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WHAT IS THE CRIMINAL LAW FOR?

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The first step is the one that altogether escapes notice. We talk of processes and states and leave their nature undecided. Sometime perhaps we shall know more about them—we think. But that is just what commits us to a particular way of looking at the matter. For we have a definite concept of what it means to learn to know a process better. (The decisive movement in the conjuring trick has been made, and it was the very one we thought quite innocent.)

Wittgenstein, *Philosophical Investigations* §308.

What is the criminal law for?

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Perhaps it goes without saying that the criminal law and its associated institutions—law enforcement, prosecutors, courts, prisons, parole agencies, sentencing commissions, and so forth—are institutions that we have set up to punish people. And perhaps it similarly goes without saying that the people we have set them up to punish are, in the usual case, guilty of some form of moral transgression. This seems, after all, to simply fall out of our understanding of the sort of practice punishment *is*—not just hard treatment, but hard treatment motivated by resentment toward the person's wrongful conduct.

I shall argue that this simple answer to the simple question that forms the title of this paper is deeply misleading. The criminal law may indeed punish people, in the sense just identified. But regardless of whether it does or does not punish people in this sense, the criminal law serves to ensure compliance with the validly enacted rules and regulations of a legal system; and thereby the long-term stability of that system; and thereby the freedom that flows from the kind of life made possible by stable social and political institutions. The point of the criminal law is to coercively enforce legal rules. As such, what is distinctive about the criminal law is not the pre-

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I have benefited greatly from discussing earlier drafts with Elizabeth Anderson, Alan Brudner, Markus Dubber, Lindsay Farmer, Chad Flanders, Alon Harel, Adam Kolber, Emmanuel Melissaris, Dan Priel, Matthew Steilen, Simon Stern, and Hamish Stewart, as well as from participants at a Faculty of Law workshop at the University of Toronto. Chris DiMatteo and Tamar Meshel provided extraordinary and invaluable research assistance, which was made possible in part by the Borden Ladner Gervais Research Fellowship.

political wrongfulness of the conduct it reaches (though some of it is pre-politically wrong); it is the ultra-harsh character of the sanctions it authorizes. Achieving retributive justice may or may not be a desirable goal for public policy. But the criminal law fulfills a more universally necessary role by stabilizing legally constituted institutions.

Moreover, insofar as the point of the criminal law is to stabilize social and political institutions, the question: "is the criminal law just?" cannot be answered separately from: "are the institutions it stabilizes just?" Rejecting the simple answer to the simple question undermines the idea that the criminal law constitutes a set of institutions separate and distinct from what Rawls referred to as society's basic structure, and which he took to be the primary subject of a theory of justice.[2] However, this idea lies at the root of the thought that the "justification of punishment" refers to a distinct philosophical problem from the justification of state authority generally, rather than being simply the sharpest and most visible instance in which such justification is required. Rejecting the claim that the criminal law is the law of punishment, not simply the law of ultra-harsh sanctions, is therefore to reject the initial starting assumption of retributivism in criminal law theory: that there is a distinct set of public institutions whose operation can be evaluated solely in terms of whether they chastise those whose conduct merits chastisement. Instead, as a rule-enforcing institution, the criminal law is cut from the same normative cloth as the institutions whose rules it enforces. Consequently, the problems of criminal justice are problems of justice more generally: social, economic, and political.[3]

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[2] JOHN RAWLS, POLITICAL LIBERALISM (1993), ch. VII ("The Basic Structure as Subject.")

[3] Retributivism in academic circles experienced a resurgence in the last generation; see Michael Davis, *Punishment Theory's Golden Half Century: A Survey of Developments from (about) 1957 to 2007*, 13 JOURNAL OF ETHICS 73–100 (2009); R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME AND JUSTICE 1–97 (1996). However, dissatisfaction with moralistic approaches to the criminal law has been gaining steam in recent years, with increasing attention being given to the criminal law as a politically constituted institution. Most of this literature has been either explicitly Rawlsian or contractualist in orientation. For instance, Corey Brettschneider has defended a contractualist

I start, in section I-A, by considering what I consider to be the strongest, and most articulate, explanation for considering the criminal law to be the domain of retributive justice, and retributive justice to be something separate and distinct from more general forms of political justice. The remainder of section I is an extended argument for the rejection of this account of the criminal law's distinctiveness. In section I-B, I defend the priority of the criminal law's rule-enforcing function to whatever retributive function it may or may not also have; I consider, in section I-C, the degree to which a retributive understanding of the criminal law bears any resemblance to criminal justice in the modern regulatory state; and in section I-D, I reject the claim that the consequences of criminal punishment on people's life chances is not a mere side-effect of the retributive practice of tallying up of wrongs with rights-vindications, and claim that the criminal law instead is *essentially* aimed at enforcing a particular distribution of benefits and burdens among a population. In section II is more constructive. I start, in section II-A, by turniing to the work of Elizabeth Anderson, in particular her account of "democratic egalitarianism." Democratic egalitarianism provides, I suggest, a robust and attractive account of what we should regard as distinctive about the criminal law (II-B). I then consider, in section II-

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theory of punishment, drawing on Rawls's "liberal principle of legitimacy." See Corey Brettschneider, *The Rights of the Guilty: Punishment and Political Legitimacy*, 35(2) POLITICAL THEORY 175–99 (2007). See also MATT MATRAVERS, JUSTICE AND PUNISHMENT: THE RATIONALE OF COERCION (2000) and Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFFALO CRIMINAL LAW REVIEW 307 (2004). More recently, Emmanuel Melissaris has defended a reconstructed Rawlsian account of punishment. See *Toward a Political Theory of Criminal Law: A Critical Rawlsian Account*, 15 NEW CRIMINAL LAW REVIEW 122 (2012), and *Property Offenses as Crimes of Injustice*, 6 CRIMINAL LAW AND PHILOSOPHY 149–66 (2012). In addition, Erin Kelly and Malcolm Thorburn have both recently made proposals to replace notions of retributive justice with a conception of criminal justice as a set of institutions operating within the framework of a liberal political order. See Kelly, *Criminal Justice Without Retribution*, 106 JOURNAL OF PHILOSOPHY 419 (2009); Thorburn, *Criminal Law as Public Law*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 42–43 (R.A. Duff & Stuart Green eds., 2011). See also Chad Flanders, *How Retributivism Fails* (unpublished manuscript on file with the author.) For older discussions, see, e.g., Jeffrie Murphy, *Retributivism, Moral Education, and the Liberal State*, 4 CRIMINAL JUSTICE ETHICS 3 (1985), and Stanley Brubaker, *Can Liberals Punish?* 82(3) AMERICAN POLITICAL SCIENCE REVIEW 821 (1988). This approach, as will be seen in section II, differs in drawing on democratic egalitarianism, and its reliance on the capabilities approach, as a basis for evaluating the performance of the criminal law and criminal justice.

C, how the criminal law's focus on *mens rea* fits into the framework of a non-moralistic, political theory of punishment and, in section II-D, contrast the democratic egalitarian insistence that the criminal law is in all cases a last resort means of enforcing otherwise acceptable legal rules, with retributivist approaches that imply that the criminal law is in many cases the uniquely appropriate sanction, regardless of the existence of less destructive remedies. Section III concludes.

I.

A.

"The problem of retributive justice," Samuel Scheffler has claimed, "is not the problem of how to allocate a limited supply of benefits among equally worthy citizens but rather the problem of how society can ever be justified in imposing the special burden of punishment on a particular human being."[4] Something like Scheffler's contrast between retributive and distributive justice is, I take it, a very basic and very widely shared assumption in criminal law scholarship. After all, among legal theorists, the justification of punishment is seen as a central philosophical challenge for the criminal law, and for the criminal law alone. The explanation for why the state may permissibly take income from A and redistribute it to B has nothing to do with punishment, although when the state diverts the same amount from A on account of A's violation of this or that criminal statute, then it has everything to do with punishment, and therefore with desert and blame. Why should there be this striking asymmetry in how state coercion is evaluated in these different contexts?

Scheffler explains the difference by appealing to a difference in the role of desert in the two contexts. Adopting Scheffler's terminology, we may say that desert functions prejusticially in

[4] Samuel Scheffler, *Justice and Desert in Liberal Theory*, 88 CALIFORNIA LAW REVIEW 965–90, 986 (2000).

cases where desert is "prior to and independent of the principles of distributive justice themselves, and by reference to which the justice of institutional arrangements is to be assessed."[5] Thus, on a prejusticial conception, a true judgment of the form "A deserves X" provides a basis for evaluating institutions and policies: they are just insofar as they tend to provide someone like A with something like X. In contrast, a legitimate-expectations view of desert holds that "[p]eople are entitled to the economic benefits that just institutions lead them to expect"; judgments of the form "A deserves X" may be "perfectly legitimate" insofar as they express "nothing more than claims of institutional entitlement," meaning that the expectations are evaluated by reference to just institutions, not vice versa.[6]

It is plausible, Scheffler claims, to give prejusticial desert a much greater role in the context of the criminal law than elsewhere in the law. This is because desert in the retributive context is *individualistic*: what a person deserves by way of punishment can be ascertained on the basis of facts about him—for instance, that he voluntarily and knowingly caused a particular type of injury to another. In contrast, it is not possible to specify what a person deserves by way of, say, income without appeal to a broad range of facts concerning the institutions, social practices and preferences that determine the market value of a particular talent or skill. "[C]itizens' material prospects," as Scheffler puts the point, "are profoundly interconnected through their shared and effectively unavoidable participation in a set of fundamental practices and institutions—the economy, the legal system, the political framework—that establish and enforce the ground rules

[5] Scheffler, *id*. at 978.

[6] Scheffler, *id*. Scheffler's defense of the "asymmetry of desert" has spawned a minor literature. See Eugene Mills, *Scheffler on Rawls, Justice and Desert*, 23 LAW AND PHILOSOPHY 261–72 (2004); Jeffrey Moriarty, *Against the Asymmetry of Desert*, 37 NOÛS 518–36 (2003); Saul Smilansky, *Control, Desert and the Difference Between Distributive and Retributive Justice*, 131 PHILOSOPHICAL STUDIES 511–24 (2006); Douglas Husak, *Holistic Retributivism*, 88 CALIFORNIA LAW REVIEW 991–1000 (2000); and Thomas Hurka, *Desert: Individualistic and Holistic*, in DESERT AND JUSTICE 45–68 (Serena Olasretti ed., 2003). More recently, see Melissaris, *supra* note 3, at 150–53.

of social cooperation."[7] In contrast, "those whom the criminal justice system legitimately punishes have normally done something that would be wrong even in the absence of a law prohibiting it."[8] The individualistic way in which we can assess desert in certain kinds of transactions – murder, rape, assault – provides a prejusticial basis for allocating punishment. But when it comes to income, health care, educational opportunities, or share of the tax burden, our inability to reliably draw individualistic judgments means that desert must take the form of legitimate expectations: what a person deserves under any of those headings is simply a matter of what just institutions would legitimately lead him to expect.

B.

There is much that is intuitive about this line of thought. Unfortunately, it deeply mischaracterizes both the character of actual criminal justice institutions and the functional role that those institutions predominantly serve. It assumes that securing retributive justice by giving people the punishment they prejusticially deserve is the primary role of criminal justice institutions as we know them. There is nothing incoherent about this idea; it just turns out not to be true. I shall sketch three arguments in support of this conclusion. First, I argue that rule-enforcing institutions are necessary to stable political institutions—and, thus, to just political institutions—in a way that institutions designed to seek retributive justice are not. This suggests that coercive rule-enforcement is a more fundamental function than meting out deserved

[7] Scheffler, *supra* note 4, at 985. Elizabeth Anderson puts the point in terms of factors that are "internal and external to the self": whereas desert is assessed with regard to factors internal to the self, "the great virtue of markets is that they prompt individuals to respond to the demands and interests of others. These factors are external to the self: they can't be controlled or even fully anticipated by those expected to respond to them … To ensure that individuals respond to the demands and interests of others, they must face prices that are sensitive to such external information, even when these diverge from the most internally meritorious attempts to anticipate and meet others' interests." Anderson, *How Should Egalitarians Cope with Market Risks*, 9 THEORETICAL INQUIRIES IN LAW 61, 69–70 (2007).

[8] Scheffler, *supra* note 4, at 978. At one point in *The Morality of Freedom*, Raz appears to endorse a more encompassing view of law as the enforcement arm of morality in general; see JOSEPH RAZ, THE MORALITY OF FREEDOM 103 (1986).

punishment. Second, I point out that the actual criminal justice institutions with which we are familiar are better accounted for in rule-enforcing terms than in punishment-imposing ones. And, finally, I argue that the criminal justice institutions play a significant role in the allocation of social advantage, suggesting that retributive justice provides an inadequate framework for the evaluation of criminal justice because it defines these—extraordinarily pervasive—distributive consequences out of existence.

First: Why are rule-enforcing institutions more fundamental than retributive institutions, and what light does that shed on the criminal law? To appreciate this point, imagine a constitutional convention at which citizens undertake to sketch the contours of a society's basic institutions and policies. Suppose that, recognizing the difficult nature of the problem of retributive justice, our constitutional framers decide that they will *not* seek to punish the guilty—for who can say whether they would not be falling into grave moral error in doing so? Moreover, they are cognizant that partiality and error will be unavoidable, and will regularly (even if, one hopes, not frequently) lead to punishment of the innocent and over-punishment of the guilty, a result they may reasonably consider to be intolerable. Suppose, then, that our framers decide to forego retributive institutions entirely. That is, they decide that the institutions of the state they are devising will never punish anyone, in the morally freighted sense of the term. The question now is: would the resulting society lack anything that we might plausibly characterize as a criminal justice system? Does the elimination of *retributive* justice institutions from a society's basic structure entail the elimination of *criminal* justice?

Clearly not. For regardless of what our constitutional framers decide with respect to punishment, they would undoubtedly nevertheless want to ensure that the institutions they *do* set up—of which some will undoubtedly be devoted to protecting fundamental individual interests

in physical integrity and security—are effective and stable over the long run. There are many ways of doing this, but attaching threats of sanctions to violations is central among them. Thus, even if our framers reject retributive justice entirely, they will nevertheless still want to set up coercive *rule-enforcing* institutions. This is not because the framers necessarily take a dim view of human nature. People may generally be inclined to comply with valid legal norms out of a sense of obligation and good will. But compliance will quickly seem to be less than fully rational when it is observed that it opens the compliant up to systematically being preyed upon. Note that, as Rawls emphasized, this is not a point about nonideal theory.[9] The need for public and coercive rule-enforcement is not predicated on an assumption that people are invariably motivated to cheat, chisel, and take advantage of the sacrifices of others. It is, rather, predicated on the need to make compliance individually rational so that everyone may have confidence in the compliance of others. As far as rule enforcement is concerned, what is important is not that our fellow citizens are *reasonable*; it is that they are *rational*.[10] "'Sanctions,'" as Hart put the point, "are therefore required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. Given this standing danger, what reason demands is *voluntary* co-operation in a *coercive* system."[11]

In contrast, the stability of social and political institutions does not similarly require institutions for the promotion of retributive justice; what is necessary is that a society's rules secure a minimum level of compliance, not that they be motivated or understood in any

[9] JOHN RAWLS, A THEORY OF JUSTICE 241 (1971): "It is clear … that we need an account of penal sanctions however limited even for ideal theory."

[10] Kelly, *supra* note 3, at 446.

[11] H.L.A. HART, THE CONCEPT OF LAW 198 (1994).

particular way, e.g. as giving people pre-justicially deserved punishment. Rule-enforcing institutions are thus fundamental to a stable constitutional structure in a way that retributive institutions are not. Some, though certainly not all, of a society's legal rule-enforcing institutions will almost certainly operate by the *ex ante* threat and *ex post* application of extremely coercive sanctions; there will thus be a reason to have such institutions regardless of whether they ever strictly punish anyone for anything. This line of thought also undermines the case for so-called "legal" retributivism, namely the view that the criminal law exists to publicly vindicate people whose legally defined rights are violated.[12] A society that disavowed rights vindication as a bloody, error-prone business would still be required to protect its citizens' underlying interests; insofar as sanction-backed threats have a role in interest protection, there will be a need for criminal justice institutions regardless of whether they ever vindicate anyone's rights.

Note that this is not an argument about people's imagined preferences for rule-enforcement over retribution. The claim is that there is a strong reason to set up rule-enforcing institutions regardless of whether a state has also chosen to set up retributive ones, whereas the reverse is not true. The continued existence of a state depends, at some level, on the possibility of coercively enforcing compliance with its laws; the interpretation of that coercion as retributively motivated punishment for pre-justicial wrongs is, in comparison, optional. The rule-enforcing function of criminal sanctions is in this respect more fundamental than their condemnatory function. In light of this fact, retributive theories of punishment are doubly misguided: firstly, criminal justice institutions' role in enforcing compliance with positive law is of more fundamental importance to a legally constituted state than is their role in vindicating pre-justicial rights; and, secondly,

[12] See ALAN BRUDNER, PUNISHMENT AND FREEDOM, ch.1 (2012).

the aspect of criminal justice institutions that is most in need of justification is the harshness of the sanctions they impose rather than the moral message they convey.

To illustrate, suppose that society A devotes none of its limited resources to preventing its citizens from being murdered and raped, but instead uses those resources to ensure that when they *are* murdered and raped, those responsible are publicly prosecuted, whipped, and pilloried. Although this has no measurable impact on rates of offending, it does ensure that those victimized have their rights vindicated. Society B, on the other hand, spends all of *its* limited resources on protecting its citizens from being murdered or raped in the first place, through some mix of *ex ante* preventive measures and the threat of sanctions *ex post* (e.g., pretrial detention, large fines, GPS monitoring, mandatory treatment regimes). Society B, however, never characterizes its sanctions as vindicating the rights of victims, never publicly denounces murder and rape as wrong, and only imposes sanctions if there is some reasonable prospect of deterring such conduct in the future. Consequently, while citizens in society A are secure in their knowledge that when they are murdered and raped, the state will publicly condemn that conduct as "rights denying," citizens in society B are secure in their knowledge that they are significantly less likely to be murdered or raped in the first place. Society B certainly leaves something to be desired insofar as it does not publicly condemn those who murder and rape. But society A is much worse. Despite its fulsome pieties, society A permits the strong to systematically prey on the weak. It is to this extent seriously unjust. Because all its resources are tied up vindicating rights even though doing so never serves to actually deter anyone from murdering or raping others, its rules against murder and rape are ineffectual. Consequently, society A's public institutions are weak, and we can expect self-help to be common, at least insofar as the citizens of society A care not only about *ex post* vindication of their rights but also *ex ante* protection of

the interests underlying those rights. In contrast, although society B foregoes *ex post* symbolic vindication of rights, it does much better at protecting the underlying interests from being invaded in the first place—meaning there are fewer violations in need of vindication—and its institutions are consequently more just and more stable. Unless the vindication of rights violations somehow creates more value than the disvalue created by their violation, there is a strong reason to prefer society B over society A.

It is true that we might prefer society C, which is identical to society B except that it trades off some degree of interest protection for rights vindication. But whether we do depends on just how much protection is sacrificed. Unlike the achievement of some minimum threshold level of protection from assault, there is little reason to view a preference for where, exactly, to strike the balance between that minimum and society B's maximum as a nonnegotiable requirement for a reasonably just constitutional structure. I conclude that sanctions to ensure compliance would be required even if they did nothing to vindicate anyone's rights; but the vindication of rights, however desirable that might be, would not be required if there were other ways of ensuring compliance.

C.

A view of criminal justice institutions as predominantly responsive to prejusticial wrongs is perhaps plausible if we focus on violent crimes such as murder and rape. This type of conduct is plausibly wrong regardless of what public institutions have to say about it, and also wrong regardless of what other people happen to be doing. So if the criminal law were primarily a matter of this sort of conduct, there might not be any reason to object to an explanation of the moral foundations of the criminal law in terms of retributive desert. But, as it turns out, the criminal law as we know it is overwhelmingly not a matter of regulating this kind of conduct.

Contemporary criminal justice institutions are in practice mostly devoted to enforcing rules that prohibit conduct that is not plausibly construed as "wrong even in the absence of a law prohibiting it." Indeed, many of the interests protected by the criminal law are not even intelligible outside a highly developed legal and institutional framework.

By any measure, American criminal law is concerned with enforcing prejusticial wrongs to only a very limited extent. One way of assessing this is to note that only a very small number of offenses—the various forms of assault, sexual assault, homicide, perhaps robbery and a few others—are plausibly construed as prejusticially wrong. In comparison, federal law has been estimated to recognize approximately 3300 distinct offenses carrying criminal sanctions.[13] This number represents only the provisions contained in the United States Code, and does not include the tens of thousands of regulations promulgated by myriad federal regulatory agencies that formally rely on the threat of criminal sanctions to enforce their rules. None of these administrative offenses are, presumably, prejusticially wrong since none of them would even be recognizable *as* wrongs outside some developed institutional framework.

Alternately, one could look not at criminal law itself, but at how that law is enforced on the ground. Three quarters of the arrests in 2010 for index crimes were for property offenses.[14] There were approximately three times as many arrests for drug offenses as for all of the violent index crimes combined. Looking beyond index crimes, of the approximately 8.2 million arrests made in 2010, only about 1.2 million, or about 15 percent, were for violent crimes.[15] Measured by

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[13] See Ronald Gainer, *Federal Criminal Code Reform*, 2 BUFFALO CRIMINAL LAW REVIEW 53 (1998).

[14] See Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, Table 4.1.2010, http://www.albany.edu/sourcebook/pdf/t412010.pdf. "Index" crimes refer to the eight categories of crime that the FBI uses to estimate crime rates: murder and nonnegligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson.

[15] Violent crimes are murder and nonnegligent manslaughter, forcible rape, robbery and aggravated assault; I have also included in this category the residual category of "other assaults," which—at 829,525

police conduct, the bread and butter of American criminal justice is not conduct such as serious assault (less than 4 percent of arrests), much less homicide (less than 0.01 percent) or rape (less than 0.2 percent). It is conduct such as driving under the influence (about 10 percent), larceny, fraud and other property offenses (about 15 percent), and a variety of public order offenses related to alcohol, vagrancy, and disorderly conduct (about 13 percent). A similar pattern is found if we look at convictions rather than arrests: of approximately 1.1 million felony convictions in state courts in 2006, only about 18 percent were for violent offenses.[16] Drug convictions alone comprise nearly twice as many felony convictions as all the categories of violent crime combined.

Moreover, these figures likely significantly overstate the degree to which the criminal justice docket is concerned with prejusticially wrongful conduct because they are based exclusively on *felony* convictions. Misdemeanor prosecutions have been estimated to outnumber felonies by an order of magnitude.[17] The criminal law's rule-enforcement function is nowhere more evident than in misdemeanor cases. For instance, driving with a suspended license—a common misdemeanor—is frequently caused by the defendant's failure to comply with more mild sanctions (fines) used to enforce a variety of substantive rules, from parking offenses to the care and insurance of one's car to failure to pay child support. Although little systematic data is

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arrests—make up by far the largest category of violent crime. These figures are available from Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, Table 4.6.2010, http://www.albany.edu/sourcebook/pdf/t462010.pdf.

[16] See Bureau of Justics Statistics, *Sourcebook of Criminal Justice Statistics*, Table 5.44.2006, http://www.albany.edu/sourcebook/pdf/t5442006.pdf.

[17] This is based on a recent estimate by the National Association of Criminal Defense Lawyers, which used the caseload statistics from 12 states to extrapolate a national rate of approximately 10.5 million misdemeanor prosecutions per year. See R.C. BORUCHOWITZ, M.N. BRINK, & M. DIMINO, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (NACDL, April 2009), http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf. For discussion, see Alexandra Natapoff, *Misdemeanors*, 85 SOUTHERN CALIFORNIA LAW REVIEW 101 (2012).

available about the millions of misdemeanor cases processed each year, common offenses include conduct such as minor thefts, loitering, public intoxication, under-age possession of alcohol, and minor drug offenses. Because only a small fraction of criminal felonies concern what may plausibly be thought to be prejusticially wrongful conduct, including the millions of misdemeanor cases processed by criminal justice institutions each year is likely to make that already small fraction much smaller still.

Finally, given that the largest portion of criminal justice expenditures is spent on corrections, one might suspect that, if anywhere, incarceration would reflect a priority for crimes plausibly construed as prejusticial wrongs. But in fact state prisons house about as many nonviolent offenders as violent ones. Moreover, when local jails and federal prisons are factored in, nonviolent offenders outnumber violent offenders by a ratio of 1.5 to 1.[18] In short: even if we were to stack the deck in favor of retributive theories by treating every instance of a sanction for conduct that is independently wrongful as an instance of pre-justicial punishment rather than as an instance of rule enforcement, it remains the case that criminal justice as we know it is generally—perhaps even overwhelmingly—*not* a matter of securing retributive justice.

One might insist that this just reflects the defective character of American criminal justice institutions, and does not serve to cast doubt on the proposition that the primary purpose of criminal justice institutions is to mete out punishment for pre-justicially wrongful conduct. The difficulty with this response is that, in the context of modern regulatory states, much of the conduct that *any* plausible criminal justice system—not just the American one—will apply to cannot be described in terms of pre-justicial wrongs. Conduct such as drug possession, theft,

[18] See John Schmitt, Kris Warner, & Sarika Gupta, *The High Budgetary Cost of Incarceration* 9, Table 3 (Center for Economic and Policy Research, June 2010), http://www.cepr.net/index.php/publications/reports/the-high-budgetary-cost-of-incarceration/.

fraud, public drunkenness, and the like may perhaps all be legitimately subject to criminal regulation, but they could scarcely be considered to be conduct that *any* set of just institutions must necessarily punish. The judgment that, for instance, stealing is wrong presupposes an understanding of the existence and nature of private property as a mode of structuring social life. As against a prejusticial view of theft, the fact that A took X from B, viewed in isolation, provides *no* reason in favor of the judgment that it would be just to punish or even sanction A for doing so. It is only after filling in the social and institutional backdrop of a society structured by expectations oriented to private property that the fact that A took X begin to provide a reason in of punishing or otherwise sanctioning A; and whether this is so is conditioned on the proposition that legally defined expectations in question are *themselves* substantively just. (Suppose that X is a slave, and A an emancipator.) Similarly, consider the notion of honest services fraud in American federal law.[19] Is this kind of conduct—in which the injured party is not deprived of a material benefit—"really" fraud? The only content I can give to this question is: Does positive law define such conduct as fraud? Of course, the fact that it does so might lead one to conclude: So much the worse for positive law. Rebutting *that* conclusion would require showing that criminalizing and punishing such conduct instantiates some independent and substantive ideal of justice. But if fraud were a prejusticial wrong, there should be some way of determining what fraud is *without* appealing to a freestanding conception of just social relations. If honest services fraud qualifies as a form of the timeless nature of "fraud," then we would have good reason to punish it, regardless of whether doing so advances anyone's interests. This is a profoundly implausible view of fraud. Whether some stretch of conduct is fraud or simply sharp business or political practice is impossible to say in the abstract; what is and is not fraud depends largely on

[19] As defined in 18 U.S.C. § 1346, and recently sharply limited by the Supreme Court in *Skilling v. United States*, 130 S.Ct. 2896 (2010).

the expectations of the relevant community—expectations that are defined by positive law and that are evaluated from the point of view of justice rather than individualistic, timeless moral rights.

D.

I now turn to pressing the argument at a different point, namely by challenging the implication that the criminal law is not, as Scheffler puts it, a matter of allocating a scarce good among moral equals, but rather a matter of giving punishment to those who deserve it. The criminal law, unlike other legal institutions, might plausibly seem to answer to a radically different conception of justice insofar as it is viewed as the law of punishment. For, given the sort of thing punishment *is*—not just harsh treatment, but harsh treatment inflicted on account of someone's prior transgressions—a desert-sensitive distribution would plausibly seem to be the only kind of distribution that would be appropriate. On this view, questions of a "fair" allotment of punishment simply do not arise.

As a rule-enforcing institution, the criminal law is inevitably in the business of providing a wide range of social goods through the sanctions it imposes. By defining a range of criminalized conduct, and enforcing those norms against violators, the criminal law provides assurances to those subject to it that they may walk about their cities and neighborhoods without fear of assault, that they will be reasonably secure in their possessions, and that their sexual autonomy will be respected, even in the context of the family.[20] In addition, the criminal law has been pressed into service in a broad range of contexts beyond the traditional *mala in se* offenses. It is, to that degree, therefore also implicated in ensuring that the financial markets are not distorted by insider trading, that the environment is not heedlessly despoiled, that public transit is not overrun

[20] On the concept of assurance, see JEREMY WALDRON, THE HARM IN HATE SPEECH 81-89 (2012).

by (literal) free riders, and so on. By defining criminal offenses to regulate this form of conduct, the rule-making institutions ground an expectation that certain sorts of interest will be protected, regardless of whether the sanctions they mete out are or are not "punishment." However, because these interests will generally be of different value to different people, and indeed, may be of negative value to some—for instance, by criminalizing certain forms of consensual commercial exchange—and because enforcement efforts are not likely to be applied uniformly in all contexts, the criminal law naturally raises questions of fairness in allocation. These questions pertain both to the benefits that criminal law enforcement generates, as well as to the burdens that it inevitably also imposes. Plainly put, the criminal law provides a valuable government service by protecting a wide range of legally recognized interests; and this is a service that, like any other, can be more or less fairly allocated.[21]

The argument can be made more explicit by appeal to Scheffler's own characterization of the scope of distributive justice. Distributive justice, Scheffler suggests,

> (1) "is concerned with the proper division of social advantages—that is, with the allocation of things that people are presumed to want";
>
> (2) arises "primarily for societies that find themselves in conditions of moderate scarcity that make it impossible for them to fully satisfy the demand for such advantages"; and
>
> (3) "because goods are scarce and their allocation is heavily dependent on social institutions, any provision of advantages to some may affect the supply available for

[21] The "fair protection" model developed by Alon Harel and Gideon Parchomovsky is one of the few philosophical discussions of punishment that is sensitive to the criminal law as a government service to which people have claims of equitable distribution. See Harel & Parchomovsky, *On Hate and Equality*, 109(3) YALE LAW JOURNAL 507–39 (1999). See also Dolovich, *supra* note 3, at 352–56.

others," which means that "the problem of distributive justice is seen as the problem of how to allocate scarce goods among moral equals."[22]

Each of these features applies in a straightforward way in the context of criminal justice. First, since the rules that the criminal law enforces undoubtedly include rules pertaining to the division of social advantage, the criminal law is inextricably involved in allocating "things that people are presumed to want." Crimes of tax evasion, fraud, and the like are simply the most obvious examples. For another example, consider the criminalization of marital rape: by closing the common law exception, legislatures allocate an important social advantage that had been unjustly denied to women, namely the ability to be free of sexual violence from their spouses. This is a form of social advantage that is of undeniable importance, and that continues to be the object of significant social struggle.

Second, enforcement is, obviously, expensive. Setting aside the costs of enforcing "administrative" regulations, the cost of preventing even a majority of the instances—to say nothing of *all* the instances—of typical street crime is extraordinary. In 2006, the federal and state governments are estimated to have spent over $214 billion on criminal justice.[23] Nevertheless, clearance rates, particularly for less serious, nonviolent offenses, remain stubbornly low.[24]

Finally, given scarcity, policy decisions by rule-enforcing institutions inevitably affect the degree to which those who are subject to those institutions enjoy the benefits and share in the

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[22] Scheffler, *supra* note 4, at 986.

[23] Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, Table 1.1.2006, http://www.albany.edu/sourcebook/pdf/t112006.pdf.

[24] Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online*, Table 4.21.2007,http://www.albany.edu/sourcebook/pdf/t4212007.pdf; *id.,* Table 5.0002.2004, http://www.albany.edu/sourcebook/pdf/t500022004.pdf. For a discussion of a fair distribution of punishment under conditions of scarcity, see Vincent Chiao, Ex Ante *Fairness in Criminal Law and Procedure*, 15(2) NEW CRIMINAL LAW REVIEW 277 (2012).

burdens of criminal justice. Consider, for instance, the familiar complaints about jurisdictions that allow a sexual complainant's reputation to be destroyed at trial; the disproportionate targeting of young minority men for humiliating searches; sentencing regimes that provide vastly different sentencing outcomes for offenders (or victims) of different races; or neighborhoods where the police are simply absent. These are not complaints about undeserved punishment. They are complaints about how the benefits and burdens created by criminal justice institutions are allocated. They are complaints about public institutions showing less than equal respect and concern for their constituents, either through the degree of protection they provide, or through the humiliating and discriminatory ways in which they choose to provide it.

It is perhaps worth emphasizing several points. First, criminal conduct is not simply the result of an isolated instance of an unencumbered choice by some individual at some arbitrary point in time. The state not only defines when and how individuals will be sanctioned for violating this or that rule, but also largely defines the social circumstances under which individuals choose their actions and plan their lives. It thereby has a significant impact on the costs of complying with this or that sanction-backed rule. Severely limited access to adequate early childhood care, education, or minimally decent employment all bear, in more or less obvious ways, on the degree to which we can expect compliance with the demands of public institutions. Indeed, gross injustice in background institutions might well be thought to excuse or perhaps even justify conduct that would otherwise be criminal. As Tommie Shelby has recently argued, residents of severely impoverished, urban, predominantly African-American ghettoes may plausibly be thought to have reduced civic obligations on account of what is in effect a serious breakdown in social reciprocity; this may include fewer obligations to comply with the

demands that the positive criminal law claims to place on them.[25] This is hardly to say that the criminal law cannot be enforced under such conditions—given the localized nature of crime, this would simply amount to further abandonment—but only that the use of targeted criminal sanctions should be part of a broader policy agenda in redressing gross background injustice.

Second, although tracing the precise relation between crime and incarceration is a complex empirical endeavor, recent studies have suggested that the run-up in incarceration rates over the last generation cannot be fully explained by reference to crime control, which at least suggests that the burdens of criminal justice have outstripped one key measure of the benefits it provides. Considered between 1960 and the present, rates of violent and property crime peaked in the early 1990s and have been steadily declining since. One study found that "[i]f incarceration rates … had tracked violent crime rates, the incarceration rate would have peaked at 317 per 100,000 in 1992, and fallen to 227 per 100,000 by 2008—less than one third of the actual 2008 level and about the same level as in 1980."[26] Perhaps all of this might still be justified if, absent such extraordinary measures, victimization rates would have been dramatically higher than they were. However, there appears to be little reason to believe that this was the case, at least without attributing inexplicably high levels of latent crime to the United States.[27]

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[25] See Tommie Shelby, *Justice, Deviance and the Dark Ghetto*, 35 PHILOSOPHY AND PUBLIC AFFAIRS 126–60, 152 (2007). See also Jeffrie Murphy, *Marxism and Retribution*, 2(3) PHILOSOPHY AND PUBLIC AFFAIRS 217–43 (1973); MATRAVERS, *supra* note 3, at 265–67.

[26] See John Schmitt, Kris Warner, & Sarika Gupta, *The High Budgetary Cost of Incarceration* 9, Table 3 (Center for Economic and Policy Research, June 2010), http://www.cepr.net/index.php/publications/reports/the-high-budgetary-cost-of-incarceration/.

[27] See Holger Spamann, Normal Crime, Unusual Punishment: US Numbers in Global Comparative Perspective, 2 (unpublished manuscript, 2012), *available at* http://www.udesa.edu.ar/files/UA_Derecho/Draft_newsetup.pdf (testing "all the major variables that have been hypothesized to predict crime and punishment and that are plausibly exogenous to both," and finding that while these variables accurately predict 74% of US homicide rates and 98% of US victimization rates for other crimes, they predict only 15% of the actual US incarceration rate.)

Finally, it is worth emphasizing just how recent this phenomenon is. The United States currently has over 7 million adults under some form of correctional supervision.[28] In the aggregate, the United States is estimated to incarcerate approximately 756 out of every 100,000 residents.[29] But as recently as 1970, aggregate incarceration rates in the United States hovered at approximately 100 per 100,000—less than one-seventh of where it stands today, and roughly on par with Canada and Western Europe.[30] This point bears emphasizing. In the space of a single generation, American criminal justice proceeded to destroy millions more lives than it ever had before, with the predominant weight of that impact being felt by poor minority men. Perhaps the unprecedented expansion of American criminal justice in the last generation has served to provide millions of Americans with a valuable good that they could not otherwise enjoy, to a degree sufficient to justify the costs inevitably created by those institutions; and perhaps the costs and benefits could not be more equitably distributed than they are. Both of these propositions are highly doubtful, but the point is that a conception of the criminal law as the law of punishment—as a distinct institutional sub-system designed to achieve a distinctive kind of justice—retributive justice for wrongdoers—prevents us from so much as getting these issues squarely into view in the first place. If the criminal law is to be evaluated in terms of its success in punishing those

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[28] Bureau of Justice Statistics, Correctional Population in the United States, 2009, figure 1. Available at: http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2316.

[29] See *World Prison Population List, 8th ed.*, ed. Roy Walmsley, published by the International Centre for Prison Studies in partnership with the University of Essex, available here: http://www.prisonstudies.org/info/downloads/wppl-8th_41.pdf. This figure is roughly consistent with reports released by the Bureau of Justice Statistics. See *Correctional Populations in the United States, 2009*, Appendix Table 2, available at: http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus09.pdf.

The aggregate figure for the United States masks quite significant state-by-state variation. The state with the lowest incarceration rate is Maine, which has an incarceration rate of about 150 per 100,000; Louisiana, in contrast, incarcerates 881 out of every 100,000 of its residents, or nearly six times as many as Maine. See Bureau of Justice Statistics, *Prisoners in 2010*, table 9, available at: http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=11.

[30] Bureau of Justice Statistics, *State and Federal Prisoners, 1925–85*, Table 1, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/sfp2585.pdf.

who deserve it, then questions about whether its institutions show equal respect and concern to those whose lives they affect is simply beside the point.[31]

To sum up: even if criminal justice institutions were to punish no one—even if they were purely coercive rule-enforcing institutions—they would nevertheless still create and allocate extraordinarily important benefits and burdens among a community of moral equals, and they would inevitably do so under conditions of at least moderate scarcity. In allocating these benefits (protection from victimization) and burdens (the direct and indirect costs of ultra-harsh sanctions), criminal justice institutions exercise an enormous impact on people's life chances. Their scale, impact, and inextricable entanglement with the allocation of social advantage suggest that they be treated as an integrated part of society's basic structure, rather than as some kind of distinct institutional subsystem, unregulated by the political ideals of egalitarian liberalism.

II.

A.

I have claimed that, both in principle and in practice, criminal justice institutions are coercive rule-enforcing institutions regardless of whether or not they are also retributive ones. I have also argued that criminal justice institutions are fully enmeshed in the overall institutional structure of the state, and that we cannot hope to specify what each person "deserves" by way of criminal sanction without also investigating the justifiability of the rules those sanctions are meant to enforce. In many cases, the status of those rules—rules against murder, sexual assault,

[31] The claim is not that retributive theorists have failed to notice that criminal justice institutions have distributive effects. It is that, by insisting on authorizing deserved punishment as the hallmark of criminal law, they have sidelined the distributive consequences of criminal justice as peripheral to criminal law theory, which (on this view) is primarily concerned with the conditions under which the application of deserved punishment would be retributively just, not whether it would further the aims of social justice.

robbery and the like—will be clear. However, history teaches that the criminal law has regularly been used as a means to quell political dissent, entrench vested property interests, and establish norms of social hierarchy.[32] Less alarmingly, even basic forms of criminality are sensitive to culturally embedded and historically shifting conceptions of bodily integrity, personhood, reputation, and privacy.[33] Criminal justice institutions may or may not inflict deserved punishment. But they are organs of political power regardless, and should be evaluated as such.

The central question for normative criminal law scholarship is thus to consider whether the pattern of protection established by criminal justice institutions is consistent with a plausible conception of equal respect and concern. That criminal justice institutions are reliable and more or less efficacious ways of ensuring the stability of social arrangements is, of course, hardly an adequate reason for having them. It is not enough that criminal justice institutions support state institutions; we want to know whether these institutions themselves are justifiable to those to whom they apply. Consider, for instance, Lord Devlin's explanation for why the criminal law should be used to punish "sin": not, Devlin claimed, because it was sin, but rather because punishing sin reinforces the "invisible bonds of common thought" that hold a society together.[34] Regardless of the merits of his rather far-fetched prediction of social calamity as a result of failing to clamp down on deviant sex, Devlin's argument fails to take seriously that justifying the

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[32] "For wealth does not exist outside a social context, theft is given definition only within a set of social relations, and the connections between property, power and authority are close and crucial. The criminal law was critically important in maintaining bonds of obedience and deference, in legitimizing the status quo, in constantly recreating the structure of authority which arose from property and in turn protected its interests." Douglas Hay, *Property, Authority and the Criminal Law*, ALBION'S FATAL TREE 25 (D. Hay, P. Linebaugh, J.G. Rule, E.P. Thompson, & C Winslow, eds., 1975).

[33] For an illuminating discussion that traces the evolution of the law of assault to changing conceptions of personhood, bodily integrity, and the like, see Lindsay Farmer, *Criminal Wrongs in Historical Perspective*, in THE BOUNDARIES OF THE CRIMINAL LAW 230–37 (R.A. Duff, L. Farmer, S.E. Marshall, M. Renzo, & V. Tadros, eds., 2010).

[34] PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 10 (1965). Compare on this point, JOHN RAWLS, POLITICAL LIBERALISM 140–44 (1993).

existence and operation of coercive state institutions requires showing not only that they stabilize social arrangements, but that the arrangements they stabilize are ones that free and equal citizens could reasonably endorse.

I now turn to consider one way in which the resources of a fuller account of liberal egalitarian theories of justice can be brought to bear on the central concerns of criminal justice. I take as my starting point the conception of "democratic equality" articulated by Elizabeth Anderson.[35] I note that I am not trying to convince skeptics to become egalitarians, or that democratic equality is the best egalitarian theory available. I am taking on the decidedly more modest task of explaining how one, I believe, attractive conception of equal respect and concern could be brought to bear on some of the major problems in criminal justice.

The basic features of democratic equality can be succinctly stated. Anderson identifies five desiderata that democratic equality places on "principles of justice": First, the principles must ensure that citizens have "effective access" to a limited range of goods "over the course of their whole lives."[36] Second, effective access to these goods must not be based on paternalistic grounds. Third, the protected interests are not fungible: one cannot compensate for an unjust distribution of one by providing more of another. Fourth, individual responsibility should be accommodated without resort to "demeaning and intrusive judgments" about people's intellectual or personal traits. Finally, these principles should be "possible objects of collective willing"—they must be principles that can be endorsed from the standpoint of a democratic

[35] Elizabeth Anderson, *What is the Point of Equality?* 109 ETHICS 287–337 (1999).

[36] Anderson frames her discussion in terms of equal citizenship. Given that the criminal law has jurisdiction over all people who are present in the state's territory, the reference to citizenship is clearly too narrow. I thus frame my discussion in terms of equality of membership rather than formal citizenship.

community, that is, a community in which all are, and are obligated to treat others as, moral equals.[37]

An especially attractive feature of democratic equality from the point of view of criminal justice is its focus on central *capabilities*. As Anderson notes, a theory of justice must specify not only a distributive rule—strict equality, maximin, threshold attainment, and so forth—but also a metric: an account of *what* it is that is subject to the distributive rule.[38] A crucial component of democratic equality is its focus on a subset of core human capabilities as its preferred metric, as the "goods" to which people must have effective access. Capabilities represent the set of functionings that are open to a person, where a functioning is a state or activity that contributes to a person's well-being: for instance, to move about, to be well-nourished, to work, to maintain family and personal relationships, to be reasonably healthy.[39] The emphasis is placed on capability rather than functioning to accommodate equal respect as a measure of people's freedom to shape their lives as they see fit—that is, to choose which functionings to achieve, and to what degree. Because democratic equality adopts a threshold, rather than strictly equalizing, distributional rule, to say that democratic equality seeks to achieve equality in the space of capabilities is to say that it seeks to ensure a minimum level of capability for all with respect to a discrete set of capabilities. This raises two questions: First, why a discrete set of capabilities rather than a single, overarching, comprehensive metric? And, second, which capabilities?

Both questions are answered by appeal to the basic commitment of egalitarian social thought: to ameliorate oppressive social relationships, and to enable each person to function as a

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[37] Anderson, *supra* note 35, at 314–15.

[38] See Anderson, *Justifying the Capabilities Approach to Justice*, in MEASURING JUSTICE 81 (H. Brighouse & I. Robeyns, eds., 2010); AMARTYA SEN, THE IDEA OF JUSTICE 232 (2011).

[39] Hamish Stewart is, to the best of my knowledge, the only other legal theorist who has suggested bringing the capabilities approach to bear on problems of criminal justice. See Stewart, *The Limits of Consent and the Law of Assault*, 24 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 205 (2011).

member in equal standing in the major institutions and practices of public life and civil society—to lead a life as a peer among peers. Thus, the question of which capabilities should be guaranteed is answered by answering the questions: Which capabilities are necessary to avoid oppressive social relationships? And, which are necessary to enable functioning as a peer in the major institutions and practices of public life and civil society? Although the question is surely open-ended, not every capability is plausibly included. For instance, while the ability to be a gourmand may be important to a person's self-conception, it does not plausibly fall under either of these headings. On the other hand, the capability to earn a living wage, to participate meaningfully in the political life of the community, to be free from violence and humiliation, to some degree of privacy, to live in decent housing, and to achieve a decent education may all, at least arguably, fall under these headings and thus be protected capabilities under democratic equality.[40]

The same considerations suggest why democratic equality insists on guaranteeing effective access to a set of discrete capabilities, rather than allowing trade-offs between various goods so long as an overall aggregate level of capability (or welfare, or happiness) is guaranteed. For democratic equality identifies particular capabilities as being of special concern in ensuring that people are neither oppressed nor forced to "bow and scrape before others … as a condition of having their claim heard."[41] The point of democratic equality is not to make everyone equally happy or equally well off. It is to ensure that everyone is in a position to live an independent life among moral equals. From this point of view, the invasion of one fundamental interest—for example, in sexual autonomy—could hardly be compensated for by an increase in the allocation

[40] I do not attempt to provide an exhaustive list of protected capabilities. For one proposal, see MARTHA NUSSBAUM, CREATING CAPABILITIES, ch.2 (2011).

[41] Anderson, *supra* note 35, at 313.

of some other sort of good—for example, decent employment—regardless of whether or not an individual would be willing to accept the trade. "Private satisfactions," as Anderson puts the point, "cannot make up for public oppression."[42] By the same token, the guarantee of effective access to these capabilities remains in place over the duration of a person's life; they are not entitlements subject to being traded away, as in the case of "starting-gate" theories that insist only upon an initially equal division of resources. Democratic equality insists, in other words, on protecting people's *status* as moral equals, rather than equalizing the *means* of satisfying their various preferences.[43]

Finally, democratic equality's focus on "effective access" to central capabilities—rather than strict equality—is also of special significance in the context of criminal justice. It would be very odd, after all, to conclude that equal respect and concern could just as well be satisfied by making one population (say, middle-class suburbanites) *less* safe as it would by making another population (say, residents of impoverished urban neighborhoods) *more* safe. For instance, the better objection to the gross disparity between crack and powder cocaine sentencing—with possession of one gram of crack, until recently, treated equivalently to possession of 100 grams of powder—was not one of unfairness, but rather that the disparity did little to stem, and much to aggravate, the hollowing out of urban neighborhoods.[44] After all, if unfairness were the problem, it could have been resolved simply by increasing the sentencing schedule for powder as well.[45]

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[42] Anderson, *id.* at 314.

[43] Anderson, *id.* at 319. Anderson connects this aspect of democratic equality to a Kantian view of human dignity "that is not conditional upon anyone's desires or preferences, not even the individual's own desires."

[44] For a discussion of the crack and powder cocaine disparity, see MARK KLEIMAN, JONATHAN P. CAULKINS AND ANGELA HAWKEN, DRUGS AND DRUG POLICY: WHAT EVERYONE NEEDS TO KNOW 61-3 (2011).

[45] Of course, it could also be objected that the sentencing schedule for crack was grossly disproportionate. I do not take a stand here on proportionality as a principle of sentencing, other than to note that there

Democratic egalitarianism thus provides a basic agenda and set of broad evaluative criteria for public institutions—including criminal justice institutions. The threat of criminal sanctions can be justified within the framework of democratic equality when they are plausibly required for ensuring the capabilities essential to equal membership. This is, of course, not to suggest that criminal justice institutions are the only institutions that have a stake in enforcing equal membership, but rather that they may form an important part of a multipronged package of institutions and policies oriented toward this goal.

Giving criminal justice institutions this role raises the salience of the following questions: First, given that a wide variety of legal institutions engage in what can be described as rule enforcement, what sets criminal justice institutions apart from other rule-enforcing institutions? Second, insofar as criminal justice institutions are engaged in practices that have the effect of denying people effective access to basic capabilities—for example, through lengthy periods of incarceration—how can these practices be rendered consistent with equal membership as democratic egalitarianism conceives of it? And, finally, can substantive principles for the use of criminal sanctions be derived from a commitment to democratic equality?

B.

There are many different ways in which compliance with legal rules can be promoted. Not every method of ensuring compliance involves threats of adverse consequences. Some methods include education, raising public awareness, promoting early childhood care, target-hardening, or surveillance.[46] Others include the use of private enforcement through, for instance, the creation

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appears to be no reason to think that *only* retributivists could explain why punishment must be proportional, whereas no mainstream form of liberal political theory could generate support for that principle. For a recent discussion of proportionality in punishment, see Adam Kolber, *Against Proportional Punishment*, 66 VANDERBILT LAW REVIEW 1141 (2013).

[46] For an excellent discussion of the narrow role of coercive institutions in a broader panoply of institutions devoted to promoting rule-compliance, see MARK KLEIMAN, WHEN BRUTE FORCE FAILS

of tort causes of action for various forms of injury. In the face of such diversity, one could simply stipulate which rule-enforcing measures should count as criminal or not, for instance, on the basis of tradition or the presence of a punitive intent or some other feature. I suggest, however, that given democratic equality's focus on the capabilities central to equal membership, a highly salient distinction is the distinction between rule-enforcing measures that effectively invade a person's basic interests—the interests, that is, that are represented by democratic equality's protected capabilities—and those that do not. On this view, criminal laws are not identified by their subject matter (the type of conduct they regulate), nor are they identified by what they express (a punitive or censuring message rather than a price). Instead, they are identified by the seriously invasive character of the sanctions they authorize relative to the capabilities central to equal membership.[47]

By this metric, *any* attempt to incarcerate or detain a person for a significant period of time—regardless of whether for punishment or for treatment—would qualify as "criminal" by virtue of the serious impact on an affected person's freedom of movement and association. Restrictive probation and parole conditions would similarly fall within the ambit of the criminal law. Monetary sanctions might also qualify, depending on their expected impact on the capabilities of those affected; extreme fines, or those targeted at the poor, might potentially qualify as serious deprivations sufficient to merit the enhanced scrutiny of criminal procedure.

I note that, insofar as what is central to the nature of the criminal sanction is its impact on a person's capabilities, this proposal leaves no room for a distinction between the strictly intended

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(2009). As Kleiman stresses, many institutions beyond simply police, prosecutors, and prisons have an impact on criminal offending, and many of the most cost-effective means of reducing criminal offending will accordingly be located outside the criminal justice system proper.

[47] See Vincent Chiao, *Punishment and Permissibility in the Criminal Law*, 32 LAW & PHILOSOPHY 729-765 (2013).

punishment and the so-called "collateral consequences" inevitably brought about in its wake, and thus contrasts sharply with longstanding precedent in the United States Supreme Court.[48] When considering whether it is desirable to rely on criminal sanctions in this or that context, the fact that a period of incarceration—or even simply a conviction—may make it significantly harder for a person to later secure gainful employment, to sustain family and social relationships, or adversely affect his immigration status, can no more be dismissed as an unintended "collateral consequence" than the failure to provide access for the disabled to public buildings can be excluded as the unintended consequence of the otherwise permissible pursuit of an aesthetic ideal for municipal architecture. As a result, it is entirely possible that under some circumstances, the foreseen-but-not-strictly-intended consequences of a conviction might render it impermissible or unjust to rely on the criminal law, even if, absent those consequences, a period of incarceration or probation would not be disproportionate. This possibility is made much more likely by the tendency of the federal and state governments to attach numerous noncriminal disabilities to criminal convictions, and to make criminal records both permanent and easily accessible.

A capabilities-based account of the criminal law is usefully contrasted with recent proposals to rethink punishment practices in light of subjective experience, in particular, in light of adaptation to the rigors of incarceration. Thus, in a recent and provocative paper, Adam Kolber has critiqued sentencing practices that focus solely on the duration of the sentence and fail to take into account how that incarceration concretely affects those who suffer them.[49] The

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[48] See, e.g., Smith v. Doe, 538 U.S. 84 (2003) (holding that social exclusion and ostracism from sex offender registries were not punishment, and hence not protected by the *ex post facto* clause); but see Padilla v. Kentucky, 130 S.Ct. 1473, 1482 (2010) (holding that criminal defendants are entitled to be informed about at least some of the immigration consequences of a guilty plea).

[49] Adam Kolber, *The Subjective Experience of Punishment*, 109 COLUMBIA LAW REVIEW 182–236 (2009). Kolber's focus on the experiential quality of punishment, as opposed to more spare

"subjective disutility of punishment," Kolber writes, "is not some mere aftereffect of punishment. Rather, it is largely or entirely the punishment itself."[50] Just as the felt impact of a $100 fine varies with the wealth of the individual defendant, a set term of years in prison can be expected to have a differing impact on the happiness of differently situated individuals, some of whom have a harder time adapting to prison than others. To nevertheless insist that equality in punishment is measured by equality in time idling in prison is to ignore the obvious: people vary in how they respond to punishment, and this variation is of moral significance insofar as it results in widely varying, and potentially quite cruel, experiences for those affected.[51] This variability in how punishment is actually experienced is rendered invisible by what Kolber, in a subsequent paper, refers to as the "duration fetish" of our sentencing practices.[52]

A democratic egalitarian approach to criminal justice shows both what is appealing and what is implausible in Kolber's argument. Kolber is surely right to point out that superficially equivalent sanctions may have dramatically different impacts on people's lives for a host of reasons, such as age, health, job prospects, family and citizenship status, and the like. It takes little insight to recognize that the consequences of, say, a six-month period of incarceration on a middle-income offender with no dependents are likely to be less devastating than they would be for an impoverished offender with substantial childcare obligations. The variability in the seriousness of a temporally equivalent period of incarceration is an instantiation of Amartya

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representations of preference, would appear to rely on the interpersonal comparability of those experiences, as it is only on the basis of interpersonal comparisons that some individuals can be said to experience more or less suffering than they are due in light of the suffering experienced by others. I shall not examine whether this assumption can be defended. For another recent appeal to subjective utility in formulating sentencing policy, see John Bronsteen, Christopher Buccafusco, & Jonathan Masur, *Happiness and Punishment*, 76 UNIVERSITY OF CHICAGO LAW REVIEW 1037–81, 1065 (2009).

[50] Kolber, *supra* note 48, at 212–13.

[51] *Id.* at 213.

[52] Adam Kolber, *The Comparative Nature of Punishment*, 89 BOSTON UNIVERSITY LAW REVIEW 1606 (2009).

Sen's familiar point that an approach to justice that focuses on the allocation of resources will miss the fact that people vary in how efficiently they are able to convert those resources into actual functionings, and thus will fail to take into account potentially quite significant differences in how peoples' lives go even when they have equal resources at their disposal. As a result, Sen has argued, unlike the capabilities approach, tracking simply the distribution of resources will systematically disadvantage people who have relatively low conversion rates.[53] An exclusive focus on sentence length has much the same effect, and a democratic egalitarian approach joins Kolber in rejecting it.

However, there is no need to slide all the way from objective goods to subjective utility.[54] The capabilities approach provides a stopping point between the two, one that is sensitive to what goods and resources enable people to do without being beholden to how people may feel about those abilities.[55] A capabilities approach does not conceive of sanctions as equivalently harsh simply because they are equivalently long, but it also does not conceive of them as equivalently harsh because they are experienced as equivalently painful. The relative severity of state-imposed sanctions is, instead, assessed through the impact those sanctions have on a

[53] See Amartya Sen, *Justice: Means versus Freedom*, 19(2) PHILOSOPHY AND PUBLIC AFFAIRS 111, at 115-16 (1990).

[54] To be fair, Kolber describes his focus on the experience of suffering as but one aspect of sanction severity. In part, this is because of the slightly different target of his discussion and mine: Kolber is interested in providing a general-purpose criterion for comparing the harshness of imprisonment. I am interested in providing a metric for evaluating when a state-imposed sanction is sufficiently harsh to be denominated "criminal," and thereby trigger the enhanced protections of criminal procedure; I am not attempting to provide an "account of disvaluable features of the world." Kolber, *The Subjective Experience of Punishment*, 109 COLUMBIA LAW REVIEW 182 (2009) at 215. It is consistent with the view sketched here to maintain, as Kolber plausibly does, that sadistically imposing minor nuisances or causing a person pointless anxiety requires justification.

[55] See Gerald A. Cohen, *Equality of What? On Welfare, Goods, and Capabilities*, in THE QUALITY OF LIFE 30–53 (M. Nussbaum & A. Sen, eds., 1993).

person's ability to achieve the functionings identified as essential to equal membership.[56] By this metric, detention for even a few days could be sufficiently severe to trigger particular scrutiny if the detainee suffers from a serious illness that will be left untreated while he is incarcerated, even if an equivalent period of detention would not otherwise qualify. Similarly, if A draws a higher wage than B, A will experience a period of incarceration as a greater financial loss; but on the approach taken here, what triggers particular scrutiny is not the difference between *ex ante* and *ex post* states, but rather whether the incarceration (or other sanction) causes A or B to drop below a minimum level of capability. By this metric a $1,000 fine might merit more legal scrutiny in the case of a person of modest means than a $10,000 fine would in the case of a millionaire.[57] Although the duration of an incarcerative sentence undoubtedly bears on this question, there is little reason to think that duration alone is a particularly good proxy.

The point can be put more generally by noting that Kolber's emphasis on subjective experience runs headlong into a version of the problem of expensive tastes. People tend to adapt to harsh conditions, such that a two-year term of imprisonment may not be experienced as twice as adverse as a one-year term. But it is not plausible to maintain that a person who acclimates to harsh imprisonment conditions and thus requires significantly harsher treatment to attain a parallel level of subjective utility is not therefore being treated unjustly if his term is inappropriately long or is served under dangerous and brutalizing conditions. The same applies, as Kolber is aware, to people whose baseline condition is unusually high or low. Replacing a wealthy offender's satin sheets with cotton ones is hardly equivalent to replacing a poor

[56] Sanctions may, of course, impact capabilities that are not "central" in the way I have suggested. The significance, here, of distinguishing a distinct subset of "central capabilities" is as a device for allocating procedural rights, i.e. as a stand-in for the traditional "civil-criminal" distinction.

[57] For Kolber's discussion of these types of cases see e.g., *The Comparative Nature of Punishment*, *supra* note 51, at 1588–89. For his account of punishment severity as drawn from a comparison of a person's *ex ante* and *ex post* states, see *id*. at 1573.

offender's bedroll with a concrete slab, even if the change in subjective utility is the same. "If," as Anderson puts the point, "people find happiness in their lives despite being oppressed by others, this hardly justifies continuing the oppression."[58]

However, a focus on capabilities need not be understood to categorically exclude consideration of psychological states in the assessment of sanction severity. After all, some of the central capabilities—notably, those having to do with self-respect and the ability to live publicly without shame—are in large part grounded in a person's psychology. However, the focus on capability rather than functioning emphasizes that what is of fundamental importance in this context is not the achievement of this or that psychological state, but the reasonably available ability to do so. Self-respect is of interest to democratic equality not because it is an agreeable psychological state, but because it is the usual outcome of social and political relationships of equality. Additionally, in other cases psychological states may figure more directly in the evaluation of sanction severity. It may be that much of the harm of extended periods of solitary confinement or harsh interrogation practices—regardless of whether they amount to "torture"—is to destroy a person's psychological integrity. Since to destroy a person's capacity for ordered thought and feeling is to destroy a capability necessary for the effective enjoyment of other central capabilities, these practices are fully cognizable within the framework of democratic equality.

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[58] Anderson, *supra* note 35, at 304. Suppose that A and B are in all respects alike, except that A experiences the incarceration as subjectively worse than B. Kolber might claim that this is to punish A that much worse than B, and that this differential in punishment requires moral justification. See Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1 (2012). My claim is not that there is no respect in which A is treated worse than B, nor even that A's greater anxiety might require accommodation or at least consideration. My claim is that when we are trying to determine whether what the state proposes to do to A and B is sufficiently destructive as to require the heightened legal safeguards of criminal procedure, an appropriate metric is the expected impact on central capabilities. Insofar as the anxiety A suffers does not rise to the level of impacting a central capability, it does not bear on this question; which is, again, not to say that it could simply be ignored altogether.

C.

Democratic equality does not suggest that the guarantee of a minimum level of basic capabilities can never be revoked; as Anderson notes, democratic equality permits relaxing the guarantee of basic capabilities in response to "serious crime."[59] How should this relaxation be understood? How can it be that a state's decision to impose sanctions that deprive people of basic capabilities is consistent with Anderson's insistence that democratic equality guarantees effective access to central capabilities for all? One strategy for resolving this challenge is clearly foreclosed to democratic egalitarians. Democratic egalitarians cannot argue that those who suffer the privations imposed by criminal justice institutions are compensated by the enhanced access to other capabilities—such as safe neighborhoods, stable institutions and secure property expectations—that it ensures. For, as Anderson has insisted, deprivation along one axis of equal membership cannot be compensated for by provision of a surfeit along another.

I suggest that a ready answer can be found in the traditions of political liberalism. Already in 1957, Hart had argued, contrary to both moralizing and Benthamite views, that the function of the substantive criminal law's excuse doctrines was to make the criminal law into a "choosing system":

> [W]hat a legal system that makes liability generally depend on excusing conditions does is to guide individuals' choices as to behaviour by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose.[60]

This view—the "fair opportunity" interpretation of the substantive criminal law—was later picked up and defended by Rawls in *A Theory of Justice*. Rawls there argued that "the principle

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[59] Anderson, *supra* note 35, at 313 and 327.

[60] *Legal Responsibility and Excuses*, collected in H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 44 (2d ed., 2008).

of responsibility"—by which he appeared to have in mind the principle that penal sanctions should not be imposed where a person is not responsible for the conduct or outcome it prohibits—"is not founded on the idea that punishment is primarily retributive or denunciatory. Instead it is acknowledged for the sake of liberty itself."[61]

The fair opportunity principle provides a means for reconciling highly coercive forms of rule enforcement with the protection of each person's interests, including the interests of those who ultimately wind up bearing the brunt of those sanctions. It ensures, as Hart stressed, that people are in a position to control and predict whether they will possibly face such sanction. By conditioning harsh sanctions on knowing and voluntary infractions, the law, as it were, enables people to insure themselves against one kind of harm (harms emanating from the state) by insuring others against a different kind of harm (harms emanating from *them*.) The fair opportunity principle renders the guarantee of effective access to basic capabilities consistent with harsh sanctions by insisting not only that the application of those penalties serves to protect everyone's interest in those capabilities, but also that they only apply to those who have in some meaningful sense voluntarily waived the protection the law extends to them. This is, however, not to slide into a "consent" theory of punishment: democratic equality's commitment to ensuring effective access to basic capabilities is inconsistent with gratuitously violent penalties, even when those subject to them have knowingly and voluntarily committed the predicate offenses.

Yet it must be conceded that not all instances of harsh, state-sponsored sanctions with which we are familiar are instances of rule enforcement. There are occasions in which the state has a

[61] RAWLS, *supra* note 9, at 241. More recently, Erin Kelly has defended this view in the course of articulating an anti-retributivist view of criminal justice. See Kelly, *supra* note 3, at 449–51. For a recent critique of the fair opportunity principle, see BRUDNER, *supra* note 12, at 70–75.

powerful reason to impose very restrictive and intrusive measures that do not fall squarely under the rubric of rule enforcement. A paradigmatic example is preventive detention, whether for the criminally insane or merely the extremely contagious. These are instances in which the state treats people as vectors of harm rather than as autonomous agents capable of conforming behavior to directives, and so do not fit comfortably within the rubric of rule enforcement.[62] Because the fair opportunity principle has little grip on these cases, one may well wonder if equal membership, even when modified by the fair opportunity principle, is consistent with treating people in this way.

I suggest, following Hart, that the fair opportunity principle not be taken as a nonnegotiable prerequisite for all cases, particularly when it comes to questions of nonideal theory. The fair opportunity principle embodies a view about the importance of liberty, in the sense of a person's ability to control certain aspects of how her future goes. Under less than ideal conditions, it is plausible that the guarantee of basic capability to all cannot be met: for A to be sufficiently secure from assault may require not only that B faces the threat of sanctions if he chooses to commit assault, but also that C be detained *ex ante* if there is very good reason to think that C cannot help but to commit assault. In such cases, the decision to waive the fair opportunity principle will represent, as Hart noted, the "sacrifice" of one principle for another.[63] The sacrifice in question is an impairment of one kind of freedom—a person's ability to control and predict her future—in favor of ensuring that another kind of freedom—the freedom that the basic capabilities represent—is maintained at a tolerable level. However, such an accommodation is

[62] See Richard L. Lippke, *No Easy Way Out: Dangerous Offenders and Preventive Detention*, 27 LAW & PHILOSOPHY 383–414 (2008); Ferdinand D. Schoeman, *On Incapacitating the Dangerous*, 16(1) AMERICAN PHILOSOPHICAL QUARTERLY 27–35 (1979).

[63] HART, *supra* note 1, at 44.

tolerable insofar as the justification for abrogating fair opportunity rests on the urgency of protecting the central capabilities that underpin democratic equality itself.[64]

It might be objected, first, that preventive detention of this sort "promote[s] the autonomy of some by denying it to others," and hence could not be the object of an impartial will; and, second, that because the fair opportunity principle allows people to be convicted of serious crimes on the basis of negligence, it could not plausibly be seen as "implicitly authorized" by the criminal's conscious wrongdoing.[65] The response to these objections is twofold. First, there is no reason to think that philosophical abstraction should yield a hard-and-fast rule about the minimum *mens rea* required for conviction for any given offense. Consider, for instance, the law of sexual assault. An insistence on subjective fault requires the prosecution to prove beyond a reasonable doubt that the accused did not have an honest, even if unreasonable, belief in consent, with the consequence that sexual assault becomes an extraordinarily difficult charge to prove.[66] Insofar as those prosecutions have a function beyond a morality play centered on the accused, there is at least a *pro tanto* reason for a more objective standard for consent.[67]

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[64] For those whose lives are so affected, "one can only say: their nature is their misfortune." RAWLS, *supra* note 9, at 576.

[65] BRUDNER, *supra* note 12, at 302–03. Scanlon, in a commentary on Carlos Nino's "consent" theory of punishment, expressed unease with the notion of consent as a stand-in for desert, and suggested a gloss of consent in light of the fair opportunity principle. I share Scanlon's unease with the notion of consent, for the natural implication of "consent" in this context is the view that we must somehow convince ourselves that each person we wish to punish has, notionally at least, consented to or otherwise authorized us to punish them. Punishment is a much bloodier proposition than that. See T.M. Scanlon, *Punishment and the Rule of Law*, in THE DIFFICULTY OF TOLERANCE 219–32, 230 (2003).

[66] Pappajohn v. The Queen, [1980] 2 S.C.R. 120.

[67] Canada, for instance, has in fact turned sexual assault—surely a serious offense—into a crime of objective fault, at least with respect to the element of the accused's belief in consent. See Criminal Code, R.S.C. 1985, c. C-46, s. 273.2(b) (limiting the defense of subjective belief in consent to circumstances in which the accused has taken "reasonable steps" to ascertain consent.) Manslaughter is another example of a serious offense—in Canada, carrying the possibility of a life sentence—which is based on objective fault. See R. v. Creighton, [1993] 3 S.C.R. 3.

Second, and more importantly, what should be the possible objects of an impartial will are not the specific policy trade-offs that a jurisdiction ultimately makes, but rather the character of the public decision making that results in those particular concrete legal rules: the constitutional essentials, not specific statutory or common law rules. The justificatory burden is thus not to show that those who are preventively detained on grounds of future dangerousness or seriously sanctioned for merely negligent conduct have, somehow, implicitly agreed to be treated in that precise way; the justificatory burden is, rather, to show that the institutions that create and enforce those rules are ones structured by an acceptable conception of equal respect and concern. That these political institutions strike a balance that is not where the theorist him- or herself would prefer is, of course, hardly a strike against the democratic credentials of the institutions.

D.

Given that criminal sanctions are the sanctions that strip people of the basic capabilities that they are otherwise guaranteed by democratic equality, the criminal law should be the law of last resort. Although for obvious reasons strict proof of absolute necessity cannot be expected, and room for a range of acceptable policy trade-offs accommodated, the serious deprivations that the criminal law inflicts provide a reason to insist that criminal sanctions be relied upon only when it is plausible that no less restrictive means would suffice to ensure an acceptable level of compliance at a reasonable cost. Naturally, what qualifies as a "reasonable" cost is a question that can be disputed in concrete cases. However, when faced with a choice between an option for securing a target compliance rate that involves serious setbacks to central capabilities and one that does not, or only to a lesser degree, a significant premium should be placed on minimizing the degree to which basic capabilities are invaded. It may or may not be appropriate for courts, in particular, to exercise robust judicial review under this heading, but the last resort principle is

meaningful as a general normative principle for citizens, legislators, and policy makers regardless of whether or not it is a directly enforceable legal norm. The last resort principle is not a hard-and-fast rule, but rather an open-ended standard that should, as Seana Shiffrin has put it, induce moral deliberation about the degree to which less intrusive though potentially more costly measures would be equally effective, and in case they are not, whether the desired policy goal is worth the candle.[68]

Doug Husak has objected to the last resort principle on the ground that we cannot reasonably expect all conceivable alternative strategies for controlling crime to be tested prior to enacting and enforcing criminal laws.[69] Husak claims that "unless we know where the burden of proof lies in judging success or failure, and how that burden can be discharged, we cannot begin to implement the last resort principle." Husak is certainly correct that the last resort principle cannot be interpreted to require a thorough comparison between all conceivable policy mechanisms before a criminal sanction can be considered legitimate. This suggests that the last resort principle should not be interpreted as a rigid rule of proof applied to all aspects of criminal justice policy, but rather as akin to a burden-shifting presumption. Indeed, this is just how John Braithwaite and Philip Pettit have interpreted the closely related idea of parsimony in punishment: because use of criminal justice institutions imposes known costs to attain speculative, distant advantages, "it is clear that the onus of proof ought to follow squarely on the

[68] Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARVARD LAW REVIEW 1214–46 (2010).

[69] Husak, *The Criminal Law as Last Resort*, 24(2) OXFORD JOURNAL OF LEGAL STUDIES 207–35 (2004), at 220.

side of justifying any such initiative, not on the side of justifying its absence or removal. The presumption ought to be in favour of less rather than more criminal justice activity."[70]

On this interpretation of the last resort principle, the fact that we cannot demand omniscience from policy makers—notably including police and prosecutors, who decide which cases to pursue and which charges to file—hardly qualifies as a reason to exempt them from an obligation to weigh the use of ultra-harsh criminal sanctions against reasonably feasible, less invasive options. Nor does it exempt policy makers from an obligation to rethink the policy objective itself, should it turn out that only unreasonably costly or unreasonably harsh enforcement measures are required to attain it. That a policy may have represented a reasonable estimation of the least restrictive alternative when it was enacted should not insulate it from subsequent review and criticism, if evidence emerges either that less restrictive alternatives were overlooked, or that the policy has turned out to be more onerous than anticipated.

A view of the criminal law as the law of last resort stands in contrast to views, such as that of Alon Harel, that suggest that the state has a duty to criminalize certain conduct "as a form of public acknowledgment of the wrongfulness of violations of the right to life and liberty."[71] According to Harel, the state has a duty to criminalize certain forms of conduct—indeed, certain forms of criminalization should, Harel suggests, be constitutionally entrenched—because the failure to do so would amount to living in a state of domination by others. Criminalizing X, Harel maintains, is a public affirmation that doing X is not a matter of an individual's private discretion; it is a public affirmation that X is a wrong and not to be done. This duty, Harel maintains, does not hinge on a prediction that criminalizing X will contribute to actually

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[70] JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS 87 (1990). For an earlier discussion of parsimony, see NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 190 (1983).

[71] See Alon Harel, *The Duty to Criminalize* 9 (unpublished manuscript 2012).

protecting people from X.[72] In a similar vein, Husak objects that, far from being the law of last resort, the censorious character of punishment means that in some contexts, it should be the criminal law should be the law of *first* resort.[73] Suppose, Husak proposes, that it has been established that criminalizing and prosecuting men who batter their wives does little to reduce the incidence of such conduct, whereas some noncriminal option would do as well or better in deterring it.[74] Would there still be a point in imposing criminal sanctions on people who engage in domestic violence?

Husak suggests that the answer is obviously yes, since there would still be value to publicly censuring people who engage in that conduct. I suggest that this confuses the proposition that there is value to publicly censuring certain types of conduct with the proposition that there is value in inflicting pointlessly harsh treatment. In denying that there would be good reason to invoke criminal sanctions in conditions where it is known that they are an ineffective means of protecting people's interests, I do not mean to suggest that there would not be a good reason to publicly censure or otherwise stigmatize such conduct as seriously wrongful. I only mean to suggest that there would not be reason to do so through harsh criminal sanctions. Inflicting such treatment on people simply to convey a message that could be conveyed in a much less destructive manner cannot be consistent with the democratic egalitarian's understanding of the guarantees of equal membership, even if the people on whom those sanctions are inflicted have voluntarily committed the crimes with which they are charged. Perhaps it is the case that we have come to the point where we do not believe that an attempt to censure or stigmatize someone has meaning unless it involves lengthy periods of incarceration or other forms of ultra-harsh

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[72] Harel, *id*.

[73] Husak, *supra* note 66, at 220–27.

[74] Husak, *id*. at 223.

sanction. To the degree that this is so, it reflects a taste for cruelty that should be reformed or suppressed rather than indulged.

III.

The last four decades have seen a dramatic and historically unprecedented expansion of American criminal justice. For tens of millions of Americans, the most obvious and direct intervention of the state in their lives is through their entanglement with criminal justice institutions. The same period has also witnessed a striking convergence in law, politics, and academic theory. As popular political discourse about criminal justice became stridently punitive, the United States Supreme Court turned away from its interest-protecting precedents in favor of a formalistic, punishment-imposing model; at the same time, the academic commentaries that one might have expected to resist such tendencies became ever more captive to the idea that the criminal law is the law of punishment, and correspondingly conflated *criminal* justice with *retributive* justice.

This, I have argued, is a very fundamental mistake. The ideology of retributive justice masks the uncomfortable fact that we cannot cleanly distinguish what an individual deserves for his crimes from his overall place in a broad skein of public institutions and the private relations those institutions structure and make possible. While the criminal law surely does punish people for their prejusticial wrongs, that is not all it does. Indeed, that is not even primarily what it does, either in principle or in practice. The criminal law is a rule-enforcing institution before it is a punishment-imposing institution, and it operates by imposing very serious sanctions on some people in order to protect the interests of other people. This suggests that, from the point of view of normative legal and political theory, the central problem of criminal justice is not to justify our taste for a moralized conception of punishment. It is, rather, the problem of explaining if and

when seriously invading the interests of some in order to protect the interests of others may nevertheless be consistent with the ideal of equal respect and concern.