon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pre-trial Detention*, Vera Evidence Brief 3 (Vera Inst. Just. New York, N.Y), Apr., 2019 (detailing research findings about the negative implications of pretrial detention—even for a short period of time—for "court appearance, conviction, sentencing, and future involvement with the justice system").

15 *See, e.g.*, Brown v. Plata, 563 U.S. 493 (2011) (holding that a population limit was necessary to remedy the violation of prisoners' Eighth Amendment rights caused by unconstitutional overcrowding in California's prison system); Brett C. Burkhardt & Alisha Jones, *Judicial Intervention into Prisons: Comparing Private and Public Prisons from 1990 to 2005*, 37 Justice Sys. J. 39 (2016).

16 *See, e.g.,* Ruth Wilson Gilmore & James Kilgore, *The Case for Abolition*, The Marshall Project, (Jun. 19, 2019).

17 Some jurisdictions have attempted to calibrate a ratio that would account for the differences between prison or jail and home confinement. In Rhode Island,

to achieve so long as there exist both carceral and non-carceral sentences.[18] It follows that we should either sentence everyone to a carceral facility (surely an unpopular idea even in the hyper-carceral United States) or eliminate carceral sanctions entirely.

Short of abolishing prisons, which is unlikely to gain political traction in the near future, there are incremental steps that could significantly decrease the impact of the carceral/non-carceral binary. For example, a system of "partial incarceration," which would allow incarcerated individuals to leave their carceral facility for hours or even days at a time to participate in pro-social activities. Prisoners could receive weekend furloughs to visit family members, and they could leave the prison grounds for work or educational pursuits.[19]

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a convicted person who meets the necessary qualifications may opt into a Community Confinement program. Instead of serving one's sentence in prison or jail, a person in this program spends twice that length of time subject to house arrest and radio frequency monitoring. Avlana Eisenberg, *Mass Monitoring*, 90 S. Cal. L. Rev. 123, 134 (2017) (citing an interview with Anne D'Alessio, Home Confinement Dir., R.I. Dep't of Corrections, in Cranston, R.I. (July 9, 2015)). Notably, home confinement in this example also includes the further requirement of electronic monitoring, which is substantially more invasive and punitive than the sanction of home confinement alone. Since 1989, when Rhode Island's Community Confinement program began, every eligible person has opted into this program, which features a 2:1 ratio between home confinement with electronic monitoring and prison or jail. *Id.* at 136. While Rhode Island's program is an isolated example, it showcases the potential for trading off the *length* of punishment with the *intensity* of punishment.

18 Further skewing the punishment outputs are "modern-day debtors' prisons—the arrest and jailing of poor people for failure to pay legal debts they can never hope to afford." *See For a Penny: The Rise of America's New Debtors' Prisons*, ACLU (Oct. 2010), www.aclu.org/issues/smart-justice/sentencing-reform/ending-modern-day-debtors-prisons ("The report details how across the country, in the face of mounting budget deficits, states are more aggressively going after poor people who have already served their criminal sentences."). The phenomenon of incarcerating a person who is unable to pay a fee or fine (e.g., traffic ticket) creates profound discontinuities, made even more stark by the poor conditions in U.S. carceral facilities).

19 This model is used with some frequency in Europe. It has also been piloted in some U.S. jurisdictions but remains the exception. One notable case in which this model was discussed extensively in the news—and heavily criticized—involved the decision to allow wealthy financier and convicted sex offender Jeffrey Epstein to leave prison daily as part of a work-release program. This case can be fairly criticized on a number of grounds, especially since such options are unavailable

A system of partial incarceration would manifest the belief that one can be simultaneously part of the community and also separated from it.[20] The principle of "normalization," central to criminal justice systems in Norway, Germany, and The Netherlands, among other European nations, exemplifies this approach. According to this principle, life in prison should be as similar as possible to life outside prison.[21] From the earliest stage when the state punishes an individual, the state also assumes the responsibility to help that person develop the necessary skills and pro-social behaviors to reintegrate into society. This holistic approach informs how prisoners are treated, interactions between prisoners and officers, and the architectural features of prison. For example, in Germany, prisoners wear their own clothes, cook their own meals, and are given keys to their cells. Correctional officers receive extensive training in psychology, educational theory, and conflict management, and they function as social workers. The physical site of prison is intended to foster rehabilitation, featuring "moderate temperatures, lots of windows and light, and wide hallways."[22]

Systems built on a foundation of normalization recognize that if the experience of incarceration alienates and subjugates the prisoner—"othering" that person—it will be vastly more difficult for that individual to reintegrate into society. By contrast, if prisoners are treated with dignity, invested in as fellow human beings who are preparing for reentry, they will be better equipped to rejoin the polity after they have served their sentences. The principle of normalization is thus consonant with a model of partial incarceration, which would remove spatial barriers associated with the carceral/non-carceral binary as much as possible to ease eventual reintegration.

By contrast, the default standard for incarceration in the United States can best be described as "full incarceration." Sharon Dolovich describes "incarceration American-style" as featuring an all-consuming "aesthetic" of incarceration, which includes "orange jumpsuits, cell blocks, bars, [and] barbed wire."[23] Other features characteristic of incarceration in the United States include a lack of personal privacy, an antagonistic dynamic between prisoners and officers, highly restricted movement, and extremely limited

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to the vast majority of prisoners. However, it raises the larger question: why is partial incarceration not more *widely* used in the U.S.?

20 For further discussion of a communitarian approach to the practices of incarceration, see Avlana Eisenberg, *The Prisoner and the Polity*, 95 N.Y.U. L. Rev. 1 (2020).

21 William Rentzmann, *Prison Philosophy and Prison Education*, 47 J. Corr. Ed. 58, 58 (1996).

22 Subramanian & Shames, *supra* note 6 at 12.

23 Sharon Dolovich, *Incarceration American-Style*, 3 Harv. L. & Pol'y Rev. 237, 237 (2009).

communication and visits with family and friends outside prison.[24] This custodial model has a totalizing effect, not only depriving incarcerated individuals of liberty and autonomy, but also removing them from even the most routine decision-making and from pro-social relationships and communities.

A full-incarceration model features an impermeable division between "us" and "them," which is also a hallmark of the United States system of criminal punishment.[25] Prisons and prisoners are hidden away, enabling non-incarcerated individuals to envision prisoners as "distant, foreign, and even subhuman, second-class citizens, undeserving of enrichment even if such enrichment would reduce crime or maximize public welfare."[26] The full incarceration model creates a sharp divide between those inside and outside prison walls,[27] such that prisoners "are not imagined as people with whom one is connected through a common humanity … as potential family members or friends, nor as future neighbors and community members."[28]

Ultimately, the project of smoothing out discontinuous input/output relationships across space is a formidable practical challenge even in a system that embraces partial incarceration and the principle of normalization. However, in a regime that favors full incarceration and features a pervasive "us versus them" dynamic, the carceral/non-carceral binary is impermeable and will preclude even the most valiant efforts to smooth input/output relationships.

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24 *See id*.; Shannon Sims, *The End of American Prison Visits: Jails end face-to-face contact—and families suffer*, The Guardian (Dec. 9, 2017), www.theguardian.com/us-news/2017/dec/09/skype-for-jailed-video-calls-prisons-replace-in-person-visits.

25 Eisenberg, *The Prisoner and the Polity*, *supra* note 20.

26 *Id*. (citing Sharon Dolovich, *Creating the Permanent Prisoner*, *in* Life Without Parole: America's New Death Penalty? 96, 121 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012)).

27 In prior work, I have examined a second "us versus them" dynamic *within* U.S. prisons between prisoners and correctional officers. Eisenberg, *The Prisoner and the Polity*, *supra* note 20 ("Correctional officers refer to prisoners as 'bad guys' or 'thugs,' defining their professional role in direct opposition, as 'the toughest beat' or as 'patrolling the toughest precincts.'"); Avlana Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 Vand. L. Rev. 71 (2016) (quoting from interviews with corrections leaders who have described the dynamic between officers and prisoners as "designed to be us versus them").

28 *Id*.; *see also* Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 Berkeley J. Crim. L. 259, 261 (2011).

II. Bumpy Output/Output Relationships and the Problem of Stigma

Efforts to smooth out criminal punishment must also contend with the problem of stigma—the mark of disgrace that may outlast a person's formal sentence.[29] The principle of normalization is anti-stigmatic, requiring the state to create a prison environment that resembles life outside prison as much as possible and to make reentry as seamless as possible.[30] By contrast, in other systems, including that of the United States, the imposition of stigma is central to expressive condemnation, which is considered a core principle of punishment.[31] The stigma associated with criminal conviction in the United States is further concretized by a vast array of restrictions that preclude the former prisoner, upon release, from full social, professional, and political participation.[32] While the sources of stigma may be either legal or social,[33] state-mandated or

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29 The online Oxford dictionary includes the following sentence after the definition of stigma, illustrating how one might use the word in context: "The stigma of having gone to prison will always be with me."

30 For example, Germany's Prison Act requires that prison life be "as similar as possible to life in the community" and that it should be structured to "facilitate reintegration into society." Subramanian & Shames *supra* note 6. According to this approach, the core of punishment is "separation from society represented by the custodial sentence itself" and no further imposition of stigma would be appropriate. *Id.*

31 *See generally* Frederic Megret, *Practices of Stigmatization*, 76 L. & Contemp. Probs. 287 (2014); Alan Brudner, *Proportionality, Stigma and Discretion*, 38 Crim. L. Q. 302 (1995).

32 *See generally* Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* Invisible Punishment: The Collateral Consequences of Mass Imprisonment 15, 15-17 (Marc Mauer & Meda Chesney-Lind eds., 2002).

33 While this Article will focus on stigma in the public sphere (whether based on legal restrictions or those enacted by private actors in the employment or educational contexts), there are also elements of stigma in the private sphere that warrant further exploration. For example, one may face significant social stigma in one's community because of a registration requirement or the imposition of electronic monitoring. A survey funded by the United States Department of Justice found that 89 percent of probation officers believed that "offenders' relationships with their significant others changed as a result of being placed on EM" and that parents' electronic monitoring also had a significant effect on their relationships with their children. *See* William Bales et al., Dep't of Justice, A Quantitative and Qualitative Study of Electronic Monitoring 92 (2010). There is also substantial indication that family members, and especially children, suffer from the social stigma of having a parent who was convicted

compelled by private actors, these distinct sources are mutually reinforcing, and their aggregation creates substantial obstacles for reentering citizens.

The stigma associated with criminal conviction thus has a ripple effect. It alters one's relationship to the state and to private actors, in both professional and personal contexts, and this effect may linger long after a person has completed his or her sentence. In the United States, the former prisoner may face a range of stigmatic effects that are directly connected to a felony conviction. Some are state-mandated, such as restrictions on public benefits or voter registration. A person who was once convicted of a sex offense—whatever the offense and however many years prior—may be permanently excluded from travel in certain areas and required to remain on a registry for life. Some former sex offenders may be subject to lifetime electronic monitoring.[34] Other stigmatic effects are imposed by private actors, as in the employment context where prospective employers can easily gain access to an applicant's criminal record and may refuse to hire the applicant because of a prior criminal conviction.

Stigma is sticky, resisting calibration and instead tending to function as a digital variable—either on or off. This results in "stigma creep," which causes significant input/output discontinuities. To the extent that one might have had a smooth initial relationship between harm input and punishment output, stigma creep distorts such continuity. Fine-tuning the number of years or months of incarceration may give the impression that one is meaningfully calibrating the severity of punishment, but it ignores the stigmatic effect that far outlasts the carceral sentence. A person who was once convicted of a felony may years later still be barred from particular professions, have

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of a crime, and that the experience of this stigma is especially acute for the children of incarcerated parents. John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities & Prisoners*, 26 Crime & Justice 121, 126 (1999) ("In the absence of efforts to encourage reacceptance and reabsorption, the stigma of imprisonment risks not only making parents into outlaws, but their children as well.").

34 A Sixth Circuit judge described the "relatively large G.P.S. device" as a "modern day scarlet letter," observing that it "will undoubtedly cause panic, assaults, harassment, and humiliation." Doe v. Bredesen, 507 F.3d 998, 1012 (6th Cir. 2007) (Keith, J., concurring in part and dissenting in part) (noting further that "because of the visibly worn monitoring device, Doe's offender status is now known to his co-workers, fellow worshipers at church, onlookers at the mall, diners at restaurants, patrons at gas stations, passengers on planes, trains, or buses, fans at sporting events, moviegoers at theaters, visitors at museums, sightseers, or any other person who may be at any conceivable location where Doe rightfully chooses to go").

limited housing options, and be required to check a "former felon" box on every subsequent application for employment and educational opportunities.[35] The stigma associated with criminal conviction can thus severely impede a person's reentry into society.

Stigma creep creates what can best be described as another species of discontinuity between multiple outputs. For purposes of clarity, "output" should be divided into two variables—"output 1" (the formal punishment, e.g., a 5-year prison sentence) and "output 2" (any further restrictions or stigmatic effect that flows directly from the conviction and/or outlasts the formal sentence). Those concerned with bumpy relationships in the criminal law should focus not only on the relationship between input and output 1, but also on that between output 1 and output 2. This is because, even if the input/output-1 relationship is smooth, a bumpy output-1/output-2 relationship will adversely affect the overall input-output relationship.

Some sources of stigma could be calibrated, such as the duration someone is required to spend on a registry or is subject to electronic monitoring. Others, such as public access to criminal records,[36] present a far greater challenge. In theory, expungement would address this concern; a person's criminal record, once sealed, would be inaccessible to landlords, private employers, and others performing background checks. After expungement, a person would be allowed to respond "no" to questions about a criminal record on rental or employment applications. However, given that information about criminal records is available online (including on archived sites), expungement would be an incomplete fix.[37]

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35 To address this concern, some states have passed ban-the-box legislation. Beth Avery, *Ban the Box: U.S. Cities, Counties, States Adopt Fair Hiring Policies*, Toolkit (Nat'l Emp. L. Project, New York, N.Y.), July 1, 2019), https://perma.cc/2CJ2-C4AD (documenting the rise of ban-the-box laws—as of 2019, 35 states and 150 cities and counties have passed these laws, and "13 states have also mandated the removal of conviction history questions from job applications for private employers"). However, such legislation only precludes employers from accessing criminal records at the outset of the application review process.

36 A sharp divide exists between the United States, where such records are accessible, and many European nations, where they are not. *See, e.g.*, Miranda Boone, *Criminal Records as an Instrument of Incapacitation*, *in* Incapacitation: Trends and New Perspectives 203, 203 (Marijke Malsch & Marius Duker eds., 2016) (noting that, in most of continental Europe, criminal records are "seen as a private matter and are not made public to individuals outside the criminal justice system").

37 Sarah Esther Lageson, *There's No Such Thing as Expunging a Criminal Record Anymore*, New America (Jan. 7, 2019), www.newamerica.org/weekly/theres-no-

Stigma creep also affects the severity or degree of punishment, creating false equivalencies. When every person with a felony conviction is made to forego public benefits—whether related to employment, educational, or housing opportunities—this exposes every individual to the same stigma regardless of the crime for which that person was convicted. Indeed, the same exposure to stigma might attach to the person who was found guilty of drug possession as to the person who was convicted of a violent assault, since both crimes are classified as felonies. In other words, individuals X and Y could have drastically different inputs, carefully calibrated with drastically different output 1 metrics, yet could share the same output 2.

This is where formalists and realists part ways. The formalist will argue that output 2 doesn't count. Indeed, courts have drawn sharp lines to separate what counts as punishment (and is thus subject to Eighth Amendment considerations) and what constitutes "mere regulation."[38] The broad swath of restrictions, commonly referred to as collateral consequences, may be experienced as punishment; however, courts have found that they are outside the realm of punishment and thus not subject to such Eighth Amendment concerns as proportionality or retroactivity.

The realist will challenge this doctrinal divide between civil regulation and criminal punishment as artificial, pointing to a vast array of sanctions that, while clearly distinguished along doctrinal lines as either civil or criminal, may in fact be experienced as identical. Output 1 and output 2 may be out of sync because of significant discrepancies between the law's formal classification of sanctions and the actual lived experience of those individuals subject to these sanctions.

For example, electronic monitoring (EM) is used in both punitive and non-punitive contexts.[39] Individuals in some states can opt to serve their sentences either in a carceral facility or with a combination of house arrest and electronic monitoring.[40] In such instances, EM is explicitly intended as a punitive sanction. In other instances, such as when used as a condition for pretrial release, the law classifies EM as serving a regulatory (and non-

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38 Marijke Malsch & Marius Duker, *Introduction*, *in* Incapacitation: Trends and New Perspectives, *supra* note 36 at 3 (discussing notification requirements, control orders, and other restrictions of liberty imposed in Europe and the United Kingdom that "have the direct effect of incapacitating" and "are of a civil nature").

39 Eisenberg, *Mass Monitoring*, *supra* note 17 at 162-63.

40 *Id*. (discussing Rhode Island's approach, which allows eligible individuals to serve twice the length of their sentence on EM and house arrest instead of prison).

punitive) function. Yet it would be challenging to isolate any difference in how EM is experienced for the person subject to it under civil versus criminal frameworks. Indeed, qualitative empirical research suggests that those subject to EM experience this sanction as punitive,[41] and that the stigma of wearing a monitor has substantial effects on their relationships with family and community members and on their employment prospects.[42] Thus, to the extent that stigma is supposed to be part of criminal punishment but not civil regulation, the imposition of EM defies this distinction.

Courts, however, have largely rejected the realist critique in favor of a formalist analysis. The Seventh Circuit's decision in *Belleau v. Wall* is illustrative.[43] Tasked with determining whether a Wisconsin law, which imposed retroactive lifetime EM on individuals who had completed their sentences, violated the Ex Post Facto Clause of the United States Constitution, the court held that it did not.[44] The court reasoned that this law was "not punishment; it is prevention."[45] The opinion, authored by Judge Posner, explained further: "Having to wear the monitor is a bother, an inconvenience, an annoyance, but no more is punishment than being stopped by a police officer on the highway and asked to show your driver's license is punishment, or being placed on a sex offender registry."[46] The Seventh Circuit provided no evidence to substantiate this characterization of EM and failed to address existing uses of EM as punitive.[47] The court also neglected to mention extensive empirical data suggesting that those subject to EM experience it as punitive.[48]

Electronic monitoring is not an isolated case. The law frequently draws sharp doctrinal lines between two sanctions that may be experienced as identical. A person unable to meet bail could be detained pretrial in a county jail (for non-punitive purposes), and later convicted at trial and returned to the same facility (for punitive purposes) to serve his or her sentence. For

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41 Peter van der Laan, *Part-Time Incapacitation: Probation Supervision and Electronic Monitoring*, *in* Incapacitation: Trends and New Perspectives, *supra* note 36 at 123.

42 Bales et al., *supra* note 33.

43 Belleau v. Wall, 811 F.3d 929 (7th Cir. 2016).

44 *Id*. at 937-38.

45 *Id*. at 937.

46 *Id*.

47 Eisenberg, *Mass Monitoring*, *supra* note 17 at 161 (critiquing the Seventh Circuit's decision).

48 *Id*.; *See also* William Bales et al., Dep't of Justice, A Quantitative and Qualitative Assessment of Electronic Monitoring, S.230530, at 90, 92 (2010) (documenting the negative effects of EM on the monitored person's familial relationships).

another example, consider civil commitment and criminal incarceration, where the inputs with respect to a person's culpability are substantially different. A person can be civilly committed without any finding of culpability—for example, to treat drug addiction or mental illness—whereas only a person found culpable can be incarcerated in the criminal context. Yet, individuals who are civilly committed and criminally incarcerated may be housed in the same facility. In Massachusetts, for example, men who are civilly committed for addiction treatment are sent to a minimum-security state prison.[49] Here again, the law's classification defies lived experience.

Similarly, the law characterizes solitary confinement as punitive when imposed because of a disciplinary violation, but as administrative or regulatory when used to protect vulnerable prisoners who are deemed at risk in the general prison population. Yet, the experience of sensory deprivation, which has been proven to cause severe psychological and other harm,[50] is the same whatever the reason for one's placement in solitary. Consider a case where the input/output-1 relationship is carefully calibrated, yet at some point during the person's sentence that individual is sent to solitary for "protection" without having committed any violation. This placement in solitary results in a bumpy output-1/output-2 relationship, in turn destroying the otherwise smooth input/output relationship. As in the regulatory EM and civil commitment contexts, the person sent to time in solitary confinement for protection is unlikely to experience the deprivations of this sanction in a way that is meaningfully different from one sent to solitary for a punitive reason such as a disciplinary infraction. While the law characterizes outputs in categorical terms (e.g., civil versus criminal, regulation versus punishment), those subject to such outputs may experience them as one and the same.

III. Bumpy Inputs and the Problem of Assessing Reasonableness

Efforts to smooth out the criminal law must also address inputs that are binary ("on-off") rather than smooth ("sliding scale"). Adam Kolber uses the example of the criminal law's reliance on reasonableness standards to illustrate the binary, all-or-nothing approach, providing the example of two individuals,

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49 Deborah Becker, *It's a Prison. It's Punishing Addicts: Calls to Reform Civil Commitments Increase*, WBUR, (Dec. 14, 2018), www.wbur.org/news/2018/12/14/civil-commitments-reform.

50 *See, e.g.*, Craig Haney, *Restricting the Use of Solitary Confinement*, 1 Ann. Rev. Criminology 285, 285 (2018); Alexander Reinert, *Solitary Troubles*, 93 Notre Dame L. Rev., 927, 929 (2018).

one of whom exercises reasonable self-defense and faces no liability for using force, and the other who falls "just short of being reasonable" and may be convicted of aggravated assault and face a lengthy prison sentence.[51]

One might avoid this all-or-nothing aspect by adding incremental inputs that would further divide the distance between reasonable and unreasonable to include such designations as "just short of reasonable." One could imagine a horizontal line representing a continuum from reasonable to unreasonable. On the far-left side of this reasonableness continuum is a vertical line representing reasonableness, and on the far-right side is a line representing unreasonableness. A series of vertical lines between these poles would represent graduated reasonableness inputs—these could even be quantified as percentages, e.g., 75% reasonable, 25% reasonable, and so forth.

Take the example of a voluntary killing. One could imagine two snapshots that represent the poles of a reasonableness continuum. The first snapshot depicts X pulling a trigger while facing Y who is holding a gun towards X. This killing would be deemed reasonable because, while a homicide, it was committed in self-defense. The second snapshot depicts X pulling the trigger to shoot Y who is standing a few feet away and whose back is turned towards X. This killing would be deemed unreasonable; the killer was not facing imminent danger and therefore could not plausibly claim that the killing was justifiable as self-defense.

Of course, most cases are not so straightforward, and the law might take into account not only details from a single moment captured by a snapshot but also additional contextual factors.[52] Such factors could include details about the personal relationship between the parties and additional information about the race, gender, or culture of the parties, as well as details concerning their professional roles, backgrounds, and past experiences. When the law takes such details into account prior to sentencing, it is to decide whether a person's behavior, while unreasonable, is sufficiently "understandable" as to mitigate that person's culpability.

The law of excuses complicates efforts to smooth out assessments of reasonableness. The law separates wrongful behaviors into (a) reasonable and thus justified given the circumstances; (b) unreasonable (and thus unjustified) yet understandable given the circumstances; and (c) unreasonable (and thus unjustified) and not understandable despite the circumstances.

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51 Kolber, *The Bumpiness of Criminal Law*, *supra* note 2 at 856.

52 Indeed, in any legal case or fact pattern, there will be multiple possible inputs, thus making it inevitable that choices be made about which of these inputs to include in developing the composite input to be considered in a reasonableness analysis.

The vertical line representing "unreasonable yet understandable" lies between the vertical lines on opposite ends of the reasonability continuum. The doctrine of provocation, which carves out a space for behaviors that are not justified but are understandable given that the defendant acted amidst a certain kind of stressful situation, would fall within this category. Traditionally, the provocation doctrine was understood to apply when the defendant was in "a state of passion engendered in him by a provocation which would cause a reasonable man to lose his normal self-control."[53] Unlike a successful self-defense claim, which could exculpate a person for a voluntary killing, a provocation claim could only reduce the severity of a defendant's crime—most commonly, from murder to voluntary manslaughter. The provocation doctrine considers contextual factors that may have provoked such an extreme reaction. While it refuses to justify the unlawful behavior, it considers facts and circumstances that explain the behavior in context and, as a concession to human frailties, it deems the action less culpable.

The law countenances some excuses but not others, creating a cliff between the two categories of unreasonable-yet-understandable and unreasonable-but-not-understandable. Nominate excuses—such as provocation—fall in the unreasonable-yet-understandable category, whereas the law may refuse to consider excuses that do not fall into established, named categories (except perhaps later at the sentencing stage),[54] and behaviors in such cases would fall into the category of unreasonable-but-not-understandable.

The law's line-drawing between these two categories has provoked significant controversy. This is because, however the law assesses whether unreasonable behavior is understandable—and thus worthy of excusing, at least in part—it must be in reference to a baseline, and the choice of baseline is contestable. From whose vantage point should the law consider what is understandable, and at what level of specificity? What additional circumstances about the situation or the relevant parties should be considered?

The law's traditional treatment of the provocation defense and the battered woman's syndrome defense in the context of intimate-partner violence illustrates such discontinuities in the context of gender. According to the common law provocation defense, this doctrine could be successfully invoked for the defendant

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53 Wayne LaFave, Criminal Law 775 (4th ed. 2003).

54 Examples of excuses that would not fit into established legal categories yet could render a person's wrongful behavior understandable include a defendant's drug addiction, dire economic need, and abusive childhood. John C.P. Goldberg, *Inexcusable Wrongs*, 103 Cal. L. Rev. 467, 476 (2015).

who killed upon discovering his wife committing adultery.[55] Historically, the law was concerned explicitly with what we could expect of a mortal man; as such, this killing, while a departure from the norm of reasonability, was squarely within the category of unreasonable yet understandable behavior. Central to this justification of the provocation doctrine is the requirement that there be no "cooling-off period"—hence the description "heat of passion."[56] Social science research suggests that women who kill their abusive partners are less likely to kill in the heat of passion and more likely to formulate a plan and to strike their abuser at a later point.[57] Here, the archetypal example is the woman killing her abusive husband while he is asleep.[58] However, historically, the battered woman's syndrome defense has been largely unsuccessful in mitigating a defendant's sentence because, in contrast to the heat of passion context, there was a cooling-off period.[59] The law's traditional approach would assess this killing—by a woman who suffered years of domestic violence—as neither reasonable nor understandable.[60]

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55 Jeremy Horder, Provocation and Responsibility 24 (1992). This doctrine originated in English common law and recognized the following four distinct categories of provocative behavior that could mitigate a person's culpability from murder to manslaughter: "a grossly insultive assault; witnessing an attack upon a friend or relative; seeing an Englishman unlawfully deprived of his liberty; and witnessing one's wife in the act of adultery." Mitchell Berman & Ian Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 Wm. & Mary L. Rev. 1027, 1036 (2011).

56 Aya Gruber, *A Provocative Defense*, 103 Cal. L. Rev. 273 (2015) ("The idea underlying the defense is that a provoked defendant acts without the 'malice' required for murder culpability.").

57 Charles Patrick Ewing, Battered Women Who Kill: Psychological Self-Defense as Legal Justification 46 (1987).

58 Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 Ohio St. J. Crim. L. 457, 461 (2006).

59 This traditional approach to the provocation defense has seen some notable shifts in recent years. While caselaw remains fragmented, some courts have given more credence to battered woman's syndrome claims in recent years. *See, e.g.*, Aman Ali, *New York court clears woman of murder in battered wife case*, Reuters, (Oct. 6, 2011), www.reuters.com/article/us-battered-wife/new-york-court-clears-woman-of-murder-in-battered-wife-case-idUSTRE7957D620111006.

60 Since these cases do not fit squarely within either traditional provocation doctrine or the classic self-defense paradigm, results have been inconsistent across jurisdictions. *See, e.g.*, Commonwealth v. Grove, 526 A.2d 369, 371 (Pa. Super. Ct. 1987) (holding that the battered woman defendant who killed her sleeping husband was guilty of first-degree murder); State v. Norman, 378 S.E.2d 8, 9 (N.C. 1989) (holding that the battered woman defendant who killed her sleeping

Drawing a line between whether or not there was a cooling-off period arguably makes the law of excuses easier to administer. In doing so, however, the law may be subject to criticism for giving priority to administrative convenience over the goal of having criminal law track plausible notions of personal responsibility, as well as for using the baseline of "reasonable man," thus privileging the male perspective.[61] At a certain level of granularity, the law of excuses—such as the provocation doctrine—may help to smooth out the bumpy relationship between determinations of reasonable and unreasonable. However, such line-drawing inevitably involves tradeoffs between the value of individualized justice and those of fairness and equality. Further, when the law draws lines that yield significant cliffs in input variables, appearing to privilege certain groups over others, this predictably will spark outrage by members of affected communities.

Consider the case of People v. Du, in which Soon Ja Du, a 51-year old Korean-American storekeeper, fatally shot Latasha Harlins, a 15-year old African-American girl, who Du thought was trying to steal a bottle of orange juice from her store.[62] According to the California Appellate Court, "[a]s Latasha turned to leave defendant shot her in the back of the head from a distance of approximately three feet, killing her instantly."[63] While there was no question that the shooting was unreasonable, the defense counsel successfully argued that Du reacted under extreme provocation given surrounding contextual circumstances including a recent spate of robberies. The court observed that the jury, which convicted Du of voluntary manslaughter, "impliedly found that defendant had the intent to kill and that the killing was unlawful….

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husband was guilty of manslaughter). Some states, like North Carolina, recognize an imperfect right of self-defense, which would mitigate a person's culpability from murder to manslaughter. *See generally* Christine M. Belew, *Killing One's Abuser: Premeditation, Pathology, or Provocation*, 59 Emory L. J. 769 (2010).

61 Efforts to liberalize the provocation defense inadvertently may have made it easier for a man who kills his intimate partner to prevail even in cases that do not involve adultery. Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 Yale L.J. 1331, 1332 (detailing such perverse results as "binding women to the emotional claims of husbands and boyfriends long ago divorced or rejected … [and] allowing defendants to argue that a battered wife who leaves has, by that very departure, supplied a reason to treat the killing with some compassion").

62 People v. Du, 5 Cal. App. 4th 822 (1992). The incident was captured on the liquor store's security camera, and police later determined that there had been "no attempt at shoplifting." Angel Jennings, *How the Killing of Latasha Harlins Changed South L.A., Long Before Black Lives Matter*, L.A. Times, Mar. 18, 2016.

63 People v. Du, 5 Cal. App. 4th 822 (1992).

[and] rejected the defense[] that the… defendant killed in self-defense." The trial judge also considered contextual factors in suspending Du's prison sentence, instead sentencing her to five years of probation, 400 hours of community service, and a $500 fine.[64] The judge reasoned: "Did Mrs. Du react inappropriately? Absolutely. But was that reaction understandable? I think that it was."[65] The judge highlighted Du's experience with prior robberies as inhibiting her ability to act rationally, concluding that Du acted under extreme provocation and duress.[66] The judge's decision in the Du case sparked outrage in the African-American community and "became a rallying cry during the 1992 Los Angeles riots."[67]

Line drawing in police use-of-force cases presents another doctrinal impediment to smoothing out criminal law inputs. In police shooting cases, for example, whether an officer's behavior is deemed reasonable will determine whether his or her behavior constitutes a justifiable homicide or murder. If the officer's behavior is deemed reasonable, then the officer will not be sanctioned; by contrast, if the officer's behavior is deemed unreasonable, then the officer could be convicted of murder and sentenced to a lengthy prison term.

Imagine a police shooting case—superficially resembling the Du case—where a police officer shoots an unarmed civilian who had turned away from the officer. At first blush, this snapshot would squarely put the incident in the category of unreasonable, since there would be no credible self-defense claim. One would thus assume that the two categories in play here would be (1) unreasonable yet understandable and (2) unreasonable but not understandable. However, in the police shooting context, the intermediary "understandable" category drops out, and the officer's behavior will be assessed as either reasonable (and thus justified) or unreasonable.[68] In determining whether he or

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64 Tracy Wilkinson & Frank Clifford, *Korean Grocer Who Killed Black Teen Gets Probation*, L.A. Times, Nov. 16, 1991, at Al, A26.

65 People v. Du, at 835.

66 *Id*.

67 Angel Jennings, *25 Years Later, Vigil Marks Latasha Harlins' Death, Which Fed Anger During Rodney King Riots*, L.A. Times, Mar. 16, 2016 www.latimes.com/local/california/la-me-0317-latasha-harlins-vigil-20160317-story.html.

68 A manslaughter verdict could serve as a compromise verdict, akin to imperfect self-defense in the civilian context. Some police convictions would be viewed as unreasonable and understandable; for example, an officer could be found to have acted recklessly with respect to the justification for killing if the officer honestly though unreasonably believed he faced a fatal threat. For further discussion, see Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense*, 2018 U. Ill. L. Rev. 629 (proposing a model statute that would "import […] the concept of imperfect

she behaved reasonably, the law explicitly considers the officer's professional role. The law considers what a "reasonable officer" would have done in such a situation, and the "reasonable officer" is understood to be a product of his or her training and experience. This choice of vantage point—the officer's perspective—reflects the high level of deference paid to officers in such cases.

Or take the 2018 case of Stephon Clark, an unarmed 23-year-old black man who was shot and killed in California. Suspecting that Clark had committed a property crime, two officers chased him before opening fire. An independent autopsy found that Clark was shot eight times, including six times in the back.[69] The United States Supreme Court has limited the "fleeing felon" rule such that police cannot use lethal force "unless necessary to prevent the [suspect's] escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[70] In this instance, the officers had apparently mistaken a white and pink iPhone in the suspect's hands for a gun.[71] Nonetheless,

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self-defense into the police use of force arena [such that i]f the jury finds that an officer's belief in the need to use deadly force was honest but unreasonable, or if the jury finds that the officer's belief was reasonable but that his use of deadly force was unreasonable, the jury may acquit the officer of murder and find him guilty of voluntary manslaughter"). Illinois' second-degree murder statute (previously termed voluntary manslaughter) allows for such a "compromise" verdict where a jury finds that an officer honestly believed that a shooting was justified but that the officer's fear was unreasonable. In a highly publicized 2018 case, a jury convicted white Chicago police officer Jason Van Dyke of second-degree murder under this statute in the shooting death of black teenager Laquan McDonald, finding that Van Dyke believed his life was in danger but that this belief was unreasonable. Michael Lansu & Mark Lebien, *Chicago Police Officer Found Guilty of 2nd-Degree Murder of Laquan McDonald*, NPR.org, Oct. 5, 2018, www.wyso.org/2018-10-05/chicago-police-officer-found-guilty-of-2nd-degree-murder-of-laquan-mcdonald.

69 Sam Stanton, *Stephon Clark shot six times in back—eight times in all—private autopsy says,* Sacramento Bee, Mar. 30, 2018, www.sacbee.com/latest-news/article207439864.html.

70 Tennessee v. Garner, 471 U.S. 1, 1 (1985).

71 Sam Stanton, *Sacramento Police Officers Won't Be Charged in Shooting of Stephon Clark, DA Says*, Sacramento Bee, Mar. 2, 2019, www.sacbee.com/news/local/crime/article227026334.html. Psychological research suggests that this mistake is consistent with a broader phenomenon whereby research subjects in a video-game experiment who take on the role of a police officer who is confronted by images of white and black men, variously holding guns, cell phones, and wallets, demonstrate racial bias: "they shoot more unarmed blacks than unarmed whites, and they fail to shoot more whites than blacks who turn out

the Sacramento County District Attorney chose not to file criminal charges against the police officers involved in Clark's death, finding that the officers were legally justified in using deadly force.[72] This shooting and its aftermath sparked numerous public protests in Sacramento, including a Black Lives Matter march that shut down an interstate freeway.

In the classic self-defense case, a killing is justified—and the killer avoids liability—because the killer had a good reason for engaging in otherwise wrongful behavior.[73] By contrast, in the police use-of-force context, the law sometimes appears to grant officers immunity under the guise of reasonableness. There may be systemic reasons not to hold police liable in some use-of-force cases. However, when officers are exempt from the normal reasonableness analysis, allowing them to avoid liability entirely for behavior that would be deemed unreasonable if committed by a non-officer, this discontinuity may create legitimacy problems for law enforcement.

Conclusion

Steep doctrinal cliffs may have dramatic practical results, yielding legal determinations that substantially undermine the credibility of criminal justice institutions. However, while there exist persuasive reasons to favor smoothing out criminal law's inputs and outputs, there are also significant conceptual, doctrinal, and practical impediments to fine-tuning these relationships. Moreover, the project of smoothing out the criminal law must contend with bumpiness between inputs and outputs, as well as discontinuous relationships among inputs and outputs. This Article begins the task of identifying these obstacles, laying the groundwork for further analysis and possible reforms.

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to be holding weapons." Lydialyle Gibson, *Shooter's choice: Social psychologist Joshua Correll uses a video game to test whether racial bias triggers the decision to shoot a suspect*, 99(6) U. Chicago Magazine (July/Aug.2007).

72 Sam Stanton, *Sacramento Police Officers Won't Be Charged in Shooting of Stephon Clark, DA Says*, Sacramento Bee, Mar. 2, 2019.

73 Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum. L. Rev. 199, 221 (1982).