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ARTICLE



Is blame warranted in applying justice?

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ABSTRACT

The belief that people convicted of crimes deserve punishment is commonplace. Yet the punitive conception of individual responsibility commonly associated with 'just deserts' exaggerates the moral meaning of criminal guilt, normalizes excessive punishment, and distracts from shared responsibility for social injustice. The problem is, many people who get caught up in the criminal justice system cannot reasonably be thought to deserve their fate. Mental illness, intellectual disability, addiction, trauma, and poverty are morally mitigating factors when it comes to assessing how *blameworthy* a person is for criminal behavior. But with the exception of extreme forms of mental illness that fall into the very narrow legal category of 'insanity,' people who struggle with serious difficulties are not treated as less blameworthy by the criminal justice system. The criteria of legal guilt does not match up well with the moral concept of *blameworthiness*.

The solution might seem to be somehow to refine legal practice to make blame more context-sensitive, but I argue that rather than try to revise our criminal justice practices to fit better with common notions of blame and desert, we should get out of the public blaming business altogether. A determination morally to condemn individual offenders is not helping us to resolve the disaster of mass incarceration or the problems faced by returning citizens. It does not help us to see clearly the connection between crime and other problems of social injustice, like poverty, lack of mental health care, drug addiction, racial discrimination, and violence. Were we to be less fixated on individual responsibility, and more cognizant of our shared responsibility to treat all members of society as equal persons, entitled to the same basic rights, liberties, and opportunities, we might be in a better position to work collectively to address problems of social injustice that contribute to the problem of crime.

KEYWORDS Blame; punishment; retribution; justice; law

Punishment as public blame

The Thirteenth Amendment of the U.S. constitution prohibits slavery and involuntary servitude, except as punishment for a crime. It is also not illegal for incarcerated and formerly incarcerated people to be stigmatized as dishonored and contemptible. In fact, this contempt plays out in many ways – through the brutal conditions of incarceration, including the punitive use of

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solitary confinement, sometimes for years at a stretch, draconian sentences that include life without parole, the lack of programming or support for the reintegration of former inmates into society, felon disenfranchisement, legal discrimination against formerly incarcerated persons, and the retraction of other rights and entitlements normally associated with citizenship.

For example, according to a 7 February 2020 article in *The Boston Globe*, Prisoners' Legal Services – a nonprofit prisoners' civil rights organization that provides legal assistance to people incarcerated in Massachusetts – is suing the Massachusetts Department of Corrections for its 'collective punishment' of prisoners at the maximum-security Souza-Baranowski Correctional Center. The *Globe* reported that six prisoners, who were subsequently transferred out of the prison, were involved in an assault of three correctional officers on 10 January 2020. In response, the DOC initiated a lockdown of all 1,000 prisoners. Prisoners were locked in their cells for 23.75 hours per day without access to programming, media, legal materials, or writing supplies. They were forced to choose between taking a shower or calling a lawyer, which they could do only if they had memorized their lawyer's phone number.¹

This scenario illustrates moral disregard for incarcerated persons *en masse*, and it is not an aberration. Criminal offenders in the United States are treated as having little, if any, moral standing. Criminal punishment plays out, in some extreme ways, as a public expression of blame and moral condemnation. My book, *The Limits of Blame*, examines the familiar practice of treating criminal justice to involve a kind of blaming behavior.² I argue that this practice goes far beyond the pragmatic need for protection from crime and the moral need publicly to repudiate wrongful acts. It represents a desire for *retribution* that has no good public justification.

I do not think a blaming orientation is responsible for the problem of mass incarceration. Practices of blame and moral condemnation, directed at people who have been convicted of crimes, do not explain why the American criminal justice system is so brutal. To understand that, we must look to a multitude of factors that extend beyond our moral attitudes toward criminal lawbreakers as such – specifically, racial injustice and the demonization of Black men, excessive fear of crime, extreme income and wealth inequality, and other social problems. The dynamics of blame that concern me intersect with those of racial and socioeconomic injustice, but I would not say that the popularity of the retributive sentiments is the driving force behind overincarceration. Nevertheless, I believe the ideal of retributive justice and, more broadly, our society's investment in blaming criminal lawbreakers, serve to rationalize and to sustain the practice of punishment in a way that decreases empathy for people who are caught up in the criminal justice system by maintaining that they deserve to be hurt and cast out. The practice of blaming criminal offenders normalizes punishment, and it does so even when punishment is excessive, as it is in

our criminal justice system. The retributive theory – namely, the view that morally culpable wrongdoers deserve punishment at the hands of the state, whether or not their punishment brings with it any social benefits – is a bad theory of punishment, *especially* under conditions of social injustice.

Of course, any reasonable retributive view would reject excessive punishment. My interest is in how the retributive philosophy, and the notion of blame it depends on, is stretched and misused in our thinking about criminal justice, why reforming our criminal justice practices to better fit a retributive philosophy is not the answer, and what an alternative paradigm of criminal justice might look like. In this paper I attempt to address these questions, albeit in a limited way. The approach I will take is to focus on the bearing social injustice should be thought to have on these matters, since social injustice describes the context within which the distortion that concerns me takes place.

In what follows, I will first outline the retributive theory, its attractions, and some of its shortcomings. Then I will argue that a nonretributive ‘harm reduction’ approach to criminal justice can offer a defensible account of the grounds and limits of justifiable punishment without subscribing to a view of punishment as a form of public blame that should be inflicted on those and only those persons who deserve it.

The retributive theory

Retributivists maintain that justice demands that criminal offenders get the punishment they deserve. Justice demands retribution, and retribution is achieved when morally culpable wrongdoers suffer in proportion to their culpable wrongdoing. The harm punishment inflicts is fitting, according to this theory, provided that offenders morally deserve it. Furthermore, according to many retributive theories, justified punishment expresses blame and condemnation that is required by morality and properly directed toward criminal wrongdoers. I will focus on retributive theories that incorporate this expressive claim about blame and moral condemnation. While the appropriateness of public blame is not, strictly speaking, a requirement of the retributive view, it is affirmed by popular retributive philosophies.³ Indeed, it is hard to imagine a reasonable argument for a retributive conception of criminal justice that does not depend on the blaming function of punishment. Criminal justice, in a society that presents its law as *legitimate*, and especially a society that identifies itself as *democratic*, must involve a public response to criminal wrongdoing that is based on shareable values. Retribution is a kind of public, moral response that is thought by its proponents to meet this standard. Retributivists take the moral position that, in suffering proportional punishment, criminal wrongdoers are getting the

social response they deserve. Retributive punishment is a kind of blaming behavior.

Let me further explain how the practice of blame connects with judgments of moral desert. As I understand it, blame adds something to a judgement of wrongdoing.⁴ What it adds is a negative evaluation and response to a wrongdoer's personhood, character, or will. It marks a change in how we think, feel, or act toward a person who has done wrong, together with the belief that these changes are morally fitting.⁵ For example, in personal life, we might confront a wrongdoer, demand an apology, break off a relationship, or engage in some kind of punitive harming. Blame may involve a variety of critical attitudes, including anger, hatred, pity, or disappointment. These attitudes express blame when they identify a person's moral faults and respond to them disapprovingly in a way that is thought to be morally deserved.

Not all of the condemnatory attitudes associated with blame include a disposition to harm the wrongdoer. Nonretributive philosophies of blame stop short of asserting that wrongdoers deserve to suffer.⁶ But all blaming responses, whether retributive or nonretributive, connect a wrongdoer's personal defects, on the one hand, and some deserved negative response, on the other. What distinguishes retributive philosophies is their insistence that criminal wrongdoers deserve the harm that (proportional) punishment does. Punishment is harmful blaming behavior that is morally deserved solely by virtue of the wrongdoer's moral faults.⁷

Rejecting the retributive theory

I reject retributive justice in favor of a 'harm-reduction' approach to criminal justice for several reasons. First, I find the retributive view unconvincing by its own logic. Legal criteria for determining guilt – which are mostly focused on voluntary behavior without regard to motive, individual psychology, or social context – do not align well with moral criteria of blameworthiness. Many incarcerated people – for example, those who are mentally ill or desperately poor – might not be blameworthy, or as blameworthy, for their criminal acts, even when they are criminally guilty. People who battle inner demons and hopeless social circumstances are held to standards of conduct they understandably have difficulty meeting. Their difficulties might reasonably be thought to mitigate their blameworthiness, yet, with few exceptions, the law does not permit mitigation, nor does it exculpate. For example, the insanity defense covers only extreme cases of cognitive impairment and does not include many serious psychological disorders that impair a person's judgment and self-control, including bi-polar disorder, schizophrenia, and autism. This point holds more generally: legally recognized excuses, including duress and provocation, are considerably narrower than morally

mitigating factors.⁸ The result is that, when we infer moral blameworthiness from criminal guilt, we exaggerate the moral meaning of criminal guilt.⁹

I agree with well-meaning retributivists that a better appreciation of morally mitigating factors could increase empathy for criminal wrongdoers and support criminal justice reform. I am interested in how to cultivate a morally-sensitive understanding of the lives of incarcerated people. But I don't think this means we must invest in judgments of desert that relate these understandings to the retributive theory. This might seem counter-intuitive. Emphasizing the moral relevance of factors that mitigate blameworthiness and desert might seem to imply that the absence of these factors would entail the appropriateness of blame and punishment. But this does not follow. We can reject the retributive theory and, more broadly, blaming accounts of criminal justice, by taking the position that moral blame is not morally required. The absence of mitigation does not entail an imperative to engage in blaming behavior.¹⁰ Retributivists must provide positive reasons to punish the blameworthy as such and this, in my opinion, they have failed to do thus. Proper sensitivity to factors – psychological and social – that make it much more difficult for some persons to abide by the law is appropriate and important but, in my assessment, it does not lead us to the position that the state should be in the business of retributive punishment.

Still, the retributive view has its attractions. In my estimation, there are two appealing features commonly associated with the retributive theory of punishment. The first is that it is wrong to punish the innocent. I agree. It is wrong to punish the innocent, and people who have been wrongfully convicted should be exonerated.¹¹ Yet we don't need to be retributivists to insist that punishing the innocent is unjust. When we say that innocent persons do not deserve punishment, what we are saying is that they have not done anything that would justify our punishment of them. We do not thereby imply anything substantive about what would justify punishment, when it comes to actual lawbreakers. Perhaps penalties should be designed to dissuade them and others from committing crimes, to express our concern for people whose rights have been violated, and to facilitate restitution. These are elements of a *harm-reduction* view, which I believe is more appealing than the retributive view.

The second attractive feature of moral retributivism is the idea that punishment must be *proportionate*. At least this requirement seems attractive, though I will argue that we should revise the relevant notion of proportionality. Retributivists argue that punishment should be scaled according to the severity of a criminal offender's *culpable wrongdoing*. Proportionality, so understood, is a function of two factors: wrongdoing and culpability. Serious crimes warrant harsher punishment and, for any given crime, persons who are more blameworthy should be punished more harshly than those who are less blameworthy. But we may reject the

retributive view without giving up a concern for proportionality. That is because we could reject moral culpability as a basis for punishment without rejecting the relevance of wrongdoing. The idea that punishment should be scaled to reflect the *wrongfulness* of criminal acts should not be equated with the idea that the application of punishment should be proportionate to *blameworthiness*.

As we have seen, the desert-bases of retributive punishment are those personal moral defects that are thought to warrant a blaming response. Blameworthiness is a ‘thick’ person-focused judgement. Wrongdoing, by contrast, is act-focused and relies on only a ‘thin’ sense of personhood. We might think of this thin sense of personhood as a *political* notion of the person, one that is presupposed by the rights and duties of citizenship.¹² It is something like the notion of a minimally rational human being. A presumption of minimal rationality is present in the mental state elements of the legal definition of crimes. A person who commits a crime acts voluntarily and, typically, with intent, knowledge, recklessness, or negligence. Thus, a criminal wrongdoer is supposed to be, in ways reflected by these standards, sensitive to reasons.¹³ This thin notion of reason-sensitivity does not provide anything like a full-blown understanding of a person’s character, motives, or values, but it may be enough to establish that a person is a candidate for guidance by legal norms and punishment for criminal behavior.

A political notion of the person is thin partly because it is important that public standards of right and wrong generalize across a variety of differences circumstances. They must generalize in this way – apply widely and be readily understandable – if they are to play a constructive, action-guiding role in law and public life. To the extent that the use of state coercion to enforce standards of behavior can be justified, enforcement will focus on upholding generalized, action-guiding standards of right and wrong, and it will aim to provide rational persons with incentives to conform their behavior to those standards.¹⁴ The threat of punishment is one aspect of a rule-based, action-guiding system designed to provide people with reasons to comply with the law.

In contrast with generalized standards of right and wrong, and the political notion of the person needed to support those standards, judgments of blameworthiness are more robust, more intertwined with individuals’ particular attributes, and more context sensitive. They concern the moral meaning, within interpersonal life, of a given person’s failure to meet morally reasonable standards of conduct. Blameworthiness concerns the fitness of a person’s character, motives, and values for interpersonal relationships and it directs us toward conclusions about a person’s responsibility for her moral faults. We might say such things as, ‘what she did was unkind and, sadly, that’s who she is. She didn’t have to act that way. She chose to act as she did because she doesn’t have much respect for other people.’

Criteria for assessing blameworthiness are not easily codified. Mitigating factors encompass features of individual psychology (such as the intensity of impulses or the scope and stubbornness of unrealistic thinking) and circumstances (such as pressure from an authority figure) that are relevant to deciding whether we can reasonably expect a wrongdoer to have acted well, that is, to have overcome internal and external obstacles to proper moral judgment, motivation, and action. These are morally subtle matters concerning how strict and demanding standards of personal moral evaluation should be. They are the subject of reasonable disagreement and, for that reason, do not function well as institutional norms. They do not fit well with a notion of law as a set of action-guiding norms justified on the basis of shareable values.

My position is that we should use the criminal justice system, sparingly, to dissuade people from committing certain wrongful acts, but we cannot and should not direct our practices of criminal justice to inflict harm on wrongdoers according to their 'just deserts.' We should reject retributive justice in favor of a 'harm reduction' approach. Harm reduction is a rights-protecting, public-safety rationale that permits us to shift burdens of rights-protection onto people who criminally threaten or violate other people's rights. Considerations of public safety sometimes permit sanctions designed to protect everyone's basic rights by deterring, reforming and, when necessary, incapacitating would-be offenders.¹⁵ A harm reduction approach sometimes authorizes sanctions in response to criminal behavior that we would not be ethically permitted to impose on people who do not threaten or violate other people's rights. Criminal wrongdoing is a necessary condition of eligibility for punishment. Harm reduction tracks serious wrongdoing, but it does not aim to exact retribution. It does not express the idea that offenders are morally blameworthy and deserve to be harmed for their wrongful acts.

These considerations are compatible with sensitivity to a notion of proportionality that tracks the wrongfulness of criminal behavior. We could reject the idea of punishment as a form of blame and retain the idea that punishment should reflect the moral wrongfulness of crime. Harsher punishment for actions that more seriously wrong their victims or, more broadly, harm society, makes sense, if punishment is to be designed to reinforce justifiable action-guiding norms and values. A system of punishment should reflect the values and priorities it is meant to serve. On a nonretributivist harm-reduction approach, we might secure a ranking by severity of crime types that sets limits to punishment for crimes that are less wrongful, even if more punishment would be an effective deterrent. Less serious crimes should not be punished more harshly than more serious crimes.¹⁶

Still, this reasoning, as far as it goes, might not seem adequate. Perhaps a wrongfulness ranking permits punishment that seems undeserved. Why might this be? Well, it could be that a criminal lawbreaker has serious

psychological problems or is otherwise socially disadvantaged – the very conditions that, in practice, challenge a retributive rationale. Is harm reduction sufficiently sensitive to such problems and disadvantages?¹⁷

In order to answer this question, I will explore an argument that emphasizes the *unfairness* of punishing seriously disadvantaged offenders. Acknowledging this unfairness is consistent with the idea that the criminal justice system could do without blame, or so I will argue, since the charge of unfairness does not depend on whether criminal lawbreakers are blameworthy for their actions or whether those who are unfairly punished are less blameworthy (although they may be).

I will proceed in two steps. The first step draws on a distributive justice paradigm to argue that the influence of natural and social contingencies on a person's life-chances implies that the practice of punishment is not publicly justifiable unless it contributes to a distributively just social order. I think this claim is either overlooked or implausibly denied by retributive theories.¹⁸ The second step maintains that punishing people who have not received the benefits of law is unfair. It is unfair even when unjustly disadvantaged criminal lawbreakers act wrongly. A plausible notion of individual criminal accountability depends on a collective commitment to equal citizenship and just background conditions. In making this argument I will show that the unfairness claim can be made without relying on a substantive notion of moral desert.

The natural and social lottery

A just society would be peaceful and mutually beneficial to its members. I begin from this idea because I think social institutions should be designed to bring about and support a cooperative and reciprocally beneficial social order. Relevant here is the notion of justice as an overall condition of society. So understood, justice is a *collective* achievement. It is a virtue of institutions and the public culture, not individual persons. Social institutions – including law, government, an educational system, and the economy – are *just* when they distribute relevant social goods – rights, liberties, opportunities, wealth, and income – in ways that are fair to all of society's members. Each member of society is entitled to the rights, liberties, opportunities, income, and wealth that would enable her to pursue, within reason, her favored life course. Or, to put the point in a different way, each member of society is entitled to a scheme of basic rights, liberties, opportunities, and material goods that is compatible with the equal entitlements of other people.

An influential account of this understanding of justice was developed by John Rawls.¹⁹ The notion of distributive justice he proposed – 'justice as fairness' – contrasts with the idea that justice is a matter of conferring deserved benefits and burdens.²⁰ Rawls argued that justice cannot be

a matter of moral desert, because distributive outcomes depend on many factors we cannot possibly be said to deserve. We don't deserve our birth-place in the social order and the advantages or disadvantages it inevitably confers upon us, nor do we deserve our place in what Rawls referred to as 'the natural lottery.' That is, we don't deserve our natural talents, abilities and disabilities, psychological dispositions, or aptitude for mental and physical health, just as we don't deserve the parents we happen to have, the social class we are born into, or the good or bad luck that befalls us. Yet these factors all influence a person's life chances. They make a difference to how well a person can expect to do in society.

The differences that social position and natural characteristics make to a person's life-chances is most striking in an unjust society, where there are few bounds to the rewards that advantaged members are able to leverage for themselves, and where poverty and subordination curtail even the most hard-working and talented person's opportunities. Yet even in a just society, attributes like intelligence, creativity, beauty, family support, and health, which are at least partly undeserved, will influence the choices a person makes and how well a person can expect to do in the course of his or her life.

Acknowledging this, Rawls concluded that the distribution of rewards for social and natural advantages should not be thought of as a matter of allocating shares in a way that corresponds to desert. He maintained that a distributive scheme should be to the mutual advantage of all members of society, including the least well off. Furthermore, Rawls argued, any inequalities in the distributive scheme should be to the greatest benefit of the least advantaged, when compared to other possible distributive schemes. For example, attaching greater social rewards to some positions, say, positions of leadership and responsibility, is justifiable when the promise of rewards creates incentives for the talented to develop their talents to the benefit of all, including the less talented. We all benefit from good doctors and thoughtful political leaders, and their higher salaries would be justified to the extent (and only to the extent) that the least well-off benefit more from this inequality than they would under a more equal income distribution scheme.

Suppose we accept a broadly Rawlsian paradigm for thinking about distributive justice and agree that all members of society should be guaranteed equal basic rights, liberties, and opportunities, and a level of material wealth and income that, at the very least, makes a decent life possible. What implications, if any, does an account of the distributive requirements of justice have for thinking about individual responsibility in criminal law? Here is a possible line of thought, suggested by Rawls. It is the responsibility of the institutions comprising society's 'basic structure' to distribute goods and opportunities fairly. It is the responsibility of individuals to act well. Institutions and individual persons are each held to relevant standards, for similar reasons.²¹ Institutions should function justly, and when they do not,

they should be reformed. People ought to comply with just laws, and when they do not, sanctions may be used to motivate compliance, repair, and reconciliation. That is, sanctions may be applied to deter criminal lawbreaking and to redress harm done. People who violate their obligations to society should face consequences that are designed to restore a just social order. We might think of this as a notion of 'corrective justice,' though I favor the terminology of 'harm reduction' to emphasize that a just order might never have existed and that criminal justice system could not bring it about on its own. A society with serious criminal disorder cannot be transformed into a just social order without the support of distributively just institutions, which is something I believe Rawls understood clearly.

On a harm reduction approach to criminal justice, individual responsibility is understood in relation to the demands of a just social order. Punishment aims to advance justice, understood as a fair distributive scheme for mutual benefit. Someone who disregards the law and violates another person's rights should be persuaded, through the imposition of negative consequences and incentives to influence behavior, that complying with just law is required by morality and in his or her interest. There is a rationale for the practice of punishment, but it is not to realize an ideal of retributive justice. There is no claim here about the intrinsic value of giving a bad person the suffering he morally deserves. Instead, criminal justice is designed to contribute to an overall just social order, which involves, fundamentally, acknowledging and addressing the basic needs and potentialities of all members of society, including those of the lawbreaker. The success of punishment is measured by whether those who have been punished are less likely to violate society's rules and more likely to contribute constructively to it. The justification of punishment depends on its prospects for success, so understood, provided that the practice of punishment is not unfair to those who suffer it.

The question, then, becomes when it would be unfair to impose punishment on particular individuals and whether we can unpack the idea of unfairness without appealing to the notion of desert in a way that would lead us back to the retributive theory. What ensures that criminal lawbreakers, especially those who are least well-off, are not excessively burdened? Does fairness require sensitivity to blameworthiness and desert? It is possible, though it would be ironic and surprising, for a theory of justice fundamentally concerned with how fairly to manage the influence of natural and social contingencies on a cooperative social scheme to endorse an allocative desert principle when it comes to punishment. It would be surprising even if a desert principle were invoked to correct for the excesses of utilitarianism. If desert plays no fundamental role in the distribution of the fruits of social cooperation, why would it play a fundamental role in the justice of responding to the breakdown of that order? The natural and social contingencies that Rawls emphasizes as factors that contribute to social inequality also figure into

plausible accounts of criminal behavior. What ensures that a harm reduction approach to punishment is sensitive to the ethical significance of these contingencies? To answer that question, let us step back and reflect on when a criminal legal order could plausibly be said to treat the individual subjects of law fairly.

Punishment and social injustice

When the law has democratic authority, our reasons to comply with it come partly from the law's expression of the reciprocal obligations and benefits of political membership. We owe it to one another, as members of a democratic society, to comply with the law as a mutually beneficial, collective scheme. There are a variety of ways to account for the relevant obligation: for example, one theory is contractual, another refers to notions of reciprocity and 'fair play,' another utilizes the idea of a 'joint commitment,' and yet another refers to democratic expressions of equal concern and respect for all citizens.²² I will not attempt to decide between these theories now, as I am more interested in their common thread, with which I am sympathetic. The point of convergence is the idea that democratic institutions constitute a collective scheme that generates reasons worth taking seriously. These reasons stem from the joint political agency and equal standing of democratic citizens – from the status of democratic citizens as co-authors and equal beneficiaries of the law. Furthermore, it is this relationship between citizens that authorizes the state exclusively to enforce the law.

A legitimacy problem for law arises, however, when some people are denied a fair opportunity for a reasonable set of alternatives to criminal behavior.²³ For example, American cities contain de facto racially segregated neighborhoods that include some very poor areas, where opportunities for education and employment are severely truncated, and there is no wealth base. Racially segregated neighborhoods are the result of housing and lending policies deliberately imposed by the government.²⁴ These policies have aimed to achieve not only racial subordination but also wealth inequality, and they have resulted in a significant wealth gap between Black and White Americans as well as a sizable Black underclass.²⁵ Members of the urban underclass are heavily policed and incarcerated at high rates. Their rights and liberties are more frequently violated, whether by state officials, private persons with economic leverage, or other ordinary people. This longstanding mistreatment has helped to produce and sustain the subordinated social standing of Black Americans, especially those who live in Black neighborhoods, and including people who are not poor.²⁶ The disadvantages imposed on marginalized communities curtail the opportunities of their members to increase their political and economic power. The result is stubborn caste-like social stratification.²⁷

The severity of this racialized socioeconomic and political inequality compromises the law as a source of ethical obligation. Because the political, social, and economic standing of socioeconomically disadvantaged people is relatively weak, their obligations to comply with the law are also correspondingly weaker.²⁸ The reasoning for this is as follows: Though members of marginalized groups may benefit from parts of the law, they do not benefit equally. They are not treated as equal citizens. In a society with an oppressed group or groups, citizenship is not a relationship of reciprocal benefit between equals. As Tommie Shelby has argued, this compromises the source of reasons that members of oppressed groups have to comply with the law. When citizenship is not a relationship of reciprocal recognition and benefit, those who are unjustly subordinated do not owe it to their fellow citizens *as such* to respect the law or, at least, their civic obligations to do so are considerably weaker.²⁹ Privileged members of society have reasons to comply with substantively just parts of the law that the disadvantaged, who lack equal political power and social recognition, do not have. The reasons privileged members have that disadvantaged members lack stem from their collective authorization of the law and the status they accord to one another as full members of society, with the rights and liberties that go with equal citizenship. The disadvantaged lack these reasons because they are not included in the relationship of equal membership. Of course, all persons have *moral* reasons not to murder, rape, or rob other people, but these reasons do not come from the law *per se*.³⁰ Despite having moral reasons not to commit criminal wrongs, the disadvantaged lack the collectively generated reasons members of a genuinely democratic society have to recognize legal authority, and this means that imposing punishment on them is unfair. It is unfair to punish the truly disadvantaged for failing to comply with the law as a mutually beneficial, collective scheme when they have not enjoyed the reciprocal benefits of that scheme.³¹

To elaborate: the indignity of incarceration, the stigma of a criminal record, and the social marginalization and exclusion connected to that stigma, are severe burdens to impose on anyone, but especially on persons who have not enjoyed the reciprocal benefits of democratic membership. This is especially true when those on the losing end of social inequality are severely disadvantaged. If punishment is calibrated to increase the justice of the social order, as I have argued it should be, those who bear its burdens can rightfully object if they have not received and are unlikely to enjoy the benefits a punishment system aims to produce. They can rightfully object because they could reasonably reject the political justification of burdens they are forced to bear. If punishment is permissible to enhance the justice of the social order, it must be to the benefit of all, including those who are least well off. Those who are liable to punishment must agree, at least in theory, that liability to punishment for criminal wrongdoing is a reasonable price to pay for the benefits of the protection of law. This means that those who do not fairly

receive law's protections, and do not enjoy the rights and liberties to which they are entitled by law and justice, have reason to reject legal norms of criminal liability. Punishing people who have not received the fundamental benefits of democratic law is *unfair*, even when unjustly disadvantaged criminal lawbreakers act wrongly.³²

The problem of crime itself is connected with the injustice of people not getting what they are entitled to. Poverty, alienation, and unfair treatment, especially when it is group-directed, drive crimes rate up. This reality challenges law's legitimacy. Education, health care, a decent income, a fair share of political power, recognition, and respect are goods we owe to one another. The state's failure to deliver these goods creates social conditions that foster crime. In this way, social injustice represents an absence of political community that damages the state's moral authority to punish. The state's moral authority is compromised by its failure to ensure reasonable opportunities for each of its members to lead a decent, law-abiding life.

We can recognize the unfairness of punishing persons who lose out under conditions of social inequality without aiming to allocate punishment by a measure of individual moral desert. In fact, a retributive approach distorts political reality. The state shares responsibility for the problem of crime and it evades that responsibility when it behaves as though criminal justice is a matter of allocating 'just deserts.' An unjust society should think about crime in more collectivist terms.

Conclusions and loose ends

Harm reduction is not really a punitive philosophy. It might better be described as a set of strategies to acknowledge wrongdoing, to contain destructive behavior, to enable troubled people to manage the problems they have, and to repair the harm their criminal behavior has done. It also directs criminal justice institutions, with the vast resources our society has devoted to law enforcement and prisons, to address the needs of marginalized populations and thereby to avert crime. In that sense, I share common ground with prison abolitionists.

The unfairness of punishing people who have not received the benefits of just law points to further complications for a theory of justice. Social disadvantages that are serious and systematic enough to undermine equal standing are typically rooted in a history of injustice. For example, the socioeconomic subordination of Black Americans in the United States is rooted in 350 years of slavery and Jim Crow segregation. This suggests a relationship between prospects for attaining distributive justice and the need to redress the legacy of historical injustice and the impact of that legacy on the public culture. Distributive justice calls for historical redress.

Let me end by acknowledging that harm reduction is also vulnerable to abuse.³³ Excessive fear of crime can distort what's reasonable about deterrence and incapacitation as rationales for punishment. Yet were we more cautious about blaming criminal lawbreakers, that is, about investing in assessments of their personal moral inferiority, this would be harder to do, or so it seems to me. Rejecting retributive modes of thinking enhances a reasonable approach to harm reduction.

Notes

1. 'Lingering Lock-down at Mass. Prison a Black Eye for Baker' (Lingering Lock-down at Mass. Prison a Black Eye for Baker [editorial], 2020).
2. Kelly (2018).
3. See, for example, Duff (2001) and Murphy and Hampton (1988).
4. George Sher makes this point clearly. See Sher (2006), Ch. 6.
5. See Scanlon (2010), Ch. 4.
6. See Scanlon (2012).
7. Retributive justice is bound up with appraisals that Derk Pereboom has helpfully termed judgements of 'basic desert.' (Pereboom, 2014, p. 127). Basic desert is a function solely of the agent's conduct and mental state, not of the consequences of blame.
8. For further discussion, see Kelly (2018), Ch. 1.
9. I will set aside legal philosophies that maintain that criminal punishment expresses a legal but not a moral judgment. See, for example, Yaffe (2018). I don't believe this thinner nonmoralistic version of the retributive view captures the public norms of criminal justice.
10. The notion of desert could be weakened into an eligibility condition for punishment. See Feinberg (1970), p. 58. For discussion, see Scanlon (2013). I do not rely on this idea because I am skeptical that the notion of rational agency I treat as an eligibility condition for punishment is wedded to a commonsense notion of moral desert.
11. On the challenges human fallibility poses to the retributive view, see Duus-Otterström (2010).
12. Thanks to Henry Richardson for discussion on this point.
13. I set aside crimes of strict liability as troublesome exceptions.
14. See Hart (1968a), pp. 44–48; Hart (1968b), pp. 181–182.
15. For an interesting discussion of the ethics of rehabilitation, see Howard (2017).
16. For further discussion, see Kelly (2018), Ch. 5.
17. For the purposes of this paper, I will treat untreated mental illness as a social disadvantage. I set aside difficult questions about untreatable mental illness and intellectual disability that are compatible with basic rationality.
18. Exceptions are 'fair play' retributive theories. See Murphy (1973) and Dagger (2018).
19. This section of the paper follows Kelly (2020).
20. Rawls (1999).
21. Rawls (1999), pp. 96–98, 301–308.
22. Locke (1689/Locke, 1988); Rawls (1999), Ch. VI; Gilbert (1993); Dworkin (2011), Parts Four and Five. See also Kelly (2018), Ch. 6.

23. See Ewing (2018).
24. Rothstein (2017).
25. See Asante-Muhammad et al. (2017). See also Massey, D. & Fischer, M. (Massey & Fischer, 2000).
26. Pattillo (2003).
27. Shankar (2018). See also Alexander (2010) and Wilkerson (2020).
28. For a similar argument supporting the diminished legal culpability of children, see Yaffe (2018). I draw on Yaffe's ideas in this and the next paragraph. See also Kelly (2019).
29. Shelby (2016), pp. 219–223, 231–238.
30. See Shelby (2016), pp. 219–220.
31. Cf. Murphy (1973).
32. This is true even if there is a sense in which the imposition of harm reduction measures do not wrong criminal lawbreakers, morally speaking. A moral principle of self-defense might be thought to generate, for ordinary persons, and state officials who act on behalf of the public, a moral permission to prevent and deter criminally harmful behavior. For further discussion, see Kelly (2018), Ch. 5. I am grateful to Victor Tadros and Andrew Williams for discussion on this point.
33. See Harcourt (1999).

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