A Prison Abolitionist Dilemma: Deprivations of Liberty in Armed Conflict

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Abstract

Prison abolitionists focused on the American criminal law typically have—at most—a passing familiarity with the international laws governing deprivations of liberty during armed conflicts. Likewise, public international lawyers typically have—at most—a passing familiarity with domestic movements against mass incarceration. Therefore, little scholarship exists to bridge the gap between criticisms of domestic criminal prisons and international military prisons. To begin bridging that gap, this paper poses a dilemma: are prison abolitionists in America prepared to extend their arguments to deprivations of liberty in the context of armed conflicts?

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Prison abolitionists—as the name implies—vehemently oppose prisons. But what about prisoners of war? Are domestic U.S. abolitionists prepared to extend their arguments to the international framework of deprivations of liberty in armed conflict? [1]

Criminal lawyers in America are familiar with the story of mass incarceration in American prisons. Prisons populations were relatively low before a wave of tough-on-crime politicians surged during the Nixon- and Reagan-era's racialized War on Drugs.[2] Now, American prisons are bursting at the seams.[3] American organizers have reacted to mass incarceration with some combination of advocacy for prison reform and prison abolition.[4] In recent years, the increased publicity of racialized police violence has galvanized support for more radical reforms of the American carceral state.[5]

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[1] This paper is most precisely concerned with "*deprivations of liberty during armed conflict*." This admittedly unwieldy term encompasses a broad range of doctrinally distinct deprivations of liberty, including, e.g., prisoners of war and administrative detention. This term, however, does not include post-war prosecutions for war crimes, which fall outside the scope of this paper. With that being said, distinctions within the types of deprivations of liberty that may occur during armed conflict are largely irrelevant for the purposes of this paper. Occasionally, the term "military incarceration" is used as a shorthand for "deprivations of liberty during armed conflict." *See also* Medecins Sans Frontiers, *Detention*, *in* THE PRACTICAL GUIDE TO HUMANITARIAN LAW, https://guide-humanitarian-law.org/content/article/3/detention-1/ ("Traditional international law makes a distinction between detention and internment. Detention is a measure that deprives an individual of his or her freedom and is enacted pursuant to a decision taken by a judicial body for criminal or administrative reasons. Detention for administrative or security reasons is usually called internment and decided by administrative or security bodies. It may take place in times of peace but also of armed conflict. International humanitarian law distinguishes between detention and internment in situation of international armed conflicts but not in non-international armed conflicts. As a consequence, the word detention is used in this entry as an overarching term to describe the various situations of persons deprived of liberty by administrative, military or judiciary decision.").

[2] James Cullen, *The History of Mass Incarceration*, Brennan Center for Justice (July 20, 2018).

[3] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, Prison Policy Initiative (March 14, 2023).

[4] *See, e.g.*, ANGELA Y. DAVIS, ARE PRISONS OBSOLETE (2003).

[5] *See, e.g.*, Keeanga-Yamahtta Taylor, *The Emerging Movement for Police and Prison Abolition*, New Yorker (May 7, 2021).

Public international lawyers are familiar with the story of International Humanitarian Law (IHL) and its limitations on deprivations of liberty in armed conflict. After the failure of the League of Nations to prevent World War II,[6] the League's successor—the United Nations Charter system—created a framework for IHL that regulates not only the prohibition of the use of force, but also how war is to be waged when it is unavoidable.[7] One boundary on war-waging imposed by modern IHL are limits on killing captured soldiers.[8] Now, modern militaries maintain extensive systems to detain perceived threats.[9] Although laws governing prisoners of war—and deprivations of liberty in armed conflict more generally—were meant to reduce the brutalities of war, some of the realistic instances of liberty deprivation have been criticized as violating human rights and IHL. For example, a particularly notorious instance of modern human rights abuses is the American military's treatment of its incarcerated enemies at Abu Ghraib.[10]

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[6] DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 10 (2021) ("The determination of the 15 major signatory governments, soon followed by another 43 accessions, to formally outlaw war as a means of national policy marks a key turning point in the attempt to turn war from a glorious and legitimate pursuit of states to an unlawful activity. Of course, the onset of mankind's most destructive war soon afterwards rather undermines this sentiment."); *id.* at 11 ("Only three years after the Kellogg–Briand Pact and the General Act had been concluded, Japan's invasion of Chinese Manchuria, soon followed by Italy's forcible acquisition of Abyssinia (Ethiopia) and then Germany's conquests of neighbouring territories, sounded the death knell for this initial experiment with collective security.").

[7] *Id.* at 101 ("[I]t is—to put it mildly—far from clear that the Charter system has gone the way of the League. There has been a sustained decline in both the incidence and severity of state-based armed conflict.").

[8] DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 410 (2021) ("*Obligation to protect*. Humane treatment requires not only that the detaining power desist from inhumane acts, but also—as expressly emphasized in Article 13, para. 2—that the detaining power prevent such acts by any other party. In particular, prisoners of war shall be protected against violence and intimidation, insults, and public curiosity (*see* Section 713).") (emphasis in original).

[9] *See, e.g.*, Hassan v. United Kingdom, E.C.H.R. 30 (describing approvingly the United Kingdom's practices for detaining enemies at Camp Bucca).

[10] Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER (May 10, 2004), https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib.

Unfortunately, criminal lawyers and public international lawyers are not familiar with each others' stories. Prison abolitionists focused on the American criminal law typically have—at most—a passing familiarity with the international laws governing deprivations of liberty during armed conflicts. Likewise, public international lawyers typically have—at most—a passing familiarity with domestic movements against mass incarceration. Therefore, little scholarship exists to bridge the gap between criticisms of domestic criminal prisons and international military prisons.

To begin bridging that gap, this paper poses a dilemma: how should prison abolitionists in America theorize about deprivations of liberty in the context of armed conflicts?[11]

That dilemma is more thorny than it originally appears. At first blush, abolitionists oppose prisons and therefore should oppose any prisons used to wage war. But some abolitionists can also acknowledge that some wars are justified. And when waging justified wars against an enemy, some abolitionists will be persuaded that depriving the enemy of their liberty is preferable to depriving the enemy of their life. Nevertheless, realistic deprivations of liberty in armed conflict—including Abu Ghraib and Japanese internment camps—suggest that theoretical justifications often fail to account for the full story.

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[11] This paper addresses an American audience of readers who are familiar with the prison abolitionist movement arising out of the criminal law in the United States, and who are considering the international framework of deprivations of liberty in armed conflict for the first time. There is already some limited scholarship going the opposite direction from international law to domestic criminal law. For example, pacifists have disagreed about the value of domestic prisons. *Compare* Tena Thau, *Pacifism and Prisons*, Explicitly Public Philosophy (July 4, 2022) https://www.oxfordpublicphilosophy.com/blog/epp-pacifism-and-prisons (arguing that pacifists should oppose the violence inflicted by prisons on prisoners), *with* Barry Gan, Professor, St. Bonaventure Univ., "Peace and Hope in Dark Times" Keynote Address at Concerned Philosophers for Peace (Feb. 2, 2021) ("So how does a non-violentist address violent law breakers—people who engaged in seditious actions and threaten others? Although nonviolence does not countenance penalizing people who have done wrong, dangerous people should be locked up and not allowed access to weapons.").

Therefore, the abolitionist dilemma of deprivations of liberty in armed conflict presents complex ethical, moral, and ideological problems that have yet to be addressed in the literature. Because reasonable perspectives on abolition permit more than one solution to this dilemma, this paper does not advocate for any particular resolution of the dilemma. Instead, this paper presents four questions to factor into an abolitionist analysis of deprivations of liberty in the context of armed conflict.

Answering each question will help the reader understand where they fall along a spectrum of reasonable abolitionists. For example, Part II asks the reader how they feel about wars themselves. After all, without interrogating how the reader feels about war itself, the reader will never be able to figure out how they feel about prisoners of war. Some readers will believe that many wars have no morally permissible justification.[12] In contrast, some readers will feel that many wars are justified, such as wars fought to resist oppression.[13] Many readers, though, will find themselves falling somewhere in the middle. For the ease of presentation, the questions are presented as having yes or no answers even though each one more precisely represents a spectrum of possible beliefs.

The reader's perspectives on prison abolition in the domestic criminal context may or may not be informative in determining their answer. For example, Part III asks the reader how necessary they think incapacitating the enemy is during wartime. Some readers may feel that the

[12] EDDY SHERWOOD & KIRBY PAGE, THE ABOLITION OF WAR: THE CASE AGAINST WAR AND QUESTIONS AND ANSWERS CONCERNING WAR 24 (1924) ("Now, at last, after ten long years, I have reached bed-rock in my conviction, I have found stable equilibrium in my though. I am finally done with war. I, too, can now say with that growing army of men and women of goodwill in every land, 'No More War.'").
[13] Andrew Fiala, *Pacifism, in* Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2021), https://plato.stanford.edu/entries/pacifism/ ("[During the American Civil War,] William Lloyd Garrison, for example, compromised his pacifist beliefs to support the cause of emancipating the slaves.").

criminal and military contexts are so different that their intuitions—for example intuitions about how perpetrators of harm can reconcile with their victims—can simply not be applied to the international law context.[14] In contrast, some readers may feel that incapacitation of the "dangerous few" in the criminal law context is one of the few scenarios in which the use of prisons is actually justified.[15] Such readers who permit incarcerating some criminals may translate their intuition from the criminal law to the international context to permit taking prisoners of war as a well-constrained deprivation of liberty during armed conflicts.

The reader will likely find that their answers to each of the four questions seem to point them in different directions. This tension within the questions demonstrates why the central dilemma is difficult and demonstrates that the dilemma warrants further analysis in the scholarly literature.

The central dilemma of how prison abolitionists should theorize about deprivations of liberty is presented in this paper in four parts. Part I asks the reader why prisons are bad. Part II asks the reader whether war can be justified. Part III asks the reader whether war can be waged without deprivations of liberty. And Part IV asks the reader whether deprivations of liberty can ever escape unsavory motivations. Part V briefly concludes without solving the central dilemma.

I. Abolition: are state deprivations of liberty per se impermissible?

[14] *Id.* at 108 ("Is not war simply an extension of the police power? It is true that there are a number of points of similarity between the two. But the points of divergence are so numerous and fundamental as to destroy the value of any conclusions based upon analogy.").
[15] Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and its Skeptics*, 135 HARV. L. REV. 2013, 2019–23 (describing abolitionists who agree with the sentiment that "yes, of course we will still need to incapacitate 'the dangerous few,' albeit in a more humane setting that affirms the basic dignity of those restrained.").

There are many compatible but distinct reasons to be critical of domestic U.S. prisons.[16] This section does not aim to persuade the reader of any particular viewpoint or weigh the relative strengths or weaknesses of the presented viewpoints. Instead, by merely acknowledging the breadth of opposition to prisons, it becomes clear why various abolitionist readers may disagree about how to resolve the dilemma of deprivations of liberty in armed conflict.

Some critics—we will call them[17] consequentialists—are skeptical that prisons are effective at achieving their purported goals.[18] Consequentialists are disappointed by, for example, recidivism rates for prisoners in America.[19]

Some critics—we will call them deontologists—view any deprivation of liberty as categorically impermissible because of their views on fundamental human rights.[20] Deontologists

[16] *See, e.g.*, FAY HONEY KNOPP ET AL., INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS 11 (Mark Morris ed. 2005) (taxonomizing nine different perspectives held by abolitionists).
[17] I have given each category of abolitionists a convenient name (from "consequentalists" to "community members"). I have provided these names exclusively for rhetorical ease of reference; I do not intend to be reductive about incredibly nuanced views. A reader may sympathize with a presented view even if they do not necessarily identify with the name of the category.
[18] Zachary Hoskins and Antony Duff, *Legal Punishment*, *in* Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2022), https://plato.stanford.edu/entries/legal-punishment/ ("In consequentialist terms, punishment will be justified if it is an effective means of achieiving its aim, if its benefits outweigh its costs, and if there is no less burdensome means of achieving the same aim. It is a contingent question whether punishment can satisfy these conditions, and some objections to punishment rest on the empirical claim that it cannot — that there are more effective and less burdensome methods of crime reduction." (citing BARBARA WOOTTON, CRIME AND THE CRIMINAL LAW (1963); KARL A. MENNINGER, THE CRIME OF PUNISHMENT (1968); DEIRDRE GOLASH, THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW (2005); DAVID BOONIN, THE PROBLEM OF PUNISHMENT 53, 264–67 (2008))).
[19] Liz Benecchi, Recidivism Imprisons American Progress, HARV. POL. REV. (Aug. 8, 2021) ("The [United States'] high recidivism rate alone demonstrates that our prisons are as ineffective as they are inefficient, a sobering reality which calls for a reimagined criminal justice system.").
[20] Zachary Hoskins and Antony Duff, *Legal Punishment*, *in* Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2022), https://plato.stanford.edu/entries/legal-punishment/ ("Abolitionists find that the various attempted justifications of this intentionally burdensome condemnatory treatment fail, and thus that the practice is morally wrong — not merely in practice but in principle.").

may be motivated, for example, by deeply held religious or spiritual objections to prisons in the same way that some people hold religious objections to the death penalty.

Some critics—we will call them libertarians—oppose *state* deprivations of liberty because they believe it is an inappropriate exercise of the state's monopoly on violence.[21] Libertarians do not necessarily oppose deprivations of liberty in all cases; for example, some libertarians may be okay with a contract in which one party agrees to endure a punishment that resembles prison if certain conditions are met because in that scenario the state is not involved.

Some critics—we will call them risk avoiders—think that some deprivations of liberty are justified, and some are not, but are also convinced that avoiding unjustified deprivations of liberty is more important than enabling justified deprivations of liberty.[22] Risk avoiders are particularly concerned, for example, with innocent people experiencing prison even if they would be okay with guilty people going to prison.

Some critics—we will call them forgivers—think that prisons are inherently punitive and, for one reason or the other, prisoners do not deserve punishment. Moderate forgivers might believe that certain prisoners should not be incarcerated, such as those convicted of low-level drug crimes. More radical forgivers may be skeptical of the idea of free-will itself, and therefore

[21] *Id.* ("[W]hen the state imposes punishment, it treats some people in ways that would typically (outside the context of punishment) be impermissible.").
[22] *Id.* ("Suppose we have come to believe, as a matter of normative theory, that a system of legal punishment could in principle be justified… It is, to put it mildly, unlikely that our normative theory of justified punishment will justify our existing penal institutions and practices… [T]o maintain our present practices, even while seeking their radical reform, will be to maintain practices that perpetrate serious injustice.").

be criticize any system that carceral system that purports to communicate condemnation or deter bad behavior.[23]

Some critics—we will call them historians—oppose prisons in America because of their shared history with slavery, Jim Crow, and racial oppression.[24] Before accepting a deprivation of liberty scheme, historians would be curious where that scheme fits into enduring systems of white supremacy.

Some critics—we will call them empathizers—worry about the realistic conditions of confinement that individuals deprived of their liberty face.[25] Moderate empathizers could be okay with prisons in certain circumstances if the conditions of confinement were more humane. Empathizers will be less swayed by systemic justifications for deprivations of liberty if prisoners must disproportionately bear the costs of achieving those justifications.

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[23] *Id.* ("Free will scepticism holds that people's behaviour is the product of determinism, luck, or chance, and thus that we are not morally responsible for our behaviour in the respects that would justify the ideas that those who commit crimes are *blameworthy* and *deserve* punishment." (citing Pereboom Derek, *Free Will Skepticism and Criminal Punishment*, *in* THE FUTURE OF PUNISHMENT 49–78 (Thomas A. Nadelhoffer ed. 2013); GREGG D. CARUSO, REJECTING RETRIBUTIVISM: FREE WILL, PUNISHMENT, AND CRIMINAL JUSTICE (2021))).

[24] *Id.* ("[A] prominent strand of abolitionism focuses on incarceration as practiced in the U.S. context, with links drawn between imprisonment and the American legacy of slavery, Jim Crow, and segregation." (citing LISA GUENTHER, GEOFFREY ADELSBERG, & SCOTT C. ZEMAN, DEATH AND OTHER PENALTIES : PHILOSOPHY IN A TIME OF MASS INCARCERATION (2015); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019)).

[25] Zachary Hoskins and Antony Duff, *Legal Punishment*, *in* Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2022), https://plato.stanford.edu/entries/legal-punishment/ ("If our normative theorising is to be anything more than an empty intellectual exercise, if it is to engage with actual practice, we then face the question of what we can or should do about our current practices."); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617 (2019) ("[A]bolitionists are committed to justice grounded in experience rather than proceeding primarily from idealized and abstract premises with little attention to how those ideals are translated into actual practices.").

Some critics—we will call them social workers—oppose prisons because they seem mutually exclusive with policy solutions that are under-prioritized when prison is on the table.[26] Social workers, for example, would support diverting funding for prisons to funding for substance abuse treatment or mental health care.

Some critics—we will call them community members—oppose deprivations of liberty because of the detrimental second-order effects incarceration has for third parties.[27] For example, community members are concerned about deprivations of liberty stopping an individual from serving as a parent to their children[28] or from showing up to their job. Community members are also concerned about the victim themselves because incarcerating the perpetrator will not necessarily serve the victim.[29]

Each of the preceding perspectives represent distinct criticisms of domestic prisons. The criticisms are not mutually exclusive; a reader can sympathize with any combination of the

[26] MPD 150, Police Abolition 101: Messages When Facing Doubts, 18 ("There is no sense in building up a system that strengthens law enforcement and further implicates the social service agencies and organizations in the cycle of police violence. The funding and development of social services have often gone hand-in-hand with their close cooperation with the police. Government agencies and nonprofits are perpetually underfunded, scrambling for grant money to stay alive while being forced to interact with police officers who often make their jobs even harder. In 2016, the Minneapolis Police Department received $165 million in city funding alone. Imagine what that kind of money could do to keep our communities safe if it was reinvested.").

[27] TODD CLEAR, IMPRISONING COMMUNITIES : HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 5–6 (2007) ("Concentrated incarceration in those impoverished communities has broken families, weakened the social-control capacity of parents, eroded economic strength, soured attitudes toward society, and distorted politics; even, after reaching a certain level, it has increased rather than decreased crime.").

[28] Christopher Wildeman, Alyssa W. Goldman, & Kristin Turney, *Parental Incarceration and Child Health in the United States*, 40 EPIDEMIOLOGICAL REV. 146, 146 ("[P]aternal incarceration is negatively associated—possibly causally so—with a range of child health and well-being indicators.").

[29] Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616 (2019) ("Whereas conventional accounts of legal justice emphasize the administration of justice through individualized adjudication and corresponding punishment or remuneration (most often in idealized terms starkly at odds with actual legal processes), abolitionist justice offers a more compelling and material effort to realize justice - one where punishment is abandoned in favor of accountability and repair.").

criticisms of deprivations of liberty. Additionally, the reader will fall somewhere on a spectrum of how strongly they endorse each criticism; they may adopt, for example, a weak or strong view of forgiveness. And finally, the reader can draw different takeaways from the combination of these criticisms about how radically prisons must be revised.

With this taxonomy of reasonable prison critics in mind, it becomes clear that different types of critics may approach the dilemma of deprivations of liberty in armed conflict differently.[30] For some critics, such as social workers primarily concerned with domestic U.S. policy, deprivations of liberty in armed conflict may not seem particularly concerning. For other critics, such as deontologists, deprivations of liberty in armed conflict may seem indistinguishable from deprivations of liberty in the criminal law, and therefore equally impermissible. The remainder of this paper aims to help domestic prison critics, and particularly prison abolitionists, reason about deprivations of liberty in armed conflict.

II. Pacifism: can war itself be avoided?

Some readers may challenge the initial premise of military incarceration by rejecting the idea of waging war itself. For these readers, the question about whether deprivations of liberty in the context of armed conflict are justified collapses into a debate about whether war itself is justified. In just war theory terms, these readers are interested in the *jus ad bellum* question: under what scenarios are wars justified? Readers who are skeptical about the justifications for wars being waged at all are sympathetic to pacifism. Pacifism, however, is a broad set of beliefs

[30] For my part, I agree with almost all of the listed justifications for abolition. I am particularly sympathetic to the views of the deontologists, historians, empathizers, and community members.

in opposition to war.[31] Therefore, not all pacifists will necessarily agree on how to resolve the dilemma of deprivations of liberty in armed conflict.

Absolute pacifists solve the problem of deprivation of liberty in armed conflicts by rejecting all wars, and by extension, rejecting war-time justifications for incarceration. Absolute pacifists "will always and everywhere reject war and violence."[32] Absolute pacifists work to find ways to move beyond our reliance on wars as the solution to social and political problems.[33] Instead of relying on war to solve social and political problems, pacifists have advanced a theory of "positive peace" that replaces "a war system" with "a peace system" comprising six elements:

> (1) universal and complete disarmament (including the disarming of internal police to minimal levels); (2) international institutions (both regional and global) immediate and adjudicate international disputes and those domestic disputes that threaten world peace; (3) the replacement of military force by international unarmed peacemaking forces and by a capacity of nonviolent struggle and nonviolent defense on the part of nations and other social entities with a perceived need to defend their rights; (4) massive educational efforts in behalf of the values and behaviors associated with a nonviolent orientation; (5) the creation of more effective institutions to protect the basic political, social, and economic rights of individuals and groups; (6) efforts by the more industrialized countries to adopt less resource-consumptive economies and by the less industrialized countries to find alternatives to present models of development.[34]

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[31] Andrew Fiala, *Pacifism, in* Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2021), https://plato.stanford.edu/entries/pacifism/ ("Pacifism is a commitment to peace and opposition to war. Our ordinary language allows a diverse set of beliefs and commitments to be held together under the general rubric of pacifism. This article will explain the family resemblance among the variety of pacifisms. It will locate pacifism within deontological and consequentialist approaches to ethics. And it will consider and reply to objections to pacifism.").

[32] *Id.*

[33] *Id.*

[34] Beverly Woodward, *The Abolition of War*, 33 CROSSCURRENTS 263, 268. Note that Woodward does not explicitly state whether she identifies as an absolute or contingent pacifist. *Id.* at 267 (In many current situations it appears that the use of violence may be 'justifiable' by important moral criteria and yet ultimately ineffective or even counterproductive."). Regardless, her positive peace system seems compatible with both views.

This positive peace framework of absolute pacifism is consistent with prison abolition. Just as absolute pacifism finds ways to move beyond our reliance on wars, abolition works to find positive ways to move beyond our reliance on prisons as the solution to social and political problems.[35] For example, abolitionist thought is rooted in intersectional Black feminist organizing against gendered violence. Black women who were[36] the victims of gendered violence were understandably hesitant to call the cops on their abusers because of the racial violence that would bring to their community.[37] Nevertheless, Black women needed to hold their abusers accountable for the harm they suffered. To achieve accountability, Black women relied on their broader community to support them by intervening.[38] Black women's grassroots community organizing has blossomed into what we call "transformative justice" today. Transformative justice addresses "violence without relying on prisons or police" and provides "some of the only options that marginalized communities have to address harm."[39]

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[35] Allegra M. McLeod, *Prison Abolition and Grounded Justice,* 62 UCLA L. REV. 1156, 1156 (2015) ("By exploring prison abolition and grounded preventive justice in tandem, this Article offers a positive ethical, legal, and institutional framework for conceptualizing abolition, crime prevention, and grounded justice together.").

[36] Although this paragraph uses the past tense to describe the original roots of the transformative justice movement, the same circumstances and responses remain relevant today.

[37] Ejeris Dixon, *Building Community Safety*, *in* BEYOND SURVIVAL 10, 10 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020) (discussing how communities in the 1940s, 1950s, and 1960s—including the author's mother's community in New Orleans—were "marked by experiences of state violence and Jim Crow segregation" because "[t]he police, white citizens' councils, and the Klan intermingled to form the backbone of a racist political and economic system.").

[38] *Id.* ("[When something violent happened], we [often] could send for the uncles, brothers, fathers, or other family members of people involved to interrupt violence. However, there was this time when we had this family that lived on our block, where the husband was attacking his wife. And people were fed up, so some men in the community with standing—a minister, teacher, doctor, and others—decided to intervene. Those men stopped by the house to let the husband know that they wouldn't tolerate his behavior and it needed to stop.").

[39] *Id.*

Prison abolitionists have not only demonstrated *why* to practice transformative justice, they have also demonstrated *how* to practice transformative justice at the grassroots level. [40] Transformative justice has been—and continues to be—practiced in the context of family abuse,[41] sexual assault,[42] child sexual abuse,[43] substance abuse,[44] violence at parties,[45] violence against sex workers,[46] intimate partner violence,[47] and disability justice.[48] The key thread running through these practices is an emphasis on centering what the victim of harm needs rather than centering any punishment for the perpetrator.[49] Importantly, these efforts do not require—or even necessarily seek—nationwide policy changes.[50]

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[40] Ejeris Dixon & Lakshmi Piepzna-Samarasinha, *Introduction*, *in* BEYOND SURVIVAL 6, 7–8 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020) ("This book includes interviews with some people who have been doing this work a really long time, and their reflections help us to see how far we have come… We hope this book gives you practical knowledge for deepening your own TJ practice, reminds you of strategies you may have already tried, and invites you to learn from those experiences as well as our own.").
[41] Amita Swadhin, *Transforming Family*, *in* BEYOND SURVIVAL 35 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020).
[42] Blyth Barnow, *Isolation Cannot Heal Isolation*, *in* BEYOND SURVIVAL Chapter 3 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020); Esteban Lance Kelly, Jenna Peters-Golden, Qui Alexander, Bench Ansfield, Beth Blum & Dexter Rose, *Philly Stands Up!*, *in* BEYOND SURVIVAL Chapter 8 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020).
[43] Staci K. Haines, Raquel Laviña, Chris Lymbertos, Rj Maccani & Nathan Shara, *Excerpts from Ending Child Sexual Abuse: A Transformative Justice Handbook*, *in* BEYOND SURVIVAL Chapter 10 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020); Nathan Shara, *Facing Shame*, *in* BEYOND SURVIVAL Chapter 21 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020).
[44] Trans Lifeline, *Why No Nonconsensual Active Rescue?*, *in* BEYOND SURVIVAL Chapter 13 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020)
[45] Safe OUTside the System Collective & Audre Lorde Project, *Excerpt from the Safer Party Toolkit*, *in* BEYOND SURVIVAL Chapter 17 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020).
[46] Monica Forrester, Elene Lam & Chanelle Gallant, *When Your Money Counts On It*, *in* BEYOND SURVIVAL Chapter 18 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020).
[47] Elisabeth Long, *Vent Diagrams as Healing Practice*, *in* BEYOND SURVIVAL Chapter 20 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020).
[48] Leah Lakshmi Piepzna-Samarasinha, *Cripping TJ*, *in* BEYOND SURVIVAL Chapter 22 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020)
[49] *See, e.g.*, Kai Cheng Thom, *What To Do When You've Been Abusive*, *in* BEYOND SURVIVAL 30, 31 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020).
[50] Shira Hassan & Leah Lakshmi Piepzna-Samarasinha, *Every Mistake I've Ever Made*, *in* BEYOND SURVIVAL 117, 120 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha eds., 2020) ("Someone asked

Compared to the transformative justice approach advanced by prison abolitionists, the positive peace approach advanced by absolute pacifists is underdeveloped in two key respects.

First, positive peace is much less concrete about achieving its goals than transformative justice is. Absolute pacifists argue that their vision for positive peace will indirectly reduce the number of prisoners by reducing the instances of war. But their six elements provide little guidance to, for example, colonized nations fighting for independence. In contrast, transformative justice is inherently a practical framework intended to be actively practiced, such as by Black women opposing gender-based violence without invoking the carceral system.

Second, positive peace encounters a collective action problem before it can challenge carceralism. When incarcerating someone during an armed conflict between political communities, the incarcerated person is not being held accountable to make any victim whole.[51] Therefore, even if an individual absolute pacifist refuses to support war efforts, for example, their decision would have, at best, an extremely attenuated influence on whether individuals are incarcerated during that war. In contrast, when an absolute abolitionist victim of interpersonal harm chooses to pursue transformative justice rather than carceral options, they directly prevent an individual from being incarcerated. The root of this difference between the military and criminal context is that war is definitionally about conflict *between* more than one political community[52] rather than about interpersonal conflict *within* one community. By operating at the

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me recently about scaling this work, and I don't want it scaled. And I think that's another politic critique, is that transformative justice [TJ] can't be scaled. We know that TJ can't be scaled because we know what scaling looks like. It looks like [restorative justice], we've got that.").

[51] Infra Part III.

[52] Even civil wars can be seen as conflicts between politically distinct communities within the same nation state.

political community level rather than the individual level, absolute pacifists encounter a yet-unresolved collective action problem.

Unlike absolute pacificists, non-absolute ("contingent") pacifists cannot bring themselves to embrace the absolute premise that "even military action aimed at protecting people against acute and systematic human-rights violations cannot be justified."[53] For example, both Albert Einstein and Bertrand Russell identified as pacifists despite supporting the war against Nazi Germany.[54] Similarly, William Lloyd Garrison "compromised his pacifist beliefs to support the cause of emancipating the slaves" during the American Civil War.[55] Contingent pacifists mirror contingent abolitionists who are willing to concede that prison may be justified for the "dangerous few" individuals who irredeemably "exhibit persistent patterns of behavior defined as dangerous."[56] But by conceding that some military actions are justified, such as military actions to protect people against acute and systematic human-rights violations, contingent pacifists must grapple with the dilemma of military incarceration during those military actions.

Therefore, neither absolute nor contingent pacifists have fully developed a response to the dilemma of deprivations of liberty during armed conflict. Absolute pacifists need to theorize further about the extent to which their ideology actually challenges carceralism. And contingent

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[53] Andrew Fiala, *Pacifism, in* Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2021), https://plato.stanford.edu/entries/pacifism/ (quoting MICHAEL ALLEN FOX, UNDERSTANDING PEACE: A COMPREHENSIVE INTRODUCTION 126 (2014))
[54] *Id.*
[55] *Id.*
[56] *See* Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and its Skeptics*, 135 HARV. L. REV. 2013, 2019–23 (describing abolitionists who agree with the sentiment that "yes, of course we will still need to incapacitate 'the dangerous few,' albeit in a more humane setting that affirms the basic dignity of those restrained.").

pacifists need to theorize further about what to do with the individuals who will be incarcerated during the wars the that they concede are justified.[57]

III. Ostensible justifications: can war be waged without deprivations of liberty?

Some readers may acknowledge that certain wars must be waged,[58] but challenge the necessity of incarcerating enemies during the war.[59] These readers may wonder, for example, why enemies are not merely repatriated to their home country immediately upon capture. Proponents of the current framework for deprivations of liberty in armed conflict, however, argue that the status quo serves three important goals.

First, militaries must neutralize enemies to win wars.[60] If enemies were merely returned to their home country upon capture, they would likely rejoin the war effort, which would make progress in the war effort futile.[61] One of the ways militaries neutralize enemy soldiers is by

[57] For my part, even though I am sympathetic to some version of contingent pacifism, I am skeptical that war itself can be consistently avoided. And so, in my opinion, the seemingly irresolvable tension between the impermissibility of incarceration and the inevitability of war animates the dilemma of deprivations of liberty in armed conflict.
[58] *See, e.g.*, RUSSEL BUCHANAN & NICHOLAS TSAGOURIAS, REGULATING THE USE OF FORCE IN INTERNATIONAL LAW 15 (2021) ("Notwithstanding the prohibition implemented by Article 2(4), the UN Charter recognises two instances in which force can be lawfully used: self-defence and enforcement action.").
[59] James Crawford & Rowan Nicholson, *The Continued Relevance of Established Rules and Institutions Relating to the Use of Force*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 96, 97 (Marc Weller ed. 2015) ("It may be that war can never be entirely eliminated. But we do have some means of 'refining' or even averting it, and one of them is the international law on the use of force (*jus ad bellum*) as it has developed since 1945.").
[60] *See* DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 171 (2021) ("The fundamental idea underlying all humanitarian rules on methods and means of warfare has since that time always been the concept of *military necessity.*").
[61] *See id.* at 404 ("It is in the interest of the detaining power to prevent enemy combatants from taking part in further military operations.").

killing them. If an enemy soldier is incapacitated without having been killed, though, they become entitled to prisoner of war status,[62] which protects them from being killed.[63]

The duration of incapacitation in the military context is notably distinct from the duration of incapacitation in the criminal context. The duration of incarceration in the military context is indefinite but tied to the goal of incapacitation, whereas the duration of incarceration in the criminal context is definite but not tied to the goal of incapacitation. Prisoners of war may be held for the duration of hostilities, at which point they must be repatriated.[64] In terms of incapacitation, this makes sense: after the hostilities have ended, there is no reason for the enemy soldier to pose any threat to the detaining military. But how long hostilities will last is inherently uncertain. And worse yet, modern warfare has blurred the line between war and peace[65] such that

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[62] *Id.* at 416 ("As the prisoner-of-war status begins at the moment of their capture, it has to be clarified when and by which act a person 'falls into the hands' of the adversary. The definition of *hors de combat* in Article 41, para. 2, AP I presumes that the detaining power has established its power over the person. On the battlefield this usually means that soldiers either surrender to the enemy or fall under the enemy's power after becoming unable to fight through injury.").

[63] *Id.* at 410 ("*Obligation to protect*. Humane treatment requires not only that the detaining power desist from inhumane acts, but also—as expressly emphasized in Article 13, para. 2—that the detaining power prevent such acts by any other party. In particular, prisoners of war shall be protected against violence and intimidation, insults, and public curiosity (*see* Section 713).") (emphasis in original).

[64] *See* GEOFFREY S. CORN, THE LAW IN WAR: A CONCISE OVERVIEW 122 (2018) ("One of the most important rights accorded to all detainees is the right of repatriation once the necessity for detention terminates. As noted above, for POWs this necessity is presumed to continue for the duration of hostilities. Accordingly, POWs must be repatriated promptly upon the termination of hostilities, and failure to do so may constitute a war crime."). Skeptical readers, however, may be worried that the eroding boundary between wartime and peacetime means that prisoners of war can be held indefinitely because the "hostilities" will never end. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 744 (2004). ("The changing nature of conflict and threat-in particular the rise of global terrorism-has eroded the customary boundaries that separate war and peace, civilians and combatants, lawful and unlawful belligerents, national security issues and domestic issues.").

[65] [65] Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 744 (2004). ("The changing nature of conflict and threat-in particular the rise of global terrorism-has eroded the customary boundaries that separate war and peace, civilians and combatants, lawful and unlawful belligerents, national security issues and domestic issues.").

detainees often have no end for their incarceration in sight. In contrast, prisoners in the criminal context have a definite end date for their detention. But while incarcerated they are provided few resources for rehabilitation and often leave prison in worse criminogenic circumstances than when they entered.[66] The fact that sentences are often for no more than a handful of years with no relation to the probability of reoffending undercuts the argument that prisoners in the criminal context are being incapacitated in any meaningful way.

If the reader accepts incapacitation as a justification in the military context but rejects it in the criminal context, they will have to accept intuitively unappealing results. Very sympathetic individuals—like child soldiers involuntarily conscripted into an army—remain indefinitely detainable, while comparatively unsympathetic individuals—like the bogeyman axe murderers conjured by tough-on-crime politicians[67]—cannot be effectively incapacitated without imposing life sentences or capital punishment.

Second, militaries adhere to the prisoners of war framework because they want reciprocity for when their own soldiers are captured by the enemy.[68] In the military context, therefore, being taken prisoner, and earning the concomitant prisoner-of-war protections, seems preferable to the potential deadly alternative provided by the positive law.

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[66] Liz Benecchi, Recidivism Imprisons American Progress, HARV. POL. REV. (Aug. 8, 2021) ("The [United States'] high recidivism rate alone demonstrates that our prisons are as ineffective as they are inefficient, a sobering reality which calls for a reimagined criminal justice system.").
[67] *See, e.g.*, Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and its Skeptics*, 135 HARV. L. REV. 2013, 2017 ("But you don't really mean you intend to set loose the axe murderers and serial rapists? That's a terrible idea.").
[68] *See* DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 704 (2021) ("Soldiers must treat their opponents in the same manner that they themselves wish to be treated."); *id.* at 445 ("Under international law the obligation to release is not dependent on corresponding conduct of the enemy. Practice has shown, however, that states do base their conduct on such reciprocity.").

Risk averse readers, therefore, may be hesitant to advocate too strongly against the prisoner of war framework in fear that a disruption in the status quo will erode existing *jus in belo* safeguards.[69] After all, the positive law provides that enemy soldiers are killable up until the moment they become prisoners. In contrast, in the U.S. criminal law context, individuals at risk of criminal incarceration enjoy well-established positive-law constitutional protections from being deprived of life or liberty without at least due process.[70] Therefore, the alternative to incarceration for prisoners of war seems to be death whereas the alternative to incarceration for domestic prisoners seems to be liberty.

Third, militaries detain their enemies for two strategic reasons: interrogation and leverage.[71] When interrogated,[72] prisoners are technically entitled to provide no more information than their first and last name, rank, date of birth, and identification number.[73] In practice, however, militaries obtain more information from the prisoners they interrogate, such as future military operations planned by the enemy.[74] Similarly, individuals suspected to have

[69] Satisfying their current *jus in belo* prisoner of war obligations is tedious for militaries. Therefore, if prisonethey would be incentivized to adopt fewer

[70] U.S. CONST. amend. XIV ("No state shall … deprive any person of life [or] liberty … without due process of law.").

[71] DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 396 (2021) ("[P]risoners are of military value to the adversary. They can be used as sources of information or to influence their comrades who are still fighting.").

[72] *Id.* at 396 ("[Prisoners] can be used as sources of information.").

[73] Geneva Convention Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information… No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.").

[74] Gregory P. Noone, Christian P., et. al., *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 NAVAL L. REV. 1 (2004) ("Effective interrogation can potentially reveal information about the troop strength of the detainee's unit as well as future military operations planned by enemy Iraqi

information about crimes in the U.S. are nominally entitled to the constitutional right to remain silent.[75] However, domestic police forces are similarly capable of skirting these rights.[76] The disconnect in both the military and criminal context between how interrogation is imagined by the law and how interrogation is executed in practice will concern certain readers.

Prisoners of war are also used as leverage against their comrades who are still fighting.[77] Just as militaries use prisoners as leverage against their comrades, domestic criminal prosecutors coerce individuals to testify against their co-defendants by leveraging the specter of incarceration.[78] However, in the criminal context, "snitches, especially jailhouse snitches, are notoriously unreliable."[79] Therefore, skeptical readers may have similar doubts about the practical value of intelligence gathered against the backdrop of incarceration in the military context.

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forces. In the case of a detainee suspected of terrorist activities, interrogation might reveal information of future planned attacks against U.S. interests, citizens, or military personnel.").

[75] U.S. CONST. amend. V; Miranda v. Arizona, 384 U.S. 436, 467–68 (1966) ("At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent.").

[76] Illinois v. Perkins, 496 U.S. 292 (1990) (permitting undercover police agents to interrogate a suspect held in jail without providing the warnings required by *Miranda*).

[77] DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 396 (2021) ("[Prisoners] can be used … to influence their comrades who are still fighting.").

[78] Andrew E. Taslitz, *Prosecuting the Informant Culture*, 109 MICH. L. REV. 1077, 1077 (2011) ("Informants snitch in exchange for benefits from the state. These benefits include … immunity from prosecution [and] sentence reductions.").

[79] *Id.* (citing PAUL GIANNELLI & MYRNA RAEDER, AM. BAR ASS'N, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 63–78 (2006)).

At this point in the paper, military incarceration may seem more justified than criminal incarceration.[80] But the analysis is not yet over. As we will see in the next section, theoretical justifications for military incarceration do not tell the full story about realistic military practices.

IV. Realistic motivations: will unsavory motivations leak into military incarceration decisions?

Militaries claim to only take prisoners of war for the purposes of incapacitation, reciprocity, and permissible strategic advantages.[81] And yet, some readers may challenge deprivations of liberty in armed conflict by pointing out how sharply realistic military incarceration practices diverge from the theoretical justifications advanced by militaries. Even if it is possible to justify deprivations of liberty in armed conflict in good faith, maybe the circumstances of armed conflict inherently create an environment ripe for abuse.[82]

This section will present a series of notorious examples of human rights abuses during deprivations of liberty in armed conflict and try to explain what may have motivated the abuses. This section draws on critical scholarship to argue that the worst abuses in military incarceration

[80] For my part, I struggle to see how war can be waged without imposing deprivations of liberty on the enemy. In other words, I find the theoretical justifications for incapacitation in the military context marginally more compelling than the justifications for incapacitation in the criminal context. My sympathy for military incarceration is personally surprising to me given my ideological commitments to prison abolition outlined in Part I.

[81] Supra Part III.

[82] For example, in the domestic criminal context, prison guards exploit prison contraband policies to profit from prisoners who purchase contraband smuggled into prison by prison guards. *See, e.g.*, Jolie McCullough & Keri Blakinger, Texas prisons stopped in-person visits and limited mail. Drugs got in anyway., TEX. TRIB. (March 29, 2021) ("[T]he persistent contraband problem is driven mostly by staff… Even before the pandemic, guards were regularly able to smuggle in phones — which sell for $800 to $1,500 — and drugs, sometimes hiding them in food, drinks or behind keys to fool metal detectors. Fears of coronavirus and staff shortages have made smuggling even easier."); Jorge Renaud, Who's really bringing contraband into jails? Our 2018 survey confirms it's staff, not visitors, Prison Policy Initiative (December 6, 2018).

are motivated by some combination of (1) retributive impulses, (2) racial hierarchy, (3) sexualized violence, and (4) economic incentives.

Perhaps notoriously inhumane abuses are not particularly persuasive for changing the status quo because all those abuses are *already* impermissible under the existing legal regime.[83] James Crawford and Rowan Nicholson, for example, argue that examples of breaches of international law—what we can call "bad apples" for our purposes[84]—are overexaggerated compared to lawful conduct.[85] Many deprivations of liberty in armed conflict are mundane and permissible.[86] At most, the existing legal regime suffers from an underenforcement problem that can be reformed, but is not fundamentally flawed. Crawford and Nicholson are responding to a realist critique that international law—and law in general—only matters insofar as it is actually enforced.[87] The realist perspective finds the bad apples to be representative of the general rule

[83] For arguments that even lawful practices under the current legal regime are impermissible, see supra Part I.
[84] Editorial, Abu Ghraib, 10 Years Later, N.Y. TIMES (April 22, 2014) ("President Bush was quick to portray the Abu Ghraib horror show as the work of a few bad apples.").
[85] James Crawford & Rowan Nicholson, *The Continued Relevance of Established Rules and Institutions Relating to the Use of Force*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW (Marc Weller ed. 2015) ("It is certainly possible to identify specific breaches of the rules on the use of force, but in itself that proves little.").
[86] *See, e.g.*, Hassan v. United Kingdom, E.C.H.R. 30 ("Finally, there is no evidence before the Court to suggest that Tarek Hassan was ill-treated while in detention. The interview records show that he was questioned on two occasions, shortly after having been admitted to the Camp, and found to be a civilian, of no intelligence value and not posing any threat to security. The witness statement submitted by the applicant, of Mr Al-Saadoon, who claimed to have seen Tarek Hassan in the civilian holding area in Camp Bucca in the period after he was questioned and before he was released, makes no mention of any sign of injury on Tarek Hassan or any complaint by him of ill-treatment. Moreover, apart from the applicant's witness statement, there is no evidence before the Court as to the cause of Tarek Hassan's death or the presence of marks of ill-treatment on his body, since the death certificate contains no information on either point. Assuming the applicant's description of his brother's body to be accurate, the lapse of four months between Tarek Hassan's release and his death does not support the view that his injuries were caused during his time in detention.").
[87] Michael J. Glennon, How International Rules Die, 93 GEO L.J. 939 (2005) ("[I]f you want to know what the law is… look at it from the perspective of the person contemplating violation." (citing Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897))).

rather than particularly exceptional. The same debate plays out in the context of domestic criminal law: are harrowing stories of prison guard, prosecutor, and police misconduct merely bad apples to be reformed[88] or indicative of systemic issues that demand systemic changes[89]?

Without retrodding this familiar path of debate between reformers and revolutionaries, this paper merely presents demonstrative examples of unsavory motivations playing a role in detention. The reader is left to decide for themselves whether they consider these instances of impermissible military incarceration to be exceptional or characteristic. If the abuses are exceptional, then the current framework of international law merely needs to be properly enforced. If the abuses are characteristic, however, the entire framework of deprivations of liberty in armed conflict is called into question. At that point, the reader must further query whether the abuses are characteristic of *deprivations of liberty* during armed conflict, or characteristic of *armed conflict* itself.[90]

A. U.S. torture at Abu Ghraib.[91]

[88] Todd J. Gillman & Gromer Jeffers Jr., At Dallas talk on police and race, Trump shrugs off 'bad apples' and again vows to 'dominate the streets', DALLAS MORNING NEWS (June 11, 2020) (quoting a public speech by Donald Trump in which he says "You always have a bad apple. No matter where you go you have bad apples, and there are not too many of them... in the police department.").
[89] ANGELA Y. DAVIS, ARE PRISONS OBSOLETE 20 (2003) ("As important as some reforms may be—the elimination of sexual abuse and medical neglect in women's prison, for example—frameworks that rely exclusively on reforms help to produce the stultifying idea that nothing lies beyond the prison. Debates about strategies of decarceration, which should be the focal point of our conversations on the prison crisis, tend to be marginalized when reform takes the center stage.").
[90] For arguments regarding the permissibility of war itself, see supra Part II.
[91] Without loss of generality, many of the circumstances described in this subsection are equally applicable to the abuse inflicted by the United States military on detainees at Guantanamo Bay.

As an understatement,[92] there is "extremely graphic photographic evidence" from 2004 that "American soldiers brutalized Iraqis" under the guise of military detention at Abu Ghraib.[93] The torture[94] the victims at Abu Ghraib experienced cannot be explained by any of the ostensible justifications for deprivations of liberty in armed conflict described above. The torture victims were not detained for incapacitative purposes.[95] They were not tortured in hopes that American soldiers would treated in a reciprocal manner when captured. And they were not tortured for strategic purposes.[96] The existing positive law framework obviously condemns torture. And yet, torture happened. Why?

First, the torture was retributive.[97] Retribution is not a conventional justification for deprivations of liberty in armed conflict, and prisoners of war are in fact explicitly protected from reprisals.[98] That protection might be news, however, to U.S. Senators James Inhofe of Oklahoma and Senator Zell Miller of Georgia, who justified the torture at Abu Ghraib by

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[92] I hesitate to recount in pornographic detail the full extent of the gratuitous violence experienced by the victims of Abu Ghraib. The depravity of the acts cannot be fully captured in a few words.
[93] Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER (May 10, 2004), https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib.
[94] Arshin Adib-Moghaddam, *Abu Ghraib and Insaniyat*, 4 INT'L STUD. J. 151, 155–56 (2007). (noting how reports by General Taguba, the International Committee of the Red Cross, James Schlesinger, and Fay-Jones attempt to rhetorically reframe "torture" into mere "abuse").
[95] Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER (May 10, 2004), https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib ("[M]ore than sixty per cent of the civilian inmates at Abu Ghraib were deemed not to be a threat to society, which should have enabled them to be released.").
[96] *Id.* ("The mistreatment at Abu Ghraib may have done little to further American intelligence, however. Willie J. Rowell, who served for thirty-six years as a C.I.D. agent, told me that the use of force or humiliation with prisoners is invariably counterproductive.").
[97] Sherene H. Razack, *How Is White Supremacy Embodied - Sexualized Racial Violence at Abu Ghraib*, 17 CAN. J. WOMEN & L. 341 (2005) ("[T]he torture was 'eye-for-eye retribution in fighting terrorism,' something dictated by Donald Rumsfeld, Dick Cheney, and George Bush-payback perhaps for 9/11." (quoting Seymour Hersh, Chain of Command: The Road from 9/11 to Abu Ghraib 46 (2004)).
[98] Geneva Convention Relative to the Treatment of Prisoners of War art. 13, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Measures of reprisal against prisoners of war are prohibited.").

alleging that the torture victims deserved it.[99] Senator Inhofe asserted that Abu Ghraib detainees were "not there for traffic violations ... they're murderers, they're terrorists, they're insurgents."[100] Senator Miller asked "[w]hy is it that there's more indignation over a photo of a prisoner with underwear on his head than over the video of a young American with no head at all?"[101]

Blurred lines between retributive and incapacitative justifications for brutal prison conditions are familiar to American abolitionists. For example, supermax facilities and control units in American prisons putatively address disciplinary problems within the penal system.[102] Supermax facilities do incapacitate the prisoners they house insofar as the prisoners are isolated to their solitary-confinement cell for 23 hours each day. But solitary confinement today is also considered "the worst form of punishment imaginable."[103] Therefore, "[t]he prevailing justification for the supermax is that the horrors it creates are the perfect complement for the horrifying personalities deemed the worst of the worst by the prison system."[104]

Second, the torture was racialized.[105] Third, the torture was sexualized.[106] The racial and sexual nature of the torture cannot be disentangled. The mainstream "clash of civilizations"

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[99] John T. Parry, *Just for Fun: Understanding Torture and Understanding Abu Ghraib*, 1 J. NAT'L SEC. L. & POL'Y 253, 256 n.7 (2005).
[100] Charles Babington, Senator Critical of Focus on Prisoner Abuse, WASH. POST, May 12, 2004, at A18.
[101] Fred Hiatt, Why Hawks Should Be Angry, WASH. POST, May 31, 2004, at A23.
[102] ANGELA Y. DAVIS, ARE PRISONS OBSOLETE 49 (2003).
[103] *Id.* at 47–48.
[104] *Id.* at 50.
[105] Arshin Adib-Moghaddam, *Abu Ghraib and Insaniyat*, 4 INT'L STUD. J. 151, 151–52 (2007) ("I am arguing that Abu Ghraib could not have happened without a particular racist current in the US, that the individuals who committed the atrocities against the detainees were not isolated, that they were part of a larger constellation with its own signifying ideational attitudes towards Muslims and Arabs.").
[106] *See, e.g.*, Aziza Ahmed, *When Men Are Harmed: Feminism, Queer Theory, and Torture at Abu Ghraib*, 11 UCLA J. ISLAMIC & NEAR E. L. 1 (2011–12) (demonstrating how queer theory can address the limitations of dominance- and cultural-feminist analyses of women soldiers' participation in the sexual violence against men at Abu Ghraib).

theory explained the relationship between race and sex in the torture as follows: the torture was sexual and photographed *because* of the racial dynamics between the Western and Islamic world.[107] On this view, photographic evidence of sexual torture had a military function as a "shame multiplier" for the victims because it could be revealed to their "sexually repressed, homophobic, and misogynist" Arab community.[108]

Sherene H. Razack convincingly challenges the "Orientalist underpinnings" of this clash of civilizations theory, which frames the Islamic world as barbaric while enabling the West to remain on the moral high ground.[109] Instead of the clash of civilizations theory, Razack persuasively ties the ritualized violence at Abu Ghraib to a different American history of racialized and sexualized[110] violence: lynching African American men. She argues that the huge volume of photographs of racialized sexual violence at Abu Ghraib are trophies for white American men and women.[111] The intended audience for the photographs, contrary to the clash

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[107] Sherene H. Razack, *How Is White Supremacy Embodied - Sexualized Racial Violence at Abu Ghraib*, 17 CAN. J. WOMEN & L. 341, 347 (2005); John T. Parry, *Just for Fun: Understanding Torture and Understanding Abu Ghraib*, 1 J. NAT'L SEC. L. & POL'Y 253, 254 (2005) ("Reports that women soldiers mistreated male Muslim prisoners or that soldiers put women's underwear on the heads of such prisoners have been accompanied by claims that these practices are particularly distressing to Muslim men.").
[108] Sherene H. Razack, *How Is White Supremacy Embodied - Sexualized Racial Violence at Abu Ghraib*, 17 CAN. J. WOMEN & L. 341, 347–48 (2005).
[109] *Id.*
[110] Lynchings were obviously racial, but were also sexual. The most frequent justifications provided for lynchings were allegations that the Black male lynching victim had raped a white woman. Furthermore, "[w]hite men involved in the lynchings and burnings spent an inordinate amount of time examining the genitals of the black men whom they were about to kill. Even as they castrated the black men, there was a suggestion of fondling, of envious caress." *Id.* at 352 (quoting Trudier Harris, Exorcising Blackness: Historicaland Literary Lynching and Burning Rituals 23 (1984)) (internal quotations removed).
[111] *Id.* at 351 ("[T]he killers had to murder Blacks in the most excessive and public way... Afterward, instead of shame and guilt, the perpetrators expressed pride in their actions, taking trophies, fragments of the corpse, selling body parts as souvenirs, and proudly displaying the photographs they had taken in local shop windows." (quoting Andrew Austin, *Review Essay: Explanation and Responsibility: Agency and Motive in Lynching and Genocide*, 35 J. OF BLACK STUDIES 719, 726 (2004)).

of civilization view, was not the victim's community, but rather the perpetrator's community.[112] "Sexualized racial violence does double duty: it provides the sense of power, control, and mastery, and, at the same time, it offers an intimacy to what it is forbidden to desire or to see as human."[113]

Fourth, the torture was profitable. The torture at Abu Ghraib was a team effort between both members of the U.S. military and private contractors working for Titan Corporation and CACI International Inc.[114] The following chart shows the great extent to which private contractors were involved in the torture at Abu Ghraib.

	Military	Private contractors
Directly responsible[115]	23	4
Failed to report[116]	8	2
Number of incidents[117]	44	16
Criminal charges[118]	10	0

[112] *Id.* at 351 ("As I am suggesting for Abu Ghraib, lynching photos were not intended for Blacks but for Whites, a tangible and lasting reminder of an important occasion.").
[113] *Id.* at 352.
[114] Mark W. Bina, *Private Military Contractor Liability and Accountability after Abu Ghraib*, 38 J. MARSHALL L. REV. 1237, 1245–46 (2005) ("Army investigators concluded that the parties responsible for [the torture] were U.S. soldiers, military police, military intelligence personnel, and private contractors that Titan and CACI employed."); *see also* Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549 (2005).
[115] *Id.* at 1247 (2005) ("In total, their investigation found that twenty-three military intelligence personnel and four private contractors were directly responsible for the torture and abuse at Abu Ghraib prison." (citing U.S. Department of Defense, Accompanying Slides to Special Defense Department Briefing on Results of Investigation of Military Intelligence Activities at Abu Ghraib Prison Facility, (2005))).
[116] *Id.* ("[E]ight military intelligence personnel and two private contractors were identified as witnessing, yet failing to report, the abuses." (citing U.S. Department of Defense, Accompanying Slides to Special Defense Department Briefing on Results of Investigation of Military Intelligence Activities at Abu Ghraib Prison Facility, (2005))).
[117] *Id.* at 1247 ("In all, there were forty-four confirmed incidents of abuse at Abu Ghraib prison. Army investigators allege employees of Titan and CACI were involved in no fewer than sixteen of the incidents." (citing P.W. Singer, The Contract the Military Needs to Break, WASH. POST, Sept. 12, 2004, at B3)).
[118] *Id.* at 1248 ("Thus far, the U.S. soldiers implicated in the Abu Ghraib scandal have faced a variety of criminal punishments. Yet, unlike their military co-workers, the employees of Titan and CACI have not yet been charged with any crimes.").

Although private companies like CACI and Titan did profit from placing employees who participated in torture at Abu Ghraib, the corporate financial incentives were not necessarily aligned with their employees participating in cruelty per se.[119] In fact, the cruelty of Abu Ghraib was likely contrary to the corporations' financial interests because they faced the risk of civil liability.[120] In contrast, in the domestic criminal context, there are direct financial incentives for municipal police departments to expand the scope of the carceral state because the police departments can use fee and fine farming to generate revenue.[121]

B. Internment of Japanese Americans during WWII.

During World War II, the United States interned approximately one hundred thousand Japanese Americans.[122] The executive branch played their role by issuing Executive Order

[119] *Id.* at 1244–45 (2005) ("The Army hired employees of CACI International Inc. ("CACI") to interrogate prisoners and analyze military intelligence, and hired employees of Titan Corp. ("Titan") to provide translation services for all segments of Operation Iraqi Freedom.").
[120] *Id.* at 1248 ("[B]oth Titan and CACI are facing civil lawsuits for their alleged roles in the Abu Ghraib scandal.").
[121] JACKIE WANG, CARCERAL CAPITALISM 36 (2018) ("I will focus [in this chapter] specifically on how municipal police departments, and the Ferguson Police Department in particular, use fee and fine farming to generate revenue.").
[122] Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 940 (2004) ("By June 1942, just six months into the war, 97,000 Japanese Americans had been rounded up, most of them held in assembly centers… By November, over 100,000 persons were forced from assembly centers into relocation camps.").

9066,[123] the military played their part by executing the internment,[124] the legislative branch played their role by criminalizing violations of the military orders,[125] and the judicial branch played their role by rubber-stamping the internment.[126]

As far as deprivations of liberty in armed conflict go, the internment of Japanese Americans during WWII was relatively by-the-book. America's involvement in the hostilities seemed sufficiently justified based on self-defense given the recent unilateral initiation of hostilities by Japan at Pearl Harbor. The military asserted—and the Supreme Court accepted—justification for internment on the basis of "military necessity."[127] The Supreme Court disclaimed any underlying racial prejudice: "[t]o cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the

[123] Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) ("I hereby authorize and direct the Secretary of War, and the Military Commanders who he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.").
[124] Jerry Kang, Watching the Watchers: Enemy Combatants in the Internment's Shadow, 68 LAW & CONTEMP. PROBS. 255, 257 (2005) ("Pursuant to this order, General John L. DeWitt issued a curfew in March 1942 that applied to all enemy aliens as well as to Japanese American citizens (called 'non-aliens'). 1 Later, the military issued a series of over 100 exclusion orders, which funneled Japanese Americans, neighborhood by neighborhood, first into temporary assembly centers, then to what were euphemistically called 'relocation' camps.").
[125] *See* Act of Mar. 21, 1942, Military Areas or Zones, Restrictions Pub. L. No. 77-503, 56 Stat. 173 (1942) (criminalizing disobedience of regulations of movement and actions in military areas).
[126] Jerry Kang, Watching the Watchers: Enemy Combatants in the Internment's Shadow, 68 LAW & CONTEMP. PROBS. 255, 256–57 (2005) ("The wartime Supreme Court decided four cases on the Japanese American internment-Hirabayashi Yasui, Korematsu, and Endo. In these cases, the Court deployed an arsenal of procedural, interpretive, and avoidance techniques to… [l]et the military do what it will, keep its own hands clean, and forge plausible deniability for others.").
[127] Eugene Gressman, Korematsu: A Melange of Military Imperatives, 68 LAW & CONTEMP. PROBS. 15, 16 n.6 (2005) ("None of the three dissents [in *Korematsu*] questioned Justice Black's use of 'military imperative[s]' to describe wartime military orders, actions, or inactions.").

issue."[128] The conditions of confinement for Japanese Americans were not exceptionally brutal.[129] And contemporary criticism of the internment was limited.[130]

Nevertheless, in retrospect, Japanese American internment has been roundly denounced as impermissible.[131] First, the internment of Japanese Americans was racialized. Even though the United States was also at war with Germany and Italy, the "curfew was made applicable to citizens residing in the area only if they were of Japanese ancestry."[132] General DeWitt, who issued the internment order, testified before Congress that German and Italians were only cause for concern "in certain cases," whereas "we must worry about the Japanese all the time until he is wiped off the map."[133] Restricting internment to only one nationality reflects "that the rules of

[128] Korematsu v. United States, 323 U.S. 214, 223 (1944), *abrogated by* Trump v. Hawaii, 201 L. Ed. 2d 775, 138 S. Ct. 2392 (2018)").
[129] *See* Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 941 (2004) (contrasting Japanese American "relocation centers" with "Nazi death camps").
[130] Roger Daniels, *The Japanese American Cases, 1942–2004: A Social History*, 68 LAW & CONTEMP. PROBS. 159, 162 ("It is notorious that virtually no protest was heard against the mass violation of the civil liberties of Japanese Americans during the war, either from the ethnic community before it was sent to camp or from the larger public then and later."). *But see* Eugene V. Rostow, *Our Worst Wartime Mistake*, 191 Harper's Magazine 1144 (1945) ("The evidence supports one conclusion only: the dominant element in the development of our relocation policy was race prejudice, not a military estimate of a military problem.").
[131] Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"); *id.* at 2448 (Sotomayor, J., dissenting) ("Today, the Court takes the important step of finally overruling Korematsu, denouncing it as 'gravely wrong the day it was decided.' This formal repudiation of a shameful precedent is laudable and long overdue.") (internal citations omitted); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 933 (2004) ("In the early 1980s, Fred Korematsu, Minoru Yasui, and Gordon Hirabayashi marched back into the federal courts that convicted them during World War II for defying the internment of persons of Japanese descent… Remarkably, this litigation [to overturn their convictions] was successful and fueled the extraordinary redress movement, which culminated in federal reparations for surviving internees.").
[132] Hirabayashi v. United States, 320 U.S. 81, 95 (1943) (justifying the applicability of a curfew to exclusively people of Japanese ancestry).
[133] Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 957 n.132 (2004) (citing COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 65–66 (1982)).

racial mapping forced the Japanese in America into a racial category: *Oriental*."[134] Because "orientals" are "forever foreign," the Court was enabled to implicitly discount their interests.[135]

Second, and relatedly, the internment of Japanese Americans was economically motivated. The initial public reaction to Pearl Harbor had actually been relatively restrained[136] rather than racially charged. But within the first several months of the war, public opinion and policy shifted towards prejudice and internment.[137] James McDonald argues persuasively that this about-face was driven by a West Coast coalition of anti-Japanese groups. The coalition was certainly motivated by racial animus, but also importantly motivated by economic self-interest in the agricultural industry.[138] These two motivations cannot be neatly disentangled: "[a] number of growers frankly admitted they preferred white competition."[139] The coalition's anti-Japanese sentiment had been brewing at least since 1890 as an outgrowth of an even older anti-Chinese sentiment in the American west.[140] In 1913, California passed an Alien Land Law which was intended "to prevent ruinous competition by the Oriental farmer against the American farmer."[141]

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[134] *Id.* at 956 (emphasis in original).
[135] *Id.* at 957–58.
[136] James McDonald, *Democratic Failure and Emergencies: Myth or Reality*, 93 VA. L. REV. 1785, 1807 ("[T]he initial public reaction on the West Coast, the region seemingly most susceptible to fall prey to 'Pearl Harbor Panic,' was one of tolerance and understanding… The initial national political reaction was similar.").
[137] *Id.* at 1806 ("Within the first several months of the war… public opinion and official policy in the United States changed from one marked by restraint to one of prejudice and internment.").
[138] *Id.* at 1810–12 (describing the anti-Japanese positions staked out by the Western Growers Protective Association, the Grower-Shipper Vegetable Association, the California Farm Bureau Federation, and the Los Angeles Chamber of Commerce).
[139] *Id.* at 1811.
[140] *Id.* at 1801 ("The prejudice against the Japanese was even more intense than against the Chinese because the nativists viewed the Japanese as more threatening. Although the Chinese were subjected to discrimination and attempts at exclusion between 1850 and 1880, at no time was China-almost inconsequential as an international power-viewed as a legitimate threat to the United States. By the end of the century, by contrast, Japan appeared to the nativists to be a potential predator.").
[141] *Id.* at 1803.

The anti-Japanese coalition wanted more than just local legislation in California, but would need more national support for that.[142] Their opportunity arrived with the war initiated at Pearl Harbor. The coalition packaged its "anti-Japanese message in a way that would have broad public appeal, exploiting wartime fears by advocating its prejudicial policies in a militaristic tone."[143]

The coalition's propaganda, lobbying, and general plan of terror and prejudice to rid the region entirely of the Japanese ultimately succeeded through the military's internment orders.[144] After that, the California Farm Bureau Federation said, candidly, "California vegetable growers have no intention of inviting the banished Japanese back after the war to compete with them."[145]

Based on these examples—from Japanese internment to Abu Ghraib—is it possible to disentangle good and bad reasons to deprive individuals of liberty during armed conflicts? Even if there are compelling theoretical justifications that can be held in good faith, can the opportunities for deprivations of liberty be exploited by bad actors with impermissible motivations? [146]

V. Conclusion

There is a gap in the criminal law and international law scholarship about how domestic U.S. prison abolitionists should extend their views to deprivations of liberty in armed conflict. Abolition seems to permit multiple perspectives on the dilemma. Rather than endorsing one

[142] *Id.* at 1803–04 ("Some anti-Japanese sentiment did exist at the national level, but that sentiment did not equate to support for the West Coast coalition's most extreme preferences.").
[143] *Id.* at 1809.
[144] *Id.* at 1806.
[145] *Id.* at 1811 (citing Morton Grodzins, Americans Betrayed: Politics and the Japanese Evacuation 59 (1949)).
[146] For my part, I believe that broader systems of oppression will unavoidably shape state deprivations of liberty, including in the context of armed conflict.

perspective, this piece provided a series of four questions for the reader to consider when analyzing deprivations of liberty in armed conflict from an abolitionist framework.