

# Criminal Law as Public Law I

## CONTEXT

### 1.1 Introduction

On a late winter day in 1984, a father brought his unconscious four-year-old son to the emergency room. The boy had suffered injuries that were sufficiently severe to require emergency brain surgery, including the removal of large sections of his skull. Although the boy's life was saved, the right hemisphere of his brain was destroyed, leaving him partially paralyzed and severely mentally disabled. Afterward, the surgeon reported finding bruising and internal bleeding consistent with a prolonged pattern of severe physical abuse. Members of Wisconsin's Department of Social Services had known that the boy was potentially being seriously abused for over a year. On a prior occasion, he had been brought to the hospital with a three-inch abrasion on his forehead as well as "numerous" other injuries across his body. At that time, the boy's father and his girlfriend were interviewed by medical staff, social services workers, and a police officer, but the boy was left in the couple's custody for lack of sufficient evidence that the injuries were due to abuse. Over the course of the following year, the boy's caseworker documented mounting evidence of such abuse. This included two further admissions to emergency rooms for bruising and lacerations, a corneal abrasion, reports from neighbors and family friends who had witnessed separate incidents of the boy being knocked to the ground by the couple, burn marks on his body that appeared to have been caused by a cigarette, and a pattern of physical violence between the father and his girlfriend, resulting in the police responding on six separate occasions to reports of domestic violence at the household. Nevertheless,

the boy remained in the father's custody until one day he was brought to the hospital so severely injured that brain surgery was required to save his life.

Doctors and police rejected the father's claim that the boy had sustained his injuries by falling down the basement stairs. It was more likely, they concluded, that the massive brain damage had resulted from physical abuse. A warrant was eventually issued for the father's arrest; after some negotiations, he entered an Alford plea, refusing to concede that he had abused his son while nevertheless conceding that the state had amassed enough evidence to convict him. He ultimately served two years in prison.<sup>1</sup>

In the meantime, the boy's biological mother filed suit, arguing that the state had failed in its duty to protect the boy while he was in his father's custody. The case, *DeShaney v. Winnebago County Department of Social Services*, eventually wound up before the Supreme Court of the United States.<sup>2</sup> Over the dissents of Justices Brennan, Blackmun, and Marshall, the Supreme Court ruled in favor of the state, reasoning that the boy was not entitled to expect the state to protect him from his abusive father. The due process clause, the court held, limited only the *state's* ability to deprive people of life, liberty, and property. It did not require the state to go further and affirmatively protect its citizens from harm inflicted by others. In dismissing the case, the Supreme Court echoed a panel of the Seventh Circuit that had come to the same conclusion. The Seventh Circuit reasoned that although the state's social worker had been "ineffectual" at protecting the younger DeShaney, she had not actually caused his injuries herself. Since the Constitution, in the view of the Seventh Circuit, was a "charter of negative rather than positive liberties," and since the state had not itself caused the boy's injuries, it could not be held responsible for merely failing to prevent someone else from doing so.<sup>3</sup>

*DeShaney* raises a wide-ranging and intensely controverted question: What role should public institutions play in the lives of those who live under their jurisdiction? The Court's answer was austere. Perhaps the various officials who were involved in the case should have done a better job of protecting the boy than they did. But, like the imperfect moral duty

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1. This account is drawn from Lynne Curry's book, *The DeShaney Case: Child Abuse, Family Rights and the Dilemma of State Intervention* (University Press of Kansas 2007), especially chs. 1 & 3.

2. 489 U.S. 189 (1989).

3. 812 F.2d 298, 301 (1987).

of charity, the moral expectation that the state will protect and promote the welfare of its citizens is discharged at the state's discretion. Neither the boy nor his mother had a legitimate expectation—a legally cognizable claim—that the state's social workers, medical personnel, or police officers would intervene to rescue the boy from his situation. The *DeShaney* court understood public institutions to be bound to respect people's rights as against the state, but no more.

Of course, Wisconsin *did* do more. For one thing, it convicted and punished Randy DeShaney for abusing his son. But following the logic of *DeShaney*, the state need not enforce the criminal law at all, at least insofar as the point of doing so is to protect people from being beaten up, killed, raped, or otherwise victimized. Those are wrongs that befall some people at the hands of others, not wrongs committed by the state acting through its agents. To be sure, there is a sense in which enforcement of the criminal law might be morally required, even under *DeShaney*. While the state might not have had an obligation to protect the younger DeShaney from violence at the hands of his father, it might still have an obligation to recognize the wrong that was done. However, from this perspective, the state had acted faultlessly. After all, it *did* ultimately prosecute the elder DeShaney for abusing his son. In doing so, it mobilized its criminal law to express public disapproval of the wrongdoing and to call the elder DeShaney to account for that wrongdoing. True, that disapproval was not worth very much to the boy, as it failed to protect him from being beaten by his father. But in the Court's view, public institutions are not required to prove their worth. They are just required to respect rights.

Seen in this light, the Supreme Court's judgment in *DeShaney* marked a thoroughgoing rejection of the penal welfarism that dominated Anglo-American thinking about the criminal law until the waning decades of the twentieth century. "Penal welfarism" is the view that, as David Garland has characterized it, "penal measures ought, where possible, to be rehabilitative interventions rather than negative, retributive punishments," and in which "the standard response to problems of crime and delinquency . . . [is] a combination of social work and social reform, professional treatment and public provision."<sup>4</sup> To the contrary, *DeShaney* suggests a view of the criminal process as purely reactive—as providing condemnation *ex post*

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4. David Garland, *The Culture of Control* (University of Chicago Press 2001), 35, 39 (emphasis removed); see also Garland's earlier book, *Punishment and Welfare* (Gower 1987).

rather than protection *ex ante*. Seen in this light, retributive justice is the moral remainder left by the rollback of the social welfare state.<sup>5</sup>

This book defends a different view of both the criminal law, and of the significance of public institutions more generally. *DeShaney* notwithstanding, we now live in the age of the administrative state. We have created public institutions that have sweeping mandates to devise, promulgate, and enforce legal rules over incredible swaths of individual and social life. Public law regulates the product safety standards for the cradles in which we place our newborn, and it specifies the health and zoning regulations that govern how we bury our dead. The institutions and substantive legal rules they promulgate are oriented toward the public welfare, and in that sense the modern administrative state is a welfare state. Crucially, the moral authority of the welfare state does not flow from *noblesse oblige* flowing from a society's elites toward its huddled and clamoring masses. The political morality of the modern administrative state bottoms out on a principle of equal respect and concern. It bottoms out on the idea that those who live under their jurisdiction have claims—"as of right," as lawyers put it—to being treated as an equal. Hence, a person's access to crucial social services—healthcare, social security, unemployment and disability insurance, police protection, education, and so forth—is not predicated on establishing that she has led a morally blameless life and hence deserves our charity. Public law does not rest on a principle of moral desert. It rests on a principle of universal entitlement, as a matter of basic political equality.

From this point of view, Wisconsin's public institutions—including its criminal law—failed in their obligations toward the younger *DeShaney*. They failed to secure for him the prerogatives of a life lived as a peer, and left him exposed to the violent domination of his father and the father's girlfriend. This does not necessarily mean that anyone should have gone to prison for that failure. What it means is that the law governing when and how the state can intervene in private relationships potentially needed to be reconsidered. They should ensure that no party to a private relationship is under the thumb of any other party. Insofar as the criminal law is

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5. How anachronistic was *DeShaney*? David Garland comments, of the British Children Act of 1908—a full eighty years prior to *DeShaney*—that the legislation “established the ‘revolutionary’ principle . . . that the problems of family ‘failure’ were to be administered not solely by charity and voluntary social work but through a series of public channels, presided over by the specialist juvenile court.” *Punishment and Welfare*, 222–3.

required to make that the case, then the criminal law can have a legitimate role to play in backstopping family law. Perhaps, for instance, it would have been reasonable to empower the caseworker, knowing what she did at the time, to have removed the younger DeShaney from his father's custody. If so, it might perhaps also have been reasonable to enable the state to enforce that decision through an escalating series of sanctions, including sanctions of a criminal nature.

What is the place of the criminal law within this picture of public law and public institutions?<sup>6</sup> The criminal law is a means to an end, and that end is: to help secure the rule of stable and just public institutions. The basic principle of public institutions, in turn, is to extend the equal protection of the law to all—that is, to promote the common good on terms befitting social and political equals. In this sense, criminal law rests on the same principle of universal entitlement that animates public law more broadly. Of course, what terms are fair and equitable is a controversial question. I shall, in due course, suggest an egalitarian principle of fair cooperation: cooperation that protects, as far as possible, each person's ability to live a life as a peer among peers. Under this principle, the criminal law must satisfy a more demanding standard than merely acknowledging wrongs after they occur. We should expect more from public institutions, including the criminal law. We should expect it to contribute to making peoples' lives go better than they otherwise would. And we should expect it to do so on the basis of each person's status as an equal, not on the basis of moral desert.

The aim of this book is to make good on these admittedly sweeping claims. The aim of this chapter, however, is merely to set the stage for those further arguments. I start by briefly sketching two models of social provision: alms to the needy and social provision. I then outline how, over the course of the eighteenth and nineteenth centuries, Anglo-American criminal law emerged as a field of public law. I suggest that the gradual assertion of public control over most aspects of the criminal

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6. I follow Robert Goodin in understanding an institution to be, "in its most general characterization, nothing more than a 'stable, valued, recurring pattern of behavior.'" Robert Goodin, "Institutions and Their Design," introduction to *The Theory of Institutional Design*, ed. Goodin (Cambridge University Press 1996), 21. The significance of institutions is that they render expectations about behavior stable and predictable. This is not, as Goodin writes, "an incidental by-product of institutionalization—not merely the consequence of 'coming to value a certain organization or procedure' for some independent reasons. Instead, that very stability and predictability is, to a very large extent, precisely why we value institutionalized patterns and what it is we value in them" (22).

process made it possible to think about crime and punishment as a matter of social provision rather than as alms to the needy. Just as the rise of the welfare state transformed the otherwise private tragedies of unemployment or poor health into publicly shared risks, the emergence of criminal law as public law transformed crime from a series of independent wrongful acts into a collective problem calling for a socially organized response. This proposition sets the stage for my argument, in Chapters 2 and 3, that justifying the criminal law is, first and foremost, a matter of applying principles of political justification to the operation of policies and institutions, and only secondarily a matter of applying conceptions of moral responsibility, desert, or blameworthiness to individual cases.<sup>7</sup>

## 1.2 Two Models of Social Welfare

Suppose a group of people living together in a shared territory have a problem: to wit, that some of their number suffer from chronic need and malnutrition, and would, if left to their own devices, face a future of disease, deprivation, and premature death. Supposing that their compatriots felt some desire to improve their situation, how might this society go about achieving that aim? One model is “alms to the needy”: the poor are provided for, to the extent they are, primarily by private ordering—by families, churches, and other nonstate institutions. These provisions are provided in an ad hoc and partial manner, out of a sense of charity, and are intended to stave off humanitarian disaster. This is presumably how the *DeShaney* majority saw Wisconsin’s Department of Social Services: well intentioned and altruistic, but supererogatory. Another model—the “social provision” model—is more demanding. Under a social provision scheme, society, through a range of redistributive social policies such as unemployment insurance, old age security, subsidized healthcare, public education, and

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7. Unless otherwise indicated, throughout this book the term “criminal law” refers not merely to statutory and decisional law, but also to the institutions and practices that comprise the criminal justice system in a more general sense. Here, as elsewhere, I am following Lindsay Farmer, who has criticized the familiar distinction between criminal law (an “autonomous philosophical system”) and criminal justice (“particular practices or policies or systems of enforcement”). See Farmer, *Criminal Law, Tradition and Legal Order* (Cambridge University Press 1997), 9.

housing, insures all its members against at least some of the major evils associated with poverty.<sup>8</sup>

Social provision is distinct from alms to the needy in at least three important respects. First, the social provision model is statist. Its policies take the form of policies that are enacted in public law rather than in the decisions of private individuals, families, solidaristic communities, or markets.<sup>9</sup> This is not to say that certain aspects of public provision might not be devolved to private actors, only that doing so requires an antecedent public decision.

Second, social provision treats poverty as a problem to be managed collectively, not as a private affliction. Rather than leaving harms to fall where they may, social provision policies spread the burdens of poverty collectively.<sup>10</sup> The justifications for doing so have tended to be essentially egalitarian in orientation, in that the risks insured against are considered to be risks that everyone could face: any of us could fall onto hard times, have been born into disadvantage, or suffer from oppression.

Finally, social provision is provided as a matter of right rather than as a matter of discretion or charity. Public law generates legitimate expectations that people will see their rights and interests protected in certain ways, and on terms that do not leave them open to the intrusive and humiliating judgments of officials, the powerful or other social elites. On the model of social provision, you are not entitled to treatment in an emergency room or to a public education because some official has reviewed your record and deemed you worthy or deserving. You are entitled to those services simply because you are a member of the polity.

While the contrast between alms to the needy and social provision is highly stylized, it tracks in broad terms a slow, and still incomplete, shift over the course of the twentieth century in American political thought

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8. S. Kuhnle and A. Sander, "The Emergence of the Western Welfare State," in *The Oxford Handbook of the Welfare State*, ed. F. Castles, S. Leibfried, J. Lewis, H. Obinger and C. Pierson. (Oxford University Press 2010): 61–80.

9. Richard Rose and Rei Shiratori, eds., *The Welfare State East and West* (Oxford University Press 1986), 34. Excerpted in Rose, "The State's Contribution to the Welfare Mix," in *Welfare Theory and Development*, ed. Peter C. Alcock and Martin Powell (SAGE 2011), 82.

10. I follow Asa Briggs's definition of a welfare state; see "The Welfare State in Historical Perspective," in *Welfare Theory and Development*, ed. Peter C. Alcock and Martin Powell (SAGE 2011), 1:14. Compare David Garland, *The Welfare State: A Very Short Introduction* (Oxford University Press 2016), ch. 1.

about social welfare, from a matter of charity to a claim of right.<sup>11</sup> More distantly, the origins of the social provision model might be traced back to Bismarck's creation of compulsory schemes of social insurance that protected against sickness, accidents, old age, and invalidity in the waning decades of the nineteenth century. Bismarck's initiatives proved popular, and rapidly spread across Europe, Scandinavia, England, Australia, and New Zealand.<sup>12</sup> Shortly thereafter, Britain became the first country to enact legislation providing for compulsory unemployment insurance.<sup>13</sup> The social provision model reflected a sea-change in attitudes toward government: rather than "a negative political force to be limited," government became "a positive social force to be harnessed and put to productive use."<sup>14</sup>

However, administrative government oriented toward securing the common good predates the creation of large-scale social insurance programs of this kind. In the United States, for instance, the "first real administrative agencies" were emergent already in the early nineteenth century in the form of local health boards. These boards had "vast governmental powers, concerning basic rights of property, economy, and personhood," and were empowered to make and enforce rules (including, in some instances, by issuing search warrants) regarding a broad range of public-health-related concerns.<sup>15</sup> In a similar vein, the American administrative state—comprised of permanent and lay officers charged, typically by statute, with developing policy and applying law in a wide array of contexts—has roots stretching well back into the nineteenth century.<sup>16</sup> In the continental context, the expansion of police powers—that is, of administrative capacity oriented toward public welfare—extends back at least to

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11. See Karen M. Tani, *States of Dependency: Welfare, Rights, and American Governance, 1935–1972*. (Cambridge University Press 2016).

12. Briggs, "The Welfare State in Historical Perspective," 28.

13. Briggs, "The Welfare State in Historical Perspective," 33. The classic account is T.H. Marshall, *Citizenship and Social Class* (Cambridge University Press 1950). See also Garland, *Punishment and Welfare*, ch. 5.

14. Garland, *Punishment & Welfare*, 135.

15. William Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (University of North Carolina Press 2002), 201–4.

16. Jerry Mashaw, *Creating the Administrative Constitution* (Yale University Press 2012). See also Darryl Brown, *Free Market Criminal Justice* (Oxford University Press 2016), ch. 7.



the eighteenth century.<sup>17</sup> These accounts belie more familiar narratives of the administrative state as a twentieth century creation. In any case, in a suitably general sense, *every* state is a regulatory state; every state establishes laws or policies oriented at promoting this or that aspect of the public welfare.<sup>18</sup>

Before proceeding further, a note is in order regarding my conception of the “administrative state.” This phrase is associated with regulations promulgated and enforced through administrative agencies housed in the executive branch of government. The feature of the administrative state that I wish to most emphasize is the existence of public institutions that seek to promote the common good across an expansive range of social life. For my purposes, how these institutions are classified under the traditional separation of powers is less important than their character as institutions that represent a social effort to achieve a collectively willed end. (Sometimes, when my emphasis is on the end rather than the means, I shall refer to the welfare state.) Of course, administrative states differ in terms of where they draw the line between public and private ordering, as well as in terms of how they conceive of the purpose of public provision.<sup>19</sup>

What is novel about the modern administrative/welfare state is not that it asserts public power to further the public welfare, but that it does so in a manner that spreads the costs of commonly shared social risks across citizens generally (or at least, in the case of social insurance, among those who pay into the system through their wages), rather than allowing the harms to fall where they may. Doing this requires not only a means of providing income support to the aged, healthcare to the sick, and education to the young, but also a means for raising revenue that goes beyond a fee-for-service model. The development of more systematic control over fiscal inputs is, as Richard Rose has pointed out, a necessary condition for the growth in public provision of goods and services.<sup>20</sup> It is in virtue of

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17. Mireille Hildebrandt, “Justice and Police: Regulatory Offenses and the Criminal Law,” *New Criminal Law Review* 12 (2009): 43–68, 59.

18. Markus Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (Columbia University Press 2005), ch. 1.

19. Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism*. (Princeton University Press 1990).

20. Richard Rose, “Common Goals but Different Roles: The State’s Contribution to the Welfare Mix,” in *The Welfare State East and West*, ed. Richard Rose and Rei Shiratori (Oxford University Press 1986), 13–39, 19.

spreading the costs of social provision broadly that public institutions are able to transform private tragedies into publicly shared risks. Consider, in this context, the fin de siècle debates in the United States surrounding the creation of a progressive income tax. The prevailing “benefits principle” treated taxes as “quite simply the price that individual citizens paid in exchange for the benefits of government protection,” and was “based, first and foremost, on the logic of reciprocal exchange.”<sup>21</sup> The benefits principle respected pre-politically negative rights in property, but made the proposition that some people should be made to pay more in taxes than they could expect to recoup in benefits extremely problematic. As Mehrotra has documented, the introduction of a progressive income tax in the United States was defended on the basis of a more robust conception of equal citizenship. Under this more demanding conception of “fiscal citizenship,” as Mehrotra puts it, equality of sacrifice was required to sustain the civic order; fiscal citizenship required a basic break with the Lockean premise that states exist to better protect an individual’s own natural rights, such as the right to property. This more robust conception of equality was defended by progressive American economists who, influenced by intellectual trends in German historicism—where Bismarck’s social insurance schemes were beginning to take root—emphasized the interdependence of citizens with each other, an interdependence crystallized in the form of public institutions.<sup>22</sup> The introduction of the progressive income tax thus already went far beyond the “charter of negative rather than positive liberties” that the Seventh Circuit would, a century later, appeal to in *DeShaney*.

In any case, notwithstanding the *DeShaney* court’s truculence, social provision schemes are now familiar and ubiquitous. Wisconsin’s Department of Social Services is just one out of thousands of public agencies at the municipal, state, and federal levels oriented at promoting the common good in a staggering variety of ways.<sup>23</sup> These are the institutions of the welfare state, and their role is to operationalize systems of social provision,

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21. Ajay K. Mehrotra, *Making the Modern American Fiscal State: Law, Politics, and the Rise of Progressive Taxation, 1877–1929* (Cambridge University Press 2013), 61.

22. See Mehrotra, *Making the Modern American Fiscal State*, ch. 2.

23. The Census Bureau estimates that there are over 90,000 “local governments” in the United States; see Carma Hogue, “Government Organization Summary Report: 2012,” available at: [http://www2.census.gov/govs/cog/g12\\_org.pdf](http://www2.census.gov/govs/cog/g12_org.pdf).

from public education to environmental protection to consumer safety to financial regulation to family law.

This is not the place to consider in any detail the historical question of why welfare state institutions arose when they did, or the degree to which the institutions and policies of various countries conform to the model of social provision. My purpose in sketching the social provision model is to provide a model for thinking about the somewhat earlier transformation (roughly from the late eighteenth century through to the early twentieth) of the criminal law from a system of private remedy to one of public administration. As public officials began asserting more systematic, and less ad hoc, control over the criminal process, they gradually began to create institutions that made it possible to view crime as more than an uncontrollable consequence of social life and rather as a collective problem that could be managed by intelligent and informed policy.<sup>24</sup> The criminal law, in other words, became both more statist and more capable of dealing with crime at the level of policy, rather than merely at the level of individual cases. Moreover, because police, prosecutorial, and correctional budgets are drawn from general revenue, rather than collected on a fee-for-service model, they are in effect redistributive. Those who stand to benefit the most from the provision of criminal justice services are not necessarily those who pay the lion's share of its costs.<sup>25</sup> As a result, criminal justice is a matter of collective concern not simply because of the moral concern individual citizens might take in how others are treated, but because the costs of providing criminal justice services are spread collectively rather than privately borne. Finally, the requirement that police, prosecutors, judges, and other criminal justice officials treat people fairly and equally is a basic feature of the political morality of criminal justice. Virtue has nothing to do with it: police, prosecutors, and judges are required to give your interests and claims equal respect whether or not they consider you morally righteous. Consequently, the institutional development of the criminal law has made the model of social provision increasingly more apt, and the model of alms to the needy increasingly less so.

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24. See Garland, *Punishment and Welfare*, 154; and Garland, *The Culture of Control*, ch. 2, especially 44–51.

25. This is a point, like so many others, on which Bill Stuntz's work has been pioneering. See for example: William J. Stuntz, "The Pathological Politics of Criminal Law," *Michigan Law Review* 100 (2001): 505–600.

### 1.3 The Emergence of Criminal Law as Public Law

Although it is now customary to think of criminal law as public law, for much of its history in the common law world, the criminal law was not a particularly state-centered institution. The distinction between crime and tort was not between a public and a private wrong, but rather a choice open to the private plaintiff: Did he want to pursue vengeance or compensation?<sup>26</sup> One and the same act could be either a crime or a tort not because it might be both a private wrong (enforceable by the victim) and a public wrong (enforceable by the king), but simply because the victim had the option of choosing between seeking his satisfaction in a punitive remedy or a compensatory one. Insofar as criminal law was state-centered, it was not because criminal acts injured a victim in which the king held a benevolent interest; rather, it was an affront to the political authority of the sovereign. In the premodern era, as Garland has noted, “law enforcement” did not connote protecting the public from crime by means of police, prosecutors, and prisons. It was rather “a matter of lordship and political rule . . . through which the King’s sovereign will was imposed against that of his enemies and against rebellious or unruly subjects.”<sup>27</sup> The idea that the criminal law could be defined by reference to the nature of the wrong done to the victim was first introduced by Blackstone in his *Commentaries*; it is, in that respect, a thoroughly modern idea.<sup>28</sup> Up until the eighteenth century, breaches of the criminal law were largely privately investigated and privately prosecuted. Punishments were, of course, carried out by public officials, but since incarcerating large numbers of people did not become an established feature of criminal justice until the nineteenth century, it did not require constant oversight of sprawling, hard to govern, and resource-intensive institutions.

Consider, first, the history of policing in the common-law world. While the idea that the safety and security of its citizens is in some sense the

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26. David J. Seipp, “The Distinction between Crime and Tort in the Early Common Law,” *Boston University Law Review* 76 (1996): 59–87 at 84.

27. Garland, *The Culture of Control*, 29. That we so intuitively associate “law enforcement” with “crime control,” Garland suggests, “reveals the extent to which we have become used to thinking about the state as the standard mechanism for dealing with crime.”

28. David Lieberman, “Mapping Criminal Law: Blackstone and the Categories of English Jurisprudence,” in *Law, Crime and English Society, 1660–1840*, ed. N. Landau (Cambridge University Press 2002), 139–61; William Blackstone, *Commentaries on the Laws of England*, 4 vols (Oxford 1765–9), 1:122, and 4:5–6.

state's responsibility no doubt has a longer lineage, the idea that it might be the state's role to protect those interests through public policing and prosecution of criminal offenses is relatively novel, at least in the United Kingdom and North America. The history of organized policing as a publicly provided service of any kind did not arise in Britain until the middle of the nineteenth century. The first public police force in Britain—Peel's Metropolitan Police—was only instituted in 1829, with versions in North American cities following in subsequent decades.<sup>29</sup> The institution of professional policing was already well established in continental jurisdictions, but they were staunchly resisted in England on the grounds that the police were a quasi-military surveillance apparatus inconsistent with English liberty.<sup>30</sup>

Prior to the development of professional policing over the middle decades of the nineteenth century, most of what we would now regard as “police” work was carried out by private citizens (the literal nightwatchmen of libertarian political theory), part-time constables, and thief-takers, as well as the victims themselves, and other members of the community in a more or less ad hoc and informal manner. Victims took it upon themselves to track down perpetrators, sometimes by offering rewards, and the government sometimes also offered rewards for information leading to a conviction (an early form of today's *qui tam* action) or pardons for criminals who betrayed their compatriots (an early form of today's conspiracy law.) This seems to have worked about as well as one might expect, with frequent complaints of abuse, dishonesty, and entrapment.<sup>31</sup>

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29. See Eric H. Monkkenon, *Police in Urban America* (Cambridge University Press 2004), ch. 1; Samuel Walker, *Popular Justice: A History of American Criminal Justice*, 2nd ed. (Oxford University Press 1998), ch. 2.

30. Clive Emsley, *The Great British Bobby: A History of British Policing from the Eighteenth Century to the Present* (Quercus 2009), 33–36. Emsley writes that “there was concern that a centralized police was something peculiarly foreign, worst of all French”; he also notes that “there was even greater concern about central government encroaching on the rights of local government.” “The History of Crime and Crime Control Institutions,” in *The Oxford Handbook of Criminology*, ed. M. Maguire, R. Morgan, and R. Reiner (Oxford University Press 2002): 203–30 at 212. Markus Dubber has traced kingly delegations of “police powers”—in the sense of general administrative powers—to municipalities in Europe to the late fourteenth century in France and the mid-fifteenth century in Germany. See Dubber, *The Police Power*, 69–70.

31. John Langbein, Renée Lettow Lerner, and Bruce Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* (Wolters Kluwer Law & Business 2009). For an account of thief-taking, see Ruth Paley, “Thief-Takers in London in the Age of the McDaniel Gang,” in *Policing and Prosecution in Britain 1750–1850*, ed. Douglas Hay and

Hence, it is perhaps unsurprising that the popularity of the idea that policing might be an inherently public function appears to track the growth in the capacity and professionalism of the public police.<sup>32</sup> As compared to the alternative, public policing might well have come to seem attractive.

Not only was the investigation of crime and the apprehension of criminals a largely private matter, so too was the prosecution of criminals once they were caught.<sup>33</sup> As with policing, other systems devoted greater institutional resources to the prosecution of crimes, such as an office of a public prosecutor, rather than relying on victims of crime to initiate and prosecute a criminal case.<sup>34</sup> But, as with policing, in England the idea that the cost of criminal prosecutions should be publicly borne was seen as inconsistent with “that perfect freedom of action and exemption from interference, which are the great privileges and blessings of society,” and it was believed that the gains in protecting people from criminal victimization in a more systematic manner were outweighed by the costs to liberty of a system of public policing and prosecutions.<sup>35</sup> For reasons that remain obscure, public prosecution in the common-law world first arose in a systematic way in North America. Private prosecutions remained the norm in England until much later: the office of the Director of Public Prosecutions was not created until 1879, and another century went by before the Crown Prosecution Services was created in 1986.<sup>36</sup> Admittedly, the practice of

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Francis Snyder, 301–40; John M. Beattie, *Crime and the Courts in England, 1660–1800* (Clarendon Press 1986), 55–59. Henry Fielding, whose Bow Street Runners were a forerunner to the Peel’s Metropolitan police, famously satirized the thief-takers (and the government of the day) in *The Life and Death of Jonathan Wild, the Great*.

32. David Alan Sklansky, “The Private Police,” *University of California Los Angeles Law Review* 46 (1999): 1165–287 at 1219.

33. Douglas Hay and Francis Snyder, “Using the Criminal Law, 1750–1850: Policing, Private Prosecution and the State,” in *Policing and Prosecution in Britain 1750–1850*, ed. Hay and Snyder (Clarendon Press 1989), especially 16–25; Beattie, *Crime and the Courts in England*, 35–41.

34. David Philips, “Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England, 1760–1860” in *Policing and Prosecution in Britain 1750–1850*, ed. Douglas Hay and Francis Snyder (Clarendon Press 1989), 118.

35. “Report from the Select Committee of the Police of the Metropolis, 1822,” 9–11, cited by Mark Koyama, “The Law & Economics of Private Prosecutions in Industrial Revolution England,” *Public Choice* 159 (2014): 277–98 at 286, n.28. As Koyama notes, given the level of corruption and patronage in English institutions at this time, “these fears were neither irrational nor necessarily driven by ideology.”

36. Jack M. Cress, “Progress and Prosecution,” *Annals of American Academy of Politics and Social Science* 423 (1976): 99; Crown Prosecution Services: <https://www.cps.gov.uk/>

private prosecution persisted in the United States well after the introduction of public prosecutors, “because some wealthy crime victims did not trust the low-paid, often inexperienced, and understaffed public prosecutors.”<sup>37</sup> However, although private prosecutions remain possible today, that power is typically thoroughly circumscribed by official discretion.<sup>38</sup>

Strikingly, Nozick’s famous parable of voluntary protective associations—the philosophical anarchist’s riposte to the Lockean argument for a state—has a historical precedent in the emergence of private prosecution associations in eighteenth century England.<sup>39</sup> These associations were designed to provide their dues-paying members with what we would now think of as public prosecutorial services. “All associations,” Philips notes, “offered their members at least two basic forms of assistance: in the detection and apprehension of suspected offenders, and in the prosecution of those arrested people.”<sup>40</sup> However, the significance of these private prosecution clubs declined as the century wore on and professional police forces became more established and expert in investigating and prosecuting crime; over time, public law enforcement substituted for private.<sup>41</sup>

Notably, Crown responsibility for prosecuting regulatory crimes has a longer and more established history than Crown responsibility for prosecuting ordinary felonies. This probably had to do with the growth in specialized institutions—the Mint, the Treasury, the Bank of England, the Post Office—that sought to enforce the laws that lay within their

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basic-page/history (accessed May 8, 2018). While prosecutions in some Scottish courts were directed by government officials by the early nineteenth century, the formal expansion of centralized, government-controlled prosecution had to wait until 1975. See Farmer, *Criminal Law, Tradition and Legal Order*, 85. For an account of the history of public prosecutions in the colonies, see Carolyn B. Ramsey, “The Discretionary Power of ‘Public’ Prosecutors in Historical Perspective,” *American Criminal Law Review* 39 (2002): 1309–93.

37. Walker, *Popular Justice*, 71.

38. As by statute in Canada: see *Criminal Code*, RSC 1985, c C-46, s.504.

39. Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974), ch. 2.

40. Philips, “Good Men to Associate and Bad Men to Conspire,” 137–38; see also Beattie, *Crime and the Courts in England*, 48–50.

41. See Koyama, “The Law and Economics of Private Prosecutions in Industrial Revolution England,” 288, fig. 2. As Koyama notes, Scotland Yard (“the first modern detective agency”) was established in 1842, and provided a level of expertise that the amateur policing efforts of the private prosecution clubs could not hope to match. See also Philips, “Good Men to Associate and Bad Men to Conspire,” 123, 150–51.

particular mandates.<sup>42</sup> The immediate point, however, is that once criminal prosecution comes under centralized public control, public officials acquire a new means for setting criminal justice policy. Public officials, whether line prosecutors or attorneys general, decide which crimes will be taken seriously, how they will be charged, what sorts of pleas will be accepted, and so forth.<sup>43</sup>

The growth of public institutions for sharing risk affected the substantive law in other ways as well. If one of the motivations for having the criminal law is to deter antisocial conduct, then it must surely matter how likely it is that someone who engages in such conduct will be caught and prosecuted.<sup>44</sup> In the era of the nightwatchman state, this probability could not have been very high. Criminal prosecutions were rare occurrences relative to the rate at which crimes were committed. Peter King has reviewed evidence of prosecutorial activity in Essex in the middle of the eighteenth century, and concluded that the vast majority of property crime went unreported and unprosecuted.<sup>45</sup> Indictments, King concludes, “cut a pitiful figure when compared to the huge number of indictable but unprosecuted acts of appropriation” that occurred during that period.<sup>46</sup> Hence, it should not be surprising that the criminal law in eighteenth and nineteenth century England—which had no public police, and no public prosecution service—was notoriously severe. This was a system of crime and

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42. See Langbein, Lerner, and Smith, *History of the Common Law*, 686–87.

43. On the prosecutors’ role in setting criminal justice policy, see William Stuntz, “Plea Bargaining and the Criminal Law’s Disappearing Shadow,” *Harvard Law Review* 117 (2004): 2548–69.

44. For evidence (from Germany) that policies regarding investigation, prosecution, and diversion affect crime rates to a greater degree than incarceration rates, see Horst Entorf, “Crime, Prosecutors, and the Certainty of Conviction,” IZA Discussion Paper No. 5670 (April 2011).

45. Peter King, *Crime, Justice and Discretion in England 1740–1820* (Oxford University Press 2003), 11–12, 132–34. King’s evidence suggests that the ratio of indicted to indictable offenses was in the range of 1–10 percent. It must be said, though, that the rate at which property crimes are prosecuted today remains similarly low. For a very rough comparison (arrest rates for offenses known to police, rather than prosecutions relative to crime overall) to contemporary figures in the United States, see *Sourcebook of Criminal Justice Statistics Online*, table 4.1.2007, available at: <http://www.albany.edu/sourcebook/pdf/t4212007.pdf> (accessed May 8, 2018). See also Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press 2016), 112–13.

46. King, *Crime Justice and Discretion in England*, 134.



punishments that depended on inflicting exemplary punishments on a relatively small number of people.

To replace a system of harsh, exemplary punishments with a system of moderate penalties uniformly imposed required a much more developed set of public institutions than was available at the time. At a minimum, it would require a more organized effort to apprehend criminals. Indeed, Clive Emsley has suggested that an important motivation behind the establishment of the Metropolitan Police was meliorating the harshness of Britain's "Bloody Code" by raising the likelihood of conviction and punishment through an organized effort at policing.<sup>47</sup> Consider that in 1820, English criminal law contained "well over" two hundred capital offenses, whereas by 1841—barely a decade after the establishment of London's Metropolitan Police in 1829—only two capital offenses remained, murder and treason.<sup>48</sup> Eric Monkkonen makes a similar observation:

The creators of the new police introduced a new concept in social control: the prevention of crime. . . . Taking an argument of the Italian criminal law reformer, Beccaria, they claimed that regular patrolling, predictable detection of offenses, and rational punishment would deter potential offenders. They even extended Beccaria's argument, claiming that the sight of the police uniform itself would deter potential offenders.<sup>49</sup>

This same period also witnessed the gradual transformation of modes of punishment, from localized, private, and exemplary to national, publicly supported, and uniform. This period, the late nineteenth to early twentieth century, witnessed the rise of prisons as standard forms of punishment.<sup>50</sup> Although workhouses for poor and vagrant individuals trace back to the

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47. Clive Emsley, *Policing in Its Context, 1750–1870* (Macmillan 1983), 59. Emsley cites a contemporary reformer's observation that while Britain had 223 capital offenses, France—which had a public police force—had only 6. However, Walker has suggested that American police forces, which were as a rule less professional, and more corrupt, than their English counterparts, were unlikely to have had much of an impact on crime. See Walker, *Popular Justice*, ch. 2.

48. Lacey, *In Search of Criminal Responsibility*, 127.

49. Monkkonen, *The Police in Urban America*, 40–41; Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree*, ed. Douglas Hay, Peter Linebaugh, John Rule, EP Thompson and Cal Winslow (Pantheon 1976), 17–63, 18.

50. For an overview of this history in the United States, see Walker, *Popular Justice*, ch. 3.

latter half of the sixteenth century, it took another three centuries before imprisonment (at hard labor) became systematically used as a response to crime.<sup>51</sup> During the eighteenth century, not only were prisons also used to house debtors—that is, to enforce private obligations rather than public wrongs—but they were themselves largely private enterprises. They were “self-financing operations,” in which “the jailer was supposed to derive his income from the fees owed by prisoners for various legal services,” including the provision of “commercial opportunities” such as the sale of bedding materials or beer.<sup>52</sup> Although punishment was a matter of ongoing controversy throughout the 1700s, it was not until the early part of the 1800s that reform efforts took on a national cast.<sup>53</sup> Nineteenth-century reformers claimed that because ease of travel on the railways made crime into a national rather than local problem, so too should punishment be administered on a national level. Local prisons began to be supported, in part, out of central government revenues, culminating ultimately in the nationalization of local prisons under Disraeli.<sup>54</sup>

Moreover, although punishment remained harsh, it became subject to greater demands for uniformity across cases, with correspondingly less tolerance for obviously exemplary forms of punishment. Reformers came to oppose capital punishment because of its spectacle, and because it “emphasized the discretionary element of justice.”<sup>55</sup> Punishment, they claimed, should be carried out in solitude, and it should be focused on reform of the offender’s soul—perhaps by means of tormenting his body, but not carried out for that reason. Facing the problem of a steady increase in the number of people being committed for trial, and the removal of transportation to the colonies as an option, reformers opted instead to turn to imprisonment. Although initially imprisonment took the form of prison ships moored in the Thames (the “hulks”), eventually reform efforts

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51. John Langbein, “The Historical Origin of the Sanction of Imprisonment for Serious Crime,” *Journal of Legal Studies* 5(1) (1976): 35–60 at 53.

52. Randall McGowen, “The Well-Ordered Prison: England, 1780–1865,” in *The Oxford History of the Prison*, ed. Norval Morris and David J. Rothman (Oxford University Press 1995), 79–110 at 82.

53. McGowen, “The Well-Ordered Prison,” 80.

54. Sean McConville, “The Victorian Prison: England, 1865–1965,” in *The Oxford History of the Prison*, ed. Norval Morris and David J. Rothman (Oxford University Press 1995), 131–68 at 139–44.

55. McGowen, “The Well-Ordered Prison,” 93.

settled on the construction of permanent prisons.<sup>56</sup> By means of the prison, criminals became separated from the social world and were subject to strict and all-encompassing forms of discipline and labor; those who returned from prison were no longer simply people who had been punished, but had become “criminals.”<sup>57</sup>

Although I have so far been focusing on institutions, the substantive law was changing as well. Particularly with rapid industrialization of the economy in the nineteenth century, the laws that public officials were called upon to enforce also began to shift. Peter Ramsay observes that during this period,

the criminal law was developed to perform a quite different function from the adjudication of right and wrong implied by the Enlightenment theories . . . [t]hat function was the regulation of otherwise lawful everyday behaviour, such as productive and commercial activity or the use of public space, by means of statutory offences, prosecuted under summary procedure and often containing no fault element at all.<sup>58</sup>

In a similar vein, Lindsay Farmer notes that these decades saw a proliferation of new statutes regulating and licensing public trade, safety, pollution, revenue, and so on. While this type of offense was not completely new, as is often assumed, there was a drastic change in the scale and quality of governmental intervention and a transformation of criminal liability. From the factory legislation of the 1830s onward, central government became increasingly involved in legislating to prevent accidents, license certain types of activity, and set standards of quality, as well as the criminalization of socially harmful activities.<sup>59</sup>

Ramsay and Farmer both argue that this same period saw courts first attempt to use the framework of homicide prosecutions as a regulatory device to ensure minimum levels of care in carrying out risky activities,

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56. For discussion of the significance of the hulks in Victorian penal policy, see Beattie, *Crime and the Courts in England*, 565–66.

57. McGowen, “The Well-Ordered Prison,” 99–108.

58. Peter Ramsay, “The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State,” *Modern Law Review* 69 (2006): 29–58 at 32.

59. Farmer, *Criminal Law, Tradition and Legal Order* at 122.

a role that was ultimately assumed by a body of statutory law that created new safety-related offenses articulating uniform standards of conduct calculated to maintain acceptable levels of risk. By creating less serious, conduct-based offenses as substitutes for more serious, intent-based ones, the law in effect spread the social costs of preventing accidents among a wider class of defendants. Rather than relying purely on a case-by-case *ex post* approach that held a hapless defendant liable for the full social harm caused by his negligence, the law spread liability more broadly, but more thinly, through the mechanism of relatively more minor regulatory offenses. Ramsay puts the point well: “Regulatory law is less concerned with punishing wilful wrongdoing than it is with distributing the burden of avoiding the risk of harm. It tends to socialize responsibility, rather than focusing on individual moral agency.”<sup>60</sup>

Not only was the content of substantive criminal law changing to meet the needs of more centralized and more powerful regulatory states: its form was changing as well. Lacey and Farmer have recently emphasized that this same period saw sustained efforts to codify the criminal law, rather than leaving it to *ad hoc* pronouncements by local courts.<sup>61</sup> Although efforts to codify the criminal law of England failed, it succeeded elsewhere—notably, Canada, where resistance to common-law criminalization has been a basic principle of criminal law since *Frey v Fedoruk* rejected “breach of the King’s peace” as a legitimate catch-all authorization for criminalizing antisocial conduct.<sup>62</sup> The rejection of a common law of crimes represents, as Lacey puts it, an impulse to “systematize” the criminal law, ideally by “reconstruct[ing] it as a coherent body of doctrine capable of being applied in an even-handed and impersonal way.” This impulse, Lacey suggests, is “closely related to the developing project of modern governance.”<sup>63</sup>

Similar patterns of criminalization could be observed in the American colonies. As Novak has documented, state and municipalities engaged in extensive amounts of regulation related to a sundry list of common social

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60. Ramsay, “Responsible Subject as Citizen,” 32. See also Farmer, *Criminal Law, Tradition and Legal Order*, 125.

61. Farmer, *Criminal Law, Tradition and Legal Order*, 161–71; Lindsay Farmer, *Making the Modern Criminal Law* (Oxford University Press 2016), ch. 5.

62. *Frey v Fedoruk*, [1950] SCR 517.

63. Lacey, *In Search of Criminal Responsibility* at 118.

problems, from liquor regulation to control of fires.<sup>64</sup> By the 1830s, for instance, Michigan had created criminal provisions pertaining to “obstructing highways, dueling, defrauding or cheating at common law, unlawfully assembling or rioting, the importing or selling of obscene books or prints, exciting disturbance at public meetings or elections, and selling corrupt or unwholesome provisions.”<sup>65</sup> What these offenses suggest is that the criminal law was not simply a matter of the state providing a forum for resolving disputes about pre-politically rights that people would have had in the state of nature. Rather, the criminal law served a wide range of governmental and regulatory aims, a role that is perhaps unsurprising given the comparative paucity of actual regulatory institutions at this time. After all, the New Deal and the creation of the modern American administrative state was nearly a century away. In its absence, the criminal law was being pressed into service as a primitive form of regulation, as a means of providing increasingly broad forms of security and social provision.<sup>66</sup>

In short, the century from the mid-1700s to the late-1800s witnessed a thoroughgoing transformation in the institutions of the criminal law. The functions of preventive patrolling and investigating crime were taken over by organized public police forces. The functions of deciding whether and how to prosecute a crime—especially in North America—were similarly taken out of the hands of private parties and consolidated in the hands of public officials. In addition, punishment became less exemplary and more uniform, less a matter of private, local control and increasingly a matter of national (or at least regional) legislation and policy. Substantive law incorporated regulatory offenses, with new offenses aimed at preventing harms rather than simply responding to willful and malicious attacks. The result was a criminal law, and criminal justice system, that lost its local and private character and became “bureaucratic, largely impersonal, and increasingly centralized.”<sup>67</sup>

Lest this narrative give the impression of a just-so story, it is important to note that not only is there no historical necessity to these changes (there is no hidden hand behind them), but the esmergence of a

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64. Novak, *The People's Welfare*.

65. Novak, *The People's Welfare* at 15–16.

66. Brown, *Free Market Criminal Justice*, ch. 7.

67. Emsley, “The History of Crime and Crime Control Institutions,” 226; Garland, *Punishment and Welfare*, 225.

centralized set of institutions and policies for responding to crime is also, at best, very much an incomplete and contested development. As many have observed, the criminal justice system—most evidently in the United States—is not really a system, in the sense of a coherently and efficiently designed set of roles and functions.<sup>68</sup> Although public officials make all the important decisions about crime and punishment, their decision-making is largely uncoordinated, and scattered among an incredibly large and diverse array of different offices and agencies. There are, for instance, nearly 18,000 distinct state and local law enforcement agencies in the United States, ranging from a great many tiny offices employing fewer than ten full-time officers all the way through to large law enforcement bureaucracies employing over 1,000 full-time officers.<sup>69</sup> The diversity of offices and agencies is further complicated by the overlap among municipal, state, and federal levels of jurisdiction. These decision-makers often have incompatible incentives, different policy agendas, and only very partial control over ultimate outcomes, given the power of other parties to effectively undermine or otherwise respond to decisions made elsewhere in the system. The diversity of offices and agencies, and the inevitable division of powers and functions among them, might be all for the best. Or it might not. In any case, it seems mostly to have developed by accident, and to be subject to no meaningful centralized oversight.

In addition, some areas of the criminal law have resisted modernization. The most notable is the law of sentencing. In Canada, for instance, sentencing remains resolutely discretionary, on the theory that each case calls for a nuanced moral judgment of such fineness that it would be spoiled by imposing so much as a “starting point” for this or that general type of offense.<sup>70</sup> The lack of meaningful oversight is perhaps why the Supreme Court of Canada’s efforts to lessen the overrepresentation

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68. This is a theme in the work of John F. Pfaff; see his *Locked In: The True Causes of Mass Incarceration—And How to Achieve Real Reform* (Basic Books 2017), and *Sentencing Law and Policy* (Foundation Press 2016), 81–84.

69. “Census of State and Local Law Enforcement Agencies, 2008,” Bureau of Justice Statistics, tbl. 1 & tbl. 2, available at <https://www.bjs.gov/content/pub/pdf/csleao8.pdf>.

70. *R v McDonnell*, [1997] 1 SCR 948 (per Sopinka J); See also *R v M (CA)*, [1996] 1 SCR 500; *R v Shropshire*, [1995] 4 SCR 227. For background, see Julian Roberts, “Structuring Sentencing in Canada, England and Wales: A Tale of Two Jurisdictions,” *Criminal Law Forum* 23 (2012): 319–45.

of Indigenous offenders in Canadian prisons have borne so little fruit.<sup>71</sup> Without some form of systematic oversight of sentencing decisions, it is difficult to devise sentencing policy in any meaningful sense. Despite the disproportionate scholarly attention given to the Federal Sentencing Guidelines, sentencing in many American states also remains highly discretionary, with an overlay of ad hoc mandatory minima.<sup>72</sup> More generally, recent decades have witnessed a partial rolling back of public institutions, with private ordering and notions of individual responsibility increasingly filling the void left by diminished public institutions and weakened commitments to social equality.<sup>73</sup>

Finally, new modes of governance have opened up new avenues of domination and oppression. Radical and conservative critics of penal welfarism were not wrong to detect condescension, oppression and, discrimination in an allegedly rehabilitative criminal process.<sup>74</sup> While the development of professional police forces probably greatly eased the burden on victims of crime to track down and apprehend those who injured them, it also paved the way for new risks of authoritarian domination, invasions of privacy, and outright abuse and domination. Eighteenth century prisons were undoubtedly chaotic places, but it was the nineteenth century that saw the full flowering of bureaucratic interest in bending and reforming the criminal's soul, whether through long periods of enforced solitude, physically grueling labor, or submission to the will of the warden. These efforts could be brutal, but they could also operate more subtly, through humiliation and subordination rather than outright violence. Consider,

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71. *R v Gladue*, [1999] 1 SCR 688 (exhorting courts to take an offender's Indigenous status into consideration at sentencing); *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 (noting that in the thirteen years following *Gladue*, representation of Indigenous persons in custody not only failed to decrease, but actually increased).

72. Kevin Reitz, "The Disassembly and Reassembly of US Sentencing Practices," in *Sentencing and Sanctions in Western Countries*, ed. Michael Tonry and Richard Frase (Oxford University Press 2001), 222–58 at 231. For a comparative discussion of guideline sentencing, see Sarah Krasnostein and Arie Freiberg, "Sentencing Guideline Schemes across the United States and Beyond" (October 9, 2014). Oxford Handbooks Online; Criminology & Criminal Justice; available at: <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-001>.

73. See Garland, *The Culture of Control*, especially ch. 7.

74. For an account, see Garland, *The Culture of Control*, ch. 3. The oppressive use of state power is a prominent and longstanding theme in scholarship on the administrative state. See e.g., Charles Reich, "Individual Rights and Social Welfare: Emerging Legal Issues," *Yale Law Journal* 74 (1965): 1245–57; and, more recently, Tani, *States of Dependence*.

for instance, Elizabeth Hinton's description (drawn from a Virginia prison in the 1970s) of how prison officials "rewarded" good behavior:

Seven days a week, a white college graduate with a degree in psychology visited [the prison] armed with a clipboard and a checklist. The inspector was to ascertain whether the mostly black inmates in the unit had tidied their five-foot-by-nine-foot cells, if they had made their beds, and if they were willing to engage in "polite" conversation. For each bit of approved behavior, the incarcerated person would be awarded a point, which was punched into a wallet-sized green credit card to be cashed in later for commissary items or Polaroid snapshots with family members during visitation. A prisoner who scored well and otherwise behaved well could advance to the next stage and move to a lower-security field camp. Many recognized the [system] for what it was. "It's a subtle coercion," one of the participants . . . remarked.<sup>75</sup>

McConville offers a similar account of an accelerated release program in use a century earlier in England. This program was not "coercive," in the sense of threatening a prisoner with an evil; rather it offered the prisoner an inducement, namely early release conditioned upon demonstrated good behavior. According to McConville, this system allowed officials to exercise a kind of petty tyranny over prisoners, punishing any deviation in behavior—even "indifferent behavior"—with a revocation of progress toward early release: "energy, commitment, and complete submission were the supposed prerequisites of early release." Even after being released, a convict was still not free. "Those who won early release knew that they were being watched and could be recalled even if their misbehavior was not criminal."<sup>76</sup>

Although incomplete, partial, and still quite controversial in various ways, the transformation of criminal law into public law has made it possible for political institutions to take a more systematic, preventive, and

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75. Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Harvard University Press 2016), 171. This is in addition, of course, to old-fashioned abuse and domination; see *id.* at 191–202 (documenting a brutal and violent campaign of policing in Detroit in the early 1970s).

76. McConville, "The Victorian Prison," 138. For yet another account, see Walker, *Popular Justice*, 96–99.



law-governed approach to crime. “The expansion and elaboration of penal-welfare institutions,” as Garland has written, “paralleled that of the welfare state as a whole.”<sup>77</sup> The emergence of criminal law as public law suggests that the state’s relation to crime and punishment more closely resembles social provision than alms to the needy. Criminal law, and criminal justice policy more generally, can no longer be interpreted as simply a venue in which private parties vindicate their natural rights against wrongdoers, at their discretion and at their own initiative. By seizing control over the criminal process, public institutions provide a systematic approach to crime and punishment as a shared social burden. Crime becomes a problem for society, rather than a series of private tragedies to be dealt with on a case-by-case basis. Public officials determine which neighborhoods will be patrolled, which crimes will be investigated and which types of victim will be prioritized, and they have the institutional and legal wherewithal to control the conditions in which punishment is meted out. These institutions are public in that they are funded by, and operated in the name of, the sovereign. They thus represent efforts to redistribute the costs of protecting oneself from victimization more broadly, instead of simply leaving them to fall where they may. Under these conditions, it seems reasonable to hold public institutions accountable for the policies and practices they end up adopting. By asserting control over the criminal process, the state takes center stage as the main agent responsible for, as Rachel Barkow puts it, “administering crime.”<sup>78</sup> It would seem morally shortsighted to focus on the merits of individual transactions to the exclusion of the responsibility of public institutions for dealing with crime in a way that is fair to all, potential victims and potential wrongdoers alike.<sup>79</sup>

Such an expectation would have been fantastical in earlier eras. Without either an organized police force for apprehending criminals and investigating crimes, or a bureaucracy devoted to their prosecution, criminal punishment was an inevitably ad hoc affair, depending largely on a miscreant having the misfortune of selecting a victim who had

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77. Garland, *The Culture of Control*, 48; see also Garland, *Punishment and Welfare*, 225–26.

78. “Administering Crime,” *UCLA Law Review* 52 (2005): 715–814; see also Gerard Lynch, “Our Administrative System of Criminal Justice,” *Fordham Law Review* 66 (1998): 2117–51.

79. See Christian List and Philip Pettit, *Group Agency* (Oxford University Press 2011), ch. 3 (arguing that focusing exclusively on individual responsibility ignores the distinctive responsibilities of group agents).

the opportunity, means, and initiative to prosecute. However, the establishment of publicly administered policing and prosecution services in England and North America represent major steps toward creating the institutional capacity required to treat crime systematically, as a problem of social policy whose costs are to a large extent borne publicly. Although the criminal law remains in many respects decentralized, uncoordinated, and privatized, over the course of the eighteenth and nineteenth centuries, the criminal law gradually emerged as a body of public law, overseeing the operation of a wide range of officials and institutions, oriented to a diverse and frequently conflicting set of objectives.

Modern criminal justice systems are substantially larger and more powerful than their eighteenth-century forbears. The growth of the regulatory state occasioned controversy between different conceptions of the rule of law and, in particular, the role of courts in overseeing the actions of administrative agencies.<sup>80</sup> How best to regulate that power, and ensure that it is used appropriately, remains extremely unclear. Some, such as Darryl Brown, have argued that the American commitment to popular control over government by amateurs rather than professional bureaucrats—most characteristically, perhaps, through the regular election of judges and prosecutors—represents a fundamental challenge to the rule of law.<sup>81</sup> Others, such as Bill Stuntz and Stephanos Bibas, have argued that American criminal justice institutions require more localism and popular control, not less.<sup>82</sup> These disputes about the proper balance of democratic and expert input are but the latest iteration of a debate that is as old as the American regulatory state itself. The growth of the regulatory state in the early decades of the twentieth century occasioned disputation concerning different conceptions of the rule of law, from a version of the continental *Rechtstaat* to Dicey-inspired visions of the supremacy of the common law to, as Daniel Ernst has suggested, compromise positions granting both broad discretion to expert agencies as well as some measure of oversight by the courts, with deference conditioned upon the quality of

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80. For an accounting of this history, see Daniel M. Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940* (Oxford University Press 2014).

81. This is the overarching theme of Brown's recent book, *Free Market Criminal Justice*.

82. William J. Stuntz, *The Collapse of American Criminal Justice* (Harvard University Press 2011); Stephanos Bibas, *The Machinery of Criminal Justice* (Oxford University Press 2015), ch. 6.

deliberation and process observed by the agencies.<sup>83</sup> However, whether one regards the administrative state as a retreat from the rule of law or its fullest flowering, still it seems reasonably clear that “[t]he rise of the modern administrative state is based largely on a perception that aggressive governmental action, repudiating the common law, [had] become necessary.”<sup>84</sup>

That the criminal law and its associated institutions are in some sense “public” now strikes us as obvious and beyond question; indeed, some philosophers have argued that the distinction between crime and tort rests on the idea that the former is “public” whereas the latter is “private.”<sup>85</sup> But that idea has a history, and that history is one of a gradual and piecemeal assertion of public control over the criminal process, from the investigation of crime, to its prosecution and the execution of a sentence. By this telling, the institutional history of the criminal law in the English-speaking world is bound up with eventual acceptance of the idea that crime is not just a problem of case-by-case adjudication of independent rights violations, but rather a problem of social policy whose resolution required the development of controversial and powerful new institutions.

## 1.4 Criminal Law as the Vindication of Private Right

I have juxtaposed two ideas: the rise of the welfare state and the gradual emergence of criminal law as public law. I have suggested that the gradual assertion of centralized, public control over most aspects of the criminal process, as well as the creation of a range of new institutions and offices, transforms criminal law from a matter of ad hoc private dispute resolution into a matter of public policy. The rest of this book seeks to motivate the thought that the time has come for the philosophy of criminal law to catch up.

For too long, the philosophy of criminal law has been dominated by a conception of criminal law as the vindication of private rights—the rights people would have in the state of nature. Consequently, philosophers have treated the morality of the criminal law as derived from, or otherwise

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83. Ernst, *Tocqueville's Nightmare*.

84. Cass Sunstein, “Lochner’s Legacy,” *Columbia Law Review* 87(5) (1987): 873–919, 902.

85. R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007), 217.

closely related to, the morality of punishment in private life, ignoring the institutional and political character of the criminal law.<sup>86</sup> In the theory of criminalization, this has taken the form of the so-called “wrongfulness” constraint, allegedly limiting the criminal law to those types of harmful acts that also amount to pre-political moral wrongs. In the theory of punishment, this has taken the form of theories that attempt to justify practices of legal punishment solely in terms of pre-political rights against victimization and punishment, while ignoring the significance of the public institutions that have been created to manage the shared risks of crime. A conception of the criminal law as the vindication of the private rights of individuals may, at best, have been appropriate in the context of a privatized, uncoordinated, and victim-driven system of criminal law—although, given how difficult it was for victims to use the criminal law to vindicate their rights in the early common law, it is doubtful that system really fits a rights vindication model either. Be that as it may, as Farmer has noted, the relentlessly individualistic focus of modern criminal law theory is “especially strange” as it arises “at precisely the moment that the practice of the law and the means of attributing liability are expanding.”<sup>87</sup> Such a conception is beyond anachronistic today, when the modern administrative state is a mature and stable political reality, not just a nascent form of bureaucratic governance.

A conception of criminal law as the vindication of private right obscures what I take to be the central moral concern with modern criminal law: its legitimation as a *political* institution. From the point of view of vindication of private right, the question of legitimacy boils down to the question of whether those who punish are accurately tracking the moral deserts (or pre-politically rights) of those who are being punished. When a private right theorist considers the role of the state in punishment, it is from a curiously apolitical point of view: as simply enforcing, for instance, the moral entitlements and obligations that were there anyway.<sup>88</sup> According to John Gardner, for instance, “[g]overnmental agents answer to all valid reasons for action, just like you and me . . . [p]olitical morality . . . is just ordinary morality as it bears on the circumstances in which certain agents

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86. For an early statement, see Herbert Morris, “A Paternalistic Theory of Punishment,” *American Philosophical Quarterly* 18(4) (1981): 263–71.

87. Farmer, *Criminal Law, Tradition and Legal Order*, 141.

88. Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford University Press 2011), 12–13, 309–11.

(certain officials and institutions) find themselves.” The differences between private morality and public policy, according to Gardner, is simply one of scale: the latter are “but large-stakes examples of the same kind of responsibilities that we all have as friends, employers, teachers, neighbours, and so on.”<sup>89</sup> Similarly, Doug Husak has argued that the authority the state claims in punishing is “no more in need of explication than the authority to punish in other kinds of case in which wrongs are committed against whoever inflicts a punitive sanction.”<sup>90</sup> Andreas von Hirsch insists that the censure in criminal punishment “involves everyday normative judgements, that are used in a wide variety of social contexts, of which punishment is merely one.”<sup>91</sup>

These are astonishing claims, as they suggest a conception of coercive state power as simply larger-scale manifestation of private moral relationships, a conception dramatically at odds with most forms of political liberalism. No political liberal, I take it, could concede that we need not worry about the legitimacy of public law so long as public institutions treat you in just the ways that friends and family members are wont to do. For liberals, public institutions would lose their legitimacy if they were to treat you in those ways, for they would then be in the business of making remarkably intrusive, potentially demeaning, and in any case highly contentious judgments about a person’s actions, character, and personality, and backing those judgments with overpowering force. As Corey Brettschneider has astutely observed, retributivists have prioritized “the question of what is deserved by the criminal *qua* person rather than the question of what punishment the state can rightfully mete out.”<sup>92</sup>

It is worth reflecting on this remarkable state of affairs. Excepting the power to make war, the criminal law is perhaps the most dramatic instance of coercive state power familiar to us today. Yet, by and large, neither philosophers of criminal law, nor their counterparts in political

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89. John Gardner, “The Negligence Standard: Political Not Metaphysical,” *Modern Law Review* 80(1) (2017): 1–21 at 2.

90. Doug Husak, “State Authority to Punish Crime,” *The New Philosophy of Criminal Law*, ed. Chad Flanders and Zach Hoskins (Rowman and Littlefield 2015), 104.

91. Andreas von Hirsch, *Deserved Criminal Sentences* (Bloomsbury 2017), 19.

92. Corey Brettschneider, “The Rights of the Guilty: Punishment and Political Legitimacy,” *Political Theory* 35(2) (2007): 175–99 at 183. Though I would add: not just retributivists. Some non-retributive theorists, such as Victor Tadros, defend accounts of punishment that are similarly based upon pre-politically individual rights.

philosophy, have spent much time considering whether there is good reason to exempt the criminal law from the usual principles of political justification, principles that seem so crucial in other areas of public law and public policy.<sup>93</sup> This book represents an attempt to think through what it would mean to treat the criminal law, and its associated institutions, as fully subject to those more familiar principles of political justification.

Here, one might object that I have been too single-minded in my criticism of criminal law as the vindication of private right. Surely, one might suggest, public institutions ought to *both* vindicate private right *and* secure the conditions for civic flourishing. As states became institutionally denser, they acquired further powers and responsibilities. Among those responsibilities, one might argue, is the responsibility to take over from individuals the moral task of calling wrongdoers to account and meting out upon them the punishment they deserve. Surely, in other words, the development of the modern administrative and welfare state empowers public institutions to include retributive justice in their growing panoply of legitimate public functions.<sup>94</sup>

Could it be the case that a legitimate function of the modern administrative and welfare state is to ensure that wrongdoers receive the censure and punishment they deserve? Perhaps; at least, I do not argue in this book that such an account of political legitimacy is somehow impossible or indefensible. However, what is striking about standard forms of political liberalism is just how little room they leave for pre-politically desert in settling controverted questions of justice.<sup>95</sup> This does not mean, of course, that giving people what they pre-politically deserve could not be reconciled with other basic political values or defended in other ways. We might come to reject liberalism, for instance. Whatever the explanation, I do not challenge the possibility of a political philosophy that is more open to the claims of retribution and desert. That is not the political

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93. Samuel Scheffler, "Justice and Desert in Liberal Political Theory," *California Law Review* 88 (2000): 965–90, remains, to my knowledge, the most sensitive account of this issue. I consider Scheffler's argument further in Chapter 2. See also Scheffler, "Distributive Justice, the Basic Structure and the Place of Private Law," *Oxford Journal of Legal Studies* 35(2) (2015): 213–35.

94. I owe this objection to Leora Dahan-Katz.

95. See Samuel Scheffler, "Responsibility, Reactive Attitudes and Liberalism in Philosophy and Politics," *Philosophy & Public Affairs* 21(4) (1992): 299–323; Chad Flanders, "Criminals behind the Veil: Political Philosophy and Punishment," *Brigham Young University Journal of Public Law* 31 (2016): 83–109.

morality that I sketch (in Chapter 3 and following) in this book. But I do not suggest it is per se impossible or unreasonable for political institutions to consider the moral value of retribution in designing social policy.

What I am at pains to reject, however, is the thought that a political morality of this kind could be sufficiently motivated simply by attending to the moral value of retribution. There are lots of ways of responding to wrongdoing, and the choice among those responses is, or so I shall argue, a substantive political decision for the citizens and officials of a given polity. I deny that how a polity should respond to wrongdoing is dictated by conceptual analysis of “wrongdoing,” “punishment,” “authority,” or other such traditional categories.<sup>96</sup> The argument that securing retributive justice could be a legitimate function of the welfare state should be defended on the field of substantive political morality: Why, when the pursuit of retribution conflicts with other political values that we have reason to care about, should preference be given to retribution? Answering that question would require retributivists to turn from reflections on interpersonal morality to assessing the morality of large public institutions operating over diverse populations under conditions of both significant scarcity and substantial uncertainty.

A further remark is in order at this point. When we think of the criminal justice system today, we think not just of the criminal law and punishment, but also of policing and prevention. Those who defend conceptions of the criminal law as the vindication of private rights tend to focus all but exclusively on the former, leaving the latter to be explicated by appeal to other values or principles. Perhaps this is only to be expected, as a purely ex post conception of criminal law has a difficult time explaining how punishing crime after it happens is morally related to preventing it from happening in the first place. Yet “there is,” as Tapio Lappi-Seppälä puts it, “an inverse relation between commitment to welfare (the generosity of welfare provisions) and the scale of imprisonment.”<sup>97</sup> Looking specifically at the United States, Katherine Beckett and Bruce Western have similarly concluded that state-level expenditure on welfare is negatively correlated with incarceration rates. “States with less generous welfare programs,”

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96. Contrast Malcolm Thorburn’s account of “robust authority” in “Punishment and Public Authority,” in *Criminal Law and the Authority of the State*, ed. Antje du Bois-Pedain, Magnus Ulväng, and Petter Asp (Hart 2017), 7–32.

97. Tapio Lappi-Seppälä, “Trust, Welfare and Political Culture: Explaining Differences in National Penal Policies,” *Crime and Justice* 37(1) (2008): 313–87 at 356.

they write, “feature significantly higher incarceration rates, while those with more generous programs incarcerate a smaller share of their residents.”<sup>98</sup> Beckett and Western conclude that “the contraction of welfare programs aimed at the poor and the expansion of penal institutions in the 1980s and 1990s reflects the emergence of an alternative mode of governance that is replacing, to varying degrees, the modernist strategy based on rehabilitation and welfarism.”<sup>99</sup> What this suggests is that ex post punishment and ex ante investment in social welfare are *substitute* goods. Yet a focus on the criminal law as the vindication of private right obscures this relationship between prevention and punishment.

For egalitarian reasons canvased in Chapters 3 and 7, I believe that we generally have reason to prefer ex ante to ex post methods, and that we should regard the retreat of the “modernist” strategy of rehabilitation and reform with dismay. In contrast, from the point of view of the vindication of private right, how much we should invest in social welfare programs is simply not part of retributive justice. It is a question that is extrinsic to the morality of the criminal law. But once we acknowledge that public institutions are fully in the business of collectively managing the risk of crime, then the choice between ex ante and ex post methods is not some *further* question to be decided by different principles of political morality, as if we could decide how much it is appropriate to invest in punishing people for their transgressions without deciding how much it is appropriate to invest in creating just and equitable social institutions. It is the function of public institutions, including criminal justice institutions, to connect our fates by spreading the costs and benefits of social cooperation broadly and fairly. In trying to decide how to do this, we ought not pretend that ex ante social welfare and ex post punishment are morally unrelated phenomena, answering to completely independent standards of fairness, such as those suggested under the traditional headings of “distributive” versus “retributive” justice.

By insisting on the criminal law as an institution devoted to blaming and punishing individuals for their wrongful acts, while ignoring the significance of other public institutions in responding to crime as a collective problem for the polity, a private right conception finds common

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98. Katherine Beckett and Bruce Western, “Governing Social Marginality,” *Punishment & Society* 3(1) (2001): 43–59 at 55.

99. Beckett and Western, “Governing Social Marginality,” 55.



ground with the *DeShaney* court. That court, after all, was concerned with Wisconsin's obligation to protect private rights to the exclusion of any obligation to serve even the most primal needs of its constituents.<sup>100</sup> This concern mirrors the retributivist preoccupation with what an *individual* is responsible for, rather than what *public institutions* are responsible for.<sup>101</sup> But if it is reasonable to expect more from public institutions than simply respect for pre-politically negative rights, it is not just *DeShaney* that we should leave behind. We should also leave behind a conception of the criminal law as essentially a matter of vindicating the private rights of individuals.

## 1.5 Conclusion

In this chapter, I have contrasted two ideal types: a model of alms to the needy and a model of social provision. Where alms to the needy relies on private actors and discretionary judgments of moral worth, social provision relies on public institutions to collectively manage shared social risks, and to do so as a matter of basic political entitlement rather than as a matter of moral grace. I have further sketched the gradual emergence of criminal law as a body of public law, and suggested that in virtue of becoming public law, crime is gradually transformed from a private tragedy for which the state merely provides a remedy into a shared social problem generating duties on the part of public institutions for protection and prevention. Finally, I have suggested that prevailing approaches to criminalization and punishment—largely, though not exclusively, retributive in orientation—obscure the questions of fair distribution and political legitimacy that are so central to the modern criminal law.

The general objective of this book is to convince you that, in the age of the administrative state, the criminal law is no longer—if ever it was—primarily a matter of publicly vindicating pre-politically negative rights. The criminal law and its associated institutions have become more statist

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100. As it happens, the United States Supreme Court has repeatedly emphasized its view that the criminal law is distinctively retributive, an issue that arises in cases where people are asserting procedural rights that the United States Constitution has reserved for “criminal” defendants. See my discussion in Chapter 6.

101. Malcolm Thorburn, “The Radical Orthodoxy of Hart’s *Punishment and Responsibility*,” in *Foundational Texts in Modern Criminal Law*, ed. Markus Dubber (Oxford University Press 2014), 290–92.

and more redistributive than ever before. It should also become more egalitarian than it is, or so I shall suggest. For this to happen, we must move beyond our preoccupation with what people deserve for their assorted transgressions. We should be more concerned than we are with determining when a criminal law intervention is most likely, out of the range of possible interventions, to optimally promote everyone's basic rights and interests; by the same token, we should be more concerned than we are with ensuring that the criminal law does not itself undermine this very ideal of social equality. These are questions about institutions, discretion, and democracy; they are, by and large, not questions about individual transactions, pre-politically rights, or the conditions of moral blameworthiness.

The next chapter begins the task of developing a normative theory of criminal law as public law. Although that account is meant to be self-standing, what motivates it is the thought that in the age of the administrative state, the legitimacy of the criminal law rests in its ability to fairly and effectively protect each person's basic needs, interests, and rights, whether that person is a potential victim, potential offender, or both. By, on the one hand, drawing upon a broad base of public support and cooperation, and, on the other, exerting comprehensive jurisdiction over the social environment, public institutions have now come to embody, in Rawls's evocative phrase, the variety of ways in which we share in one another's fate.<sup>102</sup> The account developed over the remaining chapters is intended to consider what this might mean for the criminal law.

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102. John Rawls, *A Theory of Justice* (Harvard University Press 1971), 102.