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Commodified Justice and American Penal Form

Abstract: This article seeks to analyze American penal law, ideology, and culture through the lens of Marxist theories of commodification and commodity fetishism. It first introduces the "first-order commodification of justice," that is, the positing of a quantitative equivalence between offense and punishment. Next, it introduces the "second-order commodification of justice," that is, the notion that the benefits of a particular penal regime can be reckoned alongside other social goods, mediated by the general currency of "utility." It then considers some of the consequences of this commodification for the cultural meanings of justice and punishment in American culture. It pays particular attention to how the commodification of justice interacts in a mutually reinforcing way with racism. It concludes by arguing that commodified justice can perhaps be overcome through a transition to restorative/transformative justice paradigms, effectuated by an anti-capitalist, prison-industrial-complex abolitionist political praxis.

Keywords: criminal law, Marxism, commodity fetishism, ideology, restorative and transformative justice, race and capitalism, abolition.

I. Introduction

"Commodified justice" is a mode of responding to believed wrongdoing that claims to compensate for harm through equivalent punishment in abstract, quantitative terms, and where this response itself has quantifiable value. In this article, I argue that in the United States, criminal justice has been thoroughly commodified, with many adverse consequences. To do so, I investigate the *formal* link between capitalistic commodification—the ubiquitous quantification and comparative valuation of particular entities, deemed presumptively exchangeable—and American penal rationality, particularly as it pertains to the prison sentence.

This framing is not intended to deny or displace the importance of *instrumental* understandings of the relationship between capitalism and the carceral state. Many scholars, past and present, have compellingly explained historical shifts in penal practice and politics by way of related shifts in political economy and the needs of capital (Rusche and Kirchheimer [1939] 2017; Melossi and Pavarini [1977] 1981; Gilmore 2007; Wacquant [2010] 2014). Such an approach, in which law is regarded chiefly as an instrument—conscious or not—to secure (or undo) various forms of domination, has been the typical starting point for scholars in the growing Law and Political Economy (LPE) movement. As Jedediah

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Britton-Purdy, Amy Kapczynski, and David Singh Grewal (2017, n.p.) write in their 2017 LPE manifesto: "Law" is "the mediating institution that ties together politics and economics," assuring the bidirectional influence of power in each sphere. No doubt, the penal law has this function too.[1]

Indispensable as this work is, however, it does not exhaust the question of capitalism's relationship to American punishment, which, I think, requires attention not merely to the ways the content and social uptake of the penal law reflects and reinforces capitalist relations of domination, but also to the subtler, more insidious ways its *form*—its internal logical grammar—interacts with penal ideology and culture.[2] When I speak of "commodified justice," then, I do not mean to express that "justice has a price" in the sense of class-differentiated access, though this is no doubt true. I mean, rather, to say something about the meaning and significance of justice *itself* under capitalism. Britton-Purdy, Kapczynski, and Grewal are certainly right that "law gives shape to the relations between politics and the economy at every point" (Britton-Purdy, Kapczynski, and Grewal 2017, n.p.), but this statement omits that law has a shape of its *own*—an embedded moral epistemology—which also plays a structuring role in our present.

More specifically, this article investigates connections between capitalism as an "abstract form of social domination" as Moishe Postone understands it (Postone 1993, 3), and the abstraction at the heart of the "bourgeois law" (Lucy 2009, 482). In doing so, it joins a contingent of Marxist work in legal scholarship drawing on the work of early twentieth century Soviet legal theorist Evgeny Pashukanis, which declared the centrality of equivalence and commodity exchange to the bourgeois legal form itself (Pashukanis [1924] 2003; see, for examples, Balbus 1977; Miéville 2005; Knox 2016; Bhandar 2014). However, while these Pashukanians tend to focus on private law, international law, or legal equality in general, I follow Pashukanis himself, and scholars like Dario Melossi and Massimo Pavarini, in suggesting that domestic penal law is also deeply structured by logics of commodity exchange (Melossi and Pavarini [1977] 1981, 55-56, 184-185). At the same time, I extend Pashukanis's framework, arguing that consequentialist approaches to punishment are no less suffused with the commodity form than the more retributive forms he had in mind, despite his own implicit suggestions to the contrary (Pashukanis [1924] 2003, 181-183).[3]

This article also carries the neo-Pashukanian project beyond the critique of legal doctrine and practice, where it often resides, by considering the *cultural* life of commodified justice—its role in demarcating what Stuart Hall called the "horizon of the taken-for-granted" (Hall 1988, 44) in the wider American psyche. In this sense, I am somewhat less concerned than other Marxist legal critics that the Pashukanian emphasis on equivalence may reflect the "tales some legal systems tell about themselves" more than "how the law actually operates" (Tzouvala 2021, 149). Although I do suspect that the Pashukanian framework has at least some genuine explanatory purchase on law, the self-mythology of the law is also part of my subject here, insofar as it suffuses general understandings of and expectations about justice. In attending to such discursive, socio-cognitive matters, this article

[1] Like Markus Dirk Dubber, I prefer the term "penal law" to "criminal law" because it better emphasizes the centrality of state-imposed pain (Dubber 1999, 52n7).

[2] This is not to say that all working within LPE or those intellectual traditions that have helped form and inform it focus exclusively on content. Writers from within Critical Legal Studies, for instance, have sought to elucidate ways legal forms help constitute practical consciousness (Gordon 1984, 111). I thank Liam McHugh-Russell for making this point and introducing me to the cited piece.

[3] I thank Ntina Tzouvala for introducing me to some of the authors cited in this paragraph and clarifying how I might conceptualize this article in relation to them.

participates in efforts from within critical legal theory to reinvigorate the analysis and critique of *ideology* (Marks 2000; Krever 2013; Desautels-Stein and Rasulov 2021). Here, I eschew the simple "false consciousness" notion of ideology that Marx provides in *The German Ideology* for the less mechanistic and more nuanced model that emerges through the passages in *Capital* on commodity fetishism, that is, for an understanding of ideology rooted, like the concept of law alluded to above, in *form* (Wedeen 2019, 4-8).

This approach—locating ideology in the semiotic systems and value hierarchies yielded by material social practices—is not a new one. It has been popularized by thinkers such as Slavoj Žižek and, especially, Louis Althusser, whose thought has been influential in the strand of ideology critique within legal thought that Justin Desautels-Stein and Akbar Rasulov call "legal structuralism" (Desautels-Stein and Rasulov 2021, 491-495; see also Althusser [1970] 2014, 258; Žižek 2008, 33). While this article benefits from this Althusserian approach, however, it also holds to notions of contingency and transformative agency that tend to disappear in the more totalizing moments of that thinker's *oeuvre* (Thompson 1978). Indeed, I will suggest in the concluding section that the ideological weight of commodified justice can be shed by embracing restorative and transformative justice alternatives to traditional punishment and overcoming capitalism.

Finally, I hope to complicate critical genealogies of modern punishment. In the seventeenth and eighteenth centuries, before capitalism reached the hegemonic status it now has, punishment in the West was not "commodified" in the way I describe. As Michel Foucault ([1975] 1995, 47-48) memorably narrates, punishment in this era frequently took the form of dramatic, public torture. The penal value of these brutal displays did not derive from any general abstract schema; rather, they were real-time struggles to reinscribe a previous relation of power between two particular individuals—sovereign and condemned. Foucault goes on to narrate a paradigm shift in punishment over the ensuing centuries whereby it transforms into a technical enterprise related to the constitution of the modern "soul" (ibid., 29)—a narrative that Thomas Dumm has reprised for the American experience (Dumm 1987, 9, 78, 88). Without denying the immense insight and value of such an account, this article implies a simultaneous, countervailing process. If the passage from public torture to modern penality can be glossed in terms of *individuation* (Foucault [1975] 1995, 191-194), I suggest here that it can also be glossed in terms of *abstraction* and *generality*. The "spectacle of the scaffold" was barbaric, but it also bore an essential relation to the crime, its circumstances, and the individuals involved (ibid., 44-45). But whereas the Foucauldian story points to the eventual rationalization and disciplinary management of this individuality, commodified justice, another paradigm shift for modern punishment, has seemed to beat *away* from it.

I proceed as follows. After a brief descriptive conceptual account of the commodity form in Marx, I introduce what I call the *first-order commodification of justice*, that is, the positing of an equivalence between offense and punishment, where the latter can be conceptualized as the "price" of the former. Next, I discuss what I call the *second-order commodification of justice*, that is, the notion that a particular penal regime be made commensurable with and reckoned alongside other social goods, mediated by the general currency of "utility." I then examine the consequences of this double commodification for the meaning of justice and punishment in American culture. In this section and the previous one, I pay particular attention to how this dual commodification of justice interacts in a mutually reinforcing way with racism. Finally, I conclude by arguing that the commodification of justice can perhaps be overcome through a transition to restorative and transformative justice paradigms, effectuated by an anti-capitalist, prison-industrial-complex abolitionist political praxis.

Certainly, this article cannot fully explain the particular monstrosity of the American penal state and culture, which far exceeds that of other wealthy, capitalist countries of the global North. This article also does not explain through what specific historical processes and mechanisms commodified justice has emerged and become so deeply embedded in American institutions and culture. Both explanations would require fine-grained work in historical sociology beyond both my powers and my aims at present. This article therefore offers neither a general theory nor an exhaustive account, but rather the initial outlines of a plausible critical framework. At the same time, in demonstrating the fit of this framework to the American case, I hope that this article can help us gain some qualified purchase on the hell that has been built here, and the way out.

II. What Is Commodification?

At the heart of Karl Marx's critical account of capitalism stands the commodity. Here, I briefly review this material in order to prepare the ground for the analysis that will follow. In particular, I aim to pull out an understanding of commodification as a process of converting qualitative concreteness and particularity into quantitative abstraction and commensurability.

For Marx, what is distinctive about commodities is that they possess both "use-value" and "exchange-value." "Use-value" refers to "the utility of a thing"—the qualitative tool-making capacities of iron, the taste and nutrition of corn, the aesthetic and sartorial appeal of a diamond, to take the three commodities Marx names (Marx [1867] 1978, 303). Use-value indexes the particular benefit that a particular possessor can mine from a particular object. "Exchange-value," on the other hand, "presents itself as a quantitative relation, as the proportion in which use-values of one sort are exchanged for those of another sort" (ibid., 304). It therefore expresses the *abstract, quantifiable* value of a thing, a generalized "third" term that can mediate between one commodity and another (ibid.). In this way, "the exchange of commodities is evidently an act characterized by a total abstraction from use-value" (305). This mediating third, for Marx, is "human labour in the abstract," since distinct commodities are only connected by the homogenous "labour-time socially necessary for [their] production" (305-306).

How do things become commodities? Marx writes: "To become a commodity a product must be transferred to another, whom it will serve as a use-value, by means of exchange" (308). Commodification, then, is the process through which an exchange-value is assigned to a particular use-value that precedes it, uniting both elements. This last clause is crucial. While commodification relativizes use-value and renders it secondary, it does not eliminate it; both use-value and exchange-value are constitutive of the commodity form, with the second being parasitic on the first. Commodification, therefore, should not be understood as the clean *replacement* of concrete particularity with general abstraction, so much as the perpetual *conversion* of the former into the latter. This dialectical tension is at the core of the commodity form, and, as we will see beginning in the next section, at the core of American justice as well.

III. First-Order Commodification: Offense-Punishment Equivalence

This section will examine a central premise of popular penal ideology: the notion that one can precisely "price" offenses in units of punishment. I refer to this offense-punishment equivalence as the *first-order commodification of justice*. It corresponds to the first aspect of commodified justice as defined above,

whereby believed wrongdoing is compensated for through equivalent punishment in abstract, quantitative terms.

This premise is especially crucial for retributive understandings of punishment. For Immanuel Kant, one of the canonical philosophers of retributivism, the justification of punishment turns not on any sovereign privilege or general social good, but on the natural relationship of a punishment to the wrong in question. He writes: "[W]hatever undeserved evil you cause another among the people, you do unto yourself. . . . Only the *law of retribution* (*ius talionis*) can determine the quality and quantity of punishment" (Kant [1797] 2006, 129; emphasis in the original). Without denying the particularity of a given wrong, this statement nonetheless implies that a certain measure of abstraction can be assigned thereto, such that a punishment of the proper "quality and quantity" can be divined. Offense and punishment therefore undergo a partial process of commodification as described previously; they are rendered reciprocally equivalent by means of a mediating "third"—at this stage, some regulative spectrum of rightness and wrongness. Indeed, Pashukanis observes that "the idea of the equivalent, this first truly juridical idea, itself originates in the commodity form. Felony can be seen as a particular variant of circulation, in which the exchange relation, that is the contractual relation, is determined retrospectively, after arbitrary action by one of the parties. The ratio between offence and retribution is likewise reduced to this exchange ratio" (Pashukanis [1924] 2003, 168-169).

Of course, such an insight is not only available in the Marxist tradition. Friedrich Nietzsche famously speaks of "the idea of an equivalence" between "injury" and the pain of punishment, rooted "in the contractual relationship between *creditor* and *debtor*" and pointing "back to the basic forms of purchase, sale, exchange, trade, and commerce" (Nietzsche [1887] 1998, 40; emphasis in the original). Though Nietzsche is referring to "age-old, deeply rooted" practices—certainly pre-capitalist—there is every reason to believe that capitalism, which makes commodity exchange a dominant principle of social life, should only increase the hegemony of this understanding of punishment. Indeed, for Pashukanis, capitalism allows for older practices of vengeance to be rationalized and perfected in the form of "retribution" (Pashukanis [1924] 2003, 168), just as capitalism rationalizes and perfects inchoate practices of exchange that existed before it (ibid., 118).[4]

Despite this evocation of equivalence, however, the first-order commodification of justice remains incomplete in Kant. For him, there remains a premium on "*similarity*" between offense and punishment (Kant [1797] 2006, 130); the proper relation between them remains one of *quality* as well as quantity, with the former imposing a meaningful limitation on the ambit of the latter. In other words, appropriate punishment remains partially rooted in the particularities—the "use-values"—of wrong and penal technique. Kant writes: "A punishment of money, for example, due to a verbal injury, bears no relation to the insult, for whoever has a lot of money can permit himself the insult for mere fun" (ibid., 129). That money, vehicle of abstract quantification *par excellence*, cannot ground just punishment for Kant affirms his ambivalent relationship to commodification. The equation Kant proposes between offense and punishment can then be thought of, I think, as a case of what the Marxist theorist Alfred Sohn-Rethel calls "real abstraction": the kind of abstraction that inheres in practices of exchange *themselves*, even if not in the minds of those involved in the exchange: "The

[4] Moreover, it is perhaps not coincidental that such a view about the ancient past would occur to Nietzsche, a man of nineteenth century Europe, who grew up and lived within ascending capitalism.

action alone is abstract" (Sohn-Rethel [1970] 1978, 28).[5] Likewise, in Kantian retribution, the minds of various parties remain consumed with the particulars of individual wrongs and punishments—their "use-values"—even as they engage in a species of abstract exchange—wrong *for* punishment. Retributive justice, in Kant's telling, remains without a posited system of settled values capable of fixing and generalizing "prices" in the offense-punishment exchange.

This advance in retributive theory occurs in G. W. F Hegel's *The Philosophy of Right*, a philosophico-historical exploration of the development of ethical and political rationality, culminating in a defense of the modern, liberal state. The dialectic begins with what Hegel calls the "abstract right" of the individual will, which is, constitutively, a kind of property-claiming agency: "Right is in the first place the immediate existence which freedom gives itself in an immediate way, i.e. . . . possession, which is *property*-ownership" (Hegel [1820] 2008, 56; emphasis in the original). A society of property-claiming wills is then necessarily mediated by contracts and exchange, which institute a kind of commensurability of things, the "exchange-value" that Marx talks about: "What remains identical [between things exchanged] is the *value*, in respect of which the objects of the contract are equal to one another whatever the qualitative external differences of the things exchanged. Value is their *universal* aspect" (ibid., 86; emphasis in the original). If contracts and exchange represent, at this early stage of the dialectic, a kind of germinal "right," then "wrong," one species of which is "crime" (94), is the *negation* of this right. Punishment then emerges as "the negation of the negation" (100), a means of re-assimilating violations into a wider logic of exchange. In this sense, then, Hegel's retributivism can be understood *precisely* as an effort to commodify both crime and punishment, to account for them as constitutive features of a social ontology built on property and exchange. Hegel makes this connection explicit:

> *Value*, as the inner equality of things which in their outward existence are specifically different from one another in every way, is a category which has appeared already in connection with contracts. . . . In crime, whose basic determination is the infinite aspect of the deed, the purely external specific character disappears all the more obviously, and equality remains the basic rule determining what the criminal essentially deserves. (105; emphasis in the original)

Here, we seem to arrive at the point where Kant left us. But Hegel soon moves beyond it. Punishment as the mere "negation of the negation"—imposed, at this stage of his dialectic, by individuals on other individuals—runs aground on the problem of revenge: "revenge, because it is a positive action of a particular will, becomes a new transgression . . . it falls into an infinite progression and descends from one generation to another *ad infinitum*" (106). While each punishment seeks to bring social relations back under the sign of fair and rational exchange, it fails to do so because it is *itself* arbitrary from a universal point of view. Persons will "exchange" crime and punishment on different terms, depriving this exchange of the generality required for it to assuredly settle accounts between persons and in the eyes of society as a whole. Justice therefore requires an impersonal, public protocol for the universal valuation of crime and punishment.[6]

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[5] Sohn-Rethel's notion of "real abstraction" is a topic of debate among Marxist theorists, with some, like Roberto Finelli and Moishe Postone, arguing that it is the category of labor, not exchange, which should be regarded as central (Toscano 2008, 281, 286). Some also criticize Sohn-Rethel's idea that abstraction precedes capitalism unconsciously as doing a poor job of accounting for the willful abstraction of the modern law that helped give rise to capitalism (Bhandar and Toscano 2015, 9). I remain agnostic in these debates, except to the extent that recognizing descriptive value in the phenomenon Sohn-Rethel describes commits me to his side.

[6] For a similar analysis, see Aladjem (2008, 19).

Such universalization occurs later in Hegel's dialectic with the introduction of law. Here, "right gains determinate existence" and "*quantity*" itself becomes "the principle of determination" (201, 202; emphasis in the original). The law fixes punishments in precise quantitative increments, and the universality of the crime-punishment ratio takes precedence over its appropriateness in the particular case. Hegel writes:

> Reason cannot determine . . . any principle whose application could decide, whether justice requires for an offence (i) a corporal punishment of forty lashes or thirty-nine, or (ii) a fine of five dollars . . . or four dollars and twenty-three groschen, etc., or (iii) imprisonment of a year or three hundred and sixty-four, three, etc., days, or a year and one, two, or three days. And yet injustice is done at once if there is one lash too many, or one dollar or one cent, one week in prison or one day, too many or too few.
>
> Reason itself requires us to recognize that contingency, contradiction, and semblance have a sphere and a right of their own, restricted though it be, and it is irrational to strive to resolve and rectify contradictions within that sphere. (202-203)

Law, therefore, converts the use-values of crime and punishment to *general* exchange-values. While before, a theft might have been contingently "exchanged" for, say, 40 lashes (or 39, or 5, or 100), now such a theft is *worth* 40 lashes in a much more definitive way. Moreover, that this value stands even with the admission that it bears no essential, rational relation to perfect justice in individual cases attests to the further progress of this commodification, where quantity and generality increasingly come to operate *themselves* as core criteria of justice.

Still, however, there is one more step to go before this process is complete. By speaking of *three* quantitative metrics for punishment—lashes, money, and prison-time—Hegel still preserves something of Kant. One might be able to precisely price punishments in any of these three "currencies," but they remain incommensurable with one another, and the choice of which to use remains a particular one, likely dictated by considerations of "use" (what form of punishment "fits the crime," what form do the agents in question prefer to administer, etc.). For Sohn-Rethel, following Marx, "when commodity exchange becomes multilateral and comprises a variety of commodities"—such as in a legal system with a wide variety of recognized crimes requiring punishment—"*one* of these [commodities] must serve as the means of exchange of the others" (Sohn-Rethel [1970] 1978, 58, emphasis my own). What is required is what Marx calls a "universal equivalent"—a single commodity in relation to which any particular commodity can be valued and in light of which any two commodities can be compared (Marx [1867] 1978, 324). The first-order commodification of justice in its fullest form therefore requires a universal "currency" in which to price and deliver punishment.

While Hegel does not theorize such a currency, contemporary institutions of legal punishment in the United States have more or less settled on one: the prison sentence. To be sure, there are some non-carceral sanctions for less-serious crimes, but it can hardly be doubted that incarceration has become the hegemonic "universal equivalent" for punishment in American law as well as in the public imagination. This choice is perhaps unsurprising given what we saw above about the common root of all value for Marx: socially-necessary labor-*time*. By quantifying punishment in terms of time, incarceration accords with this notion (Davis 2003, 44). Indeed, for Pashukanis, it is the widespread commodification of time that paves the way for the prison sentence: "For it to be possible for the idea to emerge that one could make recompense for an offence with a piece of abstract freedom

determined in advance, it was necessary for all concrete forms of social wealth to be reduced to the most abstract and simple form, to human labour measured in time" (Pashukanis [1924] 2003, 181). For Foucault, the relation between the "historically twin" "prison-form" and "wage-form" is at least partially the reverse, with the disciplinary techniques of "temporal sequestration" associated with the "prison-form" at least partially responsible for the very constitution of commodified labor-power as such (Foucault [1972-73] 2015, 70-71, 232). I will not seek to resolve this difference in this space, but I suspect that both accounts carry some portion of the truth, and that capitalism and the prison as historical forms have a mutual elective affinity, with each helping to produce the other.

These considerations are not merely theoretical; they help us to grasp the actual operations of the contemporary penal law. In the 1970s and 1980s, legal scholars and philosophers of law—sometimes claiming the specific mantle of Kant and Hegel (see, for instance, Murphy 1973, 221)—began to criticize the indeterminate sentencing paradigm which had been dominant in the United States since the nineteenth century for its arbitrary and uneven character (Tonry 2011, 4-5). Soon, many states began eliminating parole boards, and/or adopting more rigid sentencing standards, among them sentencing guidelines, mandatory-minimum sentences, and truth-in-sentencing laws (ibid.). While different in form, each of these innovations can be considered an example of commodification in the sense detailed above; they each sought to at least partially subsume both the particularities of individual crimes and punitive responses to them under a general rule, a schema of equivalence. Though the retributivist momentum soon ebbed (21), many of these policy innovations proved sticky, and they are commonly regarded to be among the causes of the world-historical prison boom that began in the United States in the 1980s (see, for instance, Murakawa 2014, 113-147). Even today, such practices have their defenders on quasi-Hegelian grounds. For instance, criminologist Ben Grunwald has employed statistical modeling techniques—methods that assume "that every crime has an ideal sentence"—to defend sentencing guidelines on the basis that uniformity increases fairness in a proportion that "often outweighs" the adverse effects of these guidelines in biasing individual outcomes (Grunwald 2015, 518, 501). For Grunwald as with Hegel, "contingency, contradiction, and semblance have a sphere and a right of their own" (Hegel [1820] 2008, 203).

To appreciate the scope of this commodification, one might view an exemplary artifact of this neo-retributive moment: the United States Sentencing Commission's "Sentencing Table" (see Figure 1), which features in its Sentencing Guidelines Manual. Appearing after roughly 400 pages defining and numerically valuing various federal offenses and their relevant "specific offense characteristics," various circumstantial "adjustments," and relevant aspects of a defendant's criminal history, this table gives a recommended range for the length in months of an appropriate prison sentence by relating 43 "offense levels" on one axis and six "criminal history categories" on the other. While the table does permit judicial discretion within its prescribed ranges, it still befits the Hegelian vision of law as impersonal determination,[7] in that it converts particular facts about offense and/or the person committing it into quantitative abstraction. In this way, two disparate criminal offenses, in all their particular color, can be reckoned against one another and valued in common terms. Time-in-prison is, again, the "universal equivalent" that enables this commodification.

Figure 1. United States Sentencing Commission, *Guidelines Manual 2021* (November 2021), p. 407.

[7] Indeed, Hegel himself seems to endorse a limited sphere of judicial discretion, so long as judges are "limit[ed] . . . by a maximum and minimum" (Hegel [1820] 2008, 203).

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
	4	0–6	0–6	0–6	2–8	4–10	6–12
	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
Zone B	9	4–10	6–12	8–14	12–18	18–24	21–27
	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
Zone D	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78
	20	33–41	37–46	41–51	51–63	63–78	70–87
	21	37–46	41–51	46–57	57–71	70–87	77–96
	22	41–51	46–57	51–63	63–78	77–96	84–105
	23	46–57	51–63	57–71	70–87	84–105	92–115
	24	51–63	57–71	63–78	77–96	92–115	100–125
	25	57–71	63–78	70–87	84–105	100–125	110–137
	26	63–78	70–87	78–97	92–115	110–137	120–150
	27	70–87	78–97	87–108	100–125	120–150	130–162
	28	78–97	87–108	97–121	110–137	130–162	140–175
	29	87–108	97–121	108–135	121–151	140–175	151–188
	30	97–121	108–135	121–151	135–168	151–188	168–210
	31	108–135	121–151	135–168	151–188	168–210	188–235
	32	121–151	135–168	151–188	168–210	188–235	210–262
	33	135–168	151–188	168–210	188–235	210–262	235–293
	34	151–188	168–210	188–235	210–262	235–293	262–327
	35	168–210	188–235	210–262	235–293	262–327	292–365
	36	188–235	210–262	235–293	262–327	292–365	324–405
	37	210–262	235–293	262–327	292–365	324–405	360–life
	38	235–293	262–327	292–365	324–405	360–life	360–life
	39	262–327	292–365	324–405	360–life	360–life	360–life
	40	292–365	324–405	360–life	360–life	360–life	360–life
	41	324–405	360–life	360–life	360–life	360–life	360–life
	42	360–life	360–life	360–life	360–life	360–life	360–life
	43	life	life	life	life	life	life

Since the Supreme Court's ruling in *United States v. Booker*, 543 US 220 (2005), the recommendations of the manual have only held advisory, rather than mandatory, status for judges. Because some of the adjustments in the manual depend on judicial fact-finding, not on factual material proved beyond a reasonable doubt before a jury, granting them the force of law was deemed to violate the Sixth Amendment. However, though the *Booker* ruling reduced the influence of the sentencing table, it should not be construed as a signal of waning commitment to commodified justice more broadly. Far from it: the Justices opted to make the guidelines advisory over alternative remedies for the constitutional violation because they deemed their approach best-suited to carry out Congress's inferred intent to "[maintain] a strong connection between the sentence imposed and the offender's real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve." *United States v. Booker*, 543 US 220, 246 (2005) (plurality opinion). Even after *Booker*, judges must continue to calculate the guideline ranges and reasonably explain departures therefrom. *Gall v. United States,* 552 US 38 (2007). Indeed, in practice the guidelines still exert a "gravitational pull" on judges: "Sentencing judges for the most part have treated *Booker* as a general loosening of the constraints of the previous departure standard, rather than as a basis for reviewing the policies underlying the guidelines" (Hofer 2019, 140). This ongoing commitment to equivalence between sentence and "real conduct," to uniformity among like cases of such conduct, reflects the deep influence of the first-order commodification of justice in American penal law.

IV. Second-Order Commodification: Punishment-Utility Equivalence

Pashukanis hoped that, in transcending the bourgeois legal form, the Soviet Union could succeed in "transforming punishment from retribution into a measure of expediency for the protection of society and into the reform of individuals who are a threat to society" (Pashukanis [1924] 2003, 185). In this section, however, I argue that such consequentialist approaches to punishment, no less than retributive ones, are rooted in commodification—in this case, through the mediating value of social *utility*. I refer to this punishment–utility equivalence as the *second-order commodification of justice*. It corresponds to the second aspect of commodified justice, whereby appropriate response to believed wrongdoing itself has quantifiable value.

The canonical statement of the utilitarian theory of punishment comes from Jeremy Bentham. Unlike the retributivists discussed above, who locate the justness of a punishment in its relationship to a specific wrongful act, Bentham argues that punishment is justified to the extent that it brings about an increase in total social utility by optimizing punishment's role as a deterrent. He writes: "[T]he general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, anything that tends to subtract from that happiness" (Bentham [1789] 2011, 57). Because both crime and punishment tend to subtract from the total happiness, punishment is "only to be admitted in as far as it promises to exclude some greater evil" (ibid.). Crime and punishment, therefore, are both reckoned against another "universal equivalent"—utility for society. The Benthamite lawmaker must quantify crime and punishment in these terms so as to calibrate the latter for maximal total utility. This is the conceptual core of the second-order commodification of justice.

At first, this second-order commodification might seem mutually exclusive with the first-order commodification described above. Punishment is no longer "bought" by offending, nor is offending "paid for" by punishment; both acts retain their independence and are considered from a social perspective in light of their use-values—their utility/disutility for the broader community. However, a closer look at Bentham's theory suggests less an elimination of first-order commodification than its displacement from the law itself to the minds of the individuals it governs. Bentham's first rule for penal legislation is that "*the value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence*" (ibid., 63; emphasis in the original). The efficacy of Bentham's theory, then, depends on the extent to which a given offense and the possibility of a corresponding punishment are legible as commodities to individuals, such that they can weigh their relative "values" and maximize their overall "profit." Moreover, as it is the law that will specify punishments so that individuals will recognize criminal actions as unprofitable*,* its makers must also engage in this commodification, at least as a theoretical exercise, so as to set those punishments at appropriate levels. Hence the "second-order" character of this strain of commodified justice: it presumes first-order commodification in concept—that offense and punishment can be equated—and seeks to quantitatively valorize different prospective offense-punishment equilibria against each other through the medium of utility. Cesare Beccaria, another Enlightenment-era penologist of utilitarian leanings, usefully links these ideas, albeit in reverse order: "the obstacles that deter men from committing crimes must be more formidable the more those crimes are contrary to the public good and the greater are the incentives to commit them. Thus, there must be proportion between crimes and punishments" (Beccaria [1764] 2008, 17).

Much like retributivist ideas, Benthamite principles of crime and punishment also saw a resurgence around the 1970s, most prominently in Gary Becker's (1968) landmark article "Crime and Punishment:

An Economic Approach," and the broader Law and Economics movement this article helped to launch. Indeed, Richard Posner, perhaps the best-known exponent of this mode of legal thought, subtitled a descriptive essay on it "from Bentham to Becker" (Posner 2001, 31-61).[8] For Becker, who saw himself as "resurrect[ing]" and "moderniz[ing]" the economic-minded penology of Beccaria and Bentham (Becker 1968, 209), utility provides the law not only a metric to assign proper punishments to categories of offenses but, more broadly, a way to reckon the value of punishment *in general* against other government projects, given costs and resource scarcity. Becker announces his aims thusly:

> The main purpose of this essay is to answer . . . how many resources and how much punishment *should* be used to enforce different kinds of legislation? Put equivalently, although more strangely, how many offenses *should* be permitted and how many offenders *should* go unpunished? The method used formulates a measure of the social loss from offenses and finds those expenditures of resources and punishments that minimize this loss. (Becker, 170; emphasis in the original)

While the retributive theorist and Benthamite legislator, each in their own way, concern themselves with the proper rate of exchange between crime and punishment, Becker is primarily occupied with another kind of exchange: that of punishment for other prospective social goods, given that resources are finite. Expenditures on punishment are to be set so as to minimize "the social loss from offenses." This requires that these expenditures, and the gains they may bring, be precisely quantified in terms of this social loss, a "universal equivalent" capable of bridging all other possible resource expenditures, penal and otherwise. With Becker, then, the second-order commodification of justice is articulated in its most complete form: the commodification of justice as the output of an overall penal *regime*, evaluated with attention to its operating and opportunity costs.

None of the above is to say that second-order commodification is restricted to utilitarian theories, even if it does find its paradigmatic statement therein. Retributivism, too, as Richard Lippke convincingly argues, is necessarily subject to second-order commodification, since retribution also inevitably occurs against a background of resource scarcity and necessary trade-offs (Lippke 2019). It costs *money* to punish, so punishment itself must be assigned explicit value in a manner that allows for comparisons with other prospective uses for that money. Most retributive theorists do not weigh such issues, but applying their theories in practice demands at least implicit efforts to do so (ibid., 55-56). Both first- and second-order commodification, then, can be found in at least some proportion in penal regimes animated by either utilitarian or retributive principles.

This second-order commodification has also done a great deal to shape criminal justice policy in the United States over the past half-century. If the retributive shift of the 1970s helped spell the end of the "clinical" model of punishment, in which sentences were determined by the "subjective judgment of experienced decision-makers" (Harcourt 2007, 269 n. 48), mindful of rehabilitation, it also cleared ground for new consequentialist forms of penality to emerge in an "*actuarial*" guise, characterized by "statistical correlations between group traits and group criminal offending rates" (ibid., 18). In seeking to predict crime and/or recidivism, such methods serve an end only thinkable in the wake of the second-order commodification of justice: to make effective punishment optimally cost-efficient, to "buy" as much as possible for the least expense in utility elsewhere. Indeed, such actuarial methods

[8] Bernard Harcourt also points out the significance of this subtitle, and it is from him that I discovered it (Harcourt 2011, 121). My discussion of Becker's paper benefits from Harcourt's (ibid., 133-136).

lie at the core of "predictive policing," now common in departments across the country, whereby police employ advanced analytics to determine precisely where they should devote resources and when.

Second-order commodification also contributes to the racism that pervades American penal law at every level. Many have critiqued predictive policing for justifying racist patterns of policing under the guise of objective utility maximization (Harcourt 2007, 147-168; Wang 2018, 247-250; Jefferson 2018; Browning and Arrigo, 2021). Race, by statistical proxies like geography or by structuring uneven patterns of surveillance that skew sampling, figures as an implicit input in a grand, Beckerian calculus, determining the precise exchange-value of various police actions. Such an operation yields a veneer of formal neutrality—now understandable as an effect of the abstraction of the commodity form—which produces what Naomi Murakawa and Katherine Beckett have called "the penology of racial innocence," whereby "the operation of racial power in penal practices and institutions" is "obscure[d]" (Murakawa and Beckett 2010, 696). And in turn, mass criminalization plays a constitutive role in the construction of race more broadly (Van Cleve and Mayes 2015). Indeed, Henry Louis Gates takes Posner to task, specifically, for neglecting the "racial stigmata" imposed on *all* Black people, not just those who suffer from specific discrimination, in perceiving them in terms of their probability of committing a crime (Gates 1992, 337-341, quote on 341). Such "stigmata," of course, were not first fashioned by Law and Economics scholars; Khalil Gibran Muhammad has argued that the "statistical language" of social science played a crucial role in producing the popular association between Blackness and criminality in the United States as early as the late nineteenth century (Muhammad 2011, 1). In any case, this bidirectional relationship between racism and legal punishment seems reinforced by the second-order commodification of the latter; it launders racism in statistical generality, allowing its particulars to disappear into the apparent objectivity of quantity.

First- and second-order commodification are distinct, to be sure, but they can also operate in tandem. Such is the case in the institution of plea bargaining—a ubiquitous practice in American penal law, used to resolve an overwhelming majority of cases. Robert E. Scott and William J. Stuntz, who explicitly analogize the practice of plea bargaining to contractual exchange, provide a succinct summary of this practice and its significance:

> Most cases are disposed of by means that seem scandalously casual: a quick conversation in a prosecutor's office or a courthouse hallway between attorneys familiar with only the basics of the case, with no witnesses present, leading to a proposed resolution that is then "sold" to both the defendant and the judge. To a large extent, this kind of horse-trading determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system. (Scott and Stuntz 1992, 1911-1912)

A given offense has its specific "price" in the form of its standard punishment, and this first-order commodification defines the initial "holdings" of the two parties; it provides the context for bargaining. Against this backdrop, as well as the uncertainty associated with going to trial, parties engage in a kind of speculation, bargaining away their chance at the best possible outcome in order to mitigate the chance of the worst (ibid., 1914). Practiced attorneys learn to recognize the "market price" of a particular case (1923), leading to swift bargains, or what is sometimes referred to, revealingly for our purposes, as "assembly line justice" (Blumberg 1969, 22).

Indeed, while justice by plea bargain may seem in one sense a departure from first-order commodification—it distorts the "price" deemed appropriate in the law—in another sense it is a

furtherance thereof, commodifying crime not only in cases of demonstrated guilt, but whenever there has been a *charge*. The plea bargain effectively creates a price for being accused of a given crime, whether one is in fact guilty or innocent, actuarily adjusted for the strength of the case in question and facts about the defendant's history. Whereas a trial must at least dwell at length on the particulars of the case before commodifying it at sentencing, a plea deal requires no such detour; the fact of particularity has been *itself* commodified and priced into the exchange in the form of probabilistic uncertainty. To extend a metaphor: the artisanal practice of trial litigation gives way to quasi-automated "assembly line" production.

This perfected first-order commodification is part of what permits the plea bargain to become the dominant site of the second-order commodification of justice in the United States today. Assembly line production does more than impose uniformity on its products; it also minimizes overall costs. In a system as busy as the American one, in which all parties (especially public defenders) are at constant grips with what Lawrence Blumberg calls "economies of time, labor, expense" (Blumberg 1969, 23), the plea bargain allows for the cheap resolution of cases, allowing more "justice" to be bought for the same investment of resources. The plea bargain is therefore both a case-specific exchange between lawyers and the result of similar exchanges at the level of policymaking between a penal regime and other state priorities. For it to fill both roles, it must presume that justice can be abstractly calibrated, quantified, and accumulated, and that it is reducible to a metric that makes it naturally commensurable to other goods. It must presume, in other words, both the first- and second-order commodification of justice.

V. Consequences: The Carceral Fetish in American Culture

So far, I have sought to demonstrate the deep relationship between modes of punishment in the United States and the commodity form. In this section, I consider the consequences of this diagnosis for the social meaning of crime and punishment in the United States. I therefore shift the main site of analysis from penal theory and policy to culture and popular ideology. The analysis here is somewhat speculative and certainly not exhaustive. Nevertheless, it seeks to illuminate some consequences of commodified justice in the United States.

Marx considers the lived relationship between human beings and commodities in his famous discussion of "commodity fetishism." Primarily, this phrase refers to a particular kind of distorted perception necessitated by capitalist relations. In a commodity, "the social character of men's labour appears to them as an objective character stamped upon the product of that labour" (Marx [1867] 1978, 320); quality disappears into quantity, and is only perceptible through this mediation. In this sense, the qualities of a commodity "are at the same time perceptible and imperceptible by the senses" (ibid., 320-321). As an existing thing with some use, a commodity is necessarily given to perception, but insofar as it is defined by its abstract exchange-value, this perception cannot contain the whole of its meaning. Partaking of the "transcendent," simultaneously in and out of existence, a commodity is experienced as "a very queer thing, abounding in metaphysical subtleties and theological niceties" (319-320). As the anthropologist Michael T. Taussig (2010) puts it, capitalist subjects have a "schizoid attitude" toward commodities, "an attitude that shows itself to be deeply mystical. On the one hand, these abstractions are cherished as real objects akin to inert things, whereas on the other, they are thought of as animate entities with a life-force of their own akin to spirits or gods" (ibid., 4-5). The relation to commodities that takes place in these "mist-enveloped regions of the religious world" is the commodity fetish (Marx [1867] 1978, 321). The way the fetish organizes the meaningful world

forms an important piece of the "horizon of the taken-for-granted," to repeat Stuart Hall's artful phrase from the introduction; it is one part of the material structure of ideology under capitalism, the lived conditions that shape cognitive *a prioris* about "what the world is and how it works, for all practical purposes" (Hall 1988, 44).

We can readily apply the idea of the commodity fetish to the relationship between persons and commodified justice in the United States. Legal processes, as we have seen, also convert the concrete and particular into the general and abstract, such that—in first-order commodification—the sentence becomes the "objective character" stamped onto the particular event in question. Indeed, ready-to-hand bits of folk wisdom—that "crime doesn't pay," and that to spend time in prison is to "pay one's debts to society," for instance—demonstrate how central this fact is to the subjective meaning of justice to many Americans.

One need only observe the public reaction when a high-profile sentence is handed down to perceive the power and pathos contained in the number, which seems to overflow its semantic quantitative significance. For example, consider the 2009 sentencing of Bernie Madoff, who ran the largest Ponzi scheme in American history, to 150 years in prison. In his comments at sentencing, Judge Denny Chin admitted that, given Madoff's advanced age, "any sentence above 20 or 25 years would be largely, if not entirely, symbolic." Transcript of Sentencing Hearing at 46-47, *United States v. Madoff*, No. 09-213 (S.D.N.Y. March 12, 2009). Nonetheless, Chin insisted that "the symbolism is important" for its retributive message, deterrent force, and value to the victims (ibid., 47-49). As a *New York Times* reporter editorialized, "[Chin] seemed to find a way to translate society's rage into a number" (Weiser 2011). Madoff's sentence, then, seems a classic case of fetishistic distortion. Use-value—Madoff's real wrongs and the real impact of his punishment—is articulated as exchange-value—150 years in prison—which then stands in fetishistically for the use-value it displaces; Madoff "deserves" 150 years (Sentencing Transcript, 47), a sentence that the same judge affirms, only lines above, can have no real meaning in human terms. And yet it appears to be from this very symbolic conversion—and the excess it enables while purporting to contain—that the sentence derives its gravity. The spirit of justice inheres, it seems, in the frisson of quantitative abstraction itself.

The "metaphysical subtleties and theological niceties" of prison sentences are rarely so apparent, but this is not to say they are not routinely present. Indeed, Terry K. Aladjem theorizes that punitive cultural attitudes in the United States amount to the "rudiments of an American theodicy," a quasi-religious attempt to find meaning in and justification for the evil apparent in the world (Aladjem 2008, especially 68-72, 92; the quoted phrase comes from the chapter title). This search, of course, can do great harm to those it typifies as "evil." It involves operations upon the abstract figure of the "criminal," which, facilitated by the commodification of crime and punishment with which it is associated, has itself become a kind of exchangeable commodity, a "blank, transparent, blamable individual" (ibid., 59). Indeed, if Isaac Balbus is right that a certain "fetishism of the Law" leads persons to "affirm that they owe their existence to the Law" (Balbus 1977, 583), then it is easy to surmise how persons who violate this law may be regarded: as, in a way, *without* existence, or at least underserving thereof. The criminal becomes, in a way, inhuman, defined by the "objective character" that has been "stamped upon" him or her. Joshua Kleinfeld argues that the culture of punishment in the United States differs from those of Europe in its tendency to understand criminality as "immutable and devaluing"—a mark of definitive "evil" or dangerousness (Kleinfeld 2016, 943). The distribution of these marks of "evil" is, of course, highly racialized, and this racism makes a crucial contribution to the punitive cultural theodicy that Aladjem diagnoses. Indeed, Adam Kotsko suggests in his "political theology of late capital" that the neoliberal United States requires the construction of certain

social *demons*, a role it has assigned to (among others) Black people as a racial group, presumptively associated with crime and requiring punishment (Kotsko 2018, 91-93; quoted material comes from the book's subtitle).

Associations between Blackness and criminality of this kind can be facilitated, as we've seen, by the actuarial techniques associated with the second-order commodification of justice. We are now in a better position than before, however, to recognize the fetishistic aspect of this linkage, the way it exceeds contingent epistemic error and operates as a general ideological touchstone. For Angela Davis, probabilistic considerations surrounding release from prison render "real human beings . . . in a seemingly race-neutral way . . . fetishistically exchangeable with the crimes they have already committed or will commit in the future" (quoted in Joseph 2014, 31)—a race-neutrality that Davis is well aware is illusory. The sociologist Avery Gordon affirms this link: "African Americans are treated as a criminal race, whose ontology—what they were, what they are, what they could be—is reduced to its essential criminality, their supposed basic nature" (Gordon 2017, 202). For such an equation to be made, "Blackness," like the commodified figure of "the criminal," must be rendered inert and abstract, divested of particularity and available for an "objective character" to be "stamped" on it. The critical race and legal scholar Anthony Paul Farley goes even further, positing Blackness—in resonant terms for our current purposes—as "the apogee of the commodity . . . the point . . . at which the commodity becomes flesh" (Farley 2004, 1229).

In this way, what Robert Knox observes about race and value, and Brenna Bhandar about race and property, applies also to race and criminality: the two are co-constituted through the medium of abstraction, born of the commodity form and codified in the legal form (Knox 2016, 109-110; Bhandar 2014, 212; Bhandar 2018, 8). Scholars of "racial capitalism" have exposed many of the myriad and complex ways that race and capitalism are entangled with one another (see, for instance, Robinson [1983] 2000; Johnson 2013; Johnson 2020; Melamed 2015; Gilmore 2017; Bhattacharya 2018). These brief reflections suggest a specific role for the commodity form—and its corollary penal legal form—in this entanglement. Attention to this entanglement might, in turn, shed some light on differences between the United States' penal regime and culture and those of other wealthy capitalist countries. While this claim is beyond the scope of this article, it is perhaps a particular intensity and centrality of anti-Blackness in the United States that helps explain its greater investment in the "immutability" of criminality.

In the end, commodified justice fails to satisfy even the punitive public that yearns for it. As in the Madoff case, the seeming transcendence of the number presumably arises from its apparent subsumption of the particular "social character" of the concretely experienced harm, whose negation it purports to immanentize in abstract, quantitative form. But this "religious" presence belongs to the aforementioned imperceptible aspect of commodified justice—indeed, is only present *insofar* as it is imperceptible, as the magic that claims to convert quality to quantity. What is left, in the end, is a raw number, bereft of promised meaning, an icon of false transcendence.

Certainly, the commodity fetish constitutes a kind of "enchant[ment]" of its own (Balibar [1994] 2007, 60), but, rife with the abstract distortion of social relations, this enchantment tends to prove hollow and unsatisfying. Aladjem identifies a failure of the formal law to provide, in the end, a suitable theodicy, showing that "frustration with justice" often leads to extra- or even anti-legal revenge fantasies (Aladjem 2008, 65). At the same time, it seems also to plausibly explain deepened investment in the penal law, stronger commitments to long and invariable sentences. It might be, then, that some Americans relate to commodified justice in terms of what Lauren Berlant calls "cruel optimism,"

whereby "something you desire is actually an obstacle to your flourishing" (Berlant 2011, 1). Danielle Sered, an anti-carceral writer and restorative justice practitioner, powerfully narrates the experience of victims of harm in terms like this:

> If I do come to believe the story [that carceral punishment brings healing], then when I am harmed, I want the person arrested and sentenced because I believe it will bring me relief . . . I call the police and I participate in the process, and, if I am like most victims, at the end of doing so, I am still unhealed, I still feel unsafe, and my appetite for justice is still unsatisfied. But now, unlike before I sought that remedy, I am heartbroken. (Sered 2019, 38)

Sered goes on soon after:

> [When victims like this] testify at parole boards that even ten years of a defendant's incarceration has made no dent in their pain, many people assume that the problem is simply that the person has not been incarcerated long enough, as though one day . . . we will reach the juncture where incarceration will finally help the victim, despite no indication that it has contributed to their well-being thus far. (ibid., 40)

The particular needs of Sered's victim have been neutralized in the cold generality of the prison sentence; to use Taussig's language, the "life-force" that first seemed to pulsate from this response has dissipated, leaving only the "inert thing" and disappointment. But this disappointment, rather than prompting reevaluation of the practices that led to it, seeks resolution in a magnification of them.

I expect a similar story could be told about those who have not been victimized themselves, but who seek theodicy in punishment as Aladjem suggests (indeed, as Sered's telling implies, what we think of as the "victim's perspective" might sometimes originate from such non-victims anyway).[9] Frustrated with justice, some Americans double down, hoping the void they feel will be filled with *more* punishment, *more* justice (*more* effacement of particularity, *more* racialized demonization); there can be no other solution, because, as the Marxist theorist Georg Lukács writes, the cognitive "reification" typical of modern capitalism "requires that a society should learn to satisfy all its needs in terms of commodity exchange" (Lukács [1923] 1971, 91). In doing so, however, these Americans affirm precisely the form of justice that produced such dissatisfaction in the first place, laying the groundwork for another cruelly optimistic doubling-down to come. As Sered laments, "We will punish more and more harshly, as if to prove that we were not wrong about who 'those people' are—because if we *were* wrong, if we *are* wrong, then we have done an unimaginably terrible—even an irreparable?—thing" (Sered 2019, 250). Commitment to commodified justice, then, performs the "smoothing work" *vis-à-vis* the psychically intolerable that Lisa Wedeen, drawing on Žižek and Frederic Jameson, identifies as a central function of ideology (Wedeen 2019, 5-7). Here, though, this "smoothing work" operates though perpetual intensification, as it is precisely the always-insistent possibility of its own ultimate emptiness and depravity that commodified justice, *qua* ideology, must continually work to stave off.

It is not surprising that such a society, caught in the grips of this vicious cycle, should become obsessed with punishment. Criminologist Gordon Bazemore, observing the prison boom of the late twentieth century, speaks of a "policymaker addiction to punishment" (2007, 653), and other commentators

[9] In comparing the experiences of victims of harm and citizens who seek theodicy in punishment, I do not mean to equate two very different experiences, or imply that they are worthy of similar sympathy.

note a tendency to see "concrete and steel cages as catch-all solutions to social problems" (Gilmore and Kilgore, 2019, n. p.). Evidence of this obsession is readily present not only in the law books, but in the media and entertainment industries (Novek 2011). Police procedurals, courtroom dramas, stories set in prison, true crime narratives—all these and more are ubiquitous in American entertainment, dramatizing the commodified processes described above.

This omnipresence of punishment in the American political psyche and in its cultural forms can perhaps be understood by what Guy Debord, leader of the Situationist International and maybe the foremost post-war theorist of the commodity fetish, conceptualizes as "the spectacle," the perceptible world under conditions of the total commodification of social relations, from which persons are alienated. For Debord, "the spectacle corresponds to the historical moment at which the commodity completes its colonization of social life . . . commodities are now *all* there is to see; the world we see is the world of the commodity" (Debord [1967] 1995, 29). The inhabitants of this world—the Beckerian penal policymaker, the victim of harm, the theodicy-hungry citizen, and the everyday consumer of culture—are confronted, in different ways, with a spectacularized brand of justice, where, truly, "commodities are all there is to see." And awe-inspiring as these spectacles may sometimes seem, they offer, Debord writes, only "a specious form of the sacred" (ibid., 20). In the final analysis, there is nothing behind the mist.

VI. Conclusion: Where We Go from Here

What, then, is to be done? While commodified justice is an ideological phenomenon, merely adjusting our beliefs and expectations about punishment in awareness of its existence will not be sufficient to solve it. Understanding ideology as form means that one must speak of commodified justice—as I have—as a material *distortion* and not merely a subjective *delusion*; "it constitutes . . . the way in which reality . . . cannot but appear" under conditions of capitalism (Balibar [1994] 2007, 60). As I have sought to show in this article, commodified justice in the United States is not a mere metaphor; the conceptual grammar of justice really *is* the conceptual grammar of commodification and commodity exchange. This does not mean that this grammar is intractable, but rather that it must be eliminated at its root by ending the practices that give rise to it (Pashukanis [1924] 2003, 188). To overcome the commodification of justice, in other words, justice itself must be done differently.

The rudiments of an alternative perhaps already exist. In recent decades, activists, grassroots organizers, and reformers have begun to enact and theorize paradigms of "restorative" and/or "transformative" justice, which respond to harm and conflict in ways that involve guided encounter and dialogue between harmed parties, responsible parties, and other relevant stakeholders, for the purposes not of abstract retribution or deterrence but of interpersonal repair and, ideally, social/communal transformation.[10] Restorative and transformative justice thereby resist the commodification outlined above by refusing to abstract from the particular and qualitative aspects of harm and justice,[11] both interpersonally and societally.

In this way, restorative and transformative justice plausibly militate against many of the ills of commodified justice described above. First, while commodified justice alienates both wronged parties

[10] For some differences between these two related paradigms, see Kaba (2021a, 148-149) and Terweil (2020, 431).

[11] Miranda Joseph makes a similar suggestion, though she is somewhat more ambivalent on the question of whether restorative justice can responsibly transcend "abstraction and calculation" (Joseph 2014, 54-58; quote on 58).

and wrongdoers from themselves by assimilating their unique personhoods, experiences, reasons, needs, and obligations to abstract, totalizing categories, restorative and transformative justice center particular stakeholders, allowing them to decide on an appropriate response, one that optimizes for "use-value" as they recognize it. Second, while commodified justice furthers various forms of oppression both by concealing racism in utilitarian algorithms and by facilitating acute racial demonization by means of the penal system, restorative and transformative justice undercut this logic. Indeed, if racial capitalism—as Jodi Melamed, drawing on Ruth Wilson Gilmore, suggests—is "a technology of *antirelationality*" (Melamed 2015, 78-79, 82), then restorative justice and transformative justice, by emphasizing "the fact of relationship, of our connectedness" as central to justice (Llewellyn and Philpott 2014, 18; see also Kaba 2019), resist it. Moreover, by involving the responsible party, considering his or her needs, and honoring his or her capability to make appropriate repairs, restorative and transformative justice militate against demonization as such, and so too its racialized character. Finally, while commodified justice alienates all persons from justice in general by making it fetishistic, sterile, and "spectacular"—often related to in cruelly optimistic terms—restorative justice and transformative justice potentially provide a form of public justice that may be felt, meaningful, and fulfilling, because they are responsive to real social relations, not fetishistic abstractions. Debord writes that "the spectacle is the opposite of dialogue" (Debord [1967] 1995, 17); restorative and transformative justice, which make dialogue a foundational principle, therefore may provide one manner of unmaking it.

Certainly, such frameworks are themselves threatened by logics of commodification in certain configurations and applications (Koen 2013; Harney and Moten 2013, 63; Joseph 2014, 57-58)—particularly restorative justice, which has been more open to dilution and cooptation than its counterpart (Kaba 2021a, 148-149). Nonetheless, criminologist Raymond Koen, in his Pashukanian analysis of restorative justice, maintains that even this paradigm retains a revolutionary core. Though "partial forms" may be neutralized and coopted by capitalism, capitalism "cannot countenance" "comprehensive restorative justice," which "accords with the legal morality of socialism" (Koen 2013, 228). He continues: "It seems, then, that the realisation of the revolutionary potentialities of restorative justice in its comprehensive aspect will require a socialist revolution against the hegemony of capitalism and the dictatorship of the bourgeoisie. In other words, if our future justice is to be restorative, our future society would probably have to be socialist" (ibid., 228-229). Committed proponents of restorative and transformative justice, then, should also be anti-capitalist; to do justice differently, at least at scale, a new kind of society may be required. This is not to say, however, that advocating and organizing for restorative and transformative justice should be seen as politically secondary to broader anti-capitalist efforts. To the contrary, disrupting the commodification of justice, and its attendant reinscription of capitalist ideology, would seem a potentially important prerequisite to the eventual achievement of a post-capitalist world. Therefore, anti-capitalists should support present projects of restorative and transformative justice. The two imperatives—de-commodifying justice and dismantling capitalism—are mutually reinforcing.

This integrated praxis need not be invented *ex nihilo*. It is already operative in movements for the abolition of the prison-industrial complex (PIC), which since last summer's historic uprising have seen their popular currency increase considerably. Like no other present political formation, PIC abolitionism recognizes that reimagining justice in restorative/transformative terms (see, for instance, Davis 2003, 113-115; Kaba 2021b, 3-4) and "the founding of a new society" beyond capitalism (Harney and Moten 2013, 42) imply one another. Indeed, Ruth Wilson Gilmore (2020) emphasizes that abolition must be "red," aligned with anti-capitalist objectives, and abolitionist organizers Mariame Kaba and Kelly Hayes perhaps intuit much of the analysis in this article when they bemoan

the PIC's grounding in "the commodification of human beings" (Kaba and Hayes 2021, 24). A way beyond commodified justice therefore emerges. Through bold, abolitionist politics, we can hope to change justice by "chang[ing] everything" (Kaba 2021b, 5; Gilmore forthcoming).

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