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Mass Incarceration and the Theory of Punishment

"Besides, Revenge without respect to the Example, and profit to come, is a triumph, or a glorying in the hurt of another, tending to no end; (for the End is alwayes somewhat to Come;) and glorying to no end, is vain-glory, and contrary to reason; and to hurt without reason, tendeth to the introduction of Warre; which is against the Law of Nature; and is commonly stiled by the name of *Cruelty*."[1]

"There is the feeling of a Kantian imperative behind the word 'deserts.' Certain things are simply wrong and ought to be punished. And this we do believe."[2]

4.1 Introduction

At approximately 700 people in state custody per 100,000 adult residents, the United States incarcerates far more people than any other nation. The United States now incarcerates at a rate that is five times higher than a generation ago, and about five to ten times higher than is the norm in other liberal societies.[3] The United States incarcerates over 20 percent of the world's inmate population—over 2 million individuals—despite

1. Thomas Hobbes, *Leviathan*, chapter XV, Noel Malcolm, ed. (Clarendon Press 2012), 233.

2. Willard Gaylin and David J Rothman, "Introduction," in *Doing Justice: The Choice of Punishments* (Report of the Committee for the Study of Incarceration), ed. Andrew von Hirsch (Hill & Wang 1976), xxxix.

3. Steve Redburn, Jeremy Travis, and Bruce Western, eds., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (The National Academies Press 2014), 13; see also Roy Walmsley, ed., *World Prison Population List*, 10th ed. (International Centre for Prison Studies 2013), available at: http://images.derstandard.at/2013/11/21/prison-population.pdf.

having less than 5 percent of the world's population.[4] In recent years, it has become conventional to refer to the anomalously high American incarceration rates as reflecting a policy of "mass incarceration," and law, public policy, and criminology journals are filled with discussions of the evils of mass incarceration, its causes, and what can be done to mitigate it.[5] Many commentators believe that these kinds of ultra-high incarceration rates represent a serious injustice, and that the United States should strive to reduce its inmate population by a significant degree.

The question I consider in this chapter concerns the phenomenon of mass incarceration, but in a somewhat oblique way.[6] I do not propose to ask whether the United States acts unjustly in incarcerating as many people as it does. I will simply assume that mass incarceration is unjust. This is a relatively uncontroversial assumption, since most theorists, criminologists, economists, and commentators appear to agree that the United States now incarcerates too many people, and that this is a serious moral wrong. I will also assume that a philosophical theory of punishment should, among other things, specify the conditions under which criminal punishment is just or unjust. Hence, I will assume that a philosophical theory of punishment should, when applied to the United States, offer an explanation of what makes the incarceration rate in the United States unjust. Of course, any such explanation will depend on a wide range of empirical facts and assumptions, all of which may be more or less contestable. But in general I think it is uncontroversial that a philosophical theory of punishment should provide criteria to help us judge whether any given system of punishment is just or unjust. Even proponents of "rational reconstruction" in legal theory typically suggest that their accounts do not simply rationalize the status quo, but give us a vantage point from which to evaluate it.

The claim I defend in this chapter is that an adequate theory of punishment for the United States must be open to considering the aggregate

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4. For population figures, see United States and World Population Clock, available at http://www.census.gov/popclock; for incarceration figures, see Walmsley, *World Prison Population List*.

5. There is by now an extensive literature across sociology, criminology, economics, history, politics, and law on mass incarceration. For a brief overview of the literature on the political context in which mass incarceration developed in the United States, see Redburn, Travis, and Western, eds., *The Growth of Incarceration in the United States*, ch. 4.

6. By "mass incarceration," I shall simply mean: incarceration at or above the rate currently prevailing in the United States, that is, roughly 700 per 100,000 adults.

costs and benefits of a system of punishment. It cannot be based purely on individual rights; it cannot be what I shall call a "strictly deontological" theory of punishment. Strictly deontological theories of punishment would tolerate any arbitrarily high rate of incarceration so long as each person incarcerated is guilty and receives a proportionate sentence for his or her crime. The conclusion I ultimately defend is that you can either affirm that the United States currently incarcerates too many people, or you can affirm a strictly deontological theory of punishment. But you cannot affirm both.

For a theory of punishment to provide a plausible metric for deciding how much punishment is enough requires that it take into account its aggregate social costs, relative to the gains fairly attributable to a system of punishment. Families, neighbors, community members, potential offenders, and potential victims alike all share in these costs, and just penal institutions must be able to explain why punishing this much, and no less, is plausibly consistent with publicly avowable principles of justice. I shall argue that the framework of anti-deference, introduced in Chapter 3, satisfies this criterion, whereas strictly deontological theories do not.

The argument is structured as follows. I start by briefly characterizing strictly deontological theories of punishment. I then turn, in Section 4.2, to arguing that strictly deontological theories cannot explain the injustice of mass incarceration. I consider objections in Section 4.3, and step back to draw broader lessons for the theory of punishment in Section 4.4.

4.2 Strict Deontology and Social Cost

A "strictly deontological theory of punishment" includes any theory that (1) purports to provide an explanation of when it is permissible to punish those who commit crimes, and that (2) does so in terms that exclude consideration of the expected costs and benefits of punishment. "Costs" and "benefits" should be understood generically: whether in terms of utility, social resources, capabilities, welfare, or so forth. I use the term "permissible" as follows: if it is permissible for A to do X, then A has, in general, all the justification she needs to do X; it would not be unjust for A to do X. In particular, because of clause (2), it would not be unjust even if the costs of doing X outweigh the benefits. If you prefer to understand "permissible" to include the logical possibility of "permissible,

but unjust," then you can simply rephrase clause (1) of my definition accordingly. In that case, you should understand clause (1) as: "purports to provide a comprehensive, all things considered explanation of when punishment would be justified."

What does it mean to say that strictly deontological theories categorically exclude consideration of the social costs of punishment from affecting its permissibility? It means that you can have all the justification you need (all you need to make it morally permissible) to punish someone without considering whether any good would come from doing so. You may take the social costs and benefits of punishment into account if you wish, but whether you do so is strictly up to you. Hence, a strictly deontological theory does not simply insist that deontological constraints must be respected to render punishment permissible. It goes further and claims that if the constraints are respected, then punishment *is* permissible: satisfying deontological constraints is necessary *and* sufficient to establishing that punishing someone is permissible. Consequently, "hybrid" theories of punishment are not strictly deontological in my sense, since these theories make satisfaction of deontological side-constraints into merely a necessary, rather than sufficient, condition for the permissibility of punishment.

It is worth emphasizing that strictly deontological theories are not necessarily retributive theories, and that retributive theories are not necessarily strictly deontological theories. First, retributive theories can take a teleological form, in which retribution is simply another good to be promoted. Second, strict deontology does not necessarily depend on retribution as a reason for punishment. For instance, Kit Wellman's strong rights forfeiture theory claims only that it is permissible to punish someone who has forfeited his right not to be punished. It is noncommittal as to what positive reasons we have (retributive or otherwise) to punish anyone. Therefore, a theory can be strictly deontological without being retributivist. Of course, there *are* retributive forms of strict deontology. Strictly deontological retributivists claim that, as Mitch Berman puts it, "punishment is justified because doing so is right—something we have reason, or ought, to do—and where its rightness is not derivative of its being valuable."[7] However, this is a further commitment, not one that flows from a strictly deontological theory per se.

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7. Mitchell Berman, "Two Kinds of Retributivism," in *Philosophical Foundations of the Criminal Law*, ed. R.A. Duff and Stuart P. Green (Oxford University Press 2011), 433–57 at 452.

You may wonder who defends a strictly deontological theory of punishment. Here are four contemporary versions. First, consider Wellman's recent defense of a rights forfeiture theory. According to Wellman, whatever good punishing someone may achieve, we are only permitted to punish that person if he has forfeited his right against punishment, as normally people have a strong right not to be treated in the way that punishment inevitably treats them. A person forfeits his right not to be punished by committing a crime. Therefore, we may only permissibly punish those who have committed crimes.[8] However, rights forfeiture theory is not necessarily a strictly deontological theory. Wellman helpfully distinguishes between "weak" and "strong" variants of rights forfeiture: the weak variant holds that rights forfeiture is necessary but not sufficient to explain the permissibility of punishment, whereas the strong variant holds that it is both necessary and sufficient. Rights forfeiture theory in its weak form is not a strictly deontological theory. This is because, on a weak rights forfeiture theory, it might be that we are only permitted to punish someone when she has forfeited her right against punishment *and* doing so also furthers some important social aim. Hence, while a weak form of rights forfeiture theory does purport to provide an explanation of the permissibility of punishment as required by (1), it need not do so in terms that exclude an assessment of the social costs of punishment, as required by (2). On the other hand, strong rights forfeiture theory—the version Wellman defends—is a strictly deontological theory. This is because it holds that rights forfeiture is sufficient to make punishment all-things-considered permissible, making consideration of the social costs of punishment strictly irrelevant. As Wellman puts it, if someone has forfeited her right against punishment, we may punish her whether or not doing so furthers some important social aim.[9]

Second, Arthur Ripstein has defended a rigorously Kantian form of strict deontology. According to Ripstein, "[u]nless the right to punish is

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8. Christopher Wellman, "The Rights Forfeiture Theory of Punishment," *Ethics* 122(2) (2012): 371–93; see also Wellman, *Rights Forfeiture and Punishment* (Oxford University Press 2017), ch. 2.

9. Wellman, "The Rights Forfeiture Theory of Punishment," 375 n.7. In a later work, Wellman concedes that state punishment "would not be justified unless the criminal legal system secured vitally important goods that would be unavailable in its absence." He nevertheless insists that "a punishment that serves no other purpose might nonetheless be morally permissible." *Rights Forfeiture and Punishment,* 23; compare Wellman, "Rights and State Punishment," *Journal of Philosophy* 106(8) (2009): 419–39, especially 428–30.

inherent in the idea of a rightful condition, no good consequences could authorize it." Conversely, insofar as the right to punish is inherent in the idea of a rightful condition, then "its justification does not depend on those consequences."[10] Ripstein is thus committed to the claim that the right to punish inherent in the Kantian "rightful condition" is both necessary and sufficient to justify punishment, and that the consequences of punishment are strictly immaterial. For Ripstein, public law "constitutes a system of equal freedom in which no person is subject to the choice of another,"[11] and punishment is required to "hinder hindrances to freedom"[12]—that is, criminal acts—and even if "the incentives provided by law would be empirically unnecessary . . . [punishment] would still be required."[13] Indeed, on Ripstein's view, in upholding public right, the sovereign is *obligated* to punish every crime she comes across. Failing to punish is "strictly speaking inconsistent with the rightful condition," and hence would be "wrong in the highest degree," and even "a single exception" would be a renunciation of the law's own principle.[14]

Third, although Alan Brudner takes issue with Ripstein's Kantianism, Brudner's Hegelian theory is itself a variant of strict deontological theory. Brudner explicitly denies that punishment can be "justified in prospective terms as a means to furthering socially desirable ends."[15] He rejects a Hartian-style mixed theory, according to which socially beneficial consequences of punishment provide the affirmative reason in favor of punishment. The "beneficial effects of punishment" cannot be regarded,

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10. Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009), 301.

11. Ripstein, *Force and Freedom,* 306.

12. Ripstein, *Force and Freedom,* 55.

13. Ripstein, *Force and Freedom,* 307.

14. Ripstein, *Force and Freedom,* 320–21. To be fair, Ripstein attempts to constrain the maximalist tendencies of his Kantian view by insisting that he is not taking "any specific position about what public resources should be devoted to crime detection, or where those resources should be focused." However, it is hard to see what motivates the distinction between investigation (entirely discretionary) and prosecution (entirely mandatory): if it is such an affront to the law to allow even a single crime to go unpunished, why is it not equally an affront if crime that could easily be detected (and hence punished) were allowed to go undetected (and hence unpunished)? Perversely, this suggests that the state could decide to underfund policing and crime detection precisely *so that* it could avoid acquiring the rigorous Kantian duty to punish criminals once detected.

15. Alan Brudner, *Punishment and Freedom* (Oxford University Press 2009), 38.

Brudner claims, as a public reason in favor of punishment, and hence whatever good is achieved by punishment carries no justificatory significance.[16] On Brudner's view, a criminal renders himself vulnerable to punishment because by intentionally denying someone else's rights he implicitly denies his own, and as a result he has no basis for complaint when the state violates *his* rights by punishing him.[17] The substantive justification for state punishment, according to Brudner, is that it is required to make manifest that the criminal's implicit claim to an unlimited liberty of action is "aporetic," and thereby "to vindicate the truth . . . that the only valid claims of permission to act are those that can be validated by equal ends."[18] On Brudner's view, actual concrete punishment of the criminal is positively required to make this manifest precisely because, by actualizing his claim to unlimited freedom in external conduct, the criminal clothes his egoistic principle in a false veneer of legal validity. Far from being a means of promoting the public good, punishment is justified because it expressively denies the wrongdoer's own denial of rights. Hence, Brudner's view is a strictly deontological theory: it holds that punishment is permissible—indeed, required—under conditions that make no mention of punishment's contribution to public welfare, but that instead turn only on the expressive vindication of rights.

Finally, and perhaps surprisingly, Antony Duff has recently defended a form of retributive theory that implies strict deontology.[19] According to Duff, "what gives criminal punishment its meaning and the core of its normative justification is its relationship, not to any contingent

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16. Brudner, *Punishment and Freedom,* 42.

17. Brudner, *Punishment and Freedom,* 37–41. Unlike Wellman, Brudner views punishment as a rights violation rather than as a rights forfeiture. Malcolm Thorburn defends a view reminiscent of Brudner's: see "Punishment and Public Authority," in *Criminal Law and the Authority of the State,* ed. Antje du Bois-Pedain, Magnus Ulväng, and Petter Asp (Hart 2017), 7–33.

18. Brudner, *Punishment and Freedom,* 46. See also Jean Hampton, "Correcting Harms vs Righting Wrongs: The Goal of Retribution," *University of California Los Angeles Law Review* 39 (1991): 1659–702 at 1686.

19. R.A. Duff, "Retrieving Retributivism," in *Retributivism: Essays on Theory and Policy,* ed. Mark White (Oxford University Press 2011), 3–18. Martha Nussbaum has expressed doubts about Duff's choice of a strictly deontological starting point for his account of punishment; see Martha Nussbaum, *Anger and Forgiveness* (Oxford University Press 2016), 188–89. In more recent work, Duff seems to take a softer line, arguing that guilt alone is not sufficient to justify punishment. See Antony Duff, *The Realm of Criminal Law* (Oxford University Press 2018), ch. 7.

future benefits that it might bring, but to the past crime for which it is imposed." This, according to Duff, is the "core retributivist thought."[20] Just as individuals have standing to call friends, family, and colleagues to account in the case of ordinary transgressions, the political community has standing to call citizens to account in the case of public wrongs. Calling those who commit public wrongs to account is not done because it furthers other goals that we might have; rather, it is *constitutive* of the respect due to citizens. Failure to pursue and prosecute a wrongdoer betrays an attitude of indifference to the victim, and perhaps to the perpetrator as well. Criminal punishment is a way for the community and wrongdoer to show that they are appropriately engaged with the victim's injury by demanding a "formal, forceful expression of apology."[21] Showing respect for the agency of the victim justifies us in calling the wrongdoer to account through punishment, and this reason for punishment is categorically insensitive to the expected social cost of punishment. Hence, insofar as calling a wrongdoer to account provides a sufficient reason for punishing someone—which it must, since it is allegedly constitutive of showing respect, something we presumably have sufficient reason to do—it follows that Duff's retributivism is strictly deontological.

In contrast to Wellman's noncommittal form of strict deontology, Ripstein's, Brudner's, and Duff's theories are both strictly deontological and retributive. They go beyond the claim that punishment is only permissible when someone has forfeited his or her rights, and insist that there is a positive retributive requirement to punish: to uphold the rightful condition, to expressively deny the denial of rights, or to show respect for those whose rights were wrongfully invaded. Strictly deontological retributivism would not allow us to tell one victim that we are not going to devote the resources to investigating, prosecuting, and punishing the person who assaulted him because we have a better use for those resources. Even if we do have a "better" use for the resources, to fail to call his assailant to account just *is* to fail to show him sufficient respect (uphold the rightful condition, allow a denial of rights to stand unchallenged, etc.) That is

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20. Duff, "Retrieving Retributivism," 3. Or, as Nozick once put the point, the consequential goods achieved by punishing wrongdoers—reform, deterrence, or incapacitation, say—are merely an "especially desirable and valuable bonus" rather than "part of a necessary condition for justly imposed punishment." Robert Nozick, *Philosophical Explanations* (Harvard University Press 1983), 374.

21. Duff, "Retrieving Retributivism," 18.

what it means for punishment to be constitutive of respect for the victim. Presumably, it is not the case that we are permitted to respect victims less than we otherwise would simply because there are more of them. If we design our institutions such that we know in advance that a great many perpetrators—indeed, with respect to some crimes, the large majority of them—will never be called to account for their crimes, then victims of unpunished crimes have a powerful deontological claim that they are not being taken sufficiently seriously. Their objection remains even if people who are at risk of becoming unemployed, sick, or unable to access a tolerably good education would *also* have claims if resources were diverted from those programs to fund a fully enforced criminal justice regime.

4.3 Strict Deontology and Mass Incarceration

Strictly deontological theories, retributive or otherwise, cannot explain why the United States currently incarcerates too many people. The argument can be presented as follows:

1. The United States today unjustly incarcerates too many people.
2. According to a strictly deontological theory, punishment is justified (i.e., is permissible all things considered) if it does not violate relevant deontological constraints.
3. The current American incarceration rate is not the result of widespread violation of deontological constraints.
4. Hence, a deontological theory of punishment cannot explain why the United States unjustly incarcerates too many people.

Note again that I am simply assuming that (1) is true. The second step of the argument flows from the logical structure of a deontological theory of punishment. Step (3) requires more elaboration, and I will focus most of my attention on it.

First, however, I pause to clarify the nature of premise (1). To be sure, the argument would be more ambitious if it were stated unconditionally; that is, if it purported to show that some specified rate of incarceration, *n*, is *necessarily* unjust, unjust in all possible worlds. However, I doubt any such claim can be sustained, at least for any plausible value of *n*.[22] This

22. What is a plausible value of *n*? It is worth bearing in mind that even in the United States today the incarceration rate is less than 1 percent, and that in most other Anglophone

is because for any plausible value of n, whether it is just to incarcerate that many people depends on a wide range of social facts. What might be an unjustly high rate of incarceration in modern Sweden might not be unjust in post-revolutionary China, or even in the contemporary United States. To put it slightly differently, consider a theory of punishment as a function that takes a range of factors (crime rates, sentencing norms, legal traditions, etc.) as inputs and returns an estimate of the maximum permissible rate of incarceration as an output. Call that estimate n_{MAX}. No plausible theory of punishment treats n_{MAX} as a constant; rather, its value is sensitive to the values that are assigned to the relevant inputs.[23]

Hence, premise (1) would be too strong if it required a theory of punishment to show why a *specific* rate—say 700 people in custody per 100,000 adults—is per se unjust, regardless of social context. Premise (1) is therefore more contingent, and applies specifically to the incarceration rate in the contemporary United States. That said, the more interesting question is *which* inputs a theory treats as relevant in setting n_{MAX}. Strictly deontological theories have a particularly limited set of relevant inputs, essentially those having to do with guilt and the proportionality of the sentence imposed, to the exclusion of factors having to do with (for instance) crime rates and the relative marginal cost of incarceration. Strictly deontological theories focus on the quality of individual transactions, ignoring the aggregate benefits and burdens of a system of punishment.

One way of framing the conclusion (4) that I defend is that strictly deontological theories too sharply restrict the range of relevant inputs in determining n_{MAX}. In contrast, theories of punishment that are open to

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countries, the rate is closer to 0.01 percent. It is hard to imagine what a society that incarcerated even 10 percent of its population would look like, and it may well be the case that under social conditions where one would find such a rate—perhaps conditions of civil war or insurrection—normal theories of justice would simply fail to apply.

23. To illustrate, consider the following simplified example. Suppose your theory of punishment says that the single input factor that is relevant to determining whether punishment is permissible is guilt: if someone is guilty of a crime, then it is permissible to punish him. Suppose, further, that in society S there is only one crime, C, and people who are convicted of committing C invariably serve one year in prison. In this case, the value of n_{MAX} is straightforwardly estimated: it is simply the number of people who commit C in a given year. After all, if the state were to investigate, prosecute, and convict every single person who commits C, then the number of instances in which C is committed would determine the actual incarceration rate, and given that time served for C is one year, at any given time n_{MAX} should correspond to the number of instances of C in the previous year. Any higher rate of incarceration, and S would inevitably either be incarcerating innocents or imposing disproportionate punishments. The point is that C is a variable, not a constant.

consequential considerations can appeal to a range of aggregative inputs in estimating n_{MAX}. They can, for instance, consider the expected aggregate costs of incarceration—the harms imposed directly on those incarcerated, the collateral consequences on families and communities, and the opportunity costs to society of time wasted languishing in prison—as well as its expected benefits, such as the reduction in criminal offending. When the marginal benefits from incarceration are declining relative to its social cost, then a theory that is open to aggregative reasons will plausibly set n_{MAX} at the inflection point where further reliance on incarceration entails more harm than good. An interpretation of n_{MAX} along these lines could provide a plausible explanation of why the United States unjustly incarcerates too many people. Plausibly, in expanding its custodial population from approximately 120 per 100,000 to over 700 per 100,000, the United States has come to incarcerate so many people that the marginal cost of incarceration outweighs marginal benefits.

In contrast, the strongly individualistic character of strictly deontological theories implies that it is equally permissible to punish any person who has committed a criminal act, whether he is the first person or the n^{th} person to do so, for any arbitrarily large value of n. Hence, insofar as a deontological theory purports to show that it is permissible to punish *any* criminal wrongdoer, it shows that it is permissible to punish *all* of them—regardless of the costs of doing so. Punishing that many people may be pointless or even counterproductive. But strictly deontological theories are united in rejecting those types of concerns from bearing on the permissibility of punishment: they tell us that we are permitted to punish regardless of whether doing so "is necessary to promote some important aim."[24] Hence, for a strictly deontological theory to explain why the United States today incarcerates too many people, it must do so by showing how the United States' elevated incarceration rate is a result of a widespread violations of a relevant deontological constraint, a violation that can be made out on a case-by-case basis.

Accordingly, I now turn to examining proposition (3), that the current American incarceration rate is not the the result of widespread violation of deonotological constraints. The paradigmatic deontological constraints on punishment are that punishment be restricted to people who are actually guilty of true crimes, and be administered in proportion to their

24. Wellman, "Rights Forfeiture Theory of Punishment," 375 n.7.

culpability. Is it the case that the American incarceration rate is so anomalously high because the United States punishes factually innocent people, criminalizes morally innocent conduct, or imposes disproportionate sentences? There is reason to be skeptical. Recent empirical work suggests that America's elevated incarceration rate stems largely from increases in the rates at which people who are guilty of uncontroversial crimes are prosecuted for felony offenses, and given relatively short custodial sentences as a result. This research suggests that the United States could actually incarcerate many more people than it currently does without punishing high numbers of factually innocent people, over-criminalizing, or imposing disproportionate sentences.

Factual guilt. I start with the proposition that only those who are actually guilty of a crime should be punished. Suppose the United States were to fully respect this constraint, or at least as well as can reasonably be expected (since some errors will be inevitable.) Would respecting this constraint bring the incarceration rate down significantly? No. While wrongful convictions are a serious problem, it is very unlikely that they are sufficiently numerous to contribute in any meaningful way to the scale of incarceration in the United States.[25] In fact, the United States could dramatically *raise* incarceration rates while fully respecting the constraint against punishing the innocent. The reason is simple: there are a great many crimes that go unpunished. A profoundly important fact about criminal justice in the United States is that, even with the highest incarceration rate in the world, and even with respect to so-called core offenses such as assault, sexual assault, theft, and burglary, the criminal law in the United States is not even remotely close to being fully enforced. In 2007, roughly 61 percent of murders and non-negligent manslaughters known to police resulted in arrests or were otherwise considered "solved." Those rates go down substantially for other crimes: comparable figures for rape are 42 percent, for robbery 26 percent and for burglary and car theft 13 percent.[26] Considered in the aggregate, clearance rates for violent crime have hovered around 45 percent for several decades, and the comparable figure

25. For an estimate, in the context of capital rape-murders, see D Michael Risinger, "Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate," *Journal of Criminal Law & Criminology* 97(3) (2007): 761–806.

26. Sourcebook of Criminal Justice Statistics Online, Table 4.19.2007: Offenses Known to Police and Percent Cleared by Arrest, available at: http://www.albany.edu/sourcebook/pdf/t4192007.pdf (accessed May 11, 2018).

for property crimes is roughly 15 percent.[27] These are, moreover, clearance rates, not conviction rates—that is, they represent the rate at which police consider a crime "solved," not the rate at which someone has actually been called to account for the crime through prosecution and punishment. When we turn to convictions, we see that in state courts in 2004, approximately 68 percent of murder and non-negligent manslaughter arrests resulted in convictions, while only about 16 percent of motor vehicle theft arrests and 44 percent of burglary arrests resulted in convictions.[28] As a rough, back-of-the-envelope calculation, these figures together suggest that about 43 percent of murders and non-negligent manslaughters, 6 percent of burglaries, and 2 percent of motor vehicle thefts ultimately resulted in convictions. These figures are concededly rough, since they do not account for people who are convicted through a process commencing with a summons rather than an arrest, nor do they account for crimes that are considered cleared but that do not result in an arrest. On the other hand, these rates are sensitive only to crimes known to police, and there is evidence that a great deal of crime goes unreported—in some categories, such as assault (65 percent), sexual assault (86 percent), and domestic violence (90 percent), a majority to an overwhelming majority of crime is not reported.[29] These figures appear broadly consistent with contemporary and historical trends in the United Kingdom.[30]

In short: there are *many* more instances of people forfeiting their rights against criminal punishment by committing crimes than there are instances of criminal punishment actually being imposed. The very high rate of attrition between the rate at which crimes are committed and the rates at which they are punished suggests that there is quite an extensive

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27. Sourcebook of Criminal Justice Statistics Online, Table 4.21.2007: Percent of Offenders Known to Police Who Were Cleared by Arrest, available at: http://www.albany.edu/sourcebook/pdf/t4212007.pdf (accessed May 11, 2018).

28. Sourcebook of Criminal Justice Statistics Online, Table 5.0002.2004: Felony Convictions and Sentences and Rate per 100 Arrests, available at: http://www.albany.edu/sourcebook/pdf/t500022004.pdf (accessed May 11, 2018).

29. See David Kennedy, *Deterrence and Crime Prevention: Reconsidering the Prospect of Sanction* (Routledge 2009), 45.

30. See Andrew Ashworth and Mike Redmayne, *The Criminal Process*, 4th ed. (Oxford University Press 2010), 156–57 (estimating that "no more than 2 percent" of the eight most frequently committed offenses in the United Kingdom result in a conviction). For historical evidence, see Peter King, *Crime, Justice, and Discretion in England 1740–1820* (Oxford University Press 2005), 11–12, 132–34 (reporting estimates from the late eighteenth and early nineteenth centuries that only 1–10 percent of property crimes were prosecuted).

degree of headroom in criminal justice inputs before the constraint of factual guilt kicks in as a limiting factor. For instance, if my back-of-the-envelope calculations are any guide, American criminal justice institutions could prosecute ten times as many domestic assaults, sixteen times as many burglaries, and fully fifty times as many car thefts while still punishing only the guilty. So although people who are wrongfully convicted clearly have powerful claims about how they have been treated, the injustice of mass incarceration cannot be chalked up to lots of innocent people being punished for crimes they did not commit.

Criminalization. Deontological theories of punishment do not simply claim that it is right (or all-things-considered permissible) for the guilty to be punished proportionately. They also typically claim that what it is to be guilty is, within some range, not purely a matter of positive law. People do not forfeit their rights or deserve punishment simply because the legislature says they do. Rather, they forfeit their rights or deserve punishment when the acts they perform are *appropriately* or *rightly* criminalized. Thus, even if it is conceded that the United States is mostly punishing guilty people, in the sense of people who have contavened some positive criminal law, perhaps the United States has criminalized conduct that it is simply inappropriate to criminalize in the first place. Perhaps overcriminalization of this sort explains why the United States incarcerates too many people.

By far the most significant area of criminal law that might plausibly be thought of in these terms is the so-called "war on drugs." Indeed, it is sometimes claimed that the war on drugs explains America's experiment with mass incarceration.[31] If this claim were true, and if a convincing case could be made that criminalizing narcotics violates some deontological constraint on criminalization, then perhaps deontological theorists would be able to explain why the United States should have a much lower incarceration rate. Deontological theorists could claim that while there would be no injustice in prosecuting literally every instance of every crime, it turns out there are many fewer such instances than we thought, at least once we take into account the malign influence of the war on drugs.

Unfortunately, the claim that the war on drugs explains mass incarceration is unsupported by the evidence. For over two decades, the percentage of people imprisoned for a drug offense in the United States has been fairly stable at about 20 percent—significant, but not enough

31. See, e.g., Michelle Alexander, *The New Jim Crow* (The New Press, 2010).

to explain the fivefold increase in incarceration rates over the last generation.[32] The majority of people in state prisons are there because they committed violent crimes; in fact, there are about as many people in state prisons for homicide (14 percent of state inmates) as there are for drug offenses (16 percent). If we factor in property offenses, nearly three-quarters (72.6 percent) of state prisoners are in custody because of traditional offenses.[33] While it *is* true that stripping out people convicted of drug crimes would lower incarceration rates, it would not bring rates anywhere near what they were for most of the twentieth century, or as low as they are in any of the United States' usual comparator countries.[34] And while it is also true that there was a sharp increase in the proportion of people incarcerated for drug offenses during the 1980s, that was a sharp increase from a very low baseline: in 1980, state prisons housed only 19,000 drug offenders, compared to over 170,000 violent offenders and nearly 90,000 property offenders. By 2009, the number of drug offenders in state prisons grew by roughly an additional 220,000 people, but the number of violent offenders grew by over 500,000, and the number of property offenders by almost 172,000.[35] In fact, over half of the growth in prison populations from 1980 to 2009 is explained by growth in the number of incarcerated violent offenders, and if we factor in property offenses, we account for fully two-thirds of the growth.[36] As John Pfaff has noted, "[e]ven

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32. In 2012, drug offenders made up approximately 16 percent of the state prison population. E. Ann Carson, *Prisoners in 2013* (Bureau of Justice Statistics, 2013), 15, tbl. 13, available at: http://www.bjs.gov/content/pub/pdf/p13.pdf; see also John F. Pfaff, "The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options," *Harvard Journal on Legislation* 52(1) (2015): 173–220; Pfaff, *Locked In: The True Causes of Mass Incarceration—and How to Achieve Real Reform* (Basic Books 2017), ch. 1; James Forman, Jr, "Racial Critiques of Mass Incarceration: Beyond the New Jim Crow," *New York University L.aw Review* 87(1) (2012), 47–48.

33. Carson, *Prisoners in 2013*, 15, tbl. 13. The Marshall Project, a news organization focused on criminal justice issues in the United States, has put the Bureau of Justice Statistics online in the form of an interactive website, which the reader can manipulate to see how many violent offenders would have to be released in order to cut America's incarceration rate by 50 percent. Note that even with a 50 percent reduction, the United States would still be the most punitive developed country on the planet. Available at: https://www.themarshallproject.org/2015/03/04/how-to-cut-the-prison-population-by-50-percent.

34. See Redburn, Travis, and Western, eds., *The Growth of Incarceration in the United States*.

35. Pfaff, "The War on Drugs and Prison Growth," tbl. 1A.

36. See John Pfaff, "Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth Is Wrong, and Where We Can Go from Here," *Federal Sentencing Reporter* 26(4) (2014): 265–70, 265–66.

if we released every offender currently serving time for a drug conviction, the US prison population would remain above 1 million, and the racial composition of its prisons would not shift much"—specifically, the prison population would go from 1.4 million to 1.1 million, and the percentage of black prisoners would decline two percentage points, to 36 percent.[37]

This is not to say that the so-called "war on drugs" is morally insignificant, or that it has not wrought huge swaths of largely pointless devastation through the lives of a great many people. It would also be overstating the case to say that the war on drugs has had a negligible impact on American incarceration rates. It is, for instance, possible that drug offenses may matter to incarceration rates more indirectly: it may be that the war on drugs has a given large number of people criminal records, resulting in longer sentences for subsequent, non-drug offenses. It is also possible that the war on drugs has made drug markets more dangerous, and hence more criminogenic. But in terms of actual drug incarcerations, it is reasonably clear that while they are non-negligible, they cannot explain the phenomenon of mass incarceration. The impact of incarceration for drug offenses on the incarceration rate is far overshadowed by the impact of prosecutions for traditional "core" crimes, violent crime in particular.

To put the point more generally, the implicit hypothesis underlying the thought that over-criminalization explains overpunishment is the proposition that increasing criminalization causes increasing incarceration. But it is not obvious why this would be true. After all, crimes do not prosecute themselves. Hence, it is not obvious why simply expanding the number of options available to prosecutors should expand the number of people who are incarcerated, holding resources and priorities constant. What the statistics regarding violent crime and property offenses suggest is that the set of crimes for which people are actually sent to prison have remained fairly stable even as incarceration rates have exploded. Growth in incarceration

37. John Pfaff, "The Micro and Macro Causes of Prison Growth," *Georgia State University Law Review* 28(4) (2012): 1239–73 at 1270; Pfaff, "The Causes of Growth in Prison Admissions and Populations," Working Paper No. 1884671 (2011), 22–24, available at: https://ssrn.com/abstract=1990508. Blumstein and Beck similarly acknowledge that drug offenses do not explain the bulk of the explosion in incarceration rates. Alfred Blumstein and Allen J. Beck, "Reentry as a Transient State between Liberty and Recommitment," in *Prisoner Reentry and Crime in America*, ed. Jeremy Travis and Christy Visher (Cambridge University Press 2005), 50, 78. But see Blumstein and Beck, "Population Growth in U.S. Prisons, 1980–1996," in *Prisons*, ed. Michael Tonry and Joan Petersilia (University of Chicago Press 1999), 17, 21.

appears to have largely been driven by increased numbers of prosecutions for a relatively stable number of offenses, not over-criminalization per se.[38]

Harsh sentencing. Finally, it might be thought that it is American criminal justice institutions' proclivity for meting out disproportionately harsh sentences that explains why its custodial population is so large.[39] There are, of course, many instances of headline-grabbing sentences that many people believe to be disproportionate. However, these kinds of ultra-harsh sentences do not seem to be what drives the United States' ultra-high incarceration rate. What appears to be doing most of the work is an increased willingness on the part of American prosecutors to file felony charges that carry some amount of prison time, rather than a routine demand for extremely long sentences.[40]

Pfaff has recently analyzed data from eleven states from the National Corrections Reporting Program from 1982 to 2003, and found that, when examining median and 75th percentile prisoners, time served has actually been stable, or in some cases even declining, in this period.[41] Median time served ranged from about six months (California) to about two years (New Jersey); at the 75th percentile, time served ranged from about one year (California) to about four (Virginia). In a subsequent paper, Pfaff bolsters this conclusion with data drawn from all fifty states. Actual release rates from state prisons over the last three decades closely parallel a hypothetical invariant release schedule, according to which half of all prisoners are released within a year, and three-quarters within five years, with only 1 percent remaining incarcerated after eleven years. For most inmates, the amount of time served has not materially increased during the last three decades, even as the incarceration rate has shot up.[42]

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38. Pfaff, *Locked In,* 156–57; my thanks to Elizabeth Brown for discussion of this point.

39. For a discussion of sentencing in the United States in comparison to other Western jurisdictions, see James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford University Press 2005), especially ch. 2. My discussion in this section is indebted to Pfaff, *Locked In,* ch. 2.

40. For prisoners released in 2012, the median time served for violent crimes was twenty-eight months, twelve months for property crimes, and thirteen months for drug offenses. See Carson, *Prisoners in 2013*, 8, tbl. 17.

41. John Pfaff, "The Myths and Realities of Correctional Severity," *American Law and Economics Review* 13(2) (2011), 499–504. The states in question are California, Colorado, Illinois, Kentucky, Michigan, Minnesota, Nebraska, New Jersey, South Dakota, Virginia, and Washington.

42. John Pfaff, "The Causes of Growth in Prison Admissions and Populations," available at http://web.law.columbia.edu/sites/default/files/microsites/criminal-law-roundtable-2012/

It is worth noting that, while many states have ultra-harsh repeat offender laws, with the exception of California, they appear to be rarely used.[43] Prosecutorial discretion generally means that there are ways around most harsh sentencing laws. Indeed, since the way around them is often through a guilty plea to another offense with a lower sentence, it is possible that what these laws do is to enhance the ability of prosecutors to efficiently send guilty people to prison rather than ramp up time served—an outcome to which retributivists can hardly object.

While time served has been relatively flat, Pfaff presents evidence that points to an increase in the rate at which prosecutors file felony charges, rather than arrest rates, conviction rates, or harsher sentencing, as the more significant contributor to prison population growth in the United States. Since the increase in felony charges presumably comes from cases that prosecutors in previous generations would have dismissed or treated as misdemeanors, it appears that, as Pfaff puts it, "despite the attention paid to three-strike laws, TIS [truth in sentencing laws], and the like, the predominant locus of increased punitiveness over the past ten to fifteen years still appears to be at the low end, not the high."[44] This suggests in turn that a jurisdiction that does not utilize extraordinarily harsh sentencing outcomes as a general matter may still incarcerate an extraordinary number of people largely by virtue of growth in its custodial inputs. This is a source of growth that, deontological theories are unable to meaningfully limit. It is, Pfaff writes, "[c]hanging decisions

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files/Pfaff_New_Admissions_to_Prison.pdf, at 30–32 (accessed May 11, 2018). As Pfaff puts it, "sanctioning severity does not appear to have changed much at all between 1977 and the early 2000s; to the extent that there has been any change since then, it has been in the direction of *leniency*." (4) For contrary views, see Blumstein and Beck, "Population Growth in U.S. Prisons, 1980–1996" and Blumstein and Beck, "Reentry as a Transient State between Liberty and Recommitment." Pfaff's findings are based on two data sets, not utilized by other studies, that allow Pfaff to disaggregate prison admissions per arrest into its component parts, namely felony filings per arrest, convictions per filing, and prison admissions per conviction. Pfaff, "The Micro and Macro Causes of Prison Growth," 1245.

43. Franklin Zimring, Gordon Hawkins, and Sam Kamin, *Punishment and Democracy: Three Strikes in California* (Oxford University Press 2001), 20–21. As Zimring has noted elsewhere, the federal "three strikes" law was applied 35 times in the four years after its enactment, whereas the California statute—enacted the same year as the federal statute—was applied over 40,000 times. Indeed, the California statute "has resulted in nine times as many prison terms as all of the 26 other three strikes laws in the United States combined." Franklin Zimring, "Imprisonment and the New Politics of Criminal Punishment," *Punishment & Society* 3(1) (2001): 161–66, 163.

44. Pfaff, "The Myths and Realities of Correctional Severity," 504.

in prosecutors' offices about when to file charges" that "appear to be the primary—at times, seemingly almost the sole—driver of prison growth, at least since the mid- to late-1980s."[45]

To be fair, by most accounts, America's experiment with mass incarceration began a full decade earlier, so Pfaff's analysis may well miss factors that were more operative in those earlier years than subsequently. That said, an earlier study found a similar pattern from the 1970s to 1988, suggesting that, even as America's experiment with mass incarceration was ramping up, time served was actually going down slightly, but was more than compensated for by an increase in prison admissions.[46]

It is, in any case, quite plausible that incarceration rates in the United States would typically be more sensitive to prosecutorial activity than to crime rates. This is due to the low rate at which crimes are prosecuted. Suppose, for instance, that one out of ten criminals is prosecuted. Even a modest 5 percent increase in the prosecution rate, from 10 percent to 15 percent, would result in a 50 percent increase in indictments. In contrast, a 5 percent rise in the crime rate would yield only a 0.5 percent impact on indictments, since only one out of ten cases is being prosecuted to begin with. Consequently, the institutional structure of the criminal law, with persistently low rates of prosecution relative to crime, means that prosecutorial charging decisions have a disproportionately large effect on the rate of inputs into the criminal justice system.[47] Hence, for a theory of punishment to come to grips with the phenomenon of mass incarceration, it should have some measure for estimating appropriate levels of prosecutorial activity. This is a distinct concern from proportionality in sentencing, and not one, prima facie, that lends itself to individualistic moral analysis. (It might be the case that too many prosecutions would be bad for society, but is it the case that every criminal has a right to expect no more than an *n* percent chance of being prosecuted for his or her crime?[48])

To summarize: holding crime rates constant, the United States could dramatically raise the rate at which people are placed into the criminal

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45. Pfaff, "The Causes of Growth in Prison Admissions and Populations," 7.

46. Patrick Langan, "America's Soaring Prison Population," *Science* 251(5001) (March 29, 1991): 1568–73.

47. See King, *Crime, Justice, and Discretion in England 1740–1820*, 12.

48. See Hamish Stewart's recent attempt to articulate a deontological account of the wrong of mass incarceration. See "The Wrong of Mass Punishment," *Criminal Law and Philosophy* (2016), doi:10.1007/s11572-016-9409-2.

justice system without running afoul of the deontological constraint against punishing the innocent. Moreover, even if the United States refused to incarcerate people for drug crimes, its incarceration rate would still be anomalously high, since the large majority of people who are in custody are there for traditional *mala in se* crimes. Finally, ultra-harsh sentences do not explain why the American incarceration rate is as high as it is. To the contrary, there is some reason to believe that the major cause of growth in the American incarceration rate is that more people are facing (not obviously disproportionate) custodial sentences for the (mostly traditional) crimes they (actually) commit. Hence, mass incarceration in the United States does not appear to be the result of systematic violation of any of the usual deontological constraints. This suggests, in turn, that a strictly deontological theory cannot explain why the United States incarcerates too many people. Absent a more complete account of the deontological constraints that limit the degree to which a society may permissibly punish the guilty, punishment theorists face a choice: either they can endorse the claim that the United States unjustly incarcerates too many people, or they can endorse a strictly deontological theory of punishment. What they cannot do is endorse both.[49]

I stress that I am not criticizing deontological theories of punishment for being unable to resolve the type of fine-grained "policy" question that philosophical theories in general should not be expected to answer. What I am criticizing them for is their inability to get a grip on one of the most basic issues in criminal justice, which is how much of it there should be. A theory of punishment that cannot provide a plausible framework for deciding whether it would be a good idea to quintuple the size of the incarcerated population does not have an *incomplete* answer to this question; it has *no* such answer. That is a serious failing in a theory that is

49. In subsequent writing, Wellman distinguishes between the institutional and interactional levels of justification, and suggests that whereas a strongly deontological justification applies at the interactional level, when it comes to justifying institutions a more consequentialist approach is warranted. Christopher Wellman, *Rights Forfeiture and Punishment* (Oxford University Press 2017), 53. Wellman's reason for thinking that consequential considerations do not apply at the interactional level is that punishing an innocent person in order to protect rights would impose an unreasonable burden on that person. But this is an odd reason for restricting the level at which consequential considerations apply, rather than restricting the conditions under which they are permissibly acted upon. After all, it is hard to see how the burden of wrongful punishment is rendered more reasonable by virtue of being imposed by an institution rather than by an individual. Conversely, if punishment is only permissible at the institutional level when doing so will do some good, why should it not also be permissible at the individual, interactional level under the same restriction?

ostensibly meant to help us evaluate our actual criminal justice institutions and practices.

4.4 Proportionality, Crime Rates, and Value Pluralism

I now turn to consider objections. First, one might object that even relatively short custodial sentences are disproportionately harsh for many crimes. There are two difficulties with this line of thought. First, while the concept of proportionality could, of course, be modulated so as to hit any exogenously specified incarceration rate, doing so would plainly drain proportionality of independent moral content. It would simply be a means for ensuring that the incarceration rate doesn't exceed some arbitrarily specified value for n_{MAX}, rather than a substantive factor in determining how much punishment is appropriate in a given case. Second, once we leave behind the realm of the outrageous—boiling oil for bicycle thieves, as Philip Pettit and John Braithwaite once put it—it becomes very hard, if not impossible, to be specific about what counts as a proportionate punishment. Indeed, deontological theorists often concede as much. For instance, while Wellman insists that a person who commits a crime only forfeits his claim against a proportionate punishment, he is at pains to note that what is required for a punishment to be proportionate is very hard to determine. As he notes, "the most sophisticated retributivists routinely shy away from offering precise punishments for specific crimes," and he too declines to offer a "simple formula for determining which specific rights are forfeited by any given crime."[50]

I do not mean to suggest that proportionality is a meaningless ideal. My claim is rather that the ideal of proportionality in punishment is, to borrow a Rawlsian slogan, "political, not metaphysical."[51] The norm of proportionality is made meaningful by the decisions of appropriately constituted institutions, not by abstract moral reflection. We have considered judgments—for instance, that life imprisonment for petty

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50. Wellman, "The Rights Forfeiture Theory of Punishment," 386–87; *Rights Forfeiture and Punishment,* 32; see also Andreas von Hirsch, *Deserved Criminal Sentences* (Bloomsbury 2017), ch. 5.

51. See Emmanuel Melissaris, "Toward a Political Theory of the Criminal Law: A Critical Rawlsian Account," *New Criminal Law Review* 15(1) (2012): 146–48. Metaphysical conceptions of proportionality remain current in the literature; see, e.g., Greg Roebuck and David Wood, "A Retributive Argument against Punishment," *Criminal Law and Philosophy* 5(1) (2011): 73–86.

theft is wrong—and these judgments provide a reasonably solid basis for judging a sentencing regime that routinely produces those kinds of outcomes to be in that respect unjust. But within these very broad limits, what proportional punishment consists in is determined by the operation of appropriately constituted institutions, institutions that may be informed by particular cultural beliefs, legal traditions, and so forth.[52] If we are unsure about the sentences our institutions generate, we have reason to take a hard look at the design of those institutions to ensure that they are not dominated by perverse incentives, capture, and short-term political gain. Even if they aren't, it may still be the case that the sentences they generate are pointlessly long, inflicting more harm than benefit. But that does not show that they are therefore disproportionate.

Second, proponents of strictly deontological theories may bite the bullet and claim that mass incarceration *is* permissible. Perhaps this is not as unpalatable as it sounds. Suppose, a philosopher might suggest, that half of the population steals a kidney from the other half of the population, and that all of the kidney thieves are promptly captured, prosecuted, and imprisoned for a proportionate amount of time. What would be the injustice in that? After all, everyone in prison is guilty, and is serving a proportionate punishment. Isn't that exactly what punishment is for?[53]

Again, I have simply been assuming that mass incarceration is unjust. My question is only whether strictly deontological theories can explain why that might be. What I have been suggesting is that, in effect, if you are moved by the kidney example, then perhaps you should be more sanguine about mass incarceration than is typically the case. After all, the kidney example and mass incarceration in the United States today share some important similarities. The overwhelming majority of people in jails and prisons are in fact guilty, they are guilty of mostly uncontroversial crimes, and are, in the main, serving sentences that are not obviously disproportionate. Since mass incarceration is not composed of mass violation of individual rights, there is, by this reasoning, no objection to mass incarceration.

Biting the bullet in this way is consistent with my overall conclusion, which is that strictly deontological theories cannot explain what is

52. See Nicola Lacey and Hanna Pickard, "The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems," *Modern Law Review* 78(2) (2015): 216–40 at 219–20, 227.

53. I owe this example (and this objection) to Kit Wellman.

wrong with mass incarceration, not that mass incarceration is wrong. To be clear, for reasons given below, I believe mass incarceration *is* wrong. But this is for reasons that are unavailable to a strictly deontological theorist. In any case, this bullet is sufficiently unpalatable that I suspect few will be tempted to bite it. Under mass incarceration conditions, what the state is doing is punishing lots of guilty people. If there is no moral objection to punishing any one of those individuals, it's hard to see, on an individualistic framework, where the moral objection to punishing all of them comes from. Yet there *is*, or so I assume, a moral objection to punishing them all. (Taken individually, each of the hypothetical kidney thieves plainly deserves punishment. Does that necessarily make it permissible for public institutions to give it to them? *All* of them?)

I have been stressing that strictly deontological theories cannot explain what is wrong with mass incarceration. The situation for strictly deontological retributivism is even worse. From that point of view, there is some positive reason to punish the guilty so long as doing so does not violate anyone's rights. Suppose that the wrongness of mass incarceration is consistent with respecting rights at the individual level. What does that suggest? It suggests that we should regard mass incarceration in the United States as a model for other countries to emulate. On this view, the United States does a better job than any other country in ensuring that the guilty are punished, and it does so without violating individual rights. True, punishing that many people does not further any valuable social aims, and in fact hinders many of them. But that is, by deontological lights, morally irrelevant. Hence, while most deontological retributivists deny that there is a *duty* to punish all criminals, they nevertheless seem to be implicitly committed to the view that so long as it violates no individual rights, mass incarceration of the guilty should not be regarded as a deep moral failure, but instead celebrated as a milestone in vindicating the rights of victims. Proponents of strictly deontological theories of punishment have not tended to endorse this line of thinking. But it seems baked into the logic of their position.

Third, it might be observed that even if a strictly deontological theory cannot explain why the United States incarcerates too many people, a deontological theorist can still explain why its criminal justice system is unjust in many other respects. I am, of course, happy to concede this point. After all, I am not suggesting that deontological theorists cannot explain why American criminal justice institutions are unjust in *any* respect.

There are lots of reasons those institutions are unjust, and many of these reasons have little or nothing to do with the scale of those institutions.

Note, however, that a concern with the scale of criminal justice may turn out to have implications for at least some of these issues. Suppose that American criminal justice institutions are unjust in part because the custodial population is disproportionately comprised of racial minorities. Should this inequity be remedied by incarcerating fewer guilty minority defendants, or should it instead be remedied by incarcerating more guilty white defendants? From the point of view of comparative equality, either strategy would be acceptable. However, if you believe that the United States already incarcerates too many people, then you will have reason to favor the decarceration strategy. Conversely, if you think that there are no valid moral objections to punishing someone (proportionately) for a crime that he committed, then you should regard the choice between incarcerating fewer minority criminals and incarcerating more white criminals as equally good options. If you think that punishing the guilty is constitutive of respect, the rightful condition or expressively repudiating wrongs, then you will have reason to favor the inflationary strategy.

Finally, it might be argued that my account has wrongly portrayed deontological punishment theorists as oddly single-minded—obsessed with punishing the guilty to the exclusion of all else. But nothing prevents strictly deontological theorists from recognizing value pluralism, such that any deontological reason we have to punish is qualified by the many competing demands that citizens can legitimately make on each other.

I concede that I am indeed portraying deontological theorists as morally single-minded. But I deny that this is an unfair characterization. As I have explained, strictly deontological theories cannot explain what is wrong with mass incarceration in the United States because they exclude the expected social costs and benefits of a system of punishment from the outset. Those theories make the permissibility of punishment turn entirely on one set of moral considerations to the exclusion of others, namely whether punishment does any good for anyone. That, or so it seems to me, is tantamount to denying a powerful source of competing demands on the morality of punishment. That is what it is to be morally single-minded.

Of course, it is always possible to imagine that there are further, strictly deontological, constraints that would permit a deontological theory of punishment to be appropriately critical of mass incarceration. Thus, Wellman points out that rights forfeiture is not always sufficient to render punishment permissible, "because there may be other factors which ground

obligations."[54] For instance, if A has promised B that she will not punish C even if C does forfeit his rights, then it would not normally be permissible for A to punish C, even if he does forfeit that right. However, while Wellman's example of third-party promises of immunity may be probative in individual contexts, it seems unlikely to explain why the United States has unjustly incarcerated hundreds of thousands, if not millions, of people over the last several decades.[55] So we need some other deontological constraint to explain why, given that millions of people have forfeited their rights by committing crimes, we are nevertheless obligated to punish only a small fraction of them. Given the inadequacy of standard deontological constraints on punishment to explain what is wrong with mass incarceration, it hardly seems unfair to shift the burden onto deontological theorists to state what those further conditions are supposed to be. These further conditions should explain why the United States today, despite punishing only a small fraction of the guilty, nevertheless punishes too many people; and they should do so without introducing the very considerations of social costs that strict deontology is committed to excluding as irrelevant.[56]

4.5 Anti-deference and Mass Incarceration

Why it is that strictly deontological theories are unable to explain how committed we should be to punishing the guilty? As I see it, the basic

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54. Wellman, "The Rights Forfeiture Theory of Punishment," 375 n.7. See also Larry Alexander and Kimberly Ferzan, with Stephen Morse, *Crime and Culpability* (Cambridge University Press 2009), 7–10. Tellingly, although Alexander and Ferzan initially introduce the idea of deserved punishment as entailed by respecting people's choices (6), their discussion of "moderate" retributivism transforms deserved punishment into just another type of value to be pursued, to some optimal level, by the social planner. This, I think, confuses a teleological and a deontological conception of desert. See *Crime and Culpability* at 13 (characterizing desert as a "deontological side constraint.")

55. As it happens, there is a legal device that operationalizes roughly the kind of promise Wellman envisions, which is a prosecutor's offer of immunity in exchange for cooperation with an ongoing investigation. It is unlikely that the United States incarcerates too many people because too many of these promises have been reneged on.

56. Hamish Stewart has recently tried to offer just such an account; 'The Wrong of Mass Punishment," *Criminal Law and Philosophy* (2016), doi:10.1007/s11572-016-9409-2. While I agree with Stewart that a policy of relentless prosecution and punishment is hard to square with the ideals of a free society, Stewart does not explain why such a policy is not permitted by a Kantian theory of punishment. Indeed, Ripstein explicitly claims that punishing criminals is positively *required* by the "rightful condition," such that any exceptions would be wrongful and a betrayal of the law. Ripstein, *Force and Freedom* at 320–21. Rather than a vindication, Stewart's argument thus appears to be a reductio of a Kantian approach to punishment.

problem is that strictly deontological theories are exclusively focused on the rights of individuals, and hence are led to ignore the social costs of an overall *system* of punishment. As a result, they have no means for cost containment: they lack the resources for distinguishing between what makes it justifiable to punish the first criminal and the n^{th} criminal, for any arbitrarily large n.

This is a surprising flaw in a theory ostensibly designed to assess social institutions. Evidently, it would be implausible to assess the fairness of other large social institutions, such as healthcare, education, the tax code, and so forth exclusively by looking at individual transactions. We do not determine, for instance, what the marginal tax rate should be for people in your income bracket by asking how much of your income you "deserve" to keep, while ignoring broader questions of what would make for a fair and efficient income tax structure. Nor, for that matter, do we decide how much healthcare, education, transportation, or police services to provide you without considering the broader social cost of providing that level of service. Since individualism is implausible in these other contexts, why does it seem to have such a grip on us when we are thinking about crime and punishment? What makes it plausible to insist, as Duff and Wellman do, that the permissibility of punishment has nothing to do with the "contingent future benefits" that might flow from punishment, or whether punishment under some set of circumstances is "necessary to promote some important aim"?[57]

I suspect the answer has to do with a thought I considered in Chapter 2—namely, that what a person deserves by way of punishment for crime is individually determinable, whereas what a person deserves by way of her fair share of the social product is not. The idea is that, unlike taxes, healthcare, education, and so forth, the criminal law exemplifies private interpersonal morality. On such a conception, comparing the overall social costs and benefits of a system of punishment is beside the point, morally speaking, since each person's culpability is determined on an individual basis.

Contrast this view to an account of criminal law as public law. On that kind of view, the moral standards that apply to the criminal law are simply specific applications of broader political principles—principles that embody our reasons for valuing public institutions generally. That is the force of

57. Duff, "Retrieving Retributivism," 3; Wellman, "The Rights Forfeiture Theory of Punishment," 375, n.7.

holding the criminal law to a fully political standard of justification. Hence, from a public law point of view, what it is for an individual to be fairly treated by the criminal justice system should not be explained in purely individualistic terms, but should be assessed against the legitimate expectations engendered by institutions that operate according to publicly avowable principles of justice. Just as how much income a person deserves to keep, or how much healthcare she deserves to receive are determined, in part, by reference to the costs to others of adopting the corresponding policy, what a person deserves by way of punishment is determined by considering whether others could reasonably be expected to bear the costs of imposing it.[58]

The political ideal of anti-deference, elaborated in Chapter 3, provides an illustration of this type of approach. The political ideal of anti-deference suggests that we have reason to value public institutions insofar as they protect each person's access to central capability on a non-discriminatory and non-hierarchical basis. Access to these capabilities is constitutive of equal social standing. But because criminal punishment tends itself to undermine effective access to central capability, there is a strong reason not to have more of it than necessary—that is, more than necessary to protect those capabilities for all. Punishment, as the invasion of central capability, is permissible when it is part of a strategy that optimally protects central capability on a universal and inclusive basis, but not otherwise. In other words, we have reason to value punishing the guilty to the extent, but only to the extent, that failing to punish would itself jeopardize universal access to central capability.

Because of how essential central capabilities are to a person's equal standing in society, those whose lives are thereby affected by the operation of criminal justice institutions—for instance, because they are incarcerated, or because they are at risk of being victimized by others—are owed an explanation of why they ought to agree to have their lives affected in that way. Since incarceration will certainly invade effective access to a wide swath of central capabilities, it is not enough to show that the legal rule that the sanctions are used to enforce is designed to protect central capability; it must also be shown that nothing less than a system of custodial sanctions of that kind will do to ensure that the rule is adequately respected. That, in turn, is cashed out in terms of protecting universal access to central capability, including access by those who we believe to

58. "Sensitivity to social cost is a familiar theme in the distributive justice literature. See, e.g., Ronald Dworkin, *Sovereign Virtue* (Harvard University Press 2002)

have violated the rule. If those conditions are met then public institutions will be able to say, to potential victims and wrongdoers alike: true, *you* have had your liberty impaired, but no other policy could have treated you better while still respecting each person's entitlement to equal consideration of *their* liberty.

In quintupling the size of its custodial population over the last generation, it is plausible that the United States has crossed that line. Clearly, this is a judgment call, and no amount of social science evidence could be fully determinative.[59] That said, it seems plausible to believe that while *some* level of criminal punishment is required to stably protect each person's effective access to central capability, by punishing as many guilty people as it does, the United States has now well overshot any reasonable estimation of that mark. Why? Because it is, at the very least, doubtful that increased punishment on that scale has been effective at deterring crime; because the lifetime costs to people who have served time behind bars, and to their families and communities, are staggeringly high; because there are non-punitive means of managing the risk of violent crime that build, rather than destroy, capability; and because the level of policing and punishment that some communities are now forced to tolerate have seriously eroded the expectations of reciprocity and trust that lie at the foundation of continued social cooperation. In other words, the proposition that the United States currently punishes too many people can be vindicated by appeal to the aggregate social impact of punishing that many people, including the guilty. The political ideal of anti-deference explains what is wrong with mass incarceration precisely in terms of the "contingent future costs" of punishment on that scale. What is wrong with mass incarceration in the United States is that it is excessive with respect to the "important social aim" of protecting each person's basic interests on terms befitting social and political equals.

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59. For an overview, see Pfaff, *Locked In*, ch. 4. On the scale of punishment relative to crime, see Holger Spamann, "The U.S. Crime Puzzle: A Comparative Perspective on U.S. Crime and Punishment," *American Law & Economics Review* 18(1) (2016): 33–87 (finding that mass incarceration is largely ineffective at preventing crime); Franklin Zimring, *The City That Became Safe* (Oxford University Press 2011), 187–89 (noting that NYC's massive crime decline in the 1990s and 2000s was accompanied by decreasing rates of incarceration); Redburn, Travis, and Western, eds., *The Growth of Incarceration in the United States*. On the collateral consequences of punishment, see sources cited in Chapter 6; non-punitive alternatives for managing crime, Chapter 7; and the corrosive effect of aggressive policing on trust, Chapter 3.

I conclude with three observations. First, no normative theory of criminal justice, including this one, should be expected to generate unique and determinate answers to detailed questions about this or that policy initiative. However, in contrast to deontological theories, the political ideal of anti-deference at least suggests a relevant moral principle, if no doubt contestable in application, for addressing these kinds of questions. If it turns out that quintupling the size of the custodial population does not optimally protect the likelihood that everyone—including those held in custody—will enjoy effective access to central capability when compared to other reasonably feasible institutional arrangements, that would be a reason not to do so, and potentially a reason to undo it if has already been done. A plausible theory of punishment must have a way of accommodating empirical evidence about the conditions under which we should expect punishment in general, and custodial sanctions in particular, to be an effective means in achieving the ends that public institutions are meant to promote. The evaluation of these conditions cannot afford to ignore the social cost of a system of punishment.[60] A theory of punishment need not necessarily take the evidence amassed by sociologists, economists, and criminologists about the extraordinarily high net social costs of mass incarceration to be decisive, but it cannot afford to completely ignore it, either.

That said, although I have characterized the political ideal of anti-deference in very general terms, it cannot be meaningfully applied without appeal to context-specific evidence. It is a more particularized, jurisdiction-specific, and historically contingent approach to thinking about the morality of punishment than is perhaps typical in the literature. The prevailing interpretation of the central capabilities at a given

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60. For just one example, a theory of punishment that takes seriously the task of determining when the use of custodial sanctions is appropriate, and when it has become excessive, must be sensitive to what we know about how people respond to the possibility of sanction. See, for instance, William Spelman, "What Recent Studies Do (and Don't) Tell Us about Imprisonment and Crime," *Crime and Justice* 27 (2000): 419–94; Redburn, Travis, and Western, eds., *The Growth of Incarceration in the United States*, Chapter 5. Naturally, what we conclude from an estimate of the elasticity of crime to punishment depends in part upon broader commitments in the theory of justice—how we assess the social value of reducing crime as against the costs of punishment, as well as how we assess the resulting distribution of social advantage across the population. The need for an overarching normative theory is apparent when considering that punishment is not the only way to reduce criminal offending; other means, such as increasing the male high school graduation rate, also appear to reduce offending, though at different rates, and with a different distribution of social costs and benefits. See Lance Lochner and Enrico Moretti, "The Effect of Education on Crime: Evidence from Prison Inmates, Arrests and Self-Reports," *American Economics Review* 94(1) (2004): 155–89.

place and time, the historically determined form of democratic control, the evidence with respect to crime rates, the relative impact of custodial sanctions, the availability of alternatives and the opportunity cost of punishment, for instance, are all indispensable inputs in thinking about what level of incarceration might be permissible in a given context.

Finally, one might think that my argument is a roundabout way of defending a utilitarian theory of punishment. But this is not so. There are many ways of describing the public good, and the specific approach of classical utilitarianism—maximizing aggregate welfare or preference satisfaction—is but one of them. There are many others.[61] As I have emphasized, anti-deference is prioritarian and capability-based, rather than maximizing and welfarist. Indeed, not only is anti-deference not utilitarian; it is not even consequentialist in the usual understanding of the term. The basic value of social equality is based on a principle universal moral equality, and I have made no effort to ground that principle in any kind of felicific calculus. The democratic and egalitarian credentials of anti-deference are grounded in a picture of the kind of government that is appropriate to a society of moral equals, not in anticipation of better outcomes overall. That said, it *is* part of my argument that a normative theory of criminal justice that takes seriously the aggregate costs and benefits of those institutions cannot afford to be as austerely abstract as strictly deontological theories tend to be. To be sure, strictly deontological theories of punishment can hardly be faulted for being uniquely immune to facts. That seems to be a widely shared problem in thinking about the criminal law generally. However, the inability of strictly deontological theories of punishment to come to grips with evidence-based policy is consistent with a moralizing approach that focuses on the criminal law as the expression of moral sentiment and/or the vindication of abstract rights, while marginalizing the net social cost of a system of punishment. Behind the deontologist's appeal to abstract rights and their vindication stands the emotional call to strike back at those we fear and resent.[62]

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61. Pettit and Braithwaite's republican theory of punishment, for instance, is expressly consequentialist but not at all utilitarian. See John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford University Press 1987).

62. Recall the history of California's notorious "three strikes" law, which is both harsher and broader than habitual offender laws in other states: the law was initially drafted by the father of a murder victim, and gained political traction after a paroled repeat violent offender kidnapped, sexually assaulted, and murdered a twelve-year-old girl. It was precisely *not* the product of a careful, cold-blooded look at the costs of enacting a three strikes law. Indeed,

4.6 Conclusion

There is a fair amount of irony to the argument I have mounted. Theories of punishment that focus on the consequences of a system of punishment are often thought to be unprincipled because they are allegedly consistent with excessive punishment and the trampling of people's rights in the name of crime reduction. The irony is that it is actually strictly deontological theories that lack the resources to constrain the growth of the carceral state. Despite their emphasis on constraining punishment, it is strictly deontological theories that turn out to have a problem with punishment maximalism. Refusing to so much as consider punishment's "contingent future benefits" or its contribution to an "important social aim" may appear principled in the context of the individual case, but it is much more problematic when used as a justification for ignoring the aggregate impact of hundreds of thousands, or even millions, of decisions to impose proportionate punishment on plainly guilty people. Ignoring aggregation in this broader context yields the result that where the net social costs of a generalized practice are steeply rising, the fact that they are not obviously decisive in the individual case will mask quite extreme costs when enacted as general social policy, costs that no one would think it reasonable to incur if presented with the policy in the aggregate. Yet because of their systematic exclusion of social cost, this is precisely what strictly deontological theories entail.

When the aggregate costs of incarceration are worth bearing, and when they are not—as well as what it means to share in bearing those costs as equals—are questions that cannot be answered simply by observing that a penal system only punishes the guilty, and then only proportionately. It requires instead a theory that takes seriously the political character of criminal justice institutions, and especially their role as public institutions that create and allocate crucial forms of social advantage. What is wrong

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later efforts merely to fund a *study* of the law's impact were vetoed by the governor. Why bother? After all, if we are entitled to punish wrongdoers regardless of (as Duff puts it) the "contingent future benefits" from doing so, and regardless of (as Wellman puts it) whether doing so is "necessary to promote some important aim," then evidence about what good might be achieved by more punishment is simply beside the point. Zimring, Hawkins, and Kamin archly note that popular support for California's law "could be the opposite of an instrumental justification, in which people believe that the legislation is appropriate only because it is effective. Instead, it is often the case that belief in the effectiveness of a penal statute is rooted in the citizens' conviction that the law is appropriate. Since the penal measures *feel* right, they must be working well." Zimring, Hawkins, and Kamin, *Punishment and Democracy*, 221.

with mass incarceration is not that it necessarily tramples individual rights, for one could devise a system of mass incarceration that assiduously respected the moral rights of each of the millions of guilty people it punished. What is wrong with mass incarceration is that it disfigures millions of lives for little to no end, thereby imposing extraordinary costs on people in a way that is inconsistent with publicly avowable principles of justice. Hence, if it is to be both satiable and relevant to the evaluation of public institutions, a theory of punishment should start with a conception of criminal punishment as the subject matter of a political theory of justice, rather than simply private morality writ large.