Conclusion

IN THEIR LANDMARK book, *Not Just Deserts*, John Braithwaite and Philip Pettit cautioned that "[w]hen you play the game of criminal justice on the field of retribution . . . you give full rein to those who play to the sense of normality of the majority, urging them to tyrannize the minority."[1] In the quarter century since *Not Just Deserts* was published, the American incarceration rate doubled from about 300 people in custody per 100,000 adults to over 600 people in custody per 100,000, with a disparate share of the burden falling on racial minorities. The United States now incarcerates over 2 million people on any given day.[2] During that time, retribution replaced rehabilitation as the prevailing attitude toward punishment among legal and moral philosophers in the United States. Ironically, the retributivist turn was, in large part inspired by a desire to limit the state's power to punish, and it was thought that making punishments proportional to moral desert might achieve that end.[3] But Braithwaite and Pettit were right: once unchained, the retributivist beast has proven difficult to domesticate.

In this book, I have endeavored to challenge the prevailing retributivist orthodoxy and, more generally, the individualistic and moralizing political morality that underpins it. The account I have articulated is one in

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1. John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford University Press 1992), 6–7.

2. See Sourcebook of Criminal Justice Statistics 2003 (table 6.28), at 500; available at http://www.albany.edu/sourcebook/pdf/section6.pdf (accessed May 12, 2018) and http://www.prisonstudies.org/country/united-states-america (accessed May 12, 2018).

3. See Andreas von Hirsch, *Deserved Criminal Sentences* (Bloomsbury 2017), 107–8 and 115–18 (responding to Braithwaite and Pettit); David Garland, *The Culture of Control* (University of Chicago Press 2001), at 9, 60–61.

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which the criminal law is fully enmeshed in a society's basic structure, and subject to the same principles of political evaluation that apply to that structure. Public institutions protect basic rights and interests for all, as a matter of right rather than charity, and they do so by aggregating and distributing the benefits and burdens of social cooperation. They achieve these objectives by promoting sustained patterns of cooperation among people who are not bound together by kinship, or communal or ideological affiliation, and yet have no realistic option but to find ways of living with each other. On the face of it, this kind of sustained cooperation across time, space, and social distance would seem rather improbable.

Punishment, in the form of public and coercive enforcement of agreed social rules, is one way of promoting that type of sustained cooperation. But punishment is a means that, as Durkheim famously argued, fades in relevance as complex and interlocking forms of social cooperation become self-sustaining. Insofar as we still have reason to rely on the criminal law as a means of sustaining social cooperation, its justification will rest on our reasons for wishing to promote a given form of social cooperation in the first place, in combination with our reasons for believing that criminal sanctions constitute a reasonable way of doing so. Consequently, the morality of the criminal law, and its associated institutions, must be consistent with the political morality of public institutions generally. In this book, I have suggested that we understand that morality as grounded in terms of democratic equality, and the kind of government that is appropriate to a society of equals.

Consider, in contrast, the conception of political morality that is implied by the kinds of individualistic and moralizing retributivism that have captured the philosophical imagination of Anglo-American legal theorists over the last half century. The retributivist's focus on substantive pre-politically moral wrongdoing as a central tenet of the criminal law is fundamentally antidemocratic, as it privileges the moral opinions of the philosopher over the process of deliberation and negotiation characteristic of democratic politics. Adopting the morality of interpersonal blame as a template for the morality of the criminal law yields an account that is fundamentally illiberal, as it boils down to a moral community roaring in indignation at someone who violates the norms of that community's thick moral life simply because they are the community's norms. This suggests a view of politics as a symbolic economy by means of which a moral majority steamrolls dissentients. Softer versions of expressivism—couched in terms of communication, education, or, as Duff once tellingly

put it, "secular penance"—seem, if anything, to be even more insidious in their demand that the accused internalize the values and judgments of his jailer.[4] This brings to mind Foucault's remark that for us it is the soul that has become the prison of the body.[5] Yet if privacy means anything, it must mean that public officials are not entitled to insist, upon pain of punishment, that people inscribe the party line in their heart of hearts. More generally, by insisting that the interpersonal morality of blame takes precedence over democratic values, retributivism suggests that once you are responsible for a crime, *your interests no longer count*. Once you have become a criminal, public institutions no longer owe you an obligation of equal respect and concern. It is permissible to impair your life chances through punishment, even when doing so does nothing to make anyone better off.

The view, shared among retributivists of a Kantian spirit, that the criminal law is an exclusively backward-looking institution resembles a form of rights-besotted libertarianism, and a rather punitively-minded one at that. Morris suggested that respect for persons requires punishing them for their transgressions, Ripstein claims that punishment of those who flout the law is inherent in the very idea of the "rightful condition," and Brudner claims that we must punish the criminal to make manifest our rejection of his claim to be above the law. But perhaps Sammy Davis Jr. put it best: "don't do the crime if you can't do the time . . . don't roll the dice if you can't pay the price." Like libertarianism, the Kantian's single-minded focus on holding people's feet to the fire for the poor choices they make downplays the importance of public institutions in maintaining the inegalitarian and oppressive social relations that engender crime.[6] More generally, the moral philosopher's focus on pre-politically moral rights, especially as elicited in intuitions derived from idealized one-off transactions

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4. R.A. Duff, *Punishment, Communication, and Community* (Oxford University Press 2001), 106, but see also 125–29. To be fair, Duff's more recent work is noticeably less moralistic, and places the question of criminal law squarely within the context of the constitution and maintenance of a polity's civil order: see, e.g., *The Realm of Criminal Law* (Oxford University Press 2018).

5. Michel Foucalt, *Discipline and Punish: The Birth of the Prison*, 2nd ed. (Vintage Books 1995), 30. As it happens, Herbert Morris once suggested that punishment could be justified by concern with the moral good of the guilty and the condition of his soul: "A Paternalistic Theory of Punishment," *American Philosophical Quarterly* 18(4) (1981): 263–71 at 268; see also Duff, *Punishment, Communication, and Community,* 81 (suggesting that punishment should ensure that people do what is right because they acknowledge it to be right).

6. A point that Jeffrie Murphy well recognized; see his "Marxism and Retribution," *Philosophy & Public Affairs* 2(3) (1973): 217–43.

between abstract individuals—"trolleyology," in Barbara Fried's trenchant characterization—blinds deontological retributivists to the social costs, uncertainties, and trade-offs that are inevitably part of a scheme of criminal justice in any moral world remotely like our own.[7] In a world of scarcity, such otherworldliness amounts to insensitivity to the claims of others to the resources consumed by a system of ex post punishment.

In short: the political morality of retributivism is antidemocratic, illiberal, resentful, and more concerned with the righteousness of those who punish than with the interests of those who are made to bear its costs. This is a harsh and unforgiving political philosophy. So much so that newcomers to this corner of the academic enterprise might be forgiven for surmising that modern forms of retributivism were, in effect, invented to rationalize the rise of the American carceral state. But perhaps it is unsurprising that Anglo-American criminal law theory would have adopted such a hyper-moralized approach to the criminal law at roughly the same time that American criminal justice institutions were undergoing a period of unprecedented growth. After all, ours is a system of criminal justice that runs on retributive emotions and the desire to exclude certain groups of people as undeserving of membership in the polity.[8] It is not in any obvious way characterized by a commitment to social and political equality, much less to the value of evidence-based policy in vindicating that commitment. Nevertheless, it would be a stretch to claim that retributivism in the philosophy of criminal law contributed to this generation of unremitting harshness. If anything, the causal direction is probably the reverse: it may be that a generation of legal theorists implicitly understood their task to be a matter of rationalizing the retributive sentiments prevalent in the culture.[9] I am not sure this should make us feel better about retributivism.

Is this an unfair characterization? Perhaps, if you think that the project of evaluating the criminal law differs fundamentally from the project of evaluating public institutions more generally. If you think that the criminal law rests on moral foundations that are fundamentally distinct

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7. "What *Does* Matter? The Case for Killing the Trolley Problem (or Letting It Die)," *Philosophical Quarterly* 62(248) (2012): 505–29.

8. For an account of the exclusionary political origins of American mass incarceration, see Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Harvard University Press 2016).

9. Thomas Andrew Green, *Freedom and Criminal Responsibility in American Legal Thought* (Cambridge University Press 2014), chs. 7–9; Garland, *The Culture of Control*, ch. 6.

from those of other public institutions, then you will resist my attempt to connect the morality of crime and punishment to an overarching political morality. But from the point of view of criminal law as public law, the connection is inescapable. From a public law point of view, the principles and values that we call upon to evaluate criminal law are cut from the same cloth as those that we call upon to evaluate public institutions generally. Why? Because, at its most elemental, what the criminal law is for is stabilizing cooperation with the public institutions that facilitate our utopian future. When is the criminal law an acceptable means of pursuing that aim? When it conforms to the very same principles of political justification that make that future a utopian one. Why should the criminal law be subject to those principles? Because it too is a public institution, and stands in need of the same kind of political justification.

As I have stressed, there are many possible glosses one might give to these ideas. My preferred account is democratic, egalitarian, and capability-based. Those who are subject to the law are entitled to an equal opportunity to shape its content, and have claims against degrading or humiliating judgments about their worth. Subject to those constraints, public institutions should strive to maximally protect each person's effective access to central capabilities—the capabilities required to live in that society as an equal. Public institutions should not treat the principle of equal respect and concern as waived by participation in crime, and they should ensure that the burdens of law enforcement do not themselves further entrench patterns of status hierarchy. From this point of view, the role of the criminal law is to help public institutions create a society in which each person can live as a peer among peers.

In the face of the grim realities of contemporary criminal justice—particularly, though by no means exclusively, in the United States—it may seem that the best legal theorists and philosophers can do is rationalize what can be rationalized and bemoan the rest. But I am not so sure. I am not sure it is hopelessly utopian to think that states might eventually come to significantly scale back their reliance on incarceration, provide opportunities for meaningful democratic engagement at every level, demilitarize and diversify their police forces, decriminalize conduct where continued criminalization serves only symbolic purposes, restore rights of political participation to current and former convicts, and invest more heavily in evidence-based approaches to crime, particularly when those approaches have the effect of building human capability now rather than destroying it later. But whether utopian or not, the political ideal of

anti-deference is an illustration of what it would be for the philosophy of criminal law to once again become a critical theory appropriate for the evaluation of our existing institutions and policies. It is one way of giving content to the idea that the criminal law does not stand apart from society's basic structure, but stands or falls with it. It is one way of giving content to the idea that criminal law is public law.