7

Responsibility without Resentment

"We must re-establish the principle that men are accountable for what they do, that criminals are responsible for their crimes, that while the youth's environment may help to explain the man's crime, it does not excuse that crime."[1]

"The sympathy toward the boy he was is at odds with outrage toward the man he is . . . In fact, each of these responses is appropriate, but taken together they do not enable us to respond overall in a coherent way."[2]

7.1 Introduction

Lindsay Farmer has recently remarked that "for many—whether analysing the law from a conventional or a critical perspective—responsibility, and in particular individual responsibility, is foundational to the modern criminal law." The concept of responsibility, Farmer writes, "precedes and structures any theoretical account of the criminal law."[3] Contrast Farmer's observation with one made by Samuel Scheffler, nearly a quarter century ago. Remarking on the conflict between the tenets of political liberalism with everyday moral sentiments, Scheffler observed that "none of the most

1. Platform statement of the 1968 Republican Party (Nixon versus Humphrey); cited in Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Harvard University Press 2016), 139.

2. Gary Watson, "Responsibility and the Limits of Evil," in *Responsibility, Character, and the Emotions: New Essays in Moral Psychology*, ed. Ferdinand Schoeman (Cambridge University Press 1988), 266–96 at 275.

3. Lindsay Farmer, *Making the Modern Criminal Law* (Oxford University Press 2016), 16; see also David Garland, *Punishment and Welfare* (Gower Publishing 1985), 185–9; Nicola Lacey, *In Search of Criminal Responsibility* (Oxford University Press 2016).

prominent contemporary versions of philosophical liberalism assigns a significant role to desert at the level of fundamental principle." Liberalism as a philosophical doctrine, Scheffler claimed, gave desert "no role whatsoever to play in the fundamental normative principles that apply to the basic social, political, and economic institutions of society."[4] Why has desert, and its closely related concept, responsibility, played such a central role in philosophical thinking about the criminal law, whereas those concepts—desert especially—have come to occupy (luck egalitarianism aside) such a marginal role in mainstream forms of political liberalism?

This chapter is devoted to exploring a range of answers to that question. Perhaps the criminal law has a special relationship to responsibility because blame and punishment are central to our sense of ourselves as responsible agents. Perhaps when we are face to face with actual criminal wrongdoing, we are called upon to respond with blame and punishment, no matter how much we are invested in other means of dealing with crime. Maybe we should try to prevent crime from happening. But when it happens, as it inevitably will, treating its perpetrators as responsible agents requires responding appropriately. Perhaps responsibility means that people can be liable to punishment in ways that have nothing in particular to do with equality and other liberal values, for instance if someone, without lawful excuse, wrongfully threatens another.

I shall suggest reasons to be skeptical of each of these answers. Blame and punishment may indeed be central to our sense of ourselves as responsible agents, but they are far from the exclusive manner in which moral engagement manifests. Whatever reasons we have to blame and punish people who commit crimes can be weighed against our reasons to respond in other ways, whether through compassion and repair, or through efforts to ensure that similar acts are not committed in the future. The ex post perspective of the criminal law is functionally continuous with the ex ante perspective of crime prevention, meaning that under conditions of scarcity, whatever reason we have to respond to actual instances of wrongdoing is to be weighed against our reason for investing more heavily in preventive measures. Finally, although it may be true that people who commit crimes render themselves liable to defensive harms that they would not otherwise be subject to, that is consistent with insisting that everyone's rights and interests—guilty and innocent alike—are due

4. Samuel Scheffler, "Responsibility, Reactive Attitudes and Liberalism in Philosophy and Politics," *Philosophy & Public Affairs* 21(4) (1992): 299–323 at 304.

equal consideration. Indeed, egalitarian values suggest that administrative states should often favor crime prevention over punitive response.

7.2 Equality and Responsibility

Farmer's observation reflects an important feature of contemporary normative theorizing about punishment. Although retributive theories differ amongst themselves as to what punishment consists in (censure, suffering, community sentiment, and so forth), and although they differ as to why we should impose it (vindicating rights, upholding law, communicating social disapproval, and so forth) they are unified by a basic intuition about responsibility. This intuition might be expressed somewhat as follows: what you deserve depends, to some significant degree, upon the choices you make. Part of being a responsible agent is that your normative status can be affected by your choices, and hence your choices shape how it is appropriate for others to relate to you. The shared concern among retributivists with pre-politically, pre-legal, individual desert might, in this way, be traced back to a more basic concern about responsibility. From this perspective, giving up on desert of punishment is giving up on treating people as responsible agents.[5]

Gary Watson expresses this thought eloquently. Commenting on Strawson's suggestion that making moral demands of others—and resenting them when those demands are ignored—is constitutive of treating others as part of a moral community, Watson writes:

> If holding one another responsible involves making the moral demand, and if the making of the demand *is* the proneness to such attitudes, and if such attitudes involve retributive sentiments and hence a limitation of goodwill, then skepticism about retribution is skepticism about responsibility, and holding one another responsible is at odds with one historically important ideal of love.[6]

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5. Peter Ramsay connects the modern criminal law's focus on responsibility—exemplified in categories of subjective mens rea—to the universalization of civil rights. "The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State," *Modern Law Review* 69 (2006): 29–58 at 41.

6. Gary Watson, "Responsibility and the Limits of Evil," 286. In this passage, Watson is examining, not endorsing, the Strawsonian idea.

My main concern in this chapter is the contrast Watson draws in this passage between responsibility and love. While the evaluative principles I have sketched flow out of an ideal of democratic equality rather than love, surely it ends up (one might suspect) in the same place: an attitude of moral detachment that is humanitarian, objectifying, and a little condescending—one more concerned with assuaging suffering than with making moral demands of each other. The virtues of democratic equality, one might object, are not *so* important that they would entitle us to give up on practices of responsibility altogether. Whatever else the criminal law is, one might continue, it is a bedrock form of accountability. We cannot give up on the criminal law without doing serious damage to our sense of ourselves as responsible agents, even in the name of a political value as important as democratic equality.

Recall that on the account I have sketched, status as an equal is not waived in virtue of even serious crime, which is to say that status equality is not choice-sensitive. Moreover, I have interpreted equal status to mean that a person's basic rights and interests—represented as effective access to an array of central capabilities—are not discounted in public deliberation about crime policy, even for people guilty of serious crimes. Murderers and rapists, no less than their victims, are due equal concern and respect in public law. I have also argued that culpable wrongdoing is neither necessary nor sufficient to justify criminalization. And I have claimed that even when conduct is properly criminalized, a commitment to democratic equality may prohibit punishing each of its instances, no matter how culpable those instances may be. More generally, I have emphasized that protection from crime is a socially provided good, and that public institutions should be expected to allocate it on terms that respect each person's status as an equal. This includes not relying on criminal sanctions when less invasive means of encouraging cooperation will do, quite independent of whether those who commit crimes are to blame for doing so. All of this may seem to imply that people should not be held responsible for what they do. And what could be the basis for such a judgment, other than skepticism that people truly are responsible agents?

This is a serious challenge. It provides a plausible answer to the question with which I started: why has responsibility been so central to philosophical thinking about the criminal law? The answer it suggests is that criminal law, unlike other areas of public law, manifests our concern to treat each other as responsible agents. To give up on punishment for

crime is to give up on engaging with each other as responsible agents, perhaps in favor of humanitarian moral detachment.

7.3 Prevention, Quarantine, and "Social Hygiene"

The label "preventive justice" has acquired a rather poor reputation because it is often associated with policies such as indefinite civil commitment, broken windows policing, and other forms of draconian social policy. This is an unfortunate association, if for no other reason than that many of the policies characteristic of the welfare state, starting with the earliest initiatives in social security and unemployment insurance, are obviously meant to prevent foreseeable social ills and are, in that respect, accurately described as forms of "preventive justice."[7] (The basic failure in *DeShaney* was, after all, a failure of preventive justice.) However, as a result of these associations, theories that focus on preventing crime ex ante rather than punishing it ex post are often associated with skepticism that people are truly responsible agents, and with the idea that crime policy should be one of "social hygiene" focused on the detention of dangerous persons.

This association is consequential. Retributivists get some mileage out of the thought that the alternative to holding people's feet to the fire for the bad choices they make is subjecting them to paternalistic and authoritarian social engineering that completely ignores responsibility and agency. As Alexander and Ferzan have put it, treating people as able to choose whether to comply with the law "involves as its corollary" blaming and punishing them when they choose instead to break the law.[8] This association lends credence to the thought that we must choose between punishment and moral detachment.

What makes it seem that we cannot give up on our practices of blame and punishment without giving up on our self-conception as responsible agents? I suspect that the imagination of criminal law theorists

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7. On this point, see Fred Schauer, "The Ubiquity of Prevention," in *Prevention and the Limits of the Criminal Law*, ed. Andrew Ashworth, Lucia Zedner, and Patrick Tomlin (Oxford University Press 2013), 10–22; Matt Matravers, "Is Twenty-First Century Punishment Post-Desert?," in *Retributivism Has a Past: Has It a Future?*, ed. M. Tonry (Oxford University Press 2012), 30–44 at 41–42.

8. Larry Alexander and Kimberly Ferzan, with Stephen Morse, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press 2009), 6.

here is unduly influenced by popular, but exaggerated, tropes: from the brainwashing of Anthony Burgess's *A Clockwork Orange* to the punishment of "pre-crime" in Philip K. Dick's *Minority Report* to Barbara Wootton's suggestion that the criminal law's mens rea and excuse doctrine should be allowed to "wither away" and be replaced with estimations of a person's future dangerousness. If you believe that the main alternative to a traditional conception of the criminal law is the indefinite detention of the dangerous, the medicalization of the idiosyncratic, and aggressive policing and mass surveillance for everybody else, then retributive punishment will seem appealing by comparison.[9] For unlike punishment, those other types of policies do not treat people as the authors of their own lives. Rather, they treat people as potential vectors of social harm. Plausibly, however, public institutions should treat you as a responsible moral agent, whether or not you are also a potential vector of social harm. After all, there are worse things than punishment—pity, for instance.[10]

Consider Derk Pereboom and Gregg Caruso's defense of a "quarantine" model of criminal justice, a defense that they ground in their skepticism about free will.[11] Given that skepticism, Pereboom and Caruso suggest that responding to wrongful acts with resentment, blame, and

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9. For instance, see David Hoekema's defense of a system of ex post punishments compares ex ante prevention to the mass surveillance and policing of a "kindly totalitarian state." "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 256. For a rather more nuanced account of mid-century criminology, see David Garland, *The Culture of Control* (University of Chicago Press 2001), ch. 2.

10. To say nothing of the cruelty and sadism that can be disguised as well-intentioned and humane "treatment." Although I have been critical of modern retributivism in this book, it is important to acknowledge that doctrine's roots in concern over the many abuses of mid-century criminal justice. Modern administrative states have created new avenues for subordination and domination, and skepticism about their claims that they are acting in the public interest is often compelling. This is the context for the agonized turn away from mid-century rehabilitationism to fin de siècle retributivism lucidly captured in Willard Gaylin and David J. Rothman's introduction to Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (Hill & Wang 1976).

11. See Gregg Caruso, "Free Will Skepticism and Criminal Behavior: A Public Health-Quarantine Model," *Southwest Philosophy Review* 32(1) (2016): 25–48 at 26–27; Derk Pereboom, "Free Will Skepticism and Criminal Punishment," in *The Future of Punishment*, ed. Thomas Nadelhoffer (Oxford University Press 2013), 49–78. See also Ferdinand D. Schoeman, "On Incapacitating the Dangerous," *American Philosophical Quarterly* 16(1) (1979): 27–35.

punishment would be inappropriate.[12] On the quarantine model, instead of blaming and punishing people for their bad choices, criminal justice institutions contain and treat people as a means of preventing harm going forward.[13] Anxieties about the quarantine model do not depend on the idea that quarantine is inhumane. For all we know, it could be quite comfortable. Anxieties about quarantine rest on the thought that it treats people in ways that are not linked to their choices.[14] Consequently, it is perhaps not surprising that to some even a highly retributive criminal law seems like an exercise in human liberation by comparison.

In my view, a focus on ex ante prevention should be sharply distinguished from the idea that people are not responsible agents. Skepticism about responsibility is, to be sure, one reason for supporting ex ante prevention. However, there are other reasons that do not presuppose skepticism about responsibility. Indeed, respect for responsibility can sometimes support a preference for ex ante prevention over ex post punishment, particularly when we take a less dystopian view of crime prevention. Recall an example I first discussed in Chapter 3: the choice between *schools, now* or *prisons, later*.[15] There is substantial evidence that high quality early childhood education can prevent criminal offending in the future. This evidence suggests that there are young children who, if we do nothing, will go

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12. Derk Pereboom, *Living without Free Will* (Cambridge University Press 2001), 158; Caruso, "Free Will Skepticism and Criminal Behavior," 33–35. Some version of this dialectic has been unspooling for over a century: for a detailed account, see Thomas Andrew Green, *Freedom and Criminal Responsibility in American Legal Thought* (Cambridge University Press 2014).

13. Pereboom, "Free Will Skepticism and Criminal Punishment," 72–74; Caruso, "Free Will Skepticism and Criminal Behavior," 32–36.

14. See Saul Smilansky, "Pereboom on Punishment: Funishment, Innocence, Motivation and Other Difficulties," *Criminal Law and Philosophy* (May 2016), doi 10.1007/s11572-016-9396-3; John Lemos, "Moral Concerns about Responsibility Denial and the Quarantine of Violent Criminals," *Law and Philosophy* 35 (2016): 461–83; Michael Corrado, "Two Models of Criminal Justice," UNC Legal Studies Research Paper No. 2757078 at 1, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757078 (accessed May 15, 2018) (linking Pereboom and Caruso's quarantine model to Wootton's proposal to do away with mens rea and focus instead on dangerousness).

15. See Chapter 3, Section 3.3, for references to the empirical literature. These choices arise repeatedly in criminal justice. In the 1970s, the residents of Washington, DC, then in the grip of a heroin epidemic, had to decide whether to enact harsh mandatory minimum sentences for drug offenses. As James Forman Jr. observes, at the time the city's drug treatment facility "was equipped to treat just one-tenth of the addicts who needed help." The decision about whether to enact harsh mandatory sentences was, in effect, a choice between hospital beds and prison cells. See *Locking Up Our Own: Crime and Punishment in Black America* (Farrar, Straus and Giroux 2017), ch. 4.

on to commit crimes later in life that they would not commit if provided with better education than they currently receive. Suppose the evidence is sound. That presents us with a choice. From the point of view of crime policy, we can choose to invest in a strategy of *schools, now*. Or we can forgo that investment, investing instead in a strategy of *prisons, later*. The choice between *schools, now* and *prisons, later* is a choice between ex ante prevention and ex post punishment: prevent kids from committing crimes as they grow up, or wait for them to commit the crimes and punish them for doing so. As I suggested in Chapter 3, I think we have reason to prefer *schools, now* over *prisons, later*. From the point of view of protecting each person's effective access to central capability, *schools, now* plainly outperforms *prisons, later. Schools, now* yields less crime and less punishment than *prisons, later*. Moreover, under the principle of inclusive aggregation, the punitive impact of *prisons, later* cannot be discounted on the basis that those who are punished are responsible for their wrongful acts.[16]

To be sure, the manner in which we engage with people as responsible agents in educational and punitive settings differs. In the former, we respect agency by promoting the conditions under which it is robustly exercised, whereas in the latter we respect it by acknowledging the moral significance once it has been exercised. However, the crucial point for my purposes in this chapter is that the preference for *schools, now* over *prisons, later* does not presuppose that disadvantaged children, or the adults they become, are not fully responsible agents. To the contrary: in large part, the appeal of early childhood education (as with many other forms of parenting, educational, health, and employment initiatives) is that those types of programs serve to promote the emotional, psychological, and social capacities that undergird responsible agency. A plausible interpretation of investment in educational, social, and employment programs of this kind is that they enable people to develop the emotional and social skills that enable them to exercise a greater degree of independent judgment and to be less prone to impulsive behavior in life.[17] Responsible agency,

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16. Does the appeal of *schools, now* over *prisons, later* rely on the fact that we only know that some of today's children will subsequently commit crimes, but not which ones specifically? That seems doubtful. Suppose we were to learn which children specifically will grow up to become criminals absent some intervention on our part. If anything, that would seem to strengthen our reasons for intervening now.

17. J. Heckman, R. Pinto, and P. Savelyev, "Understanding the Mechanisms through Which an Influential Early Childhood Education Program Boosted Adult Outcomes," *American Economic Review* 103(6) (2013): 2052–86 at 2053.

after all, is not an all-or-nothing affair, but rather comes in degrees. Hence, the choice between *schools, now* and *prisons, later* is not a choice between treating people as potential vectors of harm and as responsible agents. It is a choice between two different ways of respecting people as responsible agents: strengthening capacities for moral deliberation and choice, or responding to poor exercises of that agency with official forms of censure, blame, and punishment.

A further line of argument, drawing upon recent work by Erin Kelly, bolsters this conclusion.[18] Kelly argues that there is a substantial gap between acknowledging that someone is responsible for a wrong, and responding with blame or resentment. We may hold someone responsible for a wrong in that we judge that person to have intentionally acted in a way that violates the moral expectations that apply in a given case, and to have had at least some capacity to have recognized reasons that favor a better course of conduct than the one she did choose. But, Kelly argues, although there is substantial value in relating to people through universal moral expectations of this kind, people sometimes violate those expectations because their moral competence—their capacity to grasp and to feel motivated by moral reasons to act in a better way—was strained under the circumstances; not necessarily because they were insane or in some way not really acting at all, but rather because they acted under limitations or hardships that made moral action difficult. People are subject to a wide range of cognitive, emotional, and psychological traits over which they have, at best, only limited control, even when their behavior satisfies minimal standards of rationality. Fear and anger, a desire to fit in, impulse control, and a lack of attention to long-term consequences can make it difficult for a person to act morally, without making it the case that they do not act at all, or that what they did was not wrong.

Kelly concludes, plausibly in my view, that recognizing that people are limited, or have faced challenges that make morality difficult, should lead us to question the appropriateness of blame in some cases. At the very least, such cases indicate that blame is not inevitably morally required.

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18. See Erin Kelly, *The Limits of Blame: Rethinking Punishment and Responsibility* (Harvard University Press, forthcoming), chs. 2–4. See also Nicola Lacey and Hanna Pickard, "From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm," *Oxford Journal Of Legal Studies* 33(1) (2013): 1–29 (discussing "clinical model" of responsibility, which both emphasizes a person's choices and control over her conduct, while forgoing "affective blame" in favor of "concern, respect and compassion").

Responsible wrongdoing can be addressed through a variety of non-retributive responses—disappointment, sadness, sympathy, or compassion, for instance—that do not amount to taking an objectivizing, condescending, or otherwise non-agential attitude toward the wrongdoer. These responses take seriously, Kelly has pointed out, that the person at whom they are addressed is responsible for wronging another. Responses that stop short of resentment or blame can be grounded on an appreciation that although a person could have chosen differently than she did, doing so would have been unusually difficult for her. Under those circumstances, we can acknowledge her responsibility for the wrong without blaming or condemning her for it. Kelly's argument lends support to my claim that, in choosing between *schools, now* and *prisons, later*, we are not choosing between ignoring versus respecting responsible agency. Rather, we are choosing between two different ways of respecting responsible agency. We are choosing between strengthening the constitutive elements of responsible agency and resenting people for their choices, including when those choices were made under conditions under which anyone would likely have faltered.[19]

I do not want to give the impression that the main reason people commit crimes is because of their own lack of moral development (nor is this Kelly's view). To the contrary, poverty, social exclusion, and oppression only serve to further complicate the relation between responsibility and resentment. People living under such conditions may well have a claim that justice requires favoring *schools, now* over *prisons, later*. What I draw from Kelly's argument is that, in addition to possible claims of injustice, there are also distinct responsibility-related reasons for opting out of blame. Not because people growing up under conditions of serious deprivation are not responsible agents (surely they are), or because the state lacks standing to punish them given its own injustice (though it might), but rather because consistently choosing to refrain from crime can be particularly difficult for people grappling with impulse control, social exclusion, and other barriers to the effective exercise of responsible agency.

The upshot is that the choice between *schools, now* and *prisons, later* is a responsibility-responsibility trade-off. Indeed, it is entirely possible

19. Judges might address issues of this kind at sentencing. The point I am emphasizing is that the same choice is reflected in social policy more generally. Sentencing discretion is at most a small part of an overall social choice about how public institutions best respect responsible agency. My thanks to Veenu Goswami for discussion on these points.

that non-punitive, preventive means can potentially be superior to punitive ones at fostering responsible agency. Giving people a decent education may better develop responsible agency than blaming, resenting, and punishing them for the bad choices they make. To be sure, punishment ex post might be characterized as respecting responsible agency, whereas ex ante social programming might be characterized as promoting it. But this seems beside the point, which is that in either case we are choosing between different ways of responding to people as responsible agents. Hence, we can doubt whether it is appropriate to resent, blame, or punish someone without calling into question his status as a responsible agent rather than a human-shaped piece of nature, a vector of potential injury to be controlled rather than reasoned with. We can have responsibility without resentment. We should reject the thought that the alternative to retribution is humanitarian detachment, and that the alternative to punitive just deserts is medicalized social hygiene.

7.4 Can the Criminal Law Be Purely Remedial?

Proposals to invest more heavily in early childhood education, youth employment, and other such programs may seem independently attractive. They are ways of managing the social risk of crime that are neither punitive nor Woottonite, and one might concede that we have a variety of reasons to invest in programs of that kind in preference to an exclusively ex post system of punishment, including reasons grounded in democratic equality. But, or so you might think, this does not yet reach the heart of the matter. The fact is that no society has completely eradicated crime, and probably none ever will. That means that there will always be an ex post problem; whatever steps we take to minimize it, there will always be crime. And what are we supposed to do about it once it *does* happen? Surely, the fact that A has culpably victimized B requires a public, and indeed, punitive, response.[20]

Call this the purely remedial thesis, or the PRT for short. The PRT amounts to this: if someone commits a crime, then we are morally called upon to respond to that person with blame, resentment, or punishment. Since this proposition is conditional on a crime being committed,

20. See Andreas von Hirsch, *Deserved Criminal Sentences* (Bloomsbury 2017), 122–25.

it is entirely consistent with favoring policies that prevent crimes from occurring in the first place. This is why it is purely remedial. It does not tell us that the only thing we ought to do about crime is punish it. Rather, it tells us that we have a distinctive kind of reason to respond to crimes once they have happened, whether through punishment or some other blaming response.

What is the nature of that reason? There are many possible answers to that question, but one influential line of thought goes as follows: one might argue, in a Strawsonian spirit, that to *be* a responsible agent is to be *treated* as one. To treat someone as a responsible agent consists, in part, in responding to wrongdoing with a demand for justification, and with resentment, condemnation, even punishment, if the justification falls short. After all, one way of disregarding someone's status as a responsible agent is to replace resentment with pity. Pity can be more degrading than resentment; it is certainly more condescending.[21]

Half a century ago, Herbert Morris made a similar argument. He claimed that to treat a human as a person requires "permit[ting] the person to make the choices that will determine what happens to him," as well as formulating responses that "are responses respecting the person's choices."[22] In a similar spirit, Stephen Morse once defended a "law and order" approach to crime over a "social justice" approach on the ground that "poor criminals can and should be held accountable for law violations."[23] For this reason, Morse suggested limiting the range of "nonresponsibility defenses" in order to "make clear to individuals that society views them as responsible persons who are in control of their lives and who are accountable for their actions." To treat people otherwise, Morse concluded, "is to treat them as less than human."[24] A similar thought also seems to underpin Alexander and Ferzan's claim that respecting your ability to obey the law entails blaming and punishing you when you do not. Von Hirsch's "censure" theory similarly stresses punishment's role in "addressing the

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21. See Michael Moore, "Causation and the Excuses," *California Law Review* 73 (1985): 1091–149 at 1145–47 (comparing our sympathy for disadvantaged offenders to the optical illusion of a stick bent in water, and suggesting that those attitudes are based on "elitism" and "condescension").

22. "Persons and Punishment," *Monist* 52(4) (1968): 475–501 at 492.

23. Stephen Morse, "The Twilight of Welfare Criminology: A Reply to Judge Bazelon," *Southern California Law Review* 49 (1976): 1247–68 at 1265.

24. Morse, "Twilight of Welfare Criminology," 1267–68.

offender as a moral agent," as a "person capable . . . of evaluating the propriety of his conduct."[25] Finally, Duff has recently suggested that wrongdoers have a categorical "right to be prosecuted," on the ground that prosecuting someone "is to address her as a responsible member of the political community": responsibility positively requires calling wrongdoers to account through the criminal process.[26]

What does the PRT suggest for the choice between *schools, now* and *prisons, later*? As I have stressed, it is surely not the case that you need early childhood education or a summer job to qualify as a responsible agent. Hence, one might argue, regardless of whether we invest in *schools, now*, we always still have reason to invest in *prisons, later*. No matter what we do, some people will commit crimes. Often, those who commit crimes will be responsible for doing so. Under the PRT, we consequently have reason to set up a social institution of blame and punishment to deal with those cases. But, one might suggest, this is not so troubling: the state has lots of reasons to do lots of different things. Perhaps it should *also* invest in preventing crime ex ante. All that the PRT claims is that for the crime that does happen, blame and punishment are appropriate. What is troubling about this? Some degree of investment in punishment does not seem obviously out of line.

The idea that the criminal law can be purely remedial in orientation may go some way toward accounting for the overwhelmingly individualistic orientation of normative criminal law theorizing. A preoccupation with responding to crimes after they happen is, ultimately, a preoccupation with responding to discrete actions by particular individuals. If you are only concerned with responding to bad acts after they occur, the moral sentiments that those bad acts engender—directed at specific, discrete individuals—will naturally take center stage, rather than more abstract concerns about social policy. How public institutions should manage the risk of crime in the aggregate is just a different type of question: institutional and forward-looking, rather than individualistic and backward-looking. Early childhood education, summer employment, rectification of background injustice, and so forth: all great ideas, you might say. But they have nothing to do with *criminal law*. Criminal law is, by definition, a matter of responding to wrongs after they occur. Hence, the PRT

25. von Hirsch, *Deserved Criminal Sentences*, 18; and ch. 3 generally.

26. Antony Duff, *The Realm of Criminal Law* (Oxford University Press 2018), 211.

underwrites a very traditional understanding of the difference between criminal law and criminal justice policy. As Farmer once put it, "[t]o the criminal lawyer, the question of enforcement is seen as something beyond the law, to be carried out by agencies and institutions of criminal justice. The law stands above and beyond the sphere of public debate and policy."[27] From this (the traditional) point of view, the criminal law is an "autonomous philosophical system," for which moral philosophy provides "the only legitimate mode of analysis."[28]

But if the PRT is to be more than just definitional fiat, it must do more than provide a plausible account of the kind of reason that we collectively have to respond to actualized wrongdoing with blame and punishment. It must also explain how that reason relates to the other things we have reason to want public institutions to do. Backward-facing, retributive theories of punishment have mostly focused on the first issue: explaining, for instance, why we have reason to call wrongdoers to account, to censure them, and perhaps to express that censure through punishment. But we should also inquire into the second issue: assuming that we do have a good reason to respond to instances of culpable wrongdoing with blame and punishment, how does that reason relate to the other reasons that apply to public institutions?

It is important to first clarify what it would take to vindicate the PRT. There are two possibilities here. One is very robust, and the other very weak. If responding to actualized wrongdoing with blame and punishment is constitutive of responsible agency, then the PRT provides an overwhelmingly strong reason for setting up a system of prosecutions and punishment, given how central responsible agency is to our sense of ourselves. (Duff, recall, defends a *categorical* obligation to prosecute.) Hence, on this interpretation, the PRT says that we fail to treat people as responsible agents unless we blame and punish them for their culpable wrongdoing. It does not say that we should blame and punish them unless we have some other, better, use for the time, energy, and resources that doing so would consume. Conversely, if that were all it said, then the significance of the PRT would be greatly diminished. It would amount to the claim that blaming and punishing culpable wrongdoing is of *some* positive value.

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27. Lindsay Farmer, *Criminal Law, Tradition and Legal Order* (Cambridge University Press 2005), 8. See also Ramsay, "Responsible Subject as Citizen."

28. Farmer, *Criminal Law, Tradition and Legal Order,* 7–8.

That version of the PRT would be entirely consistent with never punishing anyone for anything. Perhaps there are more important things for the state to expend its limited time and resources on. Other activities might be of much greater value than punishing people—for instance, educating them, providing them with healthcare, building subways, and so forth. Interpreted in this way, the PRT boils down to the claim that censuring and punishing people for their wrongdoing is not entirely without value—plausible, but anodyne. Certainly, it would appear, not strong enough to play a significant load-bearing role in justifying a social institution of censure and punishment.[29]

What makes this second interpretation of the PRT anodyne? Consider three policy regimes: (a) the state fully enforces the criminal law, giving it lexical priority over other public aims; (b) the state partially enforces the criminal law, sometimes preferring the pursuit of other public aims over prosecuting and punishing criminals; and (c) the state never enforces the criminal law, always preferring to pursue other public aims instead. Must a proponent of any of these regimes deny that prosecuting and punishing wrongdoers is of some positive value? No. Even a state that never prosecutes and punishes anyone for anything can acknowledge the value in doing so, but hold that it has other, morally more urgent, aims that take priority. Specifying the PRT in a more concrete way, so that it rules out (c), would require some account of why responding to wrongdoing punitively on this or that occasion takes precedence over other important public aims, and it is hard to see how that can be done without some set of covering principles that adjudicate conflicts between important public aims. Ultimately, then, going beyond an anodyne interpretation of the PRT requires an account of the aims and limits of public power—that is, a theory of justice appropriate to public institutions. However, simply acknowledging a moral connection between responsibility and ex post prosecution and punishment does not on its own determine the content of a theory of justice. Hence,

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29. This is one way of interpreting Duff's discussion of why we might sometimes "do nothing" rather than criminalize: *The Realm of Criminal Law*, 280–82. A yet more anodyne interpretation might be: in deciding whether to prosecute and punish someone we believe to be guilty of a crime, we ought not base our decision on a degrading belief, such as the belief that he (or people *like him*) are incapable of autonomous choice. That interpretation of the PRT is consistent with choosing not to prosecute and punish for other reasons, and is simply an instance of what I described, in Chapter 3, as the anti-subordination principle. My thanks to Mark Dsouza for discussion of this point.

under this interpretation, the PRT is anodyne, and no threat to a fully political conception of criminal law.[30]

In contrast, if we take seriously the categorical rhetoric in which the PRT is typically defended, then the claim is not just that punishing people is of some positive value, but rather that punishing people for their culpable wrongdoing is intrinsic to (constitutive of) treating them as responsible agents. Failing to prosecute and/or punish people for their criminal acts just is to fail to respect them as responsible agents; it is to fail to respond to them in the way as we morally ought to, given that they are responsible agents. Taking seriously the categorical rhetoric in which defenses of the PRT are typically couched suggests, in short, that prosecuting and punishing wrongdoers is in an important sense non-optional. It is sufficiently weighty that we have decisive reason to set up public institutions to adjudicate, blame, and punish people, despite the time, energy, and resources in doing so.

But this interpretation of the PRT faces the inverse problem from the former interpretation. It suggests that our reason to punish culpable wrongdoing is very strong: so strong that it resists being traded off against other costly activities that public institutions may have reason to pursue. (After all, what other priorities could take precedence to treating people as responsible agents?) No matter what other uses we may have for the resources consumed by a system of ex post punishment, taking people seriously as responsible agents positively demands that we allocate those resources toward a system of punishment. Consider what this implies for conditions of scarcity where every dollar spent on prosecution and punishment is a dollar not spent on social welfare. *Schools, now* or *prisons, later*? Rigorism about prosecution and punishment points in an unappealing direction.

Once we appreciate just how strong a claim the PRT actually is, it becomes easier to appreciate why it is so profoundly implausible. My argument begins with a very simple observation, which is that it does not seem to jeopardize your status as a responsible agent if you are clever or lucky enough to get away with committing a crime. There are lots of reasons people might not be held accountable for their crimes. Most of them (insufficient evidence, for instance) do not have anything much to do with whether we consider the perpetrator to be a responsible agent. It

30. My thanks to James Edwards and Simon Palmer for discussion of these points.

is surely relevant to recall that for most crimes, most of the time, people do in fact "get away with it." If it were really true that being a responsible agent requires being called to account and facing blame for every instance of culpable wrongdoing, that would imply that there are an awful lot of people who turn out *not* to be responsible agents because they have never been called to account for some crime they have committed in the past. This seems improbable.

Admittedly, this is a simple-minded thought. On any reasonable interpretation, the PRT does not claim that people who get away with culpable acts are not responsible agents. More plausibly, the claim is: conditional on the authorities having sufficient evidence establishing a person's guilt in a particular case, they should respond with some appropriate form of public blame or punishment.[31]

However, what the simple-minded thought emphasizes is that there is a difference between committing a culpable wrong and being known to have committed a culpable wrong. I have focused on this point because acquiring such knowledge is not costless. It is a function of how much we have invested into investigating crime. But how much *should* we devote to investigating crime? There does not appear to be an obvious answer to that question. We could, for instance, decide to station a police officer on every street corner for the exclusive purpose of gathering evidence of criminal conduct. On the opposite end of the spectrum, we could return to a system of privatized criminal law, in which the burden of investigating and prosecuting crimes is exclusively a matter of private initiative. Would either be a justifiable allocation of resources? That is hard to say in the abstract, but it seems unlikely that it could be decided simply by further analysis of the concept of responsibility. It would seem, among other things, to require some account about what other activities the state should be engaging in, and how much it is worth investing in those activities rather than investigating crime. After all, under conditions of scarcity, investigating crime is ultimately in competition with everything else the state does that consumes resources. That includes investing

31. Arthur Ripstein's position runs along these lines. Ripstein suggests that the state has an obligation to punish all those who it believes to have committed crimes, but also suggests that the state has no determinate obligation to find out who has, in fact, committed a crime. *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press 2009), 320–21. This suggests that the state that investigates and punishes each and every wrong is morally on par with the state that never investigates, and hence never punishes, anyone for anything.

in public education, healthcare, environmental regulation, employment supports, and other programs that promote the development of the emotional, cognitive, and social capacities that underpin responsible agency.[32] There will inevitably be more people who we could hold to account and punish, if only we invested more in law enforcement. But by the same token, there will inevitably be people who, if only we invested more in early childhood education, healthcare, and so forth, could see their capacity for responsible agency improved, perhaps substantially. Insofar as both forms of responding to people as responsible agents consume time, energy, and resources, then the question is which one we should prefer. The PRT provides exactly zero guidance on that question.

Hence, once we interpret the PRT—as we surely must, if we are to avoid the simple-minded objection—as conditional on our acquiring the knowledge that someone has committed a culpable wrong, then we have given up the game. We have conceded that the reason the PRT gives us to punish people for their culpable wrongdoing in fact *is* assessed against the other activities we have reason to collectively pursue. Indeed, unless we are meant to punish every wrongdoer who comes to our attention, it is inevitably the case that sometimes we punish the guilty and sometimes we do not. It seems overwhelmingly plausible that the decision about when to punish is responsive to a wide range of reasons, including those having to do with (for instance) resources, knock-on effects, opportunity costs, and policy priorities. Consequently, the PRT does not support the idea that whatever else we do, we must prosecute and punish wrongdoers whenever we can. That is a contingent question, dependent upon a wide range of other variables.

In short, defenders of the PRT face a dilemma: either it is interpreted robustly, in which case it turns out that responsible agency is jeopardized simply because people often do get away with their crimes, or it is interpreted to accommodate the other claims on public attention and resources, in which case it boils down to the plausible, but uninteresting, claim that punishing people who break the law may be of independent value.[33]

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32. Jonathan Wolff and Avner de-Shalit have argued, persuasively in my view, that setting priorities under conditions of scarcity requires comparing the value of competing goods against each other, rather than placing them in silos of "local justice." See *Disadvantage* (Oxford University Press 2007), ch. 5, especially 94–95.

33. My argument here is similar to Murphy and Nagel's argument that fairness in tax policy is best assessed with respect to the operation of just social institutions, and the kinds of

The intuition underlying the PRT is that, no matter what we do by way of crime prevention, the fact that A has culpably victimized B calls out for a response. However, because blame and punishment are not self-executing, it turns out that it is impossible to cash out that thought in a way that vindicates its allegedly acontextual and pre-emptory claim upon us. Whether we have reason to do anything at all after A culpably victimizes B depends on what else we have reason to do, and the value of pursuing those ends relative to that of holding A accountable. But I have suggested that this is a completely anodyne observation, robbing the PRT of much of its apparent significance. The apparent significance of the PRT was that appeal to responsibility could provide a basis for deciding, at least in some range of important cases, whether public institutions have an obligation to punish. However, once the applicability of the PRT is understood as conditional on the other expectations we might have regarding the priorities of public institutions, it is no longer evident that the PRT can do what we had hoped for it. It fails to explain why responsibility has a specially powerful role in the context of criminal justice policy. Instead, it only provides an account of a type of value that a theory of justice, applicable to public institutions, might or might not treat as urgent under certain conditions. When the value of prosecution and punishment is of such urgency that it takes priority over other public aims, and when the converse, is resolved not by the PRT but by an overarching theory of justice.[34]

To be sure, you might be inclined to defend a theory of justice that gives the PRT greater weight in navigating the *schools, now* and *prisons, later* trade-off than the account I favor. Here, I reiterate that anti-deference is meant to illustrate how one might go about giving normative content

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outcomes they generate, rather than with respect to the alleged baseline of each person's natural right to property in an imagined pre-tax world. Fairness in criminal justice, I have been claiming, is best assessed with respect to the operation of just social institutions rather than with respect to the alleged natural rights of victims to vindication in some imagined pre-politically setup. *The Myth of Ownership* (OUP 2002) esp. 175–6.

34. Alex Sarch has suggested that the PRT might be regarded as part of a rational reconstruction of the criminal law as we know it, rather than as a contribution to a critical morality of criminal justice. The PRT is undoubtedly more plausible if its significance is cabined in this way: the sort of thing that, upon reflection, we are inclined to say about the way we have, more or less, been doing things around these parts. I certainly have no quarrel with rational reconstruction in this sense; my point is only that the PRT is of limited significance when our objective is not rationalizing the status quo but considering its justifiability from the ground up.

to a conception of criminal law as public law. It is not the only possible way, and indeed you may reject anti-deference because you think it gives insufficient weight to holding people's accountable for their poor choices. My claim is that defending that preference requires going beyond punishment's significance to interpersonal morality, and must instead be based upon an account of justice in public institutions.

In Chapter 5, I rejected "subject matter" approaches to the theory of criminalization, on the ground that they sought to treat the criminal law as a moral subsystem whose principles and values are detached from a more general theory of justice applicable to public institutions.[35] The argument I have sketched against the PRT comes to a similar conclusion, although by a different route. A purely remedial approach to punishment, like a subject-matter approach to criminalization, carves out a special morality for the criminal law. Just as one might think that the criminal law has an intrinsic subject matter (pre-justicial wrongs), one might similarly think that it has an intrinsic mode of response (condemnatory punishment). We should resist both of these thoughts. Just as subject-matter approaches to criminalization ignore broader debates about the appropriate uses of state power more generally, a purely remedial conception of punishment suggests that whatever else we do, we *always* have a reason to respond to actualized wrongdoing with prosecution and punishment. However, the significance of that punitive reason should be determined by ordinary principles of political justification, not putatively special principles intrinsic to the criminal law.

7.5 Ex Ante, Ex Post

Although I have been focusing on responsibility-related reasons for endorsing the PRT, there are other reasons as well, which are not related to responsibility. The appeal of the PRT (or something close to it) is sufficiently broad that even legal theorists who are at pains to insist upon the political dimensions of the criminal law have defended it in one or another form. What explains the broad intuitive appeal of the PRT? Here is one possibility: when someone commits a criminal act, we cannot just let that go by without doing *something*, and indeed something punitive in

35. Chapter 5, Sections 5.2–5.3.

nature. That would amount, precisely, to impunity.[36] What this intuition suggests is that my claim that ex post punishment and ex ante prevention are functional substitutes is wrong. There is something that ex post punishment does that ex ante prevention does not. It vindicates our desire to ensure that people do not commit crimes with impunity. The value of ensuring that people do not act with impunity is not limited to those with retributivist inclinations. Even non-retributivists can get behind it.

Consider Duff's suggestion that we think of the criminal law as an authoritative, public statement of our shared civic values. On Duff's depiction, the criminal law is something like a code of conduct for a profession, only instead of applying to people qua doctors or lawyers or architects, it applies to them qua members of a particular polity.[37] That polity will reflect a civil order, constituted out of formal rules, informal expectations, roles, routes of salience, emotional pathways, and so forth. The criminal law helps sustain that civil order by establishing publicly shared values and calling people to account when they act in ways that depart from those values. This is why, on Duff's account, the criminal law is suffused with moral content: it is fundamentally about people giving and asking each other for reasons for what they have done, although—unlike expansive Moorean moralism—the demand for reasons is limited to public wrongs, that is, attacks on a polity's civil order.[38] Unlike most retributivists, for Duff those reasons are socially and culturally conditioned, as they are reasons drawn out of a particular polity's conception of civil order at a particular time, rather than intuited a priori by some recumbent moral philosopher. Nevertheless, for Duff regarding ex post and ex ante measures as functionally equivalent distorts the basic function of ex post response: when someone flouts our shared civic values, we necessarily have reason to call her to account, conveying to her our disappointment at what she did, encouraging her to reform, and reassuring ourselves of our commitment to those values. Ex ante measures may be worthy endeavors too, but they

36. Igor Primoratz, "Punishment as Language," *Philosophy* 64 (1989): 187–205, 200; John Kleinig, "Punishment and Moral Seriousness," *Israel Law Review* 25 (1991): 401–21, 417–18; Jean Hampton, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution," *UCLA Law Review* 39 (1992): 1659–702, 1686–87. For an effective rejoinder, see Nathan Hanna, "Say What? A Critique of Expressive Retributivism," *Law and Philosophy* 27(2) (2008): 123–50.

37. Duff, *The Realm of Criminal Law*, 80–91.

38. Duff, *The Realm of Criminal Law*, 87–88.

cannot discharge this essentially retrospective function. The criminal law, on Duff's account, has a "distinctive function" that cannot be replaced by any other practice that does not "focus on moral wrongdoing."[39]

Malcolm Thorburn has also defended an essentially retrospective account of the criminal law, but on Kantian rather than communitarian grounds. Recall that Thorburn defends a conception of "robust authority," whereby one person is empowered to make rules for another. Thorburn's preferred example is of a parent standing in a relation of robust authority to his minor child: it is the parent's role to make decisions on behalf of the child, setting rules of conduct, ensuring compliance, and punishing willful noncompliance. This last part, punishment, is important to robust authority because willful noncompliance constitutes a challenge (a "direct attack") to the authority's figure status as an authority. Hence, while the authority may seek to prevent disobedience, once it materializes he must be empowered to respond with punishment. Punishing the disobedient child, Thorburn concludes, is necessary to make it the case that the child's disobedience "is no longer a genuine threat to the parent's claim of robust authority over the child."[40] Controversially, Thorburn suggests that his characterization of the parent-child relation also applies to the citizen-state relation—citizens stand to the state as children stand to parents. As a result, when someone commits a crime, punishment is required "in order to vindicate the king's claim of robust authority over the matter."[41]

For both Duff and Thorburn, the criminal law is not merely some generically coercive system for enforcing rules and fostering cooperation. The criminal law is essentially retrospective: calling someone to account for her crime, and imposing condemnatory punishment, are part of the inner morality of the criminal law. Other measures for managing crime may be valuable and worth pursuing, but they cannot be equated with the criminal law. Although Duff and Thorburn have different reasons for thinking so, they would presumably both regard an account of criminal

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39. Duff, *The Realm of Criminal Law*, 151.

40. Malcolm Thorburn, "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 at 21.

41. Thorburn, "Punishment and Public Authority," 25. I share Shachar Eldar's skepticism that "robust authority" is attractive either as an account of the parent-child or of the state-citizen relation: see Eldar, "Criminal Law, Parental Authority and the State," *Criminal Law and Philosophy* (forthcoming 2018), https://doi.org/10.1007/s11572-017-9452-7.

law that fails to accommodate its essentially retrospective character as departing too radically from traditional notions of crime as wrongdoing and punishment as retrospective censure for that wrongdoing. On both Duff and Thoburn's accounts, it is crucial that there is *some* system in place for retrospective punishment; they are comparatively less concerned to adjudicate the degree to which such a system should be relied upon rather than more forward-looking interventions.

There is obviously something to the intuition that crimes cannot go unpunished. Where I part company with Duff and Thorburn is that I do not seek to defend the intuition on its own terms. Rather, I think the intuition can be explained as adaptive along the lines I sketched in Chapter 2: insofar as punishment helps sustain cooperation, then it is perhaps not so surprising that humans would have come to have developed quick, emotionally-laden blaming and punitive responses when confronted with antisocial, norm-violating conduct, particularly when it comes from another group member with whom further cooperation might otherwise have been expected.[42] I have argued that the basic function of enforcing legal rules is to stabilize broad social cooperation over the long haul. If people observe deliberate rule violations repeatedly going unpunished, it will seem less and less rational to comply with the rule, at least when compliance involves costs of any kind. Reaffirming the authority of the law is, on this account, a matter of ensuring the stability of a particular type of cooperative endeavor, namely organized social life under legally constituted institutions. It would impair the cooperation-reinforcing role of law if it is widely perceived that people can defect without consequence. From this point of view, the value of the criminal law lies largely in its status as a body of authoritative, public statements about socially agreed conduct rules. To be authoritative, those rules obviously need to be enforced when they are flouted, at least to some suitable degree of probability.

Although a public law conception of criminal law is centrally concerned with a forward-looking account of what the criminal law does for people—enabling sustained social cooperation—this does not require ignoring the significance of the expressive function of the criminal law in announcing binding conduct rules and condemning deliberate violations.

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42. The adaptive significance of the retributive sentiments is by now a familiar theme in social psychology. For accessible overviews, see Jonathan Haidt in *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (Pantheon 2012), and Willem van Prooijen, *The Moral Punishment Instinct* (Oxford University Press 2018).

Indeed, precisely because the criminal law is able to sustain cooperation over the long haul by publicly establishing rules of conduct that are widely regarded to be legitimate, the criminal law's expressive function is likely to be of crucial importance.[43] To this degree, the idea that some system of ex post punishment is a stable feature of legal systems is quite plausible. This is not, however based upon an abstract conception of civic order or the political authority. Rather, it is based upon a judgment about what, given humans as they are, and social conditions as they are likely to be, is required to sustain ongoing social cooperation. There is indeed value in responding to deliberate rule-violations, perhaps by communicating censure and imposing punishment. However, this value is not distinct from the prospective value of social cooperation. To the contrary, the urge to condemn and punish those who do wrong is itself grounded in its ability to sustain social cooperation. Seen from an "internal" point of view, punishment looks fundamentally different from prevention. Seen functionally, however, ex post is ex ante: they differ in their means, not in their ends.[44]

As it happens, there is evidence that ex post punishment and ex ante prevention are indeed functional substitutes, in that less of one can be made up for by more of another. Criminologists have found evidence suggesting that there is an inverse relationship between spending on social welfare and punishment: states that spend less on the former tend to spend more on the latter.[45] In addition, there is evidence to suggest that people are more likely to comply with rules when they regard those rules as legitimate.[46] More generally, it seems likely that social cooperation is

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43. What I have in mind here by "expressive" is the criminal law's function in, as Sugden puts it, making salient certain conventions of reciprocity that have come to command broad adherence in a given society, and for which people are prepared to endure some level of sacrifice in order to punish defectors. See Robert Sugden, *The Economics of Rights, Co-operation and Welfare* (Palgrave Macmillan 2004), ch. 8.

44. My difference from Duff on this point flows out of differing objectives: Duff's aim is to provide a "rational reconstruction" of the criminal law. My aim is to provide an evaluative framework appropriate for our existing institutions. See Duff, *The Realm of Criminal Law*, 11–13.

45. See Tapio Lappi-Seppälä, "Trust, Welfare and Political Culture: Explaining Differences in National Penal Policies," *Crime and Justice* 37(1) (2008): 313–87 at 356 (finding an inverse relation between spending on social welfare and imprisonment); Katherine Beckett and Bruce Western, "Governing Social Marginality," *Punishment & Society* 3(1) (2001): 43–59 (finding similar results across American states).

46. Tom Tyler, *Why People Obey Law* (Princeton University Press 2006).

more stable the more those subject to the justice system believe that it will protect their interests and resolve their disputes fairly, providing them with a compelling reason to forgo self-help. It may also be the case that stable cooperation requires the law to not depart too notably from the principles and values that are broadly understood, in that society, to be worthy of support.[47]

A public law conception can, to this extent, vindicate Duff's concern that the criminal law should reflect widely shared social values, and should be used in ways that garner the respect of polity members. It is also consistent with Thorburn's suggestion that we have a reason to care about responding to actualized rule violations, and that this reason has to do with the stability of public authority. What it cannot vindicate, however, is a freestanding moral obligation—one untethered to a more comprehensive account of public law, and social cooperation more generally—to punish wrongdoers once they have become wrongdoers. Our reason for responding to actualized crimes with condemnatory punishment are not distinct from our reasons for seeking to prevent people from committing those acts in the first place: they make it harder to achieve the ends that public institutions (and social cooperation more generally) ought to achieve.

You might think that this has all been far too abstract and is of little consequence for "real world" criminal justice. If you are tempted by this thought, consider James Forman's account of the ballot initiative that instituted mandatory minimum sentences for drug and gun offenses in Washington, DC.[48] Forman observes that although they disagreed about whether harsh mandatory minimums would stem the tide of drugs and violence, no one thought to inquire whether drug and gun crime was, in effect, a criminal law problem rather than (say) a public health or public education or labor market problem. Why not? The PRT suggests an answer: if crimes such as trafficking in drugs and guns violate a community's civic values, and if they flout the legal system's authority to make rules for citizens, then we should respond with ex post sanction. To do otherwise would be to ignore our civic values and undermine the law's authority. Responding to crime with public health initiatives rather than punishment amounts to ignoring our civic values and undermining respect for

47. See Paul Robinson, "Empirical Desert," in *Criminal Law Conversations*, ed. Paul Robinson, Stephen Garvey and Kimberly Kessler Ferzan (Oxford University Press 2009), 29–38.

48. Forman, *Locking Up Our Own*, ch. 4.

the authority of the law. So, the only real question is how much to punish, not whether to punish. That is what it takes to "re-establish the principle that men are accountable for what they do."[49]

Of course, this is just one example of a familiar phenomenon, in which familiar labels ("health," "crime," "education") create policy silos that are then guarded by dense thickets of conceptual analysis pertaining to the meaning of those terms. If we take for granted that crime is a problem for the criminal law—that those who violate widely shared values must be held to account through some condemnatory, punitive process—we will tend to ignore the other possibilities that are open to modern administrative states for heading off crime by addressing its underlying causes. This is unfortunate, as modern administrative states create new, and more sophisticated, means of addressing crime and victimization that do not, in the final analysis, boil down to pounding on conduct that angers us. Traditional legal categories—tort, crime, regulation—should either keep up or get out of the way.

7.6 Responsibility and Fair Distribution

I have argued that a robustly egalitarian attitude toward the criminal law does not depend on skepticism about individual responsibility. Preventing crimes ex ante is desirable on both egalitarian and responsibility-promoting grounds. We might forgo blaming and punishing people who commit crimes not because we view them from a condescending and objectifying moral perspective, but because we consider investment in social welfare to be morally more urgent than blaming them for their transgressions. We would have good reason to regard ex ante measures as more urgent if the evidence suggests that they prevent crime by building, rather than impairing, effective access to central capability.

However, the suspicion that equality and responsibility are at odds with each other in the criminal law might have a different source. Taking responsibility seriously, you might think, is not just a matter of responding to people in a certain way when they wrong others. Taking responsibility seriously also requires according guilt and innocence an important role in the distribution of harm. Those who are guilty of aggressing against

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49. Platform statement of the 1968 Republican Party (Nixon versus Humphrey); cited in Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Harvard University Press 2016), 139.

others should bear the costs of repelling their criminal acts, not those who are innocent, and especially not their innocent would-be victims. Hence, taking responsibility seriously entails accepting a non-egalitarian distributive principle for punishment.

The moral significance of guilt in the distribution of harm seems deeply entrenched. For one thing, it seems to lie at the heart of self-defense. Suppose A culpably attacks B. B can repel A's attack, but only by imposing a proportionate harm on A. May B do so? Plausibly, she may. But this judgment is not grounded on an idea of political equality. After all, B may repel A's attack regardless of whether they are equals. Rather, the judgment that B may defend herself seems to be grounded on the principle that it is fairer for harms to fall on aggressors (especially, if not only, culpable aggressors) than on innocent victims.[50]

This line of thought can be traced back at least to Locke. Locke suggested that it is a "fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred."[51] More recently, Daniel Farrell has made a similar argument.[52] Farrell defends a non-retributive theory of punishment grounded on a right to self-defense, the idea being, roughly, that if B may permissibly shift the harm onto A, then she may also permissibly warn A that she will do so if A attacks her. Perhaps an intuition along these lines underlies Tadros's "duty" account of punishment, whereby those who wrongfully attack others acquire a duty to make themselves available to protect others going forward.[53] Why shouldn't the harm lie where it falls? Because, one might think, it seems more equitable to shift it onto the shoulders of those who culpably create the danger in the first place.

Is the Lockean principle plausible? It seems to me that it is. In any case, it is so deeply entrenched that a theory that denies it is unlikely to win much support. Hence, it is incumbent on me to explain how it can be

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50. See J.J. Thomson, "Self-Defense," *Philosophy & Public Affairs* 20(4) (1991): 283–310.

51. John Locke, *The Second Treatise of Government*, ch. III, s. 16, Peter Laslett, ed. (Cambridge University Press 1988).

52. Daniel M. Farrell, "Deterrence and the Just Distribution of Harm," *Social Philosophy and Policy* 12(2) (1995): 220–40; see also Farell, "The Justification of General Deterrence," *Philosophical Review* 94(3) (1985): 367–94 at 378–80; Warren Quinn, "The Right to Threaten and the Right to Punish," *Philosophy & Public Affairs* 14(4) (1985): 327–73.

53. Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford University Press 2011); see also Erin Kelly, "Criminal Justice Without Retribution," *Journal of Philosophy* 106(8) (2009): 440–62, 449.

accommodated within the framework of anti-deference—and, in particular, how it can be consistent with the principle of inclusive aggregation.

The first step is to highlight Locke's (other) proviso, namely that the safety of the innocent is to be preferred "when all cannot be preserved." One might interpret that proviso strictly, as a necessary condition: the rights of the innocent take precedence over the rights of the guilty *only* when it is impossible to protect the rights of all. Does this interpretation of the Lockean principle unsettle popular intuitions about self-defense? It seems to me that it does not. Suppose that when A attacks B, C could intervene and stop A's attack without causing harm to anyone. How should we rank possible outcomes? Perhaps: that no one is harmed is preferable to A being harmed, which is preferable to B being harmed. Defensive harming is permissible, but it is a second-best to alternatives that do not harm anyone, including culpable aggressors.[54]

Understood in this way, however, the Lockean principle is rather less damaging to an egalitarian theory of criminal law than it might appear. The moral position of public institutions parallels that of C, the good Samaritan in my example. They are in a position to intervene to prevent harm from materializing in the first place. Arguably, preventing foreseeable harms is part of the basic morality of the social welfare state. Public institutions in developed administrative states have a wide range of options for mitigating the risk of criminal victimization that go beyond threatening and imposing punishment on people who hurt other people. Preventive policing is only the most obvious example. More importantly, social welfare states minimize the risk of criminal victimization by creating universal access to education, employment, and healthcare, each of which may be expected to have a negative impact on criminal offending. This is obviously not the *only* reason to invest in such programs, but it is enough that it is *a* reason.[55]

Recall *DeShaney*, in which the Supreme Court rejected a claim by a boy's mother that the state's child protective services failed to adequately protect the boy from his abusive father. The petitioner's claim was grounded on the idea that public institutions have a duty to protect. Insofar as the state could have intervened without harming anyone—for instance, by

54. See Pereboom, *Living Without Free Will*, 172–73.

55. Nathan Hanna has similarly emphasized the importance of non-punitive alternatives: "Facing the Consequences," *Criminal Law & Philosophy* 8(3) (2014): 589–604.

removing the boy from the custody of his father—it was under an obligation to do so. This obligation was not defeated by the observation that the younger DeShaney, or a guardian acting in his stead, might have been justified in violently repelling the elder DeShaney's attacks. The permissibility of harming another in self-defense does not remove an obligation on the part of public institutions to prevent harm to anyone and everyone. Had the Supreme Court agreed, perhaps it would have said that when the interests of all can be preserved, the state has an obligation to do so; it cannot leave it to the victim to exercise self-defense—if he can.

Suppose that accepting the Lockean principle means that we can justify a system of public law that informs people that they can expect to be punished if they victimize others as a form of social self-defense. Is that consistent with the egalitarian approach to criminal justice that I have been proposing? Yes. I do not suggest that the criminal law must be abolished on grounds of equality. I suggest, rather, that we should limit its use to circumstances in which no less destructive means of safeguarding the public interest will do. In those cases, those who are punished do not have a complaint that they are being treated unfairly, for any other alternative would be worse from the point of view of protection of everyone's basic rights and interests. If it is the case that we cannot prevent harm from falling on someone, it may well be more equitable to shift that harm onto the shoulders of those who create the danger in the first place. Doing so, however, remains a second-best; second, in particular, to a system of institutions and policies that protect *each* person's effective access to central capability. But this is just what the Lockean principle, strictly interpreted, itself suggests. Otherwise put, the principle of inclusive aggregation is one of equal *consideration*, not of equal *treatment*. Anti-deference insists that the state's obligation to impartially weigh each person's rights and interests is not defeated or cancelled in cases where one party acts wrongfully. That is entirely consistent with the thought that it is permissible to create a system of legal rules enforced by ex post punishment when no alternative better protects effective access to central capability for all. Ex post punishment remains an option, but it is a last resort, just as the Lockean proviso suggests.

I have suggested that, strictly construed, the Lockean principle is consistent with a strong preference for ex ante prevention on the part of public institutions over ex post punishment of the guilty. But you may think that there is an important disanalogy here. Ex ante prevention is costly. Providing schools, healthcare, nutrition, policing, and so forth is

expensive, and that expense is drawn out of general revenue. In effect, what it amounts to is requiring potential victims to purchase insurance from wrongful attacks by others. If you are drawn to this thought, you might think that the better illustration of the Lockean principle is not the case in which C intervenes and stops A's attack at no cost to B. The better illustration, you might think, is a case in which B could effectively and proportionately repel A's attack *either* by breaking A's leg *or* by taking one step to the right. Suppose B can break A's leg by pushing a button, so doing so comes at no cost to her. On the other hand, taking one step to the right, while not a heavy cost, is not nothing either. (Maybe B particularly enjoys the view from where she is standing.)

Would B have something to answer for if she chose to break A's leg under those circumstances? I think she would. Perhaps, however, you think that victims are not obligated to have any particular preferences about what they do to aggressors, so long as what they do is not excessive. You might think that requiring B to step aside amounts to allowing wrongdoers to inflict minor harms on victims for no good reason.

I think we should reject this austere position.[56] Even the innocent are obligated to accept some level of cost if doing so is required to prevent significantly more serious costs falling on others. First, as I have been emphasizing, a publicly administered scheme of punishment also consumes collective resources, so it's not as if we can avoid imposing costs on innocent third parties simply by focusing on punishment rather than social programming. Second, one of the basic functions of the social welfare state is to spread the cost of insuring people against risks of various kinds. As Rawls put it, part of the effect of public institutions in the social welfare state is to make it the case that we share in each other's fate, rather than simply leaving the costs to fall where they may. The principle that innocent victims cannot be asked to bear *any* portion of the social costs created by the wrongful criminal acts of others thus stands in significant tension with the basic terms of the social welfare state.

For these reasons, I would not interpret the Lockean principle to entail that potential victims can never be expected to contribute to the costs of their protection.[57] Indeed, if anything, it is the refusal to contribute that is more likely to generate relationships of inequality. Less investment ex ante

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56. Though see Farrell "The Justification of General Deterrence," 389–90.

57. For a characteristically thoughtful treatment of these issues, see Victor Tadros, "Criminalization and Regulation," in *The Boundaries of the Criminal Law*, ed. R.A. Duff,

means more investment ex post; and, unlike measures funded through general revenue, the costs of criminal law enforcement are highly concentrated on discrete individuals.

What might seem controversial about this claim is that, unlike the risk that you will come down with a debilitating disease, be injured on the job, or be born with a serious disability, criminal acts are voluntary actions. By and large, people commit crimes out of choice, rather than compulsion, insanity, or mistake. Hence, assimilating criminal justice policy to social welfare policy might seem to lead back to the Woottonite thought that people are not really responsible for what they do, and are instead merely vectors of social harm to be managed rather than agents responsible for their choices. For the reasons I have sketched in this chapter, that suspicion is unfounded. Taking responsibility seriously does not uniquely require an exclusively ex post punitive response to criminal wrongdoing, much less a retributive exercise in blame and punishment. This is particularly important when ex ante measures do better at fostering the social, emotional, and cognitive capacities that undergird responsible agency. Rather than holding people's feet to the fire for the bad choices they make, it may be that we do better at treating people as responsible agents by helping them to make better choices in the first place. And it may be that egalitarian principles lead us to collectively bear the costs of doing so, rather than offloading those costs entirely onto the shoulders of people who are caught committing crimes. Just as egalitarian principles support economic redistribution, they also support incurring shared social costs to ensure that people are not abandoned to lives marked by crime, punishment, and social exclusion.

Of course, one could question whether we have reason to endorse social welfare states and the collectivization of risk. While I have been offering an egalitarian interpretation of that function, I have not endeavored to justify the social welfare state from the ground up. At most, I can point to familiar types of argument: perhaps asking potential victims (that is, everyone) to bear part of the costs associated with managing the risk posed by potential criminals (again: everyone) has something to do with the idea that whether one turns out to be a victim or a criminal is largely arbitrary from a moral point of view. Not because people do not choose to commit crimes out of their own volition, but because the factors that bear on whether one

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Lindsay Farmer, S.E. Marshall, Massimo Renzo, and Victor Tadros (Oxford University Press 2010), 163–91.

will make that choice at some point in one's life are to a very significant degree not factors for which individuals are morally answerable.[58] Seen in this light, responsibility for establishing the social conditions under which people decide whether to commit criminal acts, like responsibility for protecting people from those criminal acts, is broadly shared. That said, I shall not try to convince you to accept the basic legitimacy of social welfare states if you are skeptical. My aim is to show how criminal law and criminal justice are accountable to a fully political standard of justification, not to provide a ground-up defense of the social welfare state.

7.7 Conclusion

Conditioning your access to the basic rights and prerogatives of civic membership upon an estimation of your moral worth would be an affront to widely shared liberal political values. For liberals, your right to vote, run for office, or express yourself freely, as with more tangible rights, such as social security benefits, a hospital bed, or a seat in a classroom, should not be contingent upon convincing some bureaucrat that you are morally deserving of that right. Yet the criminal law often has a direct and substantial impact on those very same rights and prerogatives. When you are convicted of a crime, important public institutions—landlords, employers, and schools, for instance—are allowed to discriminate against you. In many parts of the United States, you are stripped of the franchise, sometimes permanently. More to the point, when you are charged with a crime your very liberty is at stake. If liberals balk at making the rights and prerogatives of civic membership turn upon an official's opinion about your moral worth, how could it be appropriate to give that very same kind of judgment such weight in the criminal law? If we are resistant to giving responsibility and desert a central role in our political philosophy, why should we be so drawn to giving those concepts such a central role in our thinking about the criminal law? The political morality of the social welfare state is grounded on a sense of basic equality. Why, then, should the morality of the criminal law be so insistently individualistic?

In this chapter, I have explored three possible answers to that question. Taking responsibility seriously implies respecting the choices people make,

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58. See Sharon Dolovich, "Legitimate Punishment in Liberal Democracy," *Buffalo Criminal Law Review* 7(2) (2004): 307–442 at 369–74; and Matt 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), 67–82 at 72–79, especially 78–79.

even when they are poor ones. That seems, in turn, to suggest that when people engage in conduct that is ill-considered, culpable, or blameworthy, we have reason to blame and punish them for doing so. We have reason to punish regardless of whether we also have reason to invest in ex ante prevention. Moreover, taking responsibility seriously means allowing that when people choose to commit criminal acts, they choose to make themselves liable to defensive harms that they would not otherwise have been liable to. In the context of the criminal law, taking responsibility seriously thus means marginalizing other important political values, such as equality. As a result, the criminal law proper is not a public institution like other public institutions. Other institutions may be evaluated in light of distributive justice, democratic equality, or other political virtues. But the criminal law is structured by individual responsibility and desert in a way those other institutions are not.

I have argued that we should reject all of these arguments. As Kelly has urged, many people find morality occasionally challenging for reasons that would make it challenging for pretty much anyone, including reasons having to do with one's emotional makeup, social exclusion, cognitive impairment, peer pressure, or a history of abuse and/or humiliation by intimates or authorities. Under these conditions, a blaming reaction seems particularly inappropriate.[59] Moreover, blame and punishment are in any case not required as part of treating people as responsible agents: investments in strengthening the capacity for responsible agency ex ante may legitimately substitute for ex post punishment. Indeed, taking responsibility (or authority) seriously does not require any particular level of investment in ex post punishment as against ex ante prevention. Public institutions respect people's choices by investing in the social conditions under which the capacity to choose is nurtured and developed. Finally, acknowledging that people can render themselves liable to defensive harm through their wrongful acts does not entail discounting the rights and interests of the guilty relative to those of the innocent.

In sum: the egalitarian's insistence that a person's status as an equal is not waived by crime does not imply skepticism about responsibility. There is no deep tension between equality and responsibility in the criminal law. We can treat people as responsible agents while also treating them as equals. Indeed, we can treat them as responsible agents precisely *by* treating them as equals.

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59. See Kelly, *Limits of Blame*, ch. 3.