3

Criminal Law as Public Law III

CONTENT

"It is perfectly true that given a just system of cooperation as a scheme of public rules and the expectations set up by it, those who, with the prospect of improving their condition, have done what the system announces that it will reward are entitled to their advantages. In this sense the more fortunate have a claim to their better situation; their claims are legitimate expectations established by social institutions, and the community is obligated to meet them. But this sense of desert presupposes the existence of the cooperative scheme; it is irrelevant to the question . . . [of how] in the first place the scheme is to be designed."[1]

"Even prisoners are supposed to be the beneficiaries of welfare state policies; even the prisons are run according to the logic of a universal right to welfare . . . [w]elfare aid is yours if and when you need it, regardless of whether you have deserved it in a moral sense."[2]

3.1 Introduction

In the previous chapter, I argued that a central function of the criminal law is to promote cooperation with public institutions, and thereby to promote the values, whatever they may be, that arise out of a shared life under public institutions. I also argued that the goal of securing the conditions of ongoing social cooperation enjoys a functional priority over other ends that we might plausibly want the criminal law to pursue, such as systematically

1. John Rawls, *A Theory of Justice* (Harvard University Press 1971), 103.

2. Thomas Ugelvik, "Prisons as Welfare Institutions? Punishment and the Nordic Model," in *Handbook on Prisons*, ed. Y. Jewkes, B. Crewe, and J. Bennett (Routledge 2016), 394; see also John Pratt, "Scandinavian Exceptionalism in an Era of Penal Excess, Part I: The Roots of Scandinavian Exceptionalism," *British Journal of Criminology* 48 (2008): 119–37.

and publicly condemning wrongdoing. I argued that this account of what the criminal law is for yields, in turn, an account of the standard that a justification of the criminal law should meet. A justification of the criminal law should provide an account of (1) when the institutions whose rules it enforces are worth supporting, as well as (2) whether its use in a particular context would be consistent with the principles that make those institutions worth supporting in the first place. I referred to this as a "fully political" standard of justification, and described the resulting view as a "public law" conception of criminal law.

In this chapter, I turn from describing the structure of a public law conception to sketching one possible account of its normative content. A public law conception is consistent with a wide range of commitments in normative political philosophy, whether liberal, libertarian, utilitarian, or otherwise. This chapter presents one such set of commitments—a view I shall refer to as the political ideal of anti-deference. Drawing upon the work of Elizabeth Anderson, Phillip Pettit, and Niko Kolodny, the political ideal of anti-deference describes a society of peers in which every person can, in Pettit's evocative phrase, look every other person in the eye without fear or deference.[3] From the point of view of anti-deference, public institutions should strive to ensure that each person is able to live as a peer among peers. They do this by ensuring that each person has an equal opportunity for influence over the laws and policies that they are subject to; and, subject to that democratic principle, effective access to the capabilities that count, in that society, as constitutive of basic equality.

Of course, any account of the reasons we have to value public institutions will be controversial. The particular interpretation I favor is democratic, egalitarian but not equalizing, and focused on a form of freedom—central capability—as its basic evaluative currency. Perhaps you favor an account that is more rights-based or more utilitarian than the account I sketch. Or perhaps you favor an account that is more populist, or more elitist, than the version I favor. Or perhaps you favor a resource or preference-based metric of evaluation. I shall not engage such high-level philosophical issues here, much less try to resolve them. The appeal of the account sketched here rests largely on its ability to stake out attractive

3. See Phillip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2013).

positions on the criminal law, a task I take up in greater detail in subsequent chapters. Without foreclosing the possibility of other accounts, my aim is to suggest how one approach to egalitarian political thought might be carried through to the context of criminal justice.

The chapter proceeds as follows. First, I quickly sketch the basic parameters of the political ideal of anti-deference in a general way. I then outline a set of principles based on the ideal of anti-deference that provide a framework for evaluating the criminal law and its associated institutions. I focus on four: equal opportunity for influence, anti-subordination, optimality, and inclusive aggregation. I consider objections in Sections 3.3 and 3.4.

3.2 The Political Ideal of Anti-deference

The political ideal of anti-deference holds that public institutions should strive to promote effective access to central capability for all. It is meant to be an ideal of "anti-deference" because it embodies an ideal of status equality. People enjoy equality in this sense when they are able to live on terms that do not require them to show deference before others, or to accept demeaning or humiliating judgments about their worth, as a condition of accessing the basic goods and services that are constitutive of equal status in their society. In a society of this kind, as Philip Pettit has vividly put it, each person can "look others in the eye without reason for the fear or deference that a power of interference might inspire; they can walk tall and assume the public status, objective and subjective, of being equal in this regard with the best."[4] Public institutions contribute to the construction of an egalitarian society of this kind by securing for each person effective access to the capabilities that articulate, in a given social context, equal social status.

Democratic equality is, obviously, a complex idea. Two dimensions stand out as especially salient. The first is political equality, in the sense of having a voice in a range of collective decision-making procedures. The second is substantive equality, in the sense of sharing equally in the benefits and burdens generated by those procedures. Anti-deference, as I propose to understand the term, offers an interpretation of both of these dimensions of equality.

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4. Pettit, *On the People's Terms*, 84.

Niko Kolodny has recently argued that the question of justifying democracy is in large part a question of social equality.[5] A society of equals is one in which no one is "above" any other, and hence no one is "below" any other either. According to Kolodny, a society of equals would be threatened if some people exercised non-reciprocal power and authority over the lives of others, even if that power and authority is only ever used for their good. Kolodny argues that "it is a particularly important component of relations of social equality among individuals that they enjoy equal opportunity for influence over the political decisions to which they are subject."[6] The reason equal opportunity for influence is so important is because when it comes to decisions that have a final authority on how one's life goes, particularly decisions that are backed up coercively, the failure to provide equal opportunity for influence over those decisions suggests that, in one respect or another, those subject to the decisions are social inferiors. It suggests that others speak *for* them rather than *with* them. Even if well intentioned and wise, a condition under which some are subject to the rule of others is a condition of paternalistic supervision rather than one of equal freedom. Unequal influence might be less of a concern when jurisdiction is contingent upon consent, or where compliance is voluntary rather than mandatory. However, public institutions typically insist upon compliance, even from those who never explicitly consented. Under such conditions, political equality requires more than simply ensuring good outcomes. Plausibly, it also requires ensuring that those who are subject to the law have an equal say in determining its content.[7]

Political equality is consistent with a wide range of policies. Substantively, which ones should we prefer? It would be foolhardy to attempt a general answer to this question. For my purposes, a partial answer is sufficient. Anti-deference suggests that, all else being equal, we should prefer policies that maximally protect each person's freedom to engage in the activities, or achieve the outcomes, that are generally understood as

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5. "Rule over None I: What Justifies Democracy?," *Philosophy & Public Affairs* 42(3) (2014): 195–229, and "Rule over None II: Equality and the Justification of Democracy," *Philosophy & Public Affairs* 42(4) (2014): 287–336.

6. "Rule over None II," 308.

7. To be sure, representatives and public officials have greater opportunities for influence than private citizens. But insofar as the former are the latter's agents, exercising only the powers delegated to them by the people, and insofar as the delegation itself is suitably democratic, then representative democracy does not per se undermine equality opportunity for influence. See Kolodny, "Rule over None II," 317–20.

required in that society to lead a decent and independent life. From this point of view, what impairs equal status is not that some have more than others per se, but rather that some do not have enough to live a decent life on their own, and consequently depend upon the beneficence of others.

For reasons that I explore more fully in Chapter 6, I adopt a capability-based account of the activities and outcomes that are constitutive of democratic equality. I shall describe a capability as a central capability if it is required for a person to live in that society as a peer. One of the attractive (if also complicating) features of a capability-based approach is its pluralism. Leading a decent and independent life requires, for instance, that one be able to access public space—streets, sidewalks, malls, and so forth—on terms befitting an equal. It is not just about objective resources, or happiness, or any other single-valued metric. The underlying concern is to ensure that a person's entitlement to the material basis associated with equal status is not conditioned on intrusive and humiliating judgments of moral worth. You should not have to prove to a landlord, employer, doctor, bureaucrat, or teacher that you are a worthy person, or otherwise morally deserving, in order to be entitled to housing, healthcare, income, or a seat in a university classroom—or indeed to any of the other goods that are central to a life led as a peer among peers. That kind of requirement fosters relations of social subservience and deference to authority that are inconsistent with the ideal of a society of equals.[8]

How are political and substantive equality related? The fairness of a procedure should not insulate an outcome from criticism, but neither should the substantive justice of an outcome make it irrelevant as to how that outcome was reached. I follow Pettit in prioritizing political over substantive equality.[9] Public institutions should ensure that those under their jurisdiction have equal opportunity for influence over the laws and policies that apply to them. Subject to that condition, policies and institutions should be evaluated in terms of the degree to which they secure the material basis of social equality, namely the capabilities associated, in a given society, with equal basic status. The rationale for prioritizing political equality is that imposing social policy by diktat is inconsistent with the underlying ideal of status equality. Under conditions of reasonable disagreement, it might be thought condescending for one group to rely on their private

8. Here, I follow Elizabeth Anderson's lead; see "What Is the Point of Equality?," *Ethics* 109 (1999): 287–337, especially at 325–26.

9. See Pettit, *On the People's Terms*, 24–25; see also Kolodny, "Rule over None II."

conviction that they are right to exclude dissenters from weighing in. At worst, it appears to be rule by some (the wise) over others (the benighted).[10] For this reason, political and substantive equality should not be simply weighed against each other: that model would suggest that the more confident you are in the righteousness of your cause, the more entitled you should feel to prevent others from challenging you. Instead, democratic equality should take priority over substantive equality. This priority is qualified, however. When the effect of a decision is to subordinate and exclude some from political participation, democratic values themselves speak in favor of overriding an ostensibly democratic decision.[11]

The general picture is this: peers should have equal voices in determining the terms of cooperation that structure their relations to each other. In many cases, respecting this constraint will not uniquely determine an outcome. All else being equal, we should prefer outcomes that maximally protect universal access to central capability. However, the democratic process should generally be respected even when it yields outcomes that we might regard as suboptimal from one or another philosophical point of view. After all, equal voice is a constituent part of democratic equality, and tends to be of particular value under the conditions of reasonable disagreement that characterize most developed democracies.

3.3 Anti-deference and the Criminal Law

Recall that a fully political standard of justification imposes two conditions on a normative theory of the criminal law. It states that:

(7) The criminal law is worth supporting if and only if:
   a. the institutions whose rules it enforces are worth supporting, and
   b. its use in a particular context would be consistent with the principles that make those institutions worth supporting in the first place.

The primary aim of this chapter is to consider how anti-deference as a political ideal can be extended to the evaluation of the criminal law; it is, in other words, to provide an interpretation of (7)(b). Taking anti-deference

10. See generally Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999).

11. In the context of judicial review, this view is most closely associated with John Hart Ely; see *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

as my starting point, I shall sketch four desiderata for the criminal law. First, criminal justice institutions should afford their constituents *equal opportunity for influence*, by offering those whose lives they affect an equal opportunity to weigh in on its basic policies and values. Second, the criminal law should not be used in ways that reflect humiliating judgments about those subject to the law: it should be consistent with a norm of *anti-subordination*. Third, because the criminal law foreseeably impairs effective access to central capability among those it sanctions, it should be called upon only if no other reasonably available, and democratically accessible, policy would do better in terms of protecting such access for all. It should, in other words, *optimally* protect effective access to central capability. Finally, criminal justice institutions should adopt a principle of *inclusive aggregation*: the interests of those who have committed crimes should not be discounted relative to those who have not.[12]

Equal opportunity for influence. Often, the people over whom public institutions have jurisdiction did not consent to live under those institutions, and lack meaningful options for exit. These facts can make public institutions look like bullies—well-intentioned ones, but bullies nonetheless. The anxiety that our institutions might amount to little more than gussied-up bullying has a tendency to become a full-blown panic attack when we turn our attention to the criminal law. Here, the bullying looks to be at its most evident: do X—*or else*. Indeed, the source of the anxiety goes further than this. It is not just the threat that seems bullying. Criminal justice institutions go beyond threatening punishment if we do not comply with the law. Notably, they also include permanent and armed police forces who are engaged, in part, in preventing people from failing to comply with the law, often by intrusive and forcible means. Historically, common law countries were slow to create such forces out of a suspicion that the presence of a quasi-military occupying police force was inconsistent with a condition of civilized liberty. Reports of humiliating and violent interactions between citizens and the police may suggest that such fears were not entirely unwarranted.[13]

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12. Melissaris has articulated a set of conditions that parallel, in some respects, the account developed here. "Toward a Political Theory of Criminal Law," *New Criminal Law Review* 15(1) (2012): 122–55 at 142.

13. The juxtaposition of extreme violence, and a highly doubtful claim to legitimacy, is a theme in the work of Alice Ristroph. For a recent statement, see "Conditions of Justified Punishment," in *The New Philosophy of Criminal Law*, ed. Chad Flanders and Zachary Hoskins (Rowman & Littlefield International 2015).

In a society of peers, it is important that each person subject to the criminal law have an equal opportunity for influencing its content, from the formal definition of the law to on-the-ground policies about policing and prosecution. A concern with democratic equality explains why a criminal law devised and operated by an entirely unaccountable panel of experts would be objectionable even if otherwise just. The criminal law purports to have the authority to tell us what to do, and to use coercion to ensure we do it. For some to have the unilateral power to call the shots when it comes to making criminal justice policy—what kind of conduct to criminalize, which neighborhoods to police, whom to search, whom to prosecute, and what counts as an appropriate punishment for a crime—is to grant those people power and authority over others. This power and authority gives them a status that others lack: citizens in such a society are merely subject to the law that the officials make. Perhaps this might be less problematic in areas of public policy that are less overtly coercive, or where the possibilities of opting out are more realistic. But the criminal law is both mandatory and highly coercive. By allowing for equal opportunity for influence over the criminal law—both formally and as it exists in practice—criminal justice institutions meliorate the concern that they boil down to gussied-up bullying, however fair and effective the criminal law may otherwise be. For even if you have no say as to whether you are under the jurisdiction of the criminal law, and even if the criminal law's rules are coercively enforced against you, there is a sense in which you are not treated as someone of lesser worth if you have the same opportunity for influence over the content and operation of the criminal law as anyone else.[14]

One way of ensuring that no one lords it over anyone else is to make decisions through a random process, for instance by running a lottery over every proposed policy change. In that case, no one's views have any more weight than anyone else's: everyone has a right to propose a policy, and the decision among them is made in an entirely impartial way. Whatever other objections one might have to setting criminal justice policy by lottery, one presumably could not object that it treats people unfairly. However, there just doesn't seem to be any reason to think that the outcomes reached by a

14. Perhaps we might thus understand Pratt's observation that, high levels of trust in expertise notwithstanding, Scandinavian prisons vest prisoners with a substantial voice in penal policy: "prisoners . . . have direct input into prison governance." Pratt, "Scandinavian Exceptionalism in an Era of Penal Excess," 120.

series of lotteries merit our respect, no matter how fair the process behind them.[15] (Although choosing *policies* by lottery should perhaps be distinguished from selecting *representatives* by lottery.[16])

Hence, the relevant question becomes whether there might be some way of ensuring equal opportunity for influence over the criminal justice system while also ensuring that the outcomes of criminal justice policy better satisfy substantive equality than a purely random procedure. In other words, one might understand the structure of anti-deference like this: *first*, consider whether a particular means of democratic decision-making provides an equal opportunity for influence; *second*, rank those that do by the likelihood that the policies they produce will tend to be substantively acceptable, recognizing that in the rivalry between competing conceptions of justice characteristic of a pluralistic and democratic politics, sincerity of conviction is not a substitute for support of the governed.[17]

Ensuring that each person has real, substantively equal opportunity for weighing in on the laws and policies that affect him or her clearly does not uniquely specify any single approach to democratic decision-making. It does not require direct electoral input on every major policy decision in criminal justice.[18] In principle, this principle could be consistent with both popular and bureaucratic models of oversight over criminal justice. The equal opportunity for influence principle would appear to be satisfied so long as the powers officials exercise are delegated to them by the people, subject to suitably robust democratic conditions. (Specifying those conditions, either

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15. Though a reversion to the baseline fairness of a lottery might be defensible as a second-best where substantive decision-making by the relevant officials results in a racially discriminatory pattern of outcomes, as appears to be the case with both traffic stops and stop-and-frisk encounters with the police. I explore this idea in "*Ex Ante* Fairness in Criminal Law and Procedure," *New Criminal Law Review* 15(2) (2011): 277–332.

16. See Alexander Guerrero, "Against Elections: The Lottocratic Alternative," *Philosophy & Public Affairs* 42(2) (2014): 135–78, especially 167, 168–69.

17. Kolodny, "Rule over None II," 313–14.

18. Darryl Brown observes that American criminal law is "perhaps unique in the degree to which it is a product of democratic political process, or put differently, the degree to which it is unmediated in its creation by specialists or expert agencies outside of legislatures." As Brown notes, criminal law is in this respect distinct from other areas of law, such as evidence, commercial law, and procedural law, which are largely the product of specialized commissions operating with modest legislative oversight. See "History's Challenge to Criminal Law Theory," *Criminal Law and Philosophy* 3 (2009): 271–87 at 283.

in general, or with respect to a certain type of delegated power, is a challenge I leave for another occasion.) There seems to be no more reason to insist that judges and prosecutors be made directly accountable through elections than to insist that, for instance, we should directly elect the chairperson of the Federal Reserve, the attorney general, or the director of the Environmental Protection Agency. Arguably, the equal-opportunity-for-influence principle could also be satisfied by a suitably robust procedure for consulting with affected communities. This could take the form of a civilian board of commissioners, or, as some have suggested, through a period of notice and comment rule-making. Or perhaps a novel institutional mechanism would be appropriate.[19]

However, it is important to stress that what is at issue here is not mere formal opportunity to be heard, but equal *actual* opportunity for influence.[20] In this respect, a consultative, participatory model may possibly be superior to an electoral model. Unlike an election, which collapses multiple dimensions of concern into a single up or down vote, discursive consultation allows for the disaggregated airing of views with respect to multiple different areas of concern. Consultative and participatory democracy might be more egalitarian if the selection of representatives for consultation is fairer than access to the ballot, which might be impeded by lack of access to relevant information, as well as more prosaic concerns relating to participation in local elections. Perhaps minority positions, as well as those of the communities that are most likely to be burdened by criminal law enforcement activity, are more likely to be heard in consultation than in electoral politics. For instance, Stuntz has argued that in electoral systems suburban voters tend to have a disproportionate influence on criminal justice priorities, even when they are relatively less affected by them.[21] Finally, consultative and participatory democracy might also do better at avoiding the kinds of demagogic excess that seems to plague

19. See Barry Friedman and Maria Ponomarenko, "Democratic Policing," *New York University Law Review* 90 (2015): 101–83 (defending proposals for greater democratic input and transparency in policing decisions, and noting that the Los Angeles and Seattle police departments operate under civilian oversight commissions); Richard A Bierschbach and Stephanos Bibas, "Notice and Comment Sentencing," *Minnesota Law Review* 97(1) (2012): 1–71 (mounting a similar line of argument with respect to sentencing policy); Bibas, *The Machinery of Criminal Justice* (Oxford University Press 2015), chs. 4–6.

20. Kolodny, "Rule over None II," 334–36.

21. Bill Stuntz, *The Collapse of American Criminal Justice* (Harvard University Press 2011), ch. 1.

direct electoral control over criminal justice officials.[22] Of course, even highly consultative and participatory forms of democracy will, at some point, have to come down to aggregating opinions through some form of voting procedure. The point is only that democratic input need not be interpreted to mean that every significant decision has to be made electorally: democratic criminal law is not necessarily criminal law by referenda.[23]

Practically, the equal opportunity principle is inconsistent with the practice of disenfranchising current or former felons, as is commonly done in the United States.[24] Although criminal disenfranchisement is a widespread practice with a long history, "no other contemporary democracy disenfranchises felons to the same extent, or in the same manner, as the United States."[25] Voting restrictions for criminals have a long history in American law. Such restrictions were pressed into the service of white supremacy during the Reconstruction era, when many Southern states amended their constitutions to use felon disenfranchisement as a functional replacement for categorical disenfranchisement of African Americans.[26] (In a cruel irony, the legal basis for felon disenfranchisement today is found in the text of the Fourteenth Amendment.[27]) Manza

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22. Vannessa Barker has argued that a participatory democracy approach tends toward a more moderate sentencing policy. See *Politics of Imprisonment: How the Democratic Process Shapes the Way America Punishes Offenders* (Oxford University Press 2009), 11–13, 85–125.

23. One might in any case wonder about the democratic credentials of elections; for a recent discussion, see Christopher Achen and Larry M. Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government* (Princeton University Press 2016).

24. My account draws from John Kleinig and Kevin Murtagh, "Disenfranchising Felons," *Journal of Applied Philosophy* 22, no 3 (2005): 217–39, Michael Cholbi, "A Felon's Right to Vote," *Law and Philosophy* 21 (2002): 543–65, and Jeffrey Reiman, "Liberal and Republican Arguments against Disenfranchisement of Felons," *Criminal Justice Ethics* (Winter/Spring 2005): 3–18. However, my account is broader than Reiman's, in that Reiman limits his claim to ex-felons who have served out their sentences.

25. Angela Behrens, Christopher Uggen, and Jeff Manza, "Ballot Manipulation and the 'Menace of Negro Domination': Racial Threat and Felon Disenfranchisement in the United States, 1850–2002," *American Journal of Sociology* 109(3) (2003): 559–605 at 562.

26. Behrens, Uggen, and Manza, "Ballot Manipulation and the 'Menace of Negro Domination,'" 596–98 (finding that "the racial composition of state prisons is firmly associated with the adoption of state felon disenfranchisement laws"); Jason Schall, "The Consistency of Felon Disenfranchisement with Citizenship Theory," *Harvard Black Letter Law Journal* 22 (2006): 53–93 at 58–59; Reuven Ziegler, "Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives," *Boston University International Law Journal* 29 (2011): 197–266 at 217–18.

27. The relevant text reads: "[W]hen the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United

and Uggen have estimated that over 5 million individuals were formally disenfranchised during the 2004 elections in the United States, rising to nearly 6 million if jail and pretrial custody populations are included.[28] In Florida, nearly one in ten people of voting age—or about 827,000—are disenfranchised, a number likely to have been sufficient, under plausible assumptions about turnout rates and political preferences, to have changed the outcome of the 2000 presidential election.[29] Just as troubling, there is evidence that simply having contact with the criminal justice system exerts a strongly negative effect on voting, civic participation, and trust in government. This includes even relatively minor contact, such as having been arrested or questioned by the police.[30]

Felon disenfranchisement raises obvious and serious questions about the democratic legitimacy of criminal justice institutions. As I see it, the equal opportunity principle has a broad scope: it includes not just those who have completed their sentences, but also those currently serving out a sentence.[31] The equal opportunity principle holds that democratic law is distinguished from the mere exercise of power in that those subject to the law to have an equal voice in shaping it. Those serving out criminal sentences are paradigmatically people subject to the law. They are not exempted from the law's jurisdiction; they are not exiles, or put into a state of lawlessness, even temporarily. To the contrary, people serving out a criminal sentence are subjected to much more aggressive regulation and supervision than almost anyone else. In being stripped of equal

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States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." The constitutionality of felon disenfranchisement was affirmed by the United States Supreme Court in *Richardson v Ramirez*, 418 U.S. 24 (1974).

28. Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (Oxford University Press 2006), 76.

29. Manza and Uggen, *Locked Out*, 78, 191–92.

30. Vesla M. Weaver and Amy E. Lerman, "Political Consequences of the Carceral State," *American Political Science Review* 104(4) (2010): 1–17; Lerman and Weaver, *Arresting Citizenship*, (University of Chicago Press 2014), ch. 6.

31. I follow Kleinig and Murtagh on this point: "Disenfranchising Felons," 227–32. Only Maine and Vermont permit currently incarcerated people to vote. Internationally, Canada, the Czech Republic, Denmark, Israel, Japan, and South Africa do so as well. See Marc Mauer, "Mass Incarceration and the Disappearing Voters," in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, ed. Marc Mauer and Meda Chesney-Lind (The New Press 2002), 50–58.

opportunity for influence, one is in effect told: you are subject to the law, but are in no way its author. For such a person, the rule of law boils down to rule by others.

What would it take for the assertion of authority of this kind to be more than simply the exercise of power of some against others? At a minimum, it would require that those subject to it have an equal opportunity to be heard in public deliberations about how that power is exercised. Hence, laws restricting the ability of people convicted of crimes to participate in the political process erode the law's claim to legitimate authority.[32]

In contrast, Christopher Bennett has recently defended a limited form of felon disenfranchisement—applicable only to those guilty of the most serious offenses—on the ground that the state has a duty to dissociate itself from wrongful acts that violate the law.[33] On Bennett's view, it is at least permissible for the state to discharge its duty to dissociate from those who commit serious crimes by removing their voting rights. Bennett's argument for this claim is telling: he asserts that we have "no better grasp" on how the state can dissociate from criminals "than the grasp we have on the same question in the interpersonal case," which he interprets to require symbols of "distancing or withdrawal," for instance when someone refuses to shake another person's hand or to be in the same room with her.[34] In the context of the state, Bennett suggests that the parallel is to withdraw "partially or temporarily, the kind of special treatment that

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32. For these reasons, in contrast to Sigler, I doubt that the value of condemning crime as a breach of civic trust can justify disenfranchisement, even while someone is being punished. See Sigler, "Defensible Disenfranchisement," *Iowa Law Review* 99 (2014): 1725–44. By the same token, I do not share Altman's judgment that it is "morally preposterous" to deny that a state may permissibly disenfranchise a genocidaire. The question is not whether someone may deserve to be excluded. The question is whether a democratic state may legitimately do so. See Andrew Altman, "Democratic Self-Determination and the Disenfranchisement of Felons," *Journal of Applied Philosophy* 22 (3) (2005): 263–73 at 268. The need to legitimate coercive state power also weighs against a democratic state's desire to impose a "normative standard of citizenship" by disenfranchising people who have wrongly attacked others. See William Bülow, "Felon Disenfranchisement and the Argument from Democratic Self-Determination," *Philosophia* 44 (2016): 759–74 at 772.

33. Christopher Bennett, "Penal Disenfranchisement," *Criminal Law & Philosophy* 10 (2016): 411–25.

34. Bennett, "Penal Disenfranchisement," 421. The example of refusing to shake hands or share a room occurs at page 420.

those in a political relationship can usually expect as members of that relationship."[35]

Does interpersonal morality require dissociating oneself from people who are guilty of quite serious crimes? I am doubtful. In many cases, it is just as, if not more, appropriate to respond to wrongdoing with engagement and dialogue rather than withdrawal and dissociation. Withdrawal and dissociation would seem to be most appropriate in cases where the future of the relationship is itself in question. Moreover, even if it would be appropriate for a private individual to withdraw and dissociate from someone who had committed a serious wrong, it is not obvious why we should regard the state as similarly situated. Short of those whom it puts to death, the state retains an ongoing relationship with all its members, including those guilty of quite serious crimes.[36] Finally, the state's standing to exclude, even temporarily, people from the democratic process on the supposition that their crimes reveal them to be hostile to democratic governance is rather dubious under conditions of serious background injustice. As Lippke notes, under such conditions, the more plausible inference may be that criminals are hostile to a system of governance that has routinely ignored their interests, rather than that they are hostile to democratic governance as such.[37]

Jean Hampton once defended a limited form of felon disenfranchisement on the ground that it contributes to an "expressive retributive response" that "negates [the] significance" of certain types of crime. She gave as examples violence against women, a racially motivated murder, and treason: crimes that are "destructive of the values and functioning of a democratic society."[38] Allowing such people to vote would be "no way to stand up for" democratic and egalitarian values; denying such people

35. Bennett, "Penal Disenfranchisement," 421. In a similar vein, Cholbi construes felon disenfranchisement as a form of symbolic banishment, although Cholbi is more critical of the practice than Bennett; see Cholbi, "A Felon's Right to Vote," 564. See also Gabriel Chin, "The New Civil Death: Rethinking Punishment in the Era of Mass Conviction," *University of Pennsylvania Law Review* 160 (2012): 1789–833.

36. See Martha Nussbaum, *Anger and Forgiveness: Resentment, Generosity, Justice* (Oxford University Press 2016), ch. 6; Erin Kelly, *Limits of Blame: Rethinking Punishment and Responsibility* (Harvard University Press, forthcoming); Corey Brettschneider, "The Rights of the Guilty: Punishment and Political Legitimacy," *Political Theory* 35(2) (2007): 175–99.

37. Richard Lippke, "The Disenfranchisement of Felons," *Law & Philosophy* 20 (2001): 553–80 at 578.

38. Hampton, "Punishment, Feminism, and Political Identity," 41–42.

the right to vote for some period of time would be an appropriate way, Hampton claimed, to vindicate those very values from attack. Unlike Bennett's account, Hampton's account has the virtue of being couched in expressly political values, and indeed egalitarian ones. But it is doubtful that Hampton is any more successful than Bennett in rationalizing the political exclusion of prisoners. After all, even if we accept her premise that we should engage in an "expressive retributive response" to crime, it is far from clear why we don't adequately discharge that duty by prosecuting, convicting, and incarcerating people. Why do we also have to take away their right to vote? Hampton claims that we must do so to "stand up for" democratic and egalitarian values, but that just appears to be so much ipse dixit; one might just as well think that we adequately stand up for those values through the trial process and imposition of punishment. Indeed, one might think that the very same value democratic and egalitarian values that Hampton appeals to show why no one, including criminals, may legitimately be stripped of the right to participate as an equal in the democratic process.[39]

Because criminal punishment represents such an intense use of state power over an individual, disenfranchisement is arguably *least* appropriate for those the state seeks to punish. In the previous chapter (Section 2.3), I argued that in cases of conflict, the criminal law should prioritize basic political values over norms of interpersonal morality. If anything, this point would seem to have special force in the context of political rights, which have a central place in our conception of basic social equality. Hence, I do not think that whatever reasons we may have to dissociate from wrongdoers in the interpersonal context should override our commitment to protecting universal rights of democratic participation as a matter of political morality.

Anti-subordination. The basic function of a system of punishment is to stabilize a broadly shared willingness to cooperate and play by the rules, not to terrorize people into compliance. From the point of view of anti-deference, those rules should promote the conditions of democratic equality, in which people are sufficiently protected in their basic rights and interests such that they can reasonably be expected to relate to each other as equals, rather than as superiors and subordinates. To ensure this kind of equality, it is not enough that one is not actively interfered

39. As the Supreme Court has held, with respect to the right to citizenship: *Trop v Dulles*, 356 U.S. 86 (1958).

with by others. As Pettit has emphasized, a choice is not fully free if it is made in the shadow of a threat, explicit or implicit, of interference should one's choices not align with someone else's preferences. Under such circumstances, they will not need to actually interfere in order to ensure that your choices reflect their preferences. Hence, one's choices must also be sufficiently, if not endlessly, robust, in the sense of protected against the most salient threats of interference with its exercise.

This line of reasoning suggests the following principle: the criminal law should seek to stabilize patterns of cooperation in a manner that is consistent with the equal status of each person relative to every other person. Institutions committed to the ideal of anti-deference could not approve the use of the criminal law, even to secure otherwise valuable aims, when doing so serves to further entrench objectionable patterns of status hierarchy. The effect of entrenched status hierarchy is that those on top will exercise undue power—sometimes veiled, sometimes explicit—over how others lead their lives along a range of important dimensions. Criminal justice in the United States has, to put it mildly, not always been very successful on this score.[40] From the common law's marital rape exception to the ongoing controversies surrounding abusive and discriminatory policing, American criminal justice has a long history of denying equal respect and concern to entire groups of people. Those who are subordinated are, in effect, told that they must show deference to others—masters, husbands, police—if they are to ensure the continued protection of their basic rights and interests.

The rise of retributivism in the waning decades of the twentieth-century was fueled, in part, by a critique of the condescending and discriminatory methods of rehabilitative justice. The anti-subordination principle preserves the core of this critique, while rejecting its retributivist trappings.[41] Indeterminate sentencing, in particular, vested extraordinary powers in public officials in the name of "rehabilitation," and critics were right to call attention to its abuses.[42] In my view, however, rather than appeal to pre-politically notions of desert and wrongdoing in punishment, the

40. See James Q Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford University Press 2003).

41. See Garland, *The Culture of Control* (University of Chicago Press 2001), ch. 3.

42. Most famously, Marvin Frankel, *Criminal Sentences: Law without Order* (Hill & Wang 1973).

better response is to ensure that the exercise of that discretion conforms to principles of basic social equality.

Consider the aggressive use of stop-and-frisk policing, as practiced in many cities across North America.[43] This type of policy should be especially troubling to egalitarians. The free use of public space is a crucially important capability, and it should be hard to justify conduct that has the effect of terrorizing people in their use of it. It is particularly hard to justify, given that the brunt of the impact is concentrated on African-American and Hispanic men.[44] This is not simply a matter of being stopped; there is evidence that African Americans who are stopped and frisked are more likely to be met with "non-lethal force," such as slapping, grabbing, or being pushed into a wall or the ground, than similarly situated whites.[45] Consider in this context Forman's description of routine police raids of a high school in Washington, DC:

> [w]hen the police rushed onto our corner, our students were forced to "assume the position," with their legs spread, faces against the wall or squad car, and hands behind their heads. Then they were searched, with the officers feeling every inch of their bodies, turning backpacks and pockets inside out, leaving the sidewalks strewn with notebooks, broken pencils, lipstick, and combs. Not

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43. I have in mind here the conjunction of two practices: police detaining individuals on a relatively low level of suspicion for questioning and/or a cursory search, as well as the use of a potential detainee's race as a non-individualized factor in deciding whether to effectuate such a stop. The practice of stop-and-frisk policing was validated in *Terry v Ohio*, 392 U.S. 1 (1968). Justice Douglas, dissenting in *Terry*, raised republican themes in warning of the dangers of granting the police an effectively unreviewable discretion to stop someone "whenever they do not like the cut of his jib." *Terry* at 39. In the Canadian context, see *R v Mann*, [2004] 3 S.C.R. 59; *R v Grant*, [2009] 2 S.C.R. 353.

44. Fagan et al., "Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City," in *Race, Ethnicity and Policing: New and Essential Readings*, ed. Stephen K. Rice and Michael D. White (NYU Press 2009); Ian Ayres and Jonathan Borowsky, "A Study of Racially Disparate Outcomes in the Los Angeles Police Department" (Report prepared for the ACLU of Southern California, October 2008, available at: https://www.aclusocal.org/en/racial-profiling-lapd-study-racially-disparate-outcomes-los-angeles-police-department) at 5–6. Arrest data tells a similar story; see Robert Brame et al., "Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23," *Crime & Delinquency* 60 (2014): 471–86 at 478 (finding that 49 percent of African-American men and 44 percent of Latino men will have been arrested at least once by age twenty-three).

45. Roland G. Fryer, "An Empirical Analysis of Racial Differences in Police Use of Force" (National Bureau of Economic Research: Working Paper 22399), 3–4.

> once, over the course of about ten searches, did the police recover anything illegal.[46]

From the point of view of anti-deference, the wide use of stop-and-frisk policies makes it reasonable for those targeted by such policies to infer that they are only free to use public space on terms set by others. Given the authoritarian and implicitly threatening context of many police interactions, the message is clear enough: you are not our equals, and you pass through here at our sufferance. It is hardly surprising, then, that studies have found a corrosive effect of aggressive stop-and-frisk policies on cooperation with and trust in police.[47]

There are unresolved empirical questions about whether aggressive stop-and-frisk policing of minorities contributes to lowering the crime rate.[48] Clearly, if aggressive stop-and-frisk does not reduce crime it would be hard to explain what would speak in favor of such a policy. Similarly, even if stop-and-frisk policing does reduce crime, the abusive and humiliating means by which such stops are often carried out are independently objectionable. So suppose that stop-and-frisk policing could be carried out in a respectful and nonabusive manner, and that doing so would lower crime rates. Moreover, suppose that it would lower crime rates in the very communities where access to central capability is deeply insecure, communities that in the United States tend to be predominantly African-American or Hispanic. Surely if that were established, that should weigh in favor of permitting the aggressive use of stop-and-frisk.

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46. James Forman, *Locking Up Our Own: Crime and Punishment in Black America* (Farrar, Straus and Giroux 2017), 153–54.

47. Stephen Schulhofer, Tom Tyler, and Aziz Huq, "American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative," *Journal of Criminal Law & Criminology* 101 (2011): 335–74, especially 345–49 (summarizing research finding that voluntary cooperation with authorities depends more strongly on perceived fairness than on fear of sanctions).

48. Aziz Huq summarizes the empirical literature on "stop, question and frisk" policies, concluding that it "remains largely predicated on a mere guess about the effect of intensive street stops on violent crime levels." "The Consequences of Disparate Policing: Evaluating Stop-and-Frisk as a Modality of Urban Policing," *Minnesota Law Review* 100 (2017): 2397–480 at 2421. Moreover, as Huq astutely notes, the important question is not whether stop-and-frisk policies reduces crime, but how this policy compares to other policing techniques that might be adopted instead, such as hot-spot policing. See also Franklin E. Zimring, *The City That Became Safe: New York's Lessons for Urban Crime and Its Control* (Oxford University Press 2012), 144–47.

I do not deny that if aggressive stop-and-frisk policing turns out to be more effective at reducing crime than feasible alternatives, this would be a powerful reason in favor of retaining the practice. However, the aim of anti-deference is not merely to protect access to central capability by reducing crime. It is to protect *effective* access to central capability—access on terms that reflect one's standing as an equal. Even if discriminatory policing does lower the crime rate, it would tend to have the effect of requiring those targeted by the policy to show deference to the police in order to be able to make use of public space. These individuals would effectively be regarded as a threat to be managed rather than as coequal citizens. This is inconsistent with the commitment to status equality that is at the heart of the political ideal of anti-deference.[49]

This argument is a qualified one. Since what is at issue here is the differential allocation of a burden in creating a public good, the views of those being asked to bear a heavier burden carry significant weight. If the targeted minority groups largely support stop-and-frisk policing—perhaps on the basis of the (potential) benefit it is alleged to produce—that would weaken the characterization of racial profiling as subordination. Even so, however, it might not render that characterization entirely inapt. It may be that the reason stop-and-frisk produces such benefits (again assuming, perhaps counterfactually, that it does) is because of past discrimination against the minority community. For example, higher rates of criminal offending in minority communities may be causally connected to social oppression by the very majority group that now seeks to impose higher costs on the minority group as a result of that higher rate of offending. If so, even if members of the oppressed group come to favor aggressive stop-and-frisk policing as the lesser of two evils, there might well still be reason to characterize the use of such policing as subordination. This is because its justification would rest on the assumption of an oppressive social relationship.[50]

The anti-subordination principle reflects the idea that criminal justice institutions are not reducible to a means for efficiently deterring and

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49. See Huq, "The Consequences of Disparate Policing: Evaluating Stop-and-Frisk as a Modality of Urban Policing," sections I.C–D.

50. This argument is owed to Kasper Lippert-Rasmussen, "Racial Profiling versus Community," *Journal of Applied Philosophy* 23(2) (2006): 191–205. Lippert-Rasmussen's paper is a response to Mathias Risse and Richard Zeckhauser, "Racial Profiling," *Philosophy & Public Affairs* 32(2) (2004): 131–70. For Risse's reply, see "Racial Profiling: A Reply to Two Critics," *Criminal Justice Ethics* 26(1) (2007): 4–19.

preventing crime. The criminal law and its associated institutions are part of an overall ensemble of public institutions oriented toward fostering relations of democratic equality among their constituents. Crime is obviously dominating. But the criminal law should not itself be a source of domination. Public institutions committed to the political ideal of anti-deference could not approve efforts to prevent crime that operate by terrorizing people in the exercise of the basic prerogatives of civic membership. That would be to substitute public domination by officials for private domination by criminals.

Optimality. Equal political voice and the restriction on public humiliation operate as constraints on a criminal justice system. Denial of political equality, just like policies or actions that reinforce degrading status hierarchies, are *per se* inconsistent with the idea of a society of peers. However, while I have emphasized the connection between status equality and distributive justice—that one's standing as an equal depends upon sufficiently robust access to a range of central capabilities—the connection between those capabilities (housing, movement, employment, and so forth) and equal status is less direct, and more subject to trade-offs, albeit of a restricted kind. Because of the criminal law's distinctive reliance on harsh sanctions that themselves amount to serious invasions of central capability, there is a strong presumption against criminal punishment even in the face of noncompliance. I accept Pettit and Braithwaite's suggestion that, given the clear impact of criminal punishment on central capability, the burden of proof should lie squarely on proposals to employ criminal justice interventions.[51] That presumption is only defeated if imposing harsh sanctions on rule violators optimally promotes effective access to central capability for all, when compared to other feasible alternatives (including doing nothing.) Optimality thus has the following structure: because impairing a person's effective access to central capability is to impair an aspect of that person's status as an equal, it should in all cases be difficult to justify. Only the potential impairment of central capability for others is sufficiently weighty to defeat that presumption.

As I propose to understand it, this part of anti-deference is an aggregative standard, in that it aggregates the overall impact of a criminal justice

51. John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Clarendon 1990) . See also Norval Morris, *Madness and the Criminal Law* (University of Chicago Press 1983).

intervention across both potential victims and potential criminals alike. It is in that respect situated within the consequentialist tradition of social theory. That said, the account is, strictly speaking, non-consequentialist in nature. That is because I start from a universal right to equal status, one that I do not attempt to defend on consequential grounds.

The literature comparing aggregative and non-aggregative approaches to social theory is expansive, and it is not my intention to enter that debate here. In brief, my reasons for preferring an aggregative approach have to do with the difficulties that non-aggregative theories tend to face in coming to grips with uncertainty and risk, both of which seem endemic to public policy generally; as well as with what I believe to be their unattractive implications in the context of the criminal justice policy specifically.

Consider Scanlon's suggestion to compare, in a strictly pairwise manner, the moral urgency of a person burdened by a decision to do A, as compared to the urgency of a person burdened by a decision to do B.[52] Comparing these claims in a pairwise manner restricts attention to the moral quality of the burdens imposed, rather than the number of people affected. For instance, Scanlon asks whether we ought to briefly stop a television broadcast watched by millions in order to disentangle someone who is suffering excruciating pain after having fallen into the broadcasting equipment. The urgency of rescuing the person who has fallen into the equipment is qualitatively more urgent that that of someone whose television program is interrupted, suggesting that we should effectuate the rescue, regardless of how many people are inconvenienced.

So far, so good. But consider what this non-aggregative approach would imply in the context of criminal justice. A person's claim to be protected from violent crime—murder or rape, for instance—is very urgent indeed. It is plainly more urgent than another person's claim not to be subject to observation by the authorities. After all, while you may find it annoying or intrusive if you are observed by a police officer on the street, that complaint is nevertheless much less urgent than that of someone who is seriously assaulted or raped. A strictly pairwise comparison of these claims would suggest that any amount of police observation would be acceptable if it prevents even one person from being victimized in that way.[53]

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52. T.M. Scanlon, *What We Owe to Each Other* (Harvard University Press 1998), 235–36.

53. A plausible compromise position accommodates aggregation by discounting the marginal weight of each additional claim (perhaps asymptotically), implying that although the lesser complaints of *n* people might in some cases outweigh the greater complaint of one, it

This implication is unattractive. It makes it too easy to justify sweeping policies of mass surveillance and aggressive policing. Perhaps living in a police state would decrease the violent crime rate marginally, and perhaps the complaint of a victim of a violent crime is, when considered in a strictly pairwise comparison, more serious than the complaint of someone who has a police officer permanently stationed outside her front door. But I am not confident that we should conclude that it would be permissible, much less morally required, for the state to station a police officer outside everyone's home, even if doing so would decrease crime. It seems natural to regard the objection to mass surveillance as having something to do with the overall impact of those policies when replicated across a society generally.[54]

Of course, there are a great many ways in which we might aggregate claims. My preferred approach is a finitely weighted rule that prioritizes the claims of the worst off, with the priority represented along a dimension of relative weight rather than more categorically.[55] The upside of accommodating aggregation in this way is that it avoids the kinds of "cliffs" that result from threshold views such as leximin or sufficientarianism, which prohibit imposing trivial losses on people just below some welfare threshold, even when doing so would create substantial benefits to a large number of people, including those just above that same welfare threshold. However, the downside is the same as the upside: this form of prioritarian aggregation allows that a trivial benefit to the fabulously well-off, supposing there are enough of them, could in principle justify imposing quite a serious loss on someone who is significantly worse off.[56]

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is not the case that two complaints of a given seriousness are counted as exactly twice as serious as one. This view is considered by Victor Tadros: see "Controlling Risk," in *Prevention and the Limits of the Criminal Law*, ed. Andrew Ashworth, Lucia Zedner, and Patrick Tomlin (Oxford University Press 2013), 133–55.

54. This line of objection particularizes a critique that Barbara Fried, among others, has raised in a more general way to non-consequentialist moral theory; see "What *Does* Matter? The Case for Killing the Trolley Problem (or Letting It Die)," *Philosophical Quarterly* 62(248) (2012): 505–29 especially 512. That said, it addresses only one type of non-aggregative view; there are many others, which may not be damaged by the kind of concern I raise in the text. Hence, the line of thought given here is, at best, merely suggestive.

55. For a thorough overview of the literature, and defense of prioritarianism, see Mathew Adler, *Well-Being and Fair Distribution: Beyond Cost-Benefit Analysis* (Oxford University Press 2011).

56. For discussion of combining the appealing concern for the worst off in leximin with the appealing concern for social welfare in more thoroughly aggregative views, see Marc

On balance, the advantages of avoiding ad hoc policy cliffs strike me as fairly substantial, while the downside risks of finitely weighted prioritarian aggregation seem manageable. The weight assigned to the claims of the worst off can be adjusted so as to strike the most appealing set of trade-offs for the most probable sorts of cases. Perhaps truly intolerable outcomes can be ruled out of the prioritarian calculus by assigning an appropriately stringent weight to the claims of the worst off, or by acknowledging some deontologically grounded constraint. For instance: one might restrict the range of possible sentences available to a sentencing court by appeal to rights against being treated in certain ways. Capital punishment, torture, life imprisonment without the possibility of parole, and long periods of solitary confinement might simply be ruled out from the outset. Consequently, a finitely weighted prioritarian approach can be brought arbitrarily close to a leximin distributive principle without the need to draw a bright line between people just below and just above some threshold of moral concern.

The optimality principle has two implications for the criminal law that are worth noting explicitly. First, it is inconsistent with most expressivist theories of punishment. Consider, for instance, Husak's claim that, far from being the law of last resort, the criminal law should in some cases be the law of *first* resort. This is because, according to Husak, the criminal law is the uniquely appropriate means for publicly condemning wrongdoing.[57] What appears to be decisive for Husak, as well as others who have defended expressivist theories of punishment, from Nozick to Hampton to Brudner, is the thought that there is an independent and non-derivative reason for valuing the expressive condemnation of criminal acts. On this view, the expressive condemnation of wrongdoing has intrinsic value, regardless of whether or not punishment in fact contributes to protecting people's basic interests. It is a way of respecting or vindicating a person's rights, regardless of whether it also protects her interests.

Fleurbaey, Bertil Tungodden, and Peter Vallentyne, "On the Possibility of Nonaggregative Priority for the Worst Off," *Social Philosophy and Policy* 26(1) (2008): 258–85.

57. Doug Husak, "The Criminal Law as Last Resort," *Oxford Journal of Legal Studies*, 24 (2) (2004): 207–35 at 220–27. See also Jean Hampton, "Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of Law," *Canadian Journal of Law & Jurisprudence* 11(1) (1998): 23–45 at 36–37; Joshua Kleinfeld, "Reconstructivism: The Place of the Criminal Law in Ethical Life," *Harvard Law Review* 129(6) (2016): 1485–565.

Economizing on punishment should lead us to reject this argument. To rely on criminal punishment solely to send a message is tantamount to locking up some people in order to make other people *feel* safer, even when doing so does not make them *actually* safer. People's subjective experiences are certainly important, but it is hard to see how they could be sufficiently important to justify imposing such serious costs on others. By punishing purely to send a message, public institutions would be stripping some people of the basic prerogatives of equal civic membership without materially advancing the security of those prerogatives for others.[58]

Perhaps expressing condemnation through punishment can be cashed out consequentially, in terms of inducing greater levels of cooperation in the future. As I noted in Chapter 2, there is a fair amount of evidence suggesting that cooperation is enhanced by sanctioning defectors. However, this account assigns a derivative rather than intrinsic value to expressive punishment. It is derived from the significance of public condemnation of wrongdoing to making it the case that one's rights and interests are adequately protected, not from an alleged intrinsic value in expressing condemnation through punishment. When regarded in this light, expressive condemnation is a permissible basis for imposing criminal sanctions only because, and insofar as, sanctions of that kind are the optimal means of sustaining cooperation with institutions and social rules that are worthy of our support. Expressive condemnation of wrongdoing is not, in other words, on its own a sufficient basis for imposing criminal sanctions.

The second implication of optimality concerns abolitionism about the criminal law. Philosophical abolitionism is a minority view, and for good reason.[59] I noted in Chapter 2 that punishment is an important

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58. For similar observations, see my "Equality, Assurance and Criminalization," *Canadian Journal of Law & Jurisprudence* 27(1) (2014): 5–26; Benjamin Ewing, "The Political Legitimacy of Retribution: Two Reasons for Skepticism," *Law & Philosophy* 34 (2014): 369–96; Victor Tadros, "Criminalization and Regulation," in *The Boundaries of the Criminal Law*, ed. R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, and Victor Tadros (Oxford University Press 2011): 163–90; Malcolm Thorburn, "Constitutionalism and the Limits of the Criminal Law," in *The Structures of the Criminal Law*, ed. R.A. Duff et al., (Oxford University Press 2011), 96; and Nathan Hanna, "Say What? A Critique of Expressive Retributivism," *Law & Philosophy* 27(2) (2008): 123–50. Here, I am arguing that expressive condemnation is not sufficient to justify the criminal law. For reasons given in Chapter 5, I also believe that it is not necessary.

59. For a recent defense, see David Boonin, *The Problem of Punishment* (Cambridge University Press 2008).

element in the evolution of cooperation. This suggests that there may be conditions when punishment is not only permissible, but morally required. Punishment is morally obligatory if it is a necessary step in stabilizing the patterns of social cooperation required of just societies. The rule of law, once established, may counsel reducing reliance on punishment. But it may take some degree of willingness to punish rule-violators to get the rule of law off the ground. Punishment may similarly be required if social conditions are such that there is no other feasible way of protecting people from serious violence, as may be the case in contexts of failed states and extreme civil unrest. These judgments are notoriously uncertain. But that is the point: the justifiability of a system of punishment in a given social context is highly contingent, and seems unlikely to be appropriate for categorical armchair judgments one way or the other.

That said, there is a kernel of truth to abolitionism. There might be reason to believe that much, even most, criminal punishment might not be justifiable *here and now*—that is, in the context of institutionally dense administrative states. It might be feasible for states of this kind to secure universal and effective access to central capability without relying, or relying nearly as much, on criminal justice interventions. These kinds of states have the developed legal, political, and regulatory institutions that make it possible for the state to respond to crime in increasingly less destructive ways, in part by intervening earlier (e.g., through universal education, early childhood education and the like), in part through more effective regulation (e.g., of access to weapons and alcohol), and in part through more sophisticated forms of ex post response to crime (e.g., through mental health counseling and treatment, drug courts, restorative justice initiatives, and the like.[60]) Even when outright abolition isn't on the table, the institutional capacity of the administrative state nevertheless suggests that punishment should often be relied upon only

60. See Mark W. Lipsey and Francis T. Cullen, "The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews," *Annual Review of Law & Social Science* 2007 (3): 297–320 at 314 (reviewing meta-analyses of rehabilitation in correctional settings and finding that "rehabilitation treatment is capable of reducing the re-offense rate of convicted offenders and that it has greater capability for doing so than correctional sanctions"); Francis T. Cullen and Cheryl Lero Jonson, "Rehabilitation and Treatment Programs," in *Crime and Public Policy*, ed. James Q. Wilson and Joan Petersilia (Oxford University Press 2011), 293–344.

in narrowly defined contexts and as a backup once other means have failed.[61] Whether modern administrative states could effectively displace all, or most, of the work currently done by criminal justice institutions is obviously an open empirical question. However, if it proves to be possible to protect effective access to central capability through non-punitive means, then the best thing to do about the criminal law might be to get rid of it.

Inclusive aggregation. I have proposed evaluating criminal justice interventions from the point of view of prioritarian aggregation. The decision to rely on the criminal law to enforce a given legal norm should be evaluated in terms of its overall impact on effective access to central capability, with priority for the interests of those whose access to those capabilities is least secure. This principle is grounded in an interpretation of the ideal of a society of equals as one in which each person may access the basic prerogatives of civic membership on terms befitting a peer. This ideal supports a qualification on the optimality principle, namely that in assessing the impact of a criminal justice intervention, public institutions generally should not consider it easier to justify invading someone's capabilities on the ground that he has committed a crime, no matter how serious. The method of aggregation should in this sense be inclusive.

Inclusive aggregation is a controversial principle, largely because it seems to marginalize the moral significance of guilt to punishment.[62] To be clear, inclusive aggregation is a requirement of equal *consideration*, not of equal *treatment*. It does not rule out criminal punishment; it only rules

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61. For an excellent discussion of the narrow role of coercive institutions in a broader panoply of institutions devoted to promoting rule compliance, see Mark Kleiman, *When Brute Force Fails: How to Have Less Crime and Less Punishment* (Princeton University Press 2009).

62. Among those who reject it are Mitch Berman, "Punishment and Justification," *Ethics* 118 (2008): 258–90; Boonin, *The Problem of Punishment*, 48; Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (Oxford University Press 1984), 189; and Daniel Farrell, "Deterrence and the Just Distribution of Harm," *Social Philosophy and Policy* 12(2) (1995): 220–40 at 224. Robert Nozick once characterized this view as "bizarre." *Anarchy, State & Utopia* (Basic Books 1974), 62. Others have found it less bizarre: see Sharon Dolovich, "Legitimate Punishment in Liberal Democracy," *Buffalo Criminal Law Review* 7 (2004): 307–442, especially 361–63, 368; and David Hoekema, "The Right to Punish, and the Right to Be Punished," in *John Rawls' Theory of Social Justice*, ed. H Gene Blocker and Elizabeth Smith (Ohio University Press 1980): 239–69 at 252. Dolovich and Hoekema draw the connection between inclusive aggregation and Rawls more explicitly, and in a more general way, than I do here. Although he doesn't use this terminology, John F. Pfaff appears to endorse a similar principle: see *Locked In* (Basic Books 2017), 179–80.

out discounting the interests of potential criminals in deciding how a legal rule is to be enforced. Society must surely enforce its rules, but how those rules are justifiably enforced should be assessed against the egalitarian concern to protect *each* person's status as an equal.

The argument for inclusive aggregation starts with the egalitarian principle that criminals do not forfeit their entitlement to equal respect and concern by virtue of having committed a crime, no matter how serious. But if so, then it follows that public institutions may not permissibly discount A's interests relative to B's because it turns out that A has committed a crime whereas B has not.[63] By deeming a guilty person's interests as of lesser worth than the claims of others, public institutions would in effect be deeming that person to be of lesser worth than those others. Hence, the egalitarian principle that requires public institutions to refrain from stigmatizing those who have committed crimes as being of lesser worth also requires them to consider equally the interests of potential criminals and victims alike in deliberations about criminal justice policy.[64]

But why should we accept the egalitarian principle that criminals do not forfeit their equal status by virtue of having committed a crime? Here, I can do no better than refer to Sharon Dolovich's observation that it would be too unrealistic to assume that even well-meaning individuals with a developed sense of justice would not sometimes fail to act appropriately. As Dolovich notes, temptations and pressures to commit criminal acts arise from a wide variety of natural and social contingencies, many of them beyond any individual's control and, moreover, contingencies to which even the best of us might well be subject. To the degree that, as Dolovich puts it, we cannot reasonably be confident that we cannot *always* avoid temptation, anger, impulsivity, desperation, and other motives for crime, it would seem reasonable to endorse the egalitarian premise that those

63. Consider the "importation model" accepted, according to Thomas Ugelvik, as the official policy of Norwegian prisons: the institutions of the welfare state, from schools to libraries to the healthcare system are imported into the prison such that a prisoner's status is maintained while in custody. Prisoners are "acknowledged as citizens with important citizen's rights, even when they are serving a custodial sentence. The prison is part of the society around it." Ugelvik, "Prisons as Welfare Institutions?," 394.

64. Compare Peter Ramsay's democratic account: "A Democratic Theory of Imprisonment," in *Democratic Theory and Mass Incarceration*, ed. Albert Dzur, Ian Loader, and Richard Sparks (Oxford University Press 2016), 85–113. The account I sketch is less Hegelian than Ramsay's, but is similarly based on a conception of political equality as the basic democratic commitment.

who commit crimes should not be treated as a class apart, but simply as what they are: ordinary, fallible people.[65]

It is perhaps worth recalling that crime is not simply the natural result of millions of independent choices by abstract and unencumbered individuals. Public institutions not only define when and how individuals will be sanctioned for violating a given legal rule, but they also contribute to defining the social circumstances under which individuals perceive the options that are realistically open to them, choose their actions, and plan their lives. Insofar as there are social determinants of crime over which public institutions exercise influence—education level, socioeconomic status, employment, and so forth—there is reason to view responsibility for crime as broadly shared rather than purely as a matter of individual fault. Given our shared decisions about how to shape those institutions, those who foreseeably go on to commit crimes can hardly be treated as having made an entirely unencumbered choice to exclude themselves from the political community, a decision for which they alone bear the blame. Egalitarians can hardly disavow collective responsibility for the bad things people do if they do them because of the state's failure to sustain the conditions of free and equal membership.[66]

Taken together, these two thoughts—the ubiquity of crime, and shared responsibility for the environment determining its incidence—support the egalitarian principle, and suggest that public institutions should not discount the interests of the guilty in determining how best to protect people from crime.[67] The egalitarianism implicit in the egalitarian principle is Rawlsian in this sense: just as for Rawlsians there is "no prejusticially given distributive share deserved by the intelligent and able that it is the job of our system of distributive justice to hand out," I am suggesting that there is also "no prejusticially given suffering

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65. Dolovich, "Legitimate Punishment in Liberal Democracy," 364–78.

66. See Tommie Shelby, "Justice, Deviance and the Dark Ghetto," *Philosophy and Public Affairs* 35(2) (Spring 2007): 126–60 at 152; Jeffrie Murphy, "Marxism and Retribution," *Philosophy and Public Affairs* 2(3) (Spring 1973): 217–43; Matt Matravers, *Justice and Punishment* (Oxford University Press 2000), 265–67; Kelly, *Limits of Blame*.

67. For contrasting views, see Christopher Wellman, "The Rights Forfeiture Theory of Punishment," *Ethics* 122(2) (2012): 371–93 (arguing that it is permissible to punish people who have committed crimes regardless of whether doing so secures any valuable public purpose); Hampton, "Punishment, Feminism, and Political Identity," 43 (arguing that because we should favor the interests of the innocent over the guilty, "we have to choose a criminal code that is committed to retribution").

that is deserved by the criminal offender that it is the job of our system of retributive justice to ensure he gets."[68] Rather, in designing public institutions—including criminal justice institutions—each person is entitled to equal respect and concern, abstracting from who in particular has turned out to have committed a crime and who has turned to have suffered an injury.

It is certainly true that a principle of inclusive aggregation gives rather less significance to individual responsibility in the evaluation of criminal justice policy than some would like. However, for reasons that I explore more fully in Chapter 7, it would be unwarranted to conclude that inclusive aggregation fails to respect people's choices. The argument I have given for inclusive aggregation does not depend upon the supposition that people who commit crimes do not voluntarily choose to act as they do, nor have I claimed that a variety of reactive attitudes—perhaps including resentment and blame—might not sometimes be appropriately oriented at those who victimize others.[69] Rather than denying that people are responsible for what they do, inclusive aggregation reflects the thought that giving in to the temptation to crime is an inevitable risk of shared social life that public institutions should strive to mitigate in ways that reflect our shared stake in how each other's lives go.

What does this mean concretely? Consider the following case. President Obama once proposed providing universal access to early childhood education across the United States. The proposal was supported by a number of decades-long longitudinal studies that indicated that providing early childhood education would reduce future criminal offending, particularly

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68. Matt Matravers, "Mad, Bad or Faulty? Desert in Distributive and Retributive Justice," in *Responsibility and Distributive Justice*, ed. C. Knight and Z. Stemplowski (Oxford University Press 2011), 136–51 at 150. See also Matravers, "Political Theory and the Criminal Law," in *Philosophical Foundations of Criminal Law*, ed. R.A. Duff and Stuart P. Green (Oxford University Press 2011), 81.

69. There are limits to inclusive aggregation. For instance, it may permit favoring the interests of victims (or potential victims) as a tiebreaker, that is in cases when an equivalent harm must fall on one side or the other. Under those conditions, it does not seem unfair to ask those who create a situation of danger to bear the costs of meliorating that risk. My thanks to David Enoch and Re'em Segev for a very helpful conversation on this point. The case of people who, in some consistent way, cannot be relied upon to accept basic reciprocity—sociopaths, for instance—raises another qualification for inclusive aggregation. For discussion of this issue, see Dolovich, "Legitimate Punishment in Liberal Democracy," 361–62.

among the disadvantaged.[70] Although Obama's proposal focused on early childhood education, there is evidence that improving the quality of education later in life also has a significant negative effect of criminal offending.[71] Similar results have been reported with summer employment for unemployed youth: even relatively low intensity ex ante treatment can have a significant and long-term negative impact on future crime.[72] Obama's proposal presented the following choice: expend resources on a prosocial intervention now, or do nothing and wait for those children to grow up and commit crimes, and then punish them for doing so at that point. In short: *schools, now* or *prisons, later*.

How should we approach this choice? In particular, how should we think about the interests of the children who, absent early childhood education, will go on to commit crimes later in life and are subsequently punished for doing so? If we are entitled to discount the interests of those who commit crimes, then their interests should be excluded from deliberation about whether to support universal early childhood education. While it is true that these children will be treated more harshly by *prisons, later* than under *schools, now*, their interests turn out to be less worthy of protection precisely because of the crimes they will have committed. Hence, as far as their interests are concerned, we are entitled to regard the choice between *schools, now* or *prisons, later* as one of moral indifference.

Inclusive aggregation suggests, in contrast, that the interests of the children who, absent the intervention, will go on to commit crimes and

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70. J. Heckman, S, Hyeok Moon, R. Pinto, P. Savelyev, and A. Yavitz, "The Rate of Return to the High/Scope Perry Preschool Program," *Journal of Economics* 94(1–2) (2009): 114–28; C. Belfield, M. Nores, S. Barnett, and L. Schweinhart, "The High/Scope Perry Preschool Program: Cost-Benefit Analysis Using Data from the Age-40 Followup," *Journal of Human Resources* 41(1) (Winter 2006): 162–90. President Obama's statement in support of expanding access to early childhood education can be found here: https://www.whitehouse.gov/the-press-office/2013/02/13/fact-sheet-president-obama-s-plan-early-education-all-americans.

71. D. Deming, "Better Schools, Less Crime?," *Quarterly Journal of Economics* 125 (2011): 2063–115 at 2065 (finding that "a treatment of between 1 and 4 years of enrollment in a higher quality public school led to large and persistent reductions in young adult criminal activity"); L. Lochner and E. Moretti, "The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports," *American Economic Review* 94(1) (2004): 155–89.

72. Sara Heller, "Summer Jobs Reduce Violence among Disadvantaged Youth," *Science* 346(6214) (December 5, 2014): 1219–23. Heller found that even a modest level of part-time employment led to a significant, and long term, decline in violent offending. Young people in the treatment groups had a decrease in violent crime arrests of 43 percent relative to those in the control group (1220). Moreover, the decrease in violent crime arrests persisted well after the end of the employment period (1221).

subsequently enter the criminal justice system have a claim of justice to *schools, now* over *prisons, later*. That policy better respects their status as equals—their entitlement to the protection of their central capabilities—than one that waits for them to commit crimes and then punishes them for doing so. It insists that even those who are (or will be) guilty of criminal acts are entitled to equal consideration in the design of public institutions.[73]

3.4 On Guilt and Innocence

My aim in this chapter has been to provide one example of how a fully political standard of justification for the criminal law could be spelled out. Beyond noting how it draws from widely shared ideals about democratic equality, I have not sought to provide a foundational defense of anti-deference. However, one family of concerns is so prevalent that it merits comment even in this context. As I have noted, my approach is aggregative in that it evaluates outcomes according to the degree to which they protect effective access to central capabilities, without discounting the interests of the guilty vis-à-vis those of the innocent. However, even restricted aggregation inevitably opens the door to worries about sacrificing the innocent at the altar of the greater good. Under this heading, one might worry that however much it values the interests of the guilty, the approach I have sketched does not take sufficiently seriously the interests of the *innocent*.

The perennial selling point for retributivism is the clarity with which it grounds the claim that only the guilty may be punished. The appeal of this "negative" retributive claim appears substantially broader and deeper than the more controversial "positive" retributive claim that the guilty are to be punished. An approach to the criminal law that sees the criminal law as an instrument for promoting social welfare may appear to be at odds

73. If the state knows that, absent treatment T, you will eventually end up committing crime C, making you liable to punishment P, it then faces a choice between the social cost of providing T as opposed to the social cost of C and the consequent punishment P. Since, by hypothesis, T is less destructive of effective access to central capability than P, it follows trivially that $T < (P + C)$. But that inequality does not follow if we are entitled to apply a discount factor, d, to P on account of your guilt in committing C; in that case, possibly $T \geq [(d)(P) + C]$. If, as some have proposed, the guilty have no claim against proportionate punishment ($d = 0$), then the question reduces simply to whether the social cost of prevention is greater than the social cost of crime.

with the negative principle. From the political trials of the Star Chamber to the criminalization of sodomy, the criminal law has often been used to oppress people who do not fit into this or that ideal of a just society.[74] My embrace of an even loosely aggregative approach to criminal justice is subject to the same worry. It might seem to suggest that we are entitled to punish whomsoever we wish, so long as doing so achieves some overarching social good, such as maximally protecting effective access to central capability. Yet it is a fixed judgment that the innocent should not be punished, even in the name of an otherwise noble social ideal. A focus on individual moral fault, whatever else its defects, at least ensures that the criminal law cannot be turned into a general purpose means for molding people and institutions to conform to some overarching vision of the good society.

The rights of the innocent are, obviously, of central moral importance. However, I suspect that these rights provide a rather less powerful objection to consequentialist approaches to punishment than is sometimes supposed. The worry about punishing the innocent might be understood in at least four different senses. First, it might be understood in terms of systematically punishing people who have not violated any determinate legal rule. Second, it might be understood in terms of opportunistically punishing people who have not violated a legal rule. Third, it might be understood in terms of punishing people who have not engaged in morally wrongful conduct. Finally, it might be understood in terms of punishing people who committed a wrong, but were not culpable in doing so—that is, as a worry about strict liability. I address each of these versions in turn.

First, the principle might be understood in a minimal, positivist sense: people ought not be criminally punished unless they engage in conduct that violates some legal rule fixed in advance. Punishing the innocent is objectionable because it amounts to punishing people who have not violated some determinate legal rule.

A public law conception straightforwardly accommodates this thought. On a public law conception, the criminal law is a generically coercive rule-enforcing institution, one that operates by threatening to impose costs on noncompliance with a legal rule. This function would be entirely undermined if sanctions were systematically imposed without regard to whether someone had complied with the rule. The use of ex post

74. For instance, in slave-owning societies: see Michael Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767–1878* (University of North Carolina Press 1980).

punishment to secure legitimate expectations must be sensitive to responsibility, in the sense of only punishing the guilty, if it is to provide the assurance that I have argued is its basic function.[75] The significance of guilt, in this respect, is not contingent upon the content of the law that is putatively being enforced. Even if it is a bad law, there is value in ensuring that it is only applied to people who actually flout its requirements. Suppose the law prohibits helping an elderly person cross the street. It would be wrong to punish someone who deliberately flouted the law, but it would be a further and different wrong to punish someone who wasn't even doing *that*. Applying an unjust law unfaithfully makes it impossible to predict when you will be liable to punishment, whereas if it is applied faithfully, at least you can know when you will and will not be liable.

A more difficult question concerns the *opportunistic* punishment of people who did not violate some legal rule—if punishing *this* person on *this* occasion might reasonably be expected to yield a better outcome than not, regardless of whether he actually broke the law. It seems that what we want is not a contingent explanation about how a given case fits into an overall pattern, but one that is grounded in the wrong done in *this individual case*. The examples that motivate this thought typically involve officials acting outside the law (hanging the innocent man to quiet the mob, etc.) This suggests that the underlying question concerns the moral status of opportunistic punishment, i.e. punishment that would secure a substantial benefit even though not authorized by law. Suppose, for instance, that someone acts in a morally reprehensible manner, but in a way that law does not actually prohibit. Perhaps he ought to have foreseen that his action would harm another, but if the law does not require him to have foreseen it, then it would be objectionable for an official to nevertheless punish him for that failure. What seems objectionable about it is that the official acts opportunistically, in that the official acts outside the law, albeit to secure a desirable outcome.

Can anti-deference explain what's wrong with opportunism by public officials? I think it can. When an official overrides the law in this way, she treats that law as less than fully authoritative: she treats it as open to renegotiation on a case-by-case basis in a way that, by hypothesis, the law itself does not contemplate. But that seems antidemocratic. When a public official decides to make an exception to the law as written, or to exceed the

75. See Matravers, "Political Theory and the Criminal Law," 80.

powers that the law grants her, she to that extent denies others equal opportunity for influence over the law. She claims for herself the authority to determine whether the law should be L, or L^+ (i.e., L plus the opportunistic exception she wishes to make). It is not that L^+ is necessarily a worse law than L; for all we know, L^+ might be morally better than L. It might be the rule that the legislature should have endorsed, as opposed to the one it did endorse. The problem is that L^+ is not *public* law.[76] In taking it upon herself to apply L^+ instead of L, the official usurps the entitlement of each person subject to the law to have an equal opportunity for influence over the law. Instead, the official unilaterally decides to replace L with L^+. This is a wrong that applies to each instance in which an official prioritizes her private judgment over democratically legitimate law. Notably, it is not contingent upon an estimate of whether allowing occasional deviations will or will not maximize the good. It is a concern about the integrity of the law that is not reducible to the law's substantive moral value.[77]

It could, of course, be the case that the law itself acknowledges an exception, requiring an official to apply L, but allowing her to apply L^+ under certain circumstances. An official who applies L^+ under those circumstances would not be acting opportunistically, since her doing so would be contemplated under public law. She would only be acting opportunistically if she were to apply L^+ under circumstances in which she is not legally authorized to do so. But whether the law should countenance such an exception is a question of the law's substantive moral value, rather than one of opportunism. No account of criminal law can prevent legislatures from enacting flawed laws; and, more to the point, the account I suggest provides a substantive criterion for evaluating whether a given law *is* flawed.[78]

Consider in this context the landmark Canadian case, *Frey v Fedoruk*.[79] Frey was caught trespassing and "peeping" at a woman while she was at home. As the criminal code at the time did not prohibit peeping, Frey was

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76. I am presuming that L *is* legitimate public law. If it is not, then there is a deeper problem than opportunism in enforcement.

77. This argument draws from Kolodny, "Rule over None II." It also has some parallels to David Estlund's treatment of the "Nuremburg defense," that is, that one should be excused from wrongdoing because one was simply following orders. See "On Following Orders in an Unjust War," *Journal of Political Philosophy* 15(2) (2007): 213–34 at 228–29.

78. For a sophisticated treatment of exceptions in the law, see Luis Duarte D'Alemeida, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law* (Oxford University Press 2015).

79. [1950] SCR 517.

charged with breach of the Queen's peace. True, nothing in the written law specifically prohibited Frey from peeping, but his actions would have been widely condemned in his community as morally odious. What objection could there be to making an exception to the law as written by prosecuting Frey? Citing concerns about undue discretion and uncertainty in the criminal law, the Supreme Court of Canada concluded that wrongfulness alone is not sufficient to empower the state to prosecute. The court insisted—correctly, in my view—that the exercise of the state's criminal law power must be constrained by the rule of law, rather than rest solely on an official's judgment, however plausible, about the morality of someone's conduct. The structure of *Frey v Fedoruk* parallels that of the hoary old chestnut about hanging an innocent man in order to still the baying mob: an accused who is known to be innocent in law, but who finds himself in circumstances where making an exception and punishing him might reasonably be thought to be of moral value. The answer to the chestnut parallels the answer in *Frey*: punishment beyond what the law authorizes is antidemocratic and contrary to a system of public law.

To be sure, the wrongfulness of denying others an equal opportunity for influence is not an all-things-considered statement about what officials must always do. Clearly, it would be wrong to frame an innocent man of murder. But it is not so clear that an official ought inevitably to cleave to her publicly defined duties, come what may. My claim is not that it is always the case that an official must do her legal duty. When an official must do her duty, and when she permissibly departs from it, is a challenging question, and probably not amenable to categorical resolution. I do not aim to contribute to resolving that question here. My aim, rather, is to explain, from within the parameters of anti-deference, why there is a unique kind of wrong that inheres in each case in which an official substitutes her private judgment for democratically legitimate law and, in that sense, punishes the innocent. This argument explains why the opportunistic punishment of someone who has not broken the law is objectionable, even apart from its consequences: doing so robs each person subject to the law of an equal say over the law that applies to him.[80]

The third version of the punishment of the innocent objection rests on a moralized interpretation of what it means for innocent people to be punished: you are innocent if what you did was not *morally* wrong. This principle, in turn, can be given one of two glosses. The first construes moral

80. I am indebted to Ekow Yankah for helpful discussion of these points.

wrongfulness as a matter of the actus reus of the crime: what you did was morally wrong if it would have wrong even if positive law did not prohibit it. In other words, criminal punishment is only permissible with respect to *mala in se* crimes. This is an implausibly demanding conception of what it means to punish the innocent. Public institutions bring about a significant change in the moral landscape. They render it permissible to do things to people that it would not otherwise be permissible to do (e.g., take their property in the form of taxes), and to require people to do things that they would not otherwise be required to do (e.g., settle disputes through the justice system). If this is true, then it follows that pre-politically wrongfulness cannot be a per se constraint on the operation of public institutions. So although anti-deference does not restrict punishment to people who commit pre-politically wrongs, that is a feature, not a bug.[81]

Finally, and more plausibly, one might interpret moral wrongfulness in mens rea terms: what you did was morally wrong if you broke the law, and did so with a suitable degree of awareness about the nature of your conduct. Hence, you are "morally" innocent if you lacked mens rea with respect to one or more of the actus reus elements of the crime. The concern about protecting the innocent, on this interpretation, boils down to a concern about the use of strict liability in the criminal law, a trend that is often associated with the growth of the administrative state.

There is indeed reason to be concerned about the overuse of strict liability in the criminal law. Yet this concern is consistent with the framework of anti-deference. After all, by restricting criminal sanctions to knowing and voluntary violations, public institutions allow people to control their exposure to criminal sanctions. In effect, they insure people against one kind of harm (harms emanating from the state) by insuring others against a different kind of harm (harms emanating from *them*). It seems plausible to regard control over whether one will be punished as part of what it means to have effective access to central capability. Thus, the value of providing people with the ability to control when the state will invade those capabilities by providing them with a fair opportunity to comply with the law's demands is readily accommodated within the perspective of anti-deference.[82]

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81. I defend this point more fully in Chapter 6.

82. See H.L.A. Hart, "Legal Responsibility and Excuses," collected in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. (Oxford University Press 2008); Rawls, *A Theory of Justice*, 241; Erin Kelly, "Criminal Justice without Retribution," *Journal*

Perhaps, however, the worry about punishing the morally innocent—in the sense of a prohibition on strict liability—is meant to be of a more categorical nature than a commitment to anti-deference is capable of supporting. Fair opportunity finds support from within the perspective of anti-deference, but by the same token it finds its limits there too. Rawls once asked us to suppose that

> Members of rival sects are collecting weapons and forming armed bands in preparation for civil strife. Confronted with this situation, the government may enact a statute forbidding the possession of firearms . . . And the law may hold that sufficient evidence for conviction is that the weapons are found in the defendant's house or property, unless he can establish that they were put there by another. Except for this proviso, the absence of intent and knowledge of possession, and conformity to reasonable standards of care, are declared irrelevant.[83]

In such a scenario, Rawls concluded, waiving the fair opportunity principle—as the contemplated strict liability statute does—would nevertheless be justified, as "the risks to their liberty on any other course would be worse." Some have taken Rawls to task for this passage. Thomas Pogge, for instance, has argued that similar reasoning would open the door to strict liability as a way of dealing with drunk drivers, drug runners, rapists, and others.[84]

On this point, I am inclined to think that we should side with Rawls. After all, the imagined case is one in which there is very good reason to think that people cannot effectively be protected from serious victimization short of some kind of strict liability regime. It is, in other words, a case in which the threat to liberty from victimization by third parties clearly outweighs the threat to liberty from abrogating the fair opportunity principle by, in essence, shifting the burden of proof onto an accused

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of Philosophy 106(8) (2009): 440–62 at 449–51. For a critique of the fair opportunity principle, see Alan Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (Oxford University Press 2009), 70–75.

83. Rawls, *A Theory of Justice*, 242.

84. Thomas Pogge, "Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions," *Social Philosophy and Policy* 12(2) (1995): 241–66 at 259.

to explain himself. A categorical insistence on proof of subjective fault in every instance is immune to a balancing of harms, and hence would have us prefer even dramatically higher rates of victimization rather than punish people who could not establish their good reasons for acting as they did. Yet if it is possible that one's liberty might be more greatly impaired in a world where one faced an extremely high risk of victimization than in a world with a much lower risk on account of a strict liability enforcement regime, then the very value that speaks in favor of the fair opportunity principle would under such circumstances also speak in favor of its limitation.

As it happens, Pogge's concerns about relaxing the rules of subjective fault for rapists describes fairly precisely the trajectory of sexual assault law in Canada. In an early case, *R v Pappajohn*, the Supreme Court of Canada affirmed the traditional common law principle that true crimes require subjective fault, holding that an honest but mistaken belief in the complainant's consent would defeat liability for sexual assault—indeed, even a completely unreasonable belief would defeat liability, so long as it was sincerely held.[85] Over the span of twenty years, with some legislative intervention and prodding by feminists, the Supreme Court gradually came around to the view that someone who wishes to defend himself against a sexual assault charge by claiming that he thought the complainant was consenting had to have taken reasonable steps to ascertain consent, the proof of which steps (at least enough to lend the claim an "air of reality") lies in the first instance on him.[86] As a result, in Canada, sexual assault—a "true crime" if ever there was one—is not only essentially an objective fault offense, it is in some respects a strict liability offense. If you intentionally touch someone in what a court regards as a sexual manner, and that person does not subjectively consent to the touching, you have committed sexual assault unless *you* can establish an air of reality to your perception that the complainant was consenting. This will typically require you to show that you formed your belief on the basis of an affirmative expression of consent; that you honestly and truly believed that her conduct evinced willingness is not sufficient. Feminists roundly perceived this shift in the law of sexual assault to be a major victory, given how

85. *R v Pappajohn*, [1980] 2 S.C.R. 120.

86. *R v Ewanchuk*, [1999] 1 S.C.R. 330.

difficult it is to prove beyond a reasonable doubt that someone did not genuinely believe that "no" meant "convince me" or "try harder."

Suppose that by making sexual assaults much easier to prosecute, these reforms significantly lower the rate of sexual assaults in Canada. That should count in favor of the rule. To be weighed against it is the loss of fair notice to those people who did in fact genuinely believe that the complainant was consenting but cannot raise sufficient evidence to establish the reasonableness of that belief. Hence, the question is whether the social gains that flow from making sexual assault easier to prosecute justify placing an onus on the initiators of sexual contact to affirmatively ascertain consent. My aim is not to speculate about how this particular exercise in balancing interests comes out. My point is that it *is* an exercise in balancing interests.

3.5 Conclusion

This chapter has sought to sketch an example of what it would take to provide a fully political justification of the criminal law, thereby establishing the viability of a public law conception of the criminal law as outlined in Chapter 2. I started with an interpretation of public institutions as a way of establishing and maintaining a society of equals, one in which each person can lead a life as a peer among peers. This interpretation is democratic, egalitarian without being equalizing, and focused on a form of freedom—effective access to central capability—as its currency of evaluation. A capability is central if it is required for a person to live in that society as a peer, and a person has effective access to it when she can exercise that capability without an objectively reasonable fear of interference from others. By stabilizing public institutions committed to the ideal of anti-deference, the criminal law plays a vital role in securing the conditions under which, in Pettit's memorable phrase, anyone can look anyone else in the eye without fear, shame, or deference.

Given this interpretation of the political morality of public institutions, I then asked what it would take to establish that institutions committed to the ideal of anti-deference would approve the use of the criminal law as a means of enforcing their rules and policies. I defended four claims. First, the criminal law should be democratic law, in the sense that it ought to be the outcome of a process that provides those who are subject to it with an equal opportunity to weigh in on its content and operation. Second, the criminal law ought not be used in a way that corrodes the

expectations of reciprocity and trust in public institutions, paradigmatically by entrenching attitudes of social subordination. Third, it should be used when, but only when, a convincing case has been made that nothing short of criminal sanctions for noncompliance will optimally protect effective access to central capability for all. Fourth, in making that case, public institutions are not entitled to discount the rights and interests of criminals. Equal status is non-waivable, or at least not waived by crime. The overall ideal that emerges is of a criminal law that supports public institutions in fostering the conditions of democratic equality, and that does so by means that are evidence-based, substantively and procedurally democratic, and protective of central capability for all.

Having sketched these principles, I now turn to applying them. Accordingly, in the next chapter I consider perhaps the single most pressing issue in contemporary American criminal law: the problem of mass incarceration.