

# What is Justice?

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## ABSTRACT

*Justice demands individual accountability for criminal wrongdoing. It also aims to achieve socioeconomic justice, democratic equality, and reparations for historical wrongs. These may seem like separable aims. Nevertheless, I will make the case for their interconnection. In particular, I will make the case that a society that aspires to embrace democratic values will relate standards of individual accountability in criminal law to prospects for achieving social justice. It will do this by linking the justification of criminal liability to the benefits of a democratic system of law. Proponents of the retributive theory deny this. The focus and guiding principle of the retributive theory of criminal justice is an individual standard of responsibility for wrongdoing. According to the retributive theory, the imperative of individual accountability applies under any circumstances in which one person wrongs another person, including unjust circumstances. When a serious moral wrong has been committed, the demands of a democratically just social order are beside the point of criminal justice. I disagree.*

*Retributive justice is expressed roughly by the concept of *lex talionis*: the law of retaliation. Today we reject the notion that criminal offenders deserve punishment that resembles their crimes in kind. We do not rape rapists or disfigure people who have scarred others. Yet, many people endorse the idea that criminal offenders deserve harms proportional in degree to their blameworthy wrongdoing. In fact, the justice of proportional harming seems obvious to many people. I do not find it obvious. I will argue that the retributive theory of criminal justice neglects the importance of the relationship between the practice of punishment and the broader requirements of social justice.*

## I. RETRIBUTIVE JUSTICE

I will begin by describing a tension surrounding the notion of proportional harming that ancient thinkers noted. Plato's *Republic* is the first philosophical treatise on the subject of justice. Socrates encounters various figures around the city and questions them about what they know. In particular, he challenges them to define justice. Several characters try their luck.<sup>1</sup> An early

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<sup>1</sup> PLATO, *REPUBLIC* (C.D.C. Reeve rev., G.M.A. Grube trans., 1992), see Books I & II.

moment in the *Republic* recalls the poet Simonides, who was reputed to be a wise man.<sup>2</sup> Simonides is reported to have said, “it is just to give to each what is owed to him.”<sup>3</sup>

The idea that justice involves giving to each what he is owed has its appeal, and Plato seems drawn to it. It seems to capture the fairness, balance, and sensitivity of justice. But how exactly are we to make sense of Simonides’ principle? What could be owed as a matter of justice? Goods, opportunities, recognition, praise, rewards, punishment? What affects *how much* is owed and *to whom*? Does justice respond to a person’s contribution, need, moral status, character, talent, behavior? Simonides’ principle is abstract, and, if it is as attractive as some of the characters in Plato’s dialogue seems to think it is, it requires interpretation.<sup>4</sup>

In Book 1 of the *Republic*, Polemarchus is eager to offer insight.<sup>5</sup> Justice involves benefitting your friends, he says, and harming your enemies.<sup>6</sup> He is immediately challenged by Socrates and other characters in the dialogue to refine his understanding to correct for possible bias. After all, what if, unbeknownst to me, my friends are bad people who ought to be my enemies? In that case, how could it be just to benefit them? Polemarchus quickly refines his definition. Justice involves benefitting your friends, provided they really are good people, and harming your enemies, provided they are actually bad.<sup>7</sup>

Polemarchus’ proposal affirms the value of loyalty. But loyalty bears a tenuous relationship to justice, since loyalties are too often tribal and divisive, and justice purports to be impartial. In that respect, Polemarchus’ thinking is provincial. But, in another respect, his interpretation of Simonides’ wisdom moves in the direction of an idea that is surprisingly modern, or at least familiar. What he proposes is close to the idea that the aim of justice is to confer benefits on the good and burdens on the bad. Justice, on this line of thinking, is connected with the notion of moral desert. It requires that people get what they deserve. Good people deserve praise and other benefits. Bad people deserve to be blamed and harmed.

There is a vast literature in philosophy on how praise and blame should be understood and why they are supposedly essential to morality. According to some moral philosophers, praise and blame are bedrock notions. Good, bad, right, wrong, and justice are all understood in relation to what and who is worthy of praise or blame.<sup>8</sup> A good action or person is one that deserves recognition and rewards. A wrongful action or bad person is one that deserves blame, condemnation, and negative consequences, including punishment. Justice is served when deserved benefits and burdens are delivered. Thus, justice is built from a foundation of praise and blameworthiness, or so it is thought.

To support this notion of justice and to avoid the distortions of bias, we would need a stable notion of praise and blameworthiness for our institutional practices to rely on. We would need to be able to determine when it is that a person morally deserves a positive or negative response and what sort of response it is that she deserves. Philosophers of praise and blame

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<sup>2</sup> *Id.* at 6.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 6-12, 108-110.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 10.

<sup>8</sup> See JOHN STUART MILL, UTILITARIANISM 42-64 (George Sher ed., 2<sup>nd</sup> ed. 2001) (1863). See also P. F. Strawson, *Freedom and Resentment*, 48 PROC. OF THE BRIT. ACAD. 1 (1962), reprinted in FREE WILL 72-93 (Gary Watson ed., 2d ed. 2003); ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT 40-45 (1990); and STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY 26-28 (2006). Many thanks to Sigrun Svavarsdottir for help with these references.

believe that what people deserve is determined by how they act and who they are. Or, more precisely, how people act determines who they are and what they deserve. The idea is that we make ourselves into the particular persons we turn out to be by endorsing reasons, values, and attitudes (good or bad) that are, in effect, the principles of our action.<sup>9</sup> This process of self-constitution defines our moral status and determines what we deserve. A person who organizes her life around the pursuit of money, acquiring more than she needs and disregarding the interests of other people, is greedy and deserves scorn. A person who disrespects other people's property rights and helps herself to their possessions is a thief who deserves not only disapproval but also harsh treatment. The point is that the principles of action we endorse through our conduct—and what those principles reveal about who we are—determine how we deserve to be treated by other people. The best student deserves the highest grade. The better team deserves the trophy. People who act well deserve admiration and praise. A criminal offender deserves punishment.

As I indicated at the outset, a focus on moral accountability is central to retributive philosophies of criminal justice. Criminal justice concerns how legal institutions should respond to people who have violated criminal laws. The focus of most philosophies of criminal justice is the practice of punishment.<sup>10</sup> Theorists attempt to answer questions such as, what is the aim of punishment? What forms of punishment are acceptable and why? When are we *permitted* to punish? When are we *required* to punish? The retributive theory is the most popular philosophy of criminal justice today.<sup>11</sup> As I have already suggested, it affirms that criminal wrongdoers deserve to be harmed in proportion to the blameworthiness of their wrongdoing. Justice demands retribution. The retributive philosophy stresses a connection between the notion of moral desert and the value of retribution. In more colloquial terms, it buys into the logic of “payback.”

I disagree with the importance moral philosophers assign to praise and blame, especially when it comes to thinking about justice, and I reject the idea that justice is a matter of allocating just deserts. Criminal justice should not aim for retribution.

## II. THE PRACTICE OF CRIMINAL JUSTICE

I will focus on three problems with the retributive theory as an account of criminal justice. The first problem concerns the practice of criminal punishment. Our system of criminal justice is characterized by a misalignment between the practice of punishment and evaluations of moral blameworthiness. People who are more likely to enter the criminal justice system tend not to be those who are the most morally blameworthy. For example, mental illness is rampant among the prison population. Intellectual disability is also thought to be more prevalent than

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<sup>9</sup> CHRISTINE M. KORSGAARD, *SELF-CONSTITUTION: AGENCY, IDENTITY, INTEGRITY* (2009).

<sup>10</sup> By “punishment,” I am referring to coercive state responses to criminal violations. I will not suppose that criminal sanctions are, by definition, retributive in nature. That is, I do not assume that the aim of punishment is to impose morally deserved pain and suffering. Once we give up the retributive aim, the state's coercive response to criminal lawbreaking need not be thought always to impose harm or to aim to do so. Thanks to John Hasnas and Chris Surprenant for discussion on this point.

<sup>11</sup> See, e.g., Michael S. Moore, *The Moral Worth of Retribution*, *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY* 179-219 (Ferdinand Schoeman ed., 1987), reprinted in MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 104-152 (1997); Mitchell Berman, *Rehabilitating Retributivism*, 32 *LAW & PHIL.* 83 (2013); Douglas Husak, *Retributivism in Extremis*, 32 *LAW & PHIL.* 83 (2013), and Herbert Morris, *Persons and Punishment*, 52 *THE MONIST* 475 (1968), reprinted in HERBERT MORRIS, *ON GUILT AND INNOCENCE* 31-58 (1976).

among the non-prison population.<sup>12</sup> Mental illness and intellectual disability are morally mitigating factors—they compromise a person’s moral responsibility—but, with few exceptions, the law does not treat them as such.

For example, in *Clark v. Arizona*, the U.S. Supreme Court upheld a schizophrenic man’s first-degree murder conviction for killing a police officer.<sup>13</sup> The Court acknowledged Clark’s delusional schizophrenia—he believed he was being pursued by a space alien—but affirmed his conviction and life sentence. It ruled that because he was not utterly incapable of distinguishing right from wrong, his delusion could not be introduced as evidence that he did not intend to kill the police officer. Not only was he guilty of murder, he was guilty of the worst kind.

In *State v. Patterson*, the court upheld Sharon Patterson’s conviction for criminally negligent homicide, despite acknowledging that she suffered from an intellectual disability that placed her in the bottom one-half of one percent of the population.<sup>14</sup> Patterson withheld water from a toddler in her care in order to prevent him from wetting his bed, resulting in his death. The court recognized that she did not understand the danger of her actions, but it upheld her conviction on the basis that a reasonable person would have recognized it. Sharon Patterson’s disability did not mitigate her criminal guilt.

In these cases, the court ruled that mental disorder and intellectual disability do not interfere with the application of a reasonable person standard for assessing criminal guilt. These cases illustrate the law’s reluctance to relativize the content of a reasonable person standard to a person’s psychological limitations. The law does not ask what it would be reasonable for a person suffering from schizophrenia to do under the grip of a delusion or about the care it is reasonable to expect an intellectually disabled person to take in order to avoid harming a child. In *State v. Patterson*, the court says, “we cannot consider the defendant’s diminished mental capacity in the context of criminally negligent homicide because we employ an objective standard.”<sup>15</sup> What this means is that in judging whether negligent homicide has been committed, the law holds all defendants to the same standard of reasonable conduct. Despite her impaired understanding of her own actions, Sharon Patterson was criminally guilty as charged.

Upholding an objective standard might serve to highlight wrongs done, and in this, it acknowledges the importance of victims’ rights not to be harmed, but it poses a problem for the retributive view, which maintains that criminal wrongdoers deserve punishment that is proportional to their blameworthiness.

It is worth considering that many crimes are related to drug and alcohol dependence. By some estimates, the vast majority of all felonies are committed by people who are either under the influence or seeking to support an addiction. According to the Bureau of Justice Statistics, in 2004 (at an early stage of the current opioid crisis), 53% of state prisoners and 45% of federal prisoners met the Diagnostic and Statistical Manual of Mental Disorders, fourth edition (DSM-

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<sup>12</sup> Jennifer Bronson, Laura M. Maruschak & Marcus Berzofsky, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Disabilities Among Prison and Jail Inmates, 2011–2012* (2015), available at <http://www.bjs.gov/content/pub/pdf/dpji1112.pdf>. Rebecca Vallas, “Disabled behind Bars: The Mass Incarceration of People with Disabilities in America’s Jails and Prisons,” Center for American Progress (July 2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/07/15103130/CriminalJusticeDisability-report.pdf> [https://perma.cc/3GZP-9NZ5]. Joan Petersilia, “Doing Justice? Criminal Offenders with Developmental Disabilities,” Policy Research Program, California Policy Research Center, The University of California, Berkeley (2000), <https://files.eric.ed.gov/fulltext/ED465905.pdf> [https://perma.cc/D555-ZK4M].

<sup>13</sup> *Clark v. Arizona*, 548 U.S. 735 (2006).

<sup>14</sup> *State v. Patterson*, 27 A.3d. 374 (2011).

<sup>15</sup> *Id.*

IV) criteria for drug dependence or abuse around the time they committed their criminal offenses.<sup>16</sup> The rate is likely higher today.<sup>17</sup> In 2013, the Office of National Drug Control Policy collected information in five metropolitan areas and found that between 63% and 83% of people arrested tested positive for drugs.<sup>18</sup> The study did not include alcohol testing. A different government study of people incarcerated for violent crimes found that about 40% reported that they were under the influence of alcohol at the time they committed their crimes, and it stands to reason that self-reports point to the low end of the actual rate.<sup>19</sup>

Addiction does not mitigate punishment for any crime, however desperate a person is to satisfy it. Our legal system has decreed that the personal hardships of addiction and mental illness—problems that would be difficult for most people to manage well—do not mitigate the law’s assessment of criminal culpability. The same holds for the limits stemming from intellectual disability and immaturity. Short of the extremes of mental illness that qualify as legal insanity, the vast majority of mentally ill, intellectually disabled, traumatized, addicted, and immature people are ruled criminally guilty when it has been established that they have committed criminal acts. Mental illness, trauma, intellectual disability, and addiction may diminish moral blameworthiness, but they do not mitigate criminal guilt. These results pose a serious challenge to the notion that moral retribution fits the law.

Defenders of a retributive philosophy might respond by claiming that we need to make some adjustments to our criminal justice practices. They might argue that our criminal justice system does not currently deliver just deserts, but it could if we were to reduce the sentences of teenagers, people afflicted with mental illness or addiction, and those who are intellectually disabled. Actually, the courts have expressed some sympathy with these ideas, at least when it comes to the very harshest penalties—specifically the death penalty and life without parole. The U.S. Supreme Court has ruled that the death penalty is unconstitutional when applied to juveniles or the legally “insane”<sup>20</sup> and that juveniles cannot receive mandatory sentences of life without parole.<sup>21</sup>

Defenders of a retributive principle might also posit that we should go easier on people with substance addictions. The devastating opioid epidemic has increased public sympathy for a

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<sup>16</sup> Christopher J. Mumula and Jennifer C. Karberg, Office of Justice Projects, Bureau of Justice Statistics Special Report, U.S. Dep’t of Justice, Drug Use and Dependence, State and Federal Prisoners, 2004 1 (2006), *available at* <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=778>.

<sup>17</sup> According to the U.S. Department of Health and Human Services, the number of Americans who use illicit drugs regularly has risen from 8.2 percent in 2002 to 9.4 in 2013. Substance Abuse and Mental Health Services Administration, *Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings*, NSDUH Series H-48, HHS Publication No. (SMA) 14-4863. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2014, 1, *available at* <https://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf>

<sup>18</sup> Dana Hunt, Meg Chapman, Sarah Jalbert, Ryan Kling, Yuli Almozlino, William Rhodes, Christopher Flygare, Kevin Neary & Caroline Nobo, Office of National Drug Control, Executive Office of the President, Arrestee Drug Abuse Monitoring Program: 2013 Annual Report (2014), *available at* [https://www.abtassociates.com/sites/default/files/migrated\\_files/91485e0a-8774-442e-8ca1-5ec85ff5fb9a.pdf](https://www.abtassociates.com/sites/default/files/migrated_files/91485e0a-8774-442e-8ca1-5ec85ff5fb9a.pdf) [<https://perma.cc/GQ9E-MNXV>]. According to the Bureau of Justice Statistics, in 2004, 38.5% of people incarcerated in state prisons for property offenses reported being under the influence of drugs at the time they committed their crimes. Mumula and Karberg, *supra* note 22, at 5.

<sup>19</sup> Lawrence A. Greenfeld, Bureau of Justice Statistics, U.S. Dep’t of Justice, Alcohol and Crime: An Analysis of National Data on the Prevalence of Alcohol Involvement in Crime (1998), iii, *available at* <https://www.bjs.gov/content/pub/pdf/ac.pdf>.

<sup>20</sup> *Miller v. Alabama* 132 S. Ct. 2455 (2012); *Jackson v. Hobbs*, 132 S. Ct. 548 (2011).

<sup>21</sup> *Atkins v. Virginia* 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005).

less punitive approach to the crimes of addiction. Now that drug addiction is no longer imagined to afflict only poor urban neighborhoods, it has become a cause of public outcry. For example, the Attorney General of the state of Massachusetts is currently suing the corporate pushers of prescription painkillers on behalf of the public.<sup>22</sup>

Now it might be thought that by punishing less, and more selectively, we still have a chance to deliver retributive justice. Yet, reforming the law to better fit the requirements of retributive justice will be difficult to achieve, if not impossible, especially since some disturbed and desperate people pose a danger to others. Though we are too quick to think incarceration is the best response to criminal wrongdoing, legal consequences are important when people criminally harm others.

A non-retributive approach to punishment maintains that we owe it to victims and potential victims to incapacitate, deter, and rehabilitate people who have demonstrated a willingness to violate the rights of other people. Deterrence, incapacitation, and rehabilitation are plausible reasons to punish. Acknowledging the seriousness of crime, recognizing the harm victims have suffered, and seeking to prevent further violations requires a response. It may call for imposing burdensome requirements on criminal lawbreakers to discourage and prevent them from committing crimes and to transform their motivations and dispositions. While some people are so impaired that efforts to deter them can have no rational influence, that is not true of all people whose capacity for morality is diminished or distorted. Furthermore, incapacitation may be effective when deterrence is not, and medical treatment and other alternatives to incarceration might help to equip persons to meet legal standards of conduct. Treatment programs are not what we traditionally think of as punishment, but requiring them can be reasonable in response to criminal behavior.

Consequence-sensitive rationales like deterrence and rehabilitation move us away from retributive thinking. It is no longer moral desert, but rather the importance of measures to enhance security for our rights, that call for the use of hard treatment or other interventions. So understood, the practice of punishment is guided by its possible benefits: greater protection for basic rights. But concern for public safety is not the only value that guides determining the appropriate legal consequences. Also important is concern for what we owe to defendants. We must take their wellbeing seriously, consider the costs it is fair to impose on them, as well as their prospects for leading law-abiding lives upon their release. Using punishment is permissible only when it brings socially beneficial results at an acceptable price—a price that includes the harm punishment does to those who are made to suffer it.

On this way of thinking, there is no justice in punishment *per se*. Once we abandon the model of just deserts, we may recognize that harming criminal offenders is not, as such, important. It is only good or justifiable when it produces beneficial consequences, provided that defendants are treated fairly.

If this is true, there is no reason to restrict the focus of our criminal justice practices to interventions that are designed to influence behavior through injury and fear. Justice might also attempt to facilitate redress and reconciliation. For example, the criminal justice system could

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<sup>22</sup>Plaintiff's Pre-Hearing Memorandum at 1-17, *Commonwealth v. Purdue Pharma L.P.*, No. 1884-cv-01808BLS2 (Mass. Super. Ct. Dec. 21, 2018).

accommodate and support the aims of restorative justice.<sup>23</sup> Typically, restorative justice involves a mediated victim-offender encounter that aims to acknowledge and repair the harm a crime has caused. Its victim-centered, healing approach usually includes coming to a restitution agreement that permits the wrongdoer to make amends. The theory is that restorative justice, as an alternative to criminal punishment, brings with it important benefits to victims, perpetrators, and the broader community.<sup>24</sup> It belongs to a public effort at healing and reintegration. We might collectively stand to gain something by relinquishing the aim of retribution.

### III. THE NATURAL AND SOCIAL LOTTERY

Let me now turn to a second objection to the retributive theory. In talking about individual responsibility and desert, I have left Polemarchus behind. Recall Polemarchus' insistence that a just person would benefit good people and harm bad people. I discussed the connection between this proposal and the modern notion of moral desert. But the Greeks did not have a modern notion of individual responsibility, with its focus on moral desert. Socrates was dissatisfied with Polemarchus' idea for a different reason. He believed that harming unjust people makes them worse. Socrates asks how it could ever be just to cause greater injustice.<sup>25</sup> He maintains that it could not be. A just person would never intentionally cause greater injustice. So, according to Socrates, Polemarchus is wrong about what justice demands. Justice could not require harming bad people when doing so would make them worse.

We might ask ourselves Socrates' question, given how we treat people whom we condemn to prison. As it is practiced today in the United States, incarceration is harsh and dehumanizing. Prison hurts and permanently alienates people. Those who are released from prison have great trouble finding jobs and readjusting to life in society. If you have done time in prison, it is extremely difficult to make a decent life for yourself if and when you are released. The unemployment rate among formerly incarcerated people is about 27%, over five times the unemployment rate for the general population (5.2%).<sup>26</sup> Among black men and women, the unemployment rate is considerably higher than that. Formerly incarcerated black men face an unemployment rate of 35.2%, and formerly incarcerated black women are unemployed at a rate of 46.7%.<sup>27</sup> Generally speaking, formerly incarcerated people have fewer resources to fall back on when they are released, because they come from the poorest segments of society.<sup>28</sup> As a result, some former inmates will be jobless, homeless, and tempted to commit crimes. Not surprisingly, recidivism rates are high, at least in the short run, though it is also true that people tend to "age out" of crime.

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<sup>23</sup> I am grateful to Ted Lewis for discussion of the relevance of restorative justice to this paper. See the Center for Restorative Justice and Peacemaking at the University of Minnesota Duluth, <https://www.d.umn.edu/rjp/>.

<sup>24</sup> See DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019). See also MARILYN ARMOUR & MARK S. UMBREIT, *VIOLENCE, RESTORATIVE JUSTICE, AND FORGIVENESS: DYADIC FORGIVENESS AND ENERGY SHIFTS IN RESTORATIVE JUSTICE DIALOGUE* (2018).

<sup>25</sup> PLATO, *supra* note 1, at 11.

<sup>26</sup> Lucius Couloute & Daniel Kopt, "Out of Prison and Out of Work: Unemployment Among Formerly Incarcerated People," Prison Policy Initiative (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> [<https://perma.cc/H32F-TQGX>].

<sup>27</sup> *Id.*

<sup>28</sup> See Bernadette Rabuy & Daniel Kopf, "Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned," Prison Policy Initiative (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/Q48V-7NE9>].

How could it be just to harm people and make them worse? Do we have a good response to Socrates's challenge?

Socrates claims he does not know how to define justice, but he observes that injustice—however exactly we define it—causes war, conflict, and fighting, while justice brings friendship and a sense of common purpose.<sup>29</sup> As he sees it, justice is not a matter of assigning individual responsibility and calculating praise and blame. It is a social order, a peaceful order that serves a common purpose. Justice is an overall state of society. It is a collective achievement.

This idea of justice as a peaceful and mutually beneficial social order fits contemporary discussions in philosophy of the notion of distributive justice. Distributive justice is a virtue of institutions, not persons. Social institutions—including government, law, an educational system, and the economy—are just when they distribute relevant social goods—rights, liberties, opportunities, wealth, and income—in ways that are mutually beneficial and fair to all of society's members. Each member of society is entitled to the rights, liberties, opportunities, income, and wealth that (within reason) would enable her to pursue her favored life course. Or, to put the point in another 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.

We have come back around to Simonides' idea that justice involves giving to each what is owed to him, but through the concept of distributive justice, rather than through the notion of retributive justice. Each member of society gets what she is owed by justice, through a fair distributive scheme.

John Rawls developed the most influential contemporary account of distributive justice. His seminal work, *A Theory of Justice*, was published in 1971.<sup>30</sup> The notion of distributive justice Rawls develops—something he calls “justice as fairness”—contrasts with the idea that justice is a matter of conferring deserved benefits and burdens. Rawls argues that justice cannot be a matter of moral desert, because distributive outcomes depend on many factors we cannot possibly be said to deserve. We do not deserve our birthplace 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 do not deserve our natural talents, abilities and disabilities, psychological dispositions, or aptitude for mental and physical health, just as we do not 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 difference 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 racial subordination severely curtail even the most hard-working and talented person's opportunities. But even in a just society, attributes like intelligence, creativity, beauty, family support, and health, which are at least partly undeserved, will influence how well a person can expect to do in the course of his or her life.

Acknowledging this, Rawls concludes that the distribution of rewards for social and natural advantages should not be thought of as a matter of allocating desert. He takes what many people would regard as a radical position. A distributive scheme should be to the mutual advantage of all members of society, including the least well off. Even more than that, Rawls

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<sup>29</sup> PLATO, *supra* note 1, at 28.

<sup>30</sup> JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed., 1999).



argues that 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, such as positions of leadership and responsibility, is justifiable when it 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 are 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. In other cases, rewards might be used to motivate people to accept jobs that are especially unappealing.

Rawls argues for the conclusion that a distributive scheme should be to the greatest advantage of all members of society, especially the least well off, by imagining which principles of justice would be chosen if people charged with the task of choosing principles of justice were situated behind a hypothetical “veil of ignorance.” His idea is that principles of “justice as fairness” are those principles that would be chosen by people who are deprived of knowledge of their own social position, gender, race, talents, religious beliefs, and other personal characteristics. Behind the veil of ignorance, it is impossible for anyone to design principles to disproportionately benefit themselves. Parties to this imagined social agreement are instead forced to choose principles that they would find acceptable from *any* social position because they are forced to reckon with the possibility that any of the various possible social positions could turn out to be their own. They must make a choice that is fair to everyone. From a position of ignorance, Rawls reasons, no one would rationally choose the desert principle, assuming we could coherently apply it. Instead, the parties would agree to something much closer to equal distribution.

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 role is left, in a theory of justice, for the notion of individual responsibility?

Rawls suggests this possible line of thought. It is the responsibility of institutions 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.<sup>31</sup> 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, punishment may be used to motivate compliance. People who violate their obligations to society should face consequences that are designed to discourage harmful wrongdoing and to enhance a just social order. Let us call this “harm reduction.”

According to a harm reduction paradigm, 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 or other strategies to influence behavior and rectify harm done, that complying with just law is both morally required and in his or her interest. Punishment aims to advance justice, understood as a cooperative scheme. There is a rationale for the practice of punishment, but it is not to realize an ideal of retributive justice. It is better understood as an aspect of corrective and reparative justice.

Rawls and Plato are aligned in this respect. As Plato understands it, the just city is one in which each class of people does its part to preserve and enhance the justice of the whole city. The city should compel those who do not. People who are willing to break the laws are educated,

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<sup>31</sup> *Id.* at 96-98, 301-08.

by the legal consequences they face, to abide by their better nature. Only in this way does Plato think we avoid the problem of making the unjust person worse, which, as previously mentioned, he thinks would be at odds with justice. The success of punishment is measured by its consequences: by whether those who have been punished are less likely to violate society's rules and more likely to contribute constructively to it.<sup>32</sup> Criminal justice belongs to a collective effort to achieve a peaceful order that serves the common good. It is a dimension of social justice.

If Plato and Rawls are correct, a criminal justice system should be designed to enhance a just distributive scheme. Justice never involves intentionally doing something that causes greater harm. The justification of punishment depends on its likely consequences for establishing a just social order. The criminal justice system does not have an independent and self-contained moral rationale. We need not organize either morality or justice around the idea that good people receive benefits and bad people deserve to be harmed. Rawls is right to point to the moral significance of contingencies that affect a person's life chances. These contingencies affect the development of personhood, including what a person counts as good reasons to act in one way or another. How we act is not the only factor that determines who we are. Our choices are themselves the result of myriad factors that have shaped our perception of the relevant alternatives. Plato's view of the importance of natural aptitude, role models, and education acknowledges this, as does Rawls's discussion of the many contingencies (family life, social position, natural talents and dispositions, and brute luck) that influence a person's opportunities, self-understanding, and choices and, hence, her life chances. Our psychology and social environment might not determine our choices, but they do make a difference to what we view as the alternatives when we decide how to act. Thus, reasonable standards of conduct depend on a reasonable menu of opportunities and the supporting conditions that enable those opportunities: education, health care, a decent income, a fair share of political power, and the recognition and respect owed to all human beings. Furthermore, the criminal justice system should itself be designed to enable and protect people's prospects for reasonable, law-abiding choices. A distribution of penalties based on violations of reasonable standards of conduct is permissible to uphold a set of rights, goods, and opportunities that all persons need in order to have decent prospects for meeting those standards.

Of course, Plato is no fan of democracy. He defends a hierarchical social order in which the city is ruled by philosopher kings and ordinary people do only the work for which they are most suited by nature, whether that is building, weaving, baking, or farming. The operative notion of personal responsibility, in Plato's philosophy, is tied to differentiated and hierarchically defined social roles. The objective of the practice of punishment, Plato reasons, is to enable a society to function well, and this requires maintaining a rigid social order, in which different classes of people are each constrained to their natural place. When that order is disturbed, punishment functions to restore it. In Plato's vision, human society has a *telos* or perfect end-state, which he understands to be a state of human flourishing. Each member of society is to play his or her part in a social script that enables the whole society, and each person in it, to flourish according to his or her nature and abilities.

A modern liberal democracy has no *telos*, and it rejects prescribed social roles. Rather than a shared notion of "the good" or "human flourishing," it is something like equal freedom

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<sup>32</sup> According to Plato, wrongdoers should be restored into their proper place in society. There is no claim here about the intrinsic value of giving a bad person the suffering he morally deserves. Instead, corrective measures are 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.

and fair opportunity that organizes society, at least in theory. No one is to be coerced to adopt any particular notion of life's meaning or purpose. A modern liberal society is pluralistic; it displays a diversity of ideas about what makes life worth living. Because there is no shared idea of the human good, a just order is oriented around the protection of a scheme of equal basic rights, liberties, and opportunities, enabling people to pursue their own values and priorities, provided their pursuits are compatible with that scheme.

Accordingly, a liberal political philosophy, one suited to a modern, pluralistic, and democratic society, cannot understand criminality as the violation or refusal of a prescribed social role. Criminality is a threat to a just order of equal basic rights and liberties. In a democratic society, each person is obligated to respect the rights and liberties of other people, and there is an important notion of individual accountability connected with this obligation. It is defined by reference to the possibility of a just social order, but not one that can be understood as an organic whole in which different classes of people are assigned complementary roles by nature or determined to be unworthy of any social position. Punishment is not designed to force people back into a social position to which they are best suited, as measured by the overall good of society, or to the margins of society where they may be vilified and discarded. Though many retributivists would not support a practice of permanent exclusion, the stigma of criminality supported by retributive thinking is prone to manipulation in this way, since it encourages us to think of criminal wrongdoers in terms of the moral defects of their personhood, for example, as violent offenders, hopeless addicts, drug dealers, or sexual predators.

This point about the orientation of a liberal political philosophy can be made more abstractly. A consequence of embracing a liberal principle of equal basic rights, liberties, and opportunities for all is that punishment cannot be understood simply as an instrument that is useful for promoting the common good. Plato's view of punishment is objectionably consequentialist. It is not enough that punishment has instrumental value in relation to the good of the whole, or of the majority. In a democracy, coercive actions by the state must be justifiable to each person. The state's claim to legitimacy must be acceptable from all points of view, including the perspective of those who are least well off. The practice of punishment is also subject to this evaluative test.

#### IV. PUNISHMENT AND SOCIAL INJUSTICE

The practice of criminal justice in an unjust social order faces a serious problem. People who are more likely to be caught up in the criminal justice system are not only those who suffer mental illness, disability, or addiction; they are people who are economically, politically, and socially disadvantaged. They are people who have not enjoyed the benefits of equal membership. The problem of crime itself is connected with the injustice of people not getting what they are entitled to. Poverty, alienation, and unfair treatment, including injustice directed toward disfavored members of society, drive crime rates up. This reality undermines the retributive thesis, which is my third argument against it. The role the state plays in creating the conditions that foster crime damages the state's moral authority. If education, health care, a decent income, a fair share of political power, recognition, and respect are goods we owe to one another, a society that deprives some people of these goods enters a zone of moral hazard. The state shares responsibility for the problem of crime and it evades that responsibility when it behaves as though criminal justice is solely a matter of allocating individual responsibility and desert.

Punishment in the United States is harsh. Convicted felons are not only subjected to the indignity of incarceration, they are also saddled with the stigma of a criminal record and the social marginalization and exclusion that accompany it. These are severe burdens to impose on anyone, but especially on persons who have not enjoyed the benefits of equal membership. 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 the burdens they are forced to bear are fundamentally unfair. 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 benefit of the protection of law. Those who do not receive law's protection 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 benefits of law is fundamentally unfair.

This unfairness 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 social injustice. For example, the socioeconomic subordination of Black Americans in the United States is rooted in a long history 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.

## CONCLUSIONS

I made three arguments against the retributive theory of criminal justice. The first emphasized a mismatch between operative criteria of criminal culpability and moral notions of blameworthiness. Many people in the criminal justice system are not blameworthy, or as blameworthy, for their criminal actions. The law does not acknowledge this, nor does it make sense to reform the law for a better match with moral norms of blameworthiness, in view of the moral urgency of protecting people's basic rights. This counts against the retributive theory. The second argument claimed that the influence of natural and social contingencies on a person's life chances implies that the practice of punishment cannot be justified unless it contributes to a distributively-just social order. This is either overlooked or implausibly denied by the retributive theory. The third argument was that punishing people who have not received the benefits of law is fundamentally 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 just background conditions.

In making these arguments, I aim to show that we should reject the retributive theory and recognize that we cannot achieve criminal justice without a broader commitment to social justice. The criminal justice system should not be used to benefit our friends and to harm those we perceive to be our enemies. The practice of criminal justice is legitimate only for its contribution to the possibility of a democratically just society. Otherwise it is seriously compromised in ethical terms. This is seen most clearly by those who are most harmed by it.<sup>33</sup>

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