

RETHINKING CRIMINAL JUSTICE

Erin I. Kelly

Abstract: The punitive, moralizing conception of individual responsibility commonly associated with retributive justice exaggerates the moral meaning of criminal guilt. Criminal guilt does not imply moral desert, nor does it justify moral blame. Mental illness, intellectual disability, addiction, immaturity, poverty, and racial oppression are factors that mitigate our sense of a wrongdoer's moral desert, though they are mostly not treated by the criminal justice system as relevant to criminal culpability. The retributive theory also distracts from shared responsibility for social injustice. Instead of highlighting the moral urgency of correcting conditions that help to explain the crime rate, a commitment to retribution diverts attention from the social conditions that engender crime. These conditions include an unequal distribution of social, economic, and political power, which poses a serious problem for the retributive theory. When disadvantaged members of society act in ways that violate the criminal law, they are less morally blameworthy, even when the laws they violate are justified. Judgments of blame and desert, in relation to criminal justice, vary in accordance with political status. The diminished political power of oppressed groups is at odds with a retributive justification of punishment.

1 The Stigma of Criminality

In 1829, the Eastern State Penitentiary opened in the city of Philadelphia. Its corridors spread out like spokes from the prison's dark center. They are lined with dozens of eight-by-twelve-foot individual cells, each with a small window where a shaft of light enters. Eastern State's design was lauded by reformers, who proposed the individual prison cell as a progressive idea. The aim was, through isolation and silence, to awaken the conscience of the inmate and turn him into a better person. Prison was not intended as a place to spend your life. Most sentences were not longer than two years, and after doing their time, inmates were expected to resume normal life in society.

1 Solitary confinement is used nowadays as a “disciplinary measure” in
2 prisons, but it is no longer promoted as a progressive idea. In fact, solitary
3 confinement is recognized internationally as a violation of human rights. In
4 that respect, current standards have evolved in line with morality. On the
5 other hand, contrary to the vision of some nineteenth-century reformers, the
6 American criminal justice system today displays little faith in the prospect of
7 rehabilitation and has, for the most part, dropped any commitment to it. At
8 the same time, the use of incarceration has expanded massively. The United
9 States has the largest prison population and the highest incarceration rate
10 in the world. Two years is on the low end of many sentences, which can
11 be *much* longer than that, and punishment is not designed to transform
12 anyone—at least not for the better. Instead, the practice of criminal justice
13 is an obstacle to positive personal change.

14 In continental Europe, incarceration is less frequently used and, when
15 it is, sentences are relatively light. Historian and legal scholar James
16 Whitman (2003) provides detailed evidence for concluding that criminal
17 justice systems in Europe and in democratic societies elsewhere in the
18 world are decidedly more merciful than American “harsh justice” (see also
19 Kleinfeld 2016). For example, in France and Germany, prison policies are
20 designed to prevent the symbolic degradation of inmates. Prison uniforms
21 have been abolished. Barred cell doors have been eliminated and replaced
22 with doors that offer privacy. Guards are required to address inmates
23 respectfully using the prefix “Mr.” or “Ms.” These measures belong to
24 what Germans call a “principle of approximation,” which is the idea that
25 prison life should approximate life outside prison as much as possible
26 (Whitman 2003, 8). This deliberate emphasis on respect and dignity in the
27 practice of punishment is nearly unthinkable in the United States, where
28 sentences are maximal, prison conditions are brutal, and status degradation
29 is almost intrinsic to criminal punishment.

30 In the United States, a prison record makes it practically impossible
31 to live normally in society, to do the ordinary things that enable us to
32 be independent adults and good citizens—like finding a job, renting an
33 apartment, voting, and getting an education (Jacobs 2015). In many cases,
34 jobs with professional credentials are unavailable to people with criminal
35 records. For example, in the state of California, a person with a record
36 of conviction for *any* felony is ineligible to be licensed as a nurse, social
37 worker, optometrist, landscape architect, contractor, psychologist, marriage
38 or family therapist, Department of Motor Vehicles employee, home-care
39 aide, or professional photocopier (Justice Center 2020). More generally,
40 it is not illegal to discriminate against felons who apply for employment,
41 admission to college, mortgages, or housing. The American system of
42 punishment imposes a lasting stigma on people who have been convicted
43 of crimes.

44 What is the rationale today for the harshly punitive orientation toward
45 criminal lawbreakers in the United States? The most popular philosophy
46

1 of criminal punishment, the one that seems to enthrall moral philosophers,
2 legal theorists, and the American public alike, is based on the idea that
3 justice has not been done until the criminally guilty get the punishment they
4 deserve. Justice demands retribution. Retribution is achieved when morally
5 culpable wrongdoers suffer in proportion to their culpable wrongdoing,
6 or so it is claimed. Punishment is ugly, but crime makes it necessary.
7 Retribution is *morally fitting*.

8 Many people find this a natural and even comforting thought. Retribu-
9 tion offers a resolution to a scenario in which something has gone terribly
10 wrong. The cosmic symmetry it promises generates a sense of satisfaction
11 that holds our attention. In fact, it holds our attention so well that it keeps
12 us from thinking about *why* people commit crimes and *who* we are locking
13 away. These are critically important questions and thinking about them
14 provokes doubts about whether criminal punishment actually delivers the
15 moral fit it promises (Kelly 2018, 16–44).

16 I will focus on the connection between the retributive rationale and
17 the stigma of criminality. I will do this because, as I understand it, the
18 retributive justification of punishment is bound with the idea that the
19 criminal offender is a “bad person,” deserving of punishment not only
20 because of what he has done but according to who he is (Kleinfeld 2016,
21 948–949). Retributivists maintain that morality demands more than that
22 we judge criminal lawbreakers to have acted wrongly. It requires us to
23 harm moral wrongdoers, provided that they are blameworthy. We should
24 *blame* criminal lawbreakers for their wrongful lawbreaking by imposing
25 on them the suffering they deserve. In this way, blame adds something
26 to a judgment of wrongdoing. What it adds is a negative evaluation and
27 response to a wrongdoer’s personhood, character, or will, in light of her
28 wrongful behavior. Retributive punishment is a form of public blame
29 directed at the wrongdoer as a criminal—a morally inferior type of person.
30 This personal evaluation is important. Unless a criminal wrongdoer is
31 personally responsible for doing wrong, the idea that he morally deserves
32 punishment is unfounded.

33 So understood, the retributive philosophy seems designed to fit what
34 Immanuel Kant describes as the responsibility a person bears for his own
35 *bad will*. A bad will lies behind and motivates wrongdoing. It expresses
36 agency and constitutes personhood. Bearing responsibility in this sense
37 is what makes a wrongdoer morally culpable for his wrongdoing. Of
38 course, establishing a person’s responsibility for his bad will is insufficient
39 to justify retributive punishment. Even if a person is responsible for what
40 he is like, it would still need to be demonstrated that he deserves to be
41 harmed in response to his blameworthy wrongdoing. The state’s authority
42 to serve as the harming agent must also be established. But without the
43 responsibility claim, the retributive thesis is hopeless. A person could hardly
44 be said to deserve punishment for what he is not responsible for. Thus
45 I will concentrate on the responsibility claim. If the retributive theory
46

1 fails to make good on it, and I think it does, we should reject retributive
2 philosophies of criminal justice.

3 4 2 Responsibility for Self

5
6 To count as responsible, Kant argues, a human being “*himself* must make
7 or have made himself into whatever, in a moral sense, he is or to become”
8 (Kant 1793, 40). According to Kant, a person of *bad will* has made
9 himself into what he is through his free choices. Kant puts this point in
10 metaphysically strong terms: “Whatever his previous deportment may have
11 been, whatever natural causes may have been influencing him and whether
12 these causes were to be found within him or outside him, his action is
13 yet free and determined by none of these causes” (Kant 1793, 36). Kant
14 thinks that, as rational beings, when we encounter temptations, desires,
15 or impulses, we have the capacity to step back, to evaluate whether these
16 temptations or desires provide us with good reasons to act, and to refuse
17 them when they do not. This reflective and evaluative capacity comprises
18 our moral freedom. Kant maintains that our capacity for reason implies
19 that we *always* have this freedom. But is this true? How do we know if and
20 when a person is rational enough to support this metaphysical conclusion
21 about his freedom? And when a person fails to act well, when may we
22 reasonably conclude that he *could have* satisfied moral standards of right
23 action? What are the limiting cases?

24 When it comes to appreciating *why* a person has, in fact, acted as he
25 has, Kant is circumspect. Principles of action, a person’s “maxims,” Kant
26 writes, “sometimes even his own, are not observable; consequently, the
27 judgment that the agent is an evil man cannot be made with certainty if
28 grounded on experience” (Kant 1793, 16). No one, Kant writes, who
29 examines his own psyche can be sure he has acted for the reasons he would
30 rationally endorse. “We like to flatter ourselves with the false claim to a
31 more noble motive,” says Kant, “but in fact we can never, even by the
32 strictest examination, completely plumb the depths of the secret incentives
33 of our actions” (Kant 1785, 19). Kant is conceding that skeptical worries
34 about “moral worth”—that is, about the quality of a person’s will—are
35 impossible to defeat. Someone who seems to have acted for good reasons
36 might not have, and vice versa. By implication, this doubt infects our
37 confidence in the judgment that a person who has failed to act well could
38 have acted better. The judgment that someone who has acted badly could
39 have done better involves a counterfactual evaluation—an evaluation of
40 the possibility that a person who failed to act well would act better in
41 some alternative scenario in which, for example, she tries harder or takes
42 some precautions (Kelly 2018, 53–60). Yet, by Kant’s reasoning, a person’s
43 incentives can be no clearer to us in a relevant counterfactual scenario in
44 which she acts well than they were in the actual scenario in which she
45 failed.

1 Present day “compatibilists” are more cautious than Kant was in their
2 metaphysical assessment of our freedom to make ourselves into the persons
3 we turn out to be. They are sensitive to the various causes that influence our
4 characters and choices and, in response, they lower the threshold criteria of
5 moral responsibility. The basic idea behind “soft” compatibilism is this: if
6 we have no reason to doubt a person’s basic capacity for rationality, and
7 a person’s action expresses what she is actually like, we can and should
8 hold her to be “responsible”—that is, blameworthy and punishable. In
9 principle, this notion of “default responsibility” aligns fairly well with
10 familiar criminal justice practices. But, despite the appeal of this metaphys-
11 ically unencumbered, or less encumbered, notion of moral responsibility,
12 there are reasons to doubt its viability as the basis for a justification of
13 punishment.

14 Many incarcerated people struggle with difficult psychological problems.
15 For example, the incarcerated population exhibits higher rates of prior
16 sexual abuse, childhood exposure to traumatic violence, and post traumatic
17 stress disorder (Raj et al. 2008; Abram et al. 2004; Browne et al. 1999;
18 Richie and Johnson 1996). Mental illnesses such as sociopathy, schizophre-
19 nia, and bipolar disorder are more common among the prison population.
20 According to a report by the U.S. Department of Justice, over half of all
21 prison inmates have a serious mental health disorder (James and Glaze
22 2006). Could it really be that *these* are the people who *deserve* the hard
23 treatment they get?

24 Consider some cases you might read about in law textbooks. Eric Clark
25 shot and killed a police officer. Our society demands the harshest penalties
26 for crimes like his. Clark was convicted of first-degree murder and received
27 a life sentence. In 2006, the U.S. Supreme Court heard his appeal (Clark v.
28 Arizona, 548 U.S. 735 [2006]). Why? Because when Eric Clark pulled
29 the trigger, it was a desperate effort to defeat a dangerous space alien.
30 The Court acknowledged Clark’s delusional schizophrenia but affirmed his
31 conviction and life sentence. It ruled that his psychosis was irrelevant to
32 determining whether he intended to kill a human being.

33 Now consider Sharon Patterson’s case (State v. Patterson, 131 Conn.
34 App. 65 [2011]). She was caring for a two-year-old boy who was not her
35 son. When he wet his bed, she decided to stop giving him water in the
36 evening. He also sometimes refused solid foods and, to get him to eat, she
37 decided to restrict his water during the day as well. Withholding water from
38 a child is a dangerous thing to do and, as a result, the boy died. Sharon
39 Patterson was charged with criminally negligent homicide, found guilty,
40 and given ten years in prison. It is also the case, and relevant to morality,
41 that Sharon Patterson is intellectually disabled. She didn’t understand the
42 harm she was doing. She thought she was helping. The court recognized
43 that she did not understand the danger of her actions, but it upheld her
44 conviction on the basis that a reasonable person would have understood it.
45
46

1 What about a person who steals to support a drug addiction? Over
2 two million people are afflicted by an opioid disorder in the United States
3 today. But addiction does not mitigate punishment for any crime. Or
4 consider the thousands of cases in the United States of people sentenced to
5 life in prison for crimes they committed as juveniles (Rovner 2017). The
6 state of Pennsylvania alone has more than 480 people serving life sentences
7 they received as juveniles. Studies show that childhood abuse and neglect
8 increase criminal delinquency by approximately 40% (Widom 1992, 1989).
9 That truth, however, mitigates neither guilt nor punishment.

10 Our legal system has decreed that people such as these are legally cul-
11 pable. Although the personal hardships of mental illness, trauma, and
12 addiction represent problems that would be difficult for most people to
13 manage well, none of them mitigates the law's assessment of criminal cul-
14 pability, or not much. The same holds for the limitations of intellectual
15 disability and immaturity. Short of the extremes of mental illness that
16 qualify as legal "insanity," the vast majority of mentally ill, intellectually
17 disabled, traumatized, addicted, and immature people are ruled criminally
18 guilty when it has been established that they have committed criminal acts.
19 It is hard to make *ethical* sense of these *legal* results. At the very least, they
20 pose a serious challenge to the notion that moral retribution fits the law.

21 Defenders of a retributive philosophy might respond by claiming that
22 we need to make some adjustments to our criminal justice practices. They
23 might argue that our criminal justice system does not *now* deliver just
24 deserts, but it *could*, were we to dial back the sentences of teenagers, people
25 afflicted with mental illness or addiction, and those who are intellectually
26 disabled. Actually, the courts have expressed some sympathy with these
27 ideas, at least when it comes to the very harshest penalties, specifically,
28 the death penalty and life without parole. They have ruled that the death
29 penalty is unconstitutional when applied to juveniles or the mentally ill,
30 and that juveniles cannot receive mandatory sentences of life without
31 parole (*Atkins v. Virginia*, 536 U.S. 304 [2002]; *Roper v. Simmons*, 543
32 U.S. 551 [2005]; *Miller v. Alabama*, 132 S. Ct. 2455 [2012]; *Jackson v.*
33 *Hobbs*, 132 S. Ct. 548 [2011]). It might also be thought that we should
34 go easier on people with substance addictions. The devastating opioid
35 epidemic has increased public sympathy for a less punitive approach to
36 the crimes of addiction. Now that addiction is no longer imagined to
37 afflict only the ghetto poor, it has become a cause of public outcry. For
38 example, the attorney general of the state of Massachusetts is currently
39 suing the corporate pushers of prescription painkillers on behalf of the
40 public (*Commonwealth of Massachusetts v. Purdue Pharma Superior Court*
41 *C.A. No. 1884-cv-01808 (BLS2)* [2019]).

42 So it might be thought that by punishing less, and more selectively, we
43 still have a chance to deliver retributive justice. But some disturbing facts
44 would remain. Our prisons are filled with people who are poor. Data
45 from the Bureau of Justice Statistics indicate that incarcerated people across
46

1 all race and ethnicity groups earned about forty percent less before going
 2 to prison than their non-incarcerated peers (Rabuy and Kopf 2015; Bu-
 3 reau of Justice Statistics 2004). These are the poorest of the poor. They
 4 are also, disproportionately, people who have suffered racial harassment,
 5 discrimination, and other forms of racialized mistreatment (The Sentenc-
 6 ing Project 2018). For example, aggressive policing tactics in inner city
 7 neighborhoods influence arrest rates (Butler 2017, 23–40). Although black
 8 Americans are not more likely to use drugs than whites, they are more
 9 likely to be arrested and incarcerated for drug use (Edwards et al. 2013).
 10 Socioeconomic disadvantage also influences the crime rate in poor, inner-
 11 city neighborhoods—racially segregated neighborhoods with failing schools
 12 and few jobs. For example, more robberies and murders are committed in
 13 disadvantaged neighborhoods. Socioeconomic deprivation is not, however,
 14 a factor that mitigates a criminal offender’s “just deserts.” Lack of police
 15 protection provides no legal excuse for the crime of gang affiliation, or
 16 the illegal possession of a weapon, whether or not a person who lives in
 17 gang territory would otherwise fear for his personal safety. Furthermore,
 18 the hopeless condition of the racialized ghetto does not mitigate criminal
 19 guilt for a person’s oppositional use of violence. Nor does an impoverished
 20 person have any legal excuse or justification for selling illegal drugs to
 21 sustain a living.

22 These are complicated matters and we resist thinking about them. We
 23 commonly set them aside as irrelevant: *of course* measures of social dis-
 24 advantage drop out of the criminal process. Criminal justice is about
 25 *individual responsibility*. What does it have to do with a person’s *so-*
 26 *sioeconomic profile*? Disadvantage does not determine individual choice.
 27 However unfair your social circumstances may be, *you* are responsible for
 28 *your choices*. As long as nobody forced you act as you did, you are respon-
 29 sible for what you have done. Furthermore, certain actions—such as theft,
 30 fraud, robbery, assault, rape, and murder—are wrong under *any* circum-
 31 stances, however difficult those circumstances may be. We must draw a line
 32 and hold people accountable to it. When a person commits a crime, even if
 33 he is desperately poor, traumatized, addicted, or mentally ill, we must hold
 34 him responsible for it. We owe it to victims and law-abiding citizens to
 35 remove that person from society and mark him as *bad*—damaged, perhaps,
 36 but bad nonetheless.

37 Let’s focus for a moment on the conclusion to which this line of thinking
 38 brings us—the idea that we should not merely remove a criminal wrongdoer
 39 from society, but we should mark him as a *bad person*, someone who is
 40 morally inferior, defective, and unworthy. As I have suggested, this conclu-
 41 sion involves an inference from the wrongfulness of the criminal act to the
 42 badness of the criminal wrongdoer. It displays a condemnatory personal
 43 judgment and purports to license the negative sentiments that typically
 44 accompany moral condemnation—moralized anger, disgust, hatred, and a
 45 desire to punish.

1 There is a vast moral philosophy literature on the importance of the
 2 “retributive sentiments” to morality. Yet judgments about personal badness
 3 are hard to contain, because the “badness” factor extends beyond the
 4 criminal wrongdoer. It goes to the circumstances under which a person
 5 commits a crime. It encompasses struggling neighborhoods, childhood
 6 exposure to violence and abuse, lack of critical resources and opportuni-
 7 ties, weak social structures, peer pressure, lack of personal security, and
 8 psychiatric emergencies. These are powerfully bad things. In fact, the more
 9 a person’s troublesome psychological and social circumstances affect our
 10 understanding of that person’s choices, the harder it is to make sense of
 11 where a person’s responsibility begins and ends. We cannot thoughtfully
 12 or honestly keep our focus on what a person deserves. A “compatibilist”
 13 understanding of moral responsibility is unconvincing. When a person’s
 14 individual “badness” begins to seem, in context, even somewhat under-
 15 standable, our evaluations of moral desert lose their grip (Indermaur et al.
 16 2012).

17 This instability in our evaluations of moral desert should bother the re-
 18 tributivist. It should bother the retributivist because socioeconomic factors
 19 amount to reasons to think the disadvantaged are *less blameworthy* for
 20 their criminal wrongdoing than criminal defendants from more privileged
 21 socioeconomic groups. And if the truly disadvantaged who commit crimes
 22 are less blameworthy for their criminal acts, they are also *less deserving* of
 23 punishment than their more privileged peers, even when they violate just
 24 laws.

25 This idea—that disadvantaged members of society are less blamewor-
 26 thy for criminal wrongdoing and less deserving of punishment than their
 27 privileged peers—is controversial. I will now defend it by developing an
 28 argument that appeals to the relevance of law’s claim to democratic au-
 29 thority and to some facts about the distribution of political power. I will
 30 address this argument to the retributivist. I reject the retributive theory
 31 partly, but not only, on the basis of this argument. I have already suggested
 32 that skeptical worries about the moral competence of mentally ill and in-
 33 tellectually disabled people present a difficulty for a retributive theory of
 34 criminal justice. I also think the very idea of retribution is hard to justify.
 35 Moral philosophers commonly assert that it is ethically foundational—a
 36 basic premise of moral life. I do not agree that it is, but I will not elaborate
 37 that objection here. My aim now is to explore the challenge posed to the
 38 retributive theory by socioeconomic inequality. If the retributive theory
 39 fails to apply under anything like the conditions that we should expect to
 40 be socially relevant, we should abandon it.

41 42 3 Deflating Desert

44 By referring to law’s democratic authority, I mean to appeal to the idea
 45 that our reasons to comply with law come partly from the law’s expression
 46

1 of the democratic will of the public. The idea is that we owe it to one
 2 another, as members of a democratic society, to comply with this collective
 3 will expressed through law. There are a variety of ways explored in the
 4 literature to account for this obligation: for example, one is contractual,
 5 another refers to notions of reciprocity and “fair play,” another utilizes
 6 the idea of a “joint commitment,” and yet another refers to democratic
 7 expressions of equal concern and respect for all citizens (Locke 1689; Rawls
 8 1999, 293–343; Gilbert 1993; Dworkin 2011, 69–97; See also Kelly 2018,
 9 149–177). I will not attempt to decide between these theories now, as I
 10 am more interested in their common thread, with which I am sympathetic.
 11 The point of convergence is the idea that democratic institutions are public
 12 decision-making procedures that generate reasons worth taking seriously.
 13 These reasons stem from the joint political agency of democratic citizens—
 14 from the status of democratic citizens as co-authors of the law.

15 A legitimacy problem for law arises, however, when some people are
 16 denied a fair opportunity for a reasonable set of alternatives to criminal be-
 17 havior. American cities contain de facto racially segregated neighborhoods
 18 that include some very poor areas, where opportunities for education and
 19 employment are severely truncated, and there is no wealth base. Racially
 20 segregated neighborhoods are the result of housing and lending policies
 21 deliberately imposed by the government (Rothstein 2017). These policies
 22 have aimed to achieve not only racial subordination but also wealth in-
 23 equality, and they have resulted in a significant wealth gap between black
 24 and white Americans and a sizable black underclass (Asante-Muhammad
 25 et al. 2017; Massey and Fischer 2000). Members of the urban underclass
 26 are heavily policed and incarcerated at high rates. Their rights and liberties
 27 are more frequently violated, whether by state officials, private persons
 28 with economic leverage, or other ordinary people. This longstanding mis-
 29 treatment sustains the subordinated social standing of black Americans,
 30 especially those who live in black neighborhoods, and including people
 31 who are not poor, and it curtails black Americans’ opportunities to increase
 32 their political and economic power (Pattillo 2003). The result is stubborn,
 33 caste-like social stratification (Shankar 2018).

34 The severity of this racialized socioeconomic and political inequality
 35 compromises the law as a source of ethical obligation. Because the political
 36 power of socioeconomically disadvantaged people, and especially the most
 37 disadvantaged black Americans, is weak, their obligations to comply with
 38 the law are also correspondingly weaker.¹ They lack power to authorize or
 39 reform the law and, to that extent, the laws are not *their laws*.² Although
 40

41 ¹ For a similar argument supporting the diminished legal culpability of children, see Yaffe
 42 (2018). I draw on Yaffe’s ideas in this and the next paragraph. I have also pursued this line of
 43 thinking in Kelly (2019).

44 ² The presence of political communities that have elected black leaders offers an interesting
 45 challenge to this argument. Still, since criminal justice is state-based and its principles and
 46 rules are historically entrenched, the presence of localized black political leadership should

The proofreader indicated semicolon on line 8, but if you’d like a period instead I can change that.

1 marginalized populations may benefit from parts of the law, they benefit as
2 relatively passive legal subjects rather than as co-authors.

3 The same is not true of more privileged members of society, whose
4 political voice has power. As a result, privileged members of society have
5 reasons to comply with substantively just parts of the law that the disad-
6 vantaged, who lack political power, do not have. These reasons stem from
7 their collective authorization of the law. Because the disadvantaged have
8 little if any authority over the law, they lack these reasons. As a result,
9 they do not owe it to their fellow citizens *as such* to respect the law or, at
10 least, their civic obligations to do so are considerably weaker. Of course,
11 they still have *moral* reasons not to murder, rape, or rob other people, but
12 these reasons do not come from the law *per se* (Shelby 2016, 219–223,
13 231–238). Despite having moral reasons not to commit criminal wrongs,
14 the disadvantaged do not exercise democratic agency together with their
15 fellow citizens. They lack the collectively generated reasons their fellow
16 citizens have to recognize legal authority, and they are less blameworthy
17 for violating the criminal law.

18 Now let's turn to the notion of moral desert. Unjust inequalities diminish
19 the moral accountability of unjustly disadvantaged criminal wrongdoers in
20 the following respect. Because the disadvantaged have weaker reasons to
21 recognize law's normative authority, they are less *deserving* of punishment
22 for violating the law—assuming, that is, that we can indeed make sense
23 of the logic of desert. Disadvantaged persons are less morally culpable
24 for their criminal acts because the disregard they have shown for the law
25 is less objectionable. It is less objectionable because it does not include
26 disregard for civic obligations that arise for persons who are positioned to
27 participate in the law's collective authorship. To put the point in a different
28 way, the truly disadvantaged do not violate a joint commitment to the law
29 because they are not party to that joint commitment (Kisolo-Ssonko 2019;
30 Gilbert 2006). A reasonable retributive theory would thus hold that the
31 truly disadvantaged are less deserving of retributive punishment when they
32 break the law.

33 In sum, members of the urban poor who break the criminal law do not
34 deserve as much blame for their criminal actions. Criminal guilt does not
35 imply moral desert, nor does it justify moral blame. When disadvantaged
36 members of society act in ways that violate the criminal law, they are less
37 morally blameworthy, even when the laws they violate are justified. This
38 argument focuses on the diminished political power of an oppressed group.
39 Judgments of blame and desert, in relation to criminal justice, vary in
40 accordance with political status.

41 If the arguments that I have given in this and section 2 of the paper are
42 compelling, there are good reasons to think that our system of criminal
43

44 not be taken to obligate community members to obey the law. Thanks to Myisha Cherry for
45 pressing me on this point. See Forman, Jr. (2017).
46

1 punishment is not really about giving anyone what they deserve. The
 2 criminal justice system is designed to remove some people from society,
 3 whether or not they get what they deserve. We are warehousing mental
 4 illness, addiction, abuse, and deprivation. The idea that the people we
 5 banish from society morally deserve their fate is a distortion that permits
 6 us to rest more comfortably with that reality.

8 4 Harm Reduction

10 Where does this leave us? Is a reasonable philosophy of punishment even
 11 *possible* in a society marked by serious racial and economic injustice?
 12 Although the causes of crime stretch beyond anything the criminal justice
 13 system can handle on its own, the criminal justice system could attempt to
 14 provide a limited remedy.

15 I propose that we reject the retributive view and instead consider criminal
 16 justice as a measure of “harm reduction.” Harm reduction is a rights-
 17 protecting, public safety rationale that permits us to shift significant burdens
 18 of rights protection onto people who threaten or violate other people’s
 19 rights. The burdens are significant in the sense that we would not be
 20 ethically permitted to impose them on people who do not threaten or
 21 violate other people’s rights. The idea is this. Considerations of public
 22 safety permit active measures designed to protect everyone’s basic rights.
 23 These measures include punishment that aims to reduce the harm crime
 24 does, by deterring and incapacitating would-be offenders. So understood,
 25 punishment is acceptable because the alternative is to permit wrongful
 26 rights violations—namely, of people who have not threatened or violated
 27 anyone’s rights. Harm reduction also includes efforts, like prison education
 28 and health care, to equip inmates for life after prison. These efforts are
 29 good for incarcerated people and they help to reduce the crime rate. They
 30 belong to the limited effect a criminal justice system can have to address the
 31 causes of crime. A more fully effective approach would involve meeting the
 32 requirements of social justice. In other words, the value of harm reduction
 33 implies the importance of empowering the disadvantaged politically and
 34 securing for them the goods to which they are entitled by justice. But a
 35 criminal justice system cannot provide the measures to accomplish this.
 36 Solving the social problems that drive the crime rate up demands social
 37 commitment and institutions that go beyond a criminal justice system.

38 A harm-reduction approach calibrates the costs of punishment in terms
 39 that contrast with retributive values. It counts the suffering inflicted by
 40 a punishment system on people who are convicted as *harm*, along with
 41 other harms criminal wrongdoers have done, rather than as a *good*, or a
 42 basic achievement of *justice*, as retributivists would have it. So understood,
 43 the aim of harm reduction puts pressure on any sentencing scheme to be
 44 minimal and as painless as possible—for example, offering meaningful
 45 protections for privacy and dignity, as well as access to education, health
 46

1 care, and other basic entitlements that it is possible to provide to people who
2 are incarcerated. As suggested above, providing these services and goods
3 also reduces the likelihood that inmates will recidivate. More generally,
4 the goal of reducing harm implies that alternatives to incarceration should
5 be sought when they are consistent with a reasonable approach to public
6 safety. We should not equate punishment with prison.

7 On a harm-reduction approach to criminal justice, moral concepts of
8 blame and desert play no important role. In fact, they are taken to be out
9 of place in thinking about criminal justice, since there are reasons to be
10 skeptical about their application to many defendants, and because they do
11 not fit legal criteria of criminal culpability—criteria we cannot and should
12 not readily abandon. I introduced skeptical doubt by appealing to familiar
13 intuitions about moral desert. Mental illness, intellectual disability, addic-
14 tion, immaturity, poverty, and racial oppression are factors that mitigate
15 our sense of a wrongdoer's moral desert, although they are mostly not
16 treated by the criminal justice system as relevant to criminal culpability.
17 For this reason, legal guilt does not license moral blame, even if an offender
18 has done something morally wrong. Furthermore, it is hard to see how
19 the criteria of legal culpability could be revised to line up better with our
20 notion of moral blameworthiness. Mitigating punishment in accordance
21 with a defendant's diminished blameworthiness could be at odds with a
22 rights-protecting, public safety rationale for the criminal justice system,
23 since some disturbed people have demonstrated that they pose a danger to
24 other people.

25 In short, given the mismatch between moral desert and legal culpability,
26 we face a choice. We could decide to revise our criteria of legal culpa-
27 bility to aim for a better fit with judgments of moral desert, or we could
28 consider the kind of legal consequences that might be morally permissible
29 even when they are not morally deserved. Harm reduction exemplifies
30 the latter approach. It asks us to seek a reasonable balance between two
31 aims: (1) reducing the harm crime does and (2) minimizing the harmful-
32 ness of punishment to offenders. In striking this balance, harm reduction
33 achieves some measure of distributive justice by reducing unfairness in
34 the distribution of harms, but it does so imperfectly. People who are bur-
35 dened by social injustice are still likely to be disproportionately harmed
36 by the criminal justice system, because the problem of crime is inseparable
37 from the dynamics of social injustice. By acknowledging this conclusion,
38 a harm-reduction approach to criminal justice incorporates an element of
39 shared responsibility, not only to balance the aims of harm reduction, but
40 also to address the causes of crime. A harm-reduction approach accepts
41 that a criminal justice system cannot, on its own, deliver justice, and the
42 retributive theory obscures this.

43 The retributive theory is no good. Our efforts to organize punishment
44 around the idea that wrongdoers deserve to suffer are half-hearted at best,
45 and the results cannot be reconciled with familiar beliefs about individual
46

responsibility. Instead of doubling down on some new version of the retributive thesis, we could be more honest with ourselves. The retributive ideal that held itself up as a beacon of justice is no more than an unconvincing attempt to twist our collective failures into a righteous form of condemnation, directed at people whose lives we deem to be expendable.

Until we commit ourselves, as a society, to racial and economic justice, we should be morally cautious in our assessments of individual responsibility and minimal in our punishments. My hope is that moral caution about blame and desert could help to make the criminal justice system less punitive and more fair.

Erin I. Kelly
Tufts University
E-mail: Erin.Kelly@tufts.edu

References:

- Abram, Karen M., Linda A. Teplin, Devon R. Charles, Sandra L. Longworth, Gary M. McClelland, and Mina K. Dulcan. 2004. "Posttraumatic Stress Disorder and Trauma in Youth in Juvenile Detention." *Archives of General Psychiatry* 61 (4): 403–410. <https://doi.org/http://doi.org/10.1001/archpsyc.61.4.403>.
- Asante-Muhammad, Dedrick, Chuck Collins, Josh Hoxie, and Emanuel Nieves. 2017. *The Road to Zero Wealth: How the Racial Wealth Divide Is Hollowing out America's Middle Class*. Washington, D.C: Institute for Policy Studies and Prosperity Now. https://ipsdc.org/wp-content/uploads/2017/09/The-Road-to-Zero-Wealth_FINAL.pdf.
- Atkins v. Virginia, 536 U.S. 304 (2002).
- Browne, Angela, Brenda Miller, and Eugene Maguin. 1999. "Prevalence and Severity of Lifetime Physical and Sexual Victimization among Incarcerated Women." *International Journal of Law and Psychiatry* 22 (3-4): 312–318. [https://doi.org/http://dx.doi.org/10.1016/S0160-2527\(99\)00011-4](https://doi.org/http://dx.doi.org/10.1016/S0160-2527(99)00011-4).
- Bureau of Justice Statistics. 2004. *Survey of Inmates in State Correctional Facilities*. Washington, D.C: Bureau of Justice Statistics. <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=275>.
- Butler, Paul. 2017. *Chokehold: Policing Black Men*. New York: The New Press.
- Clark v. Arizona, 548 U.S. 735 (2006).
- Commonwealth of Massachusetts v. Purdue Pharma Superior Court C.A. No. 1884-cv-01808 (BLS2). January 15, 2019. https://d279m997dpfwgl.cloudfront.net/wp/2019/01/Mass_AGO_Pre-Hearing_Memo_and_Exhibits.pdf.
- Dworkin, Ronald. 2011. *Justice for Hedgehogs*. Cambridge, MA: Harvard University Press.
- Edwards, Ezekiel, Will Bunting, and Lynda Garcia. 2013. *The War on Marijuana in Black and White*. New York: American Civil Liberties Union. https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf.
- Forman Jr., James. 2017. *Locking up Our Own: Crime and Punishment in Black America*. New York: Farrar, Straus, and Giroux.
- Gilbert, Margaret. 1993. "Group Membership and Political Obligation." *Monist* 76 (1): 119–131. <https://doi.org/10.5840/monist19937619>.
- Gilbert, Margaret. 2006. *A Theory of Political Obligation*. Oxford: Oxford University Press.

Acknowledgments This paper was presented at the 2019 Res Philosophica Conference on Mass Incarceration at Saint Louis University. I am grateful to the conference participants for discussion, especially my commentator, Myisha Cherry. I also presented this paper as a Tedx Cambridge talk, <https://www.tedxcambridge.com/talk/who-belongs-in-prison/>, and to the Tufts University Political Science Department as the 2019 Wooten Lecture. I thank Dmitri Gunn, AJ Harper, and Brian Douglas for helping me to develop the Tedx version.

- 1 Indermaur, David, Lynne Roberts, Caroline Spiranovic, Geraldine Mackenzie, and Karen Gelb.
2 2012. "A Matter of Judgment: The Effects of Information and Deliberation on Public
3 Attitudes to Punishment." *Punishment & Society* 14 (2): 147–165. <https://doi.org/http://doi.org/10.1177/1462474511434430>.
- 4 Jackson v. Hobbs, 132 S. Ct. 548 (2011).
- 5 Jacobs, James B. 2015. *The Eternal Criminal Record*. Cambridge, MA: Harvard University
6 Press.
- 7 James, Doris J. and Lauren E. Glaze. 2006. *Mental Health Problems of Prison and Jail
8 Inmates, Bureau of Justice Statistics Special Report*. Washington, D.C: U.S. Department of
9 Justice. <https://www.bjs.gov/content/pub/pdf/mhppji.pdf>.
- 10 Justice Center. 2020. *National Inventory of Collateral Consequences of Conviction*. New
11 York: The Council of State Governments. [https://niccc.csgjusticecenter.org/database/
12 results/?jurisdiction=&consequence_category=&narrow_category=&triggering_offense_
13 category=&consequence_type=&duration_category=&page_number=1](https://niccc.csgjusticecenter.org/database/results/?jurisdiction=&consequence_category=&narrow_category=&triggering_offense_category=&consequence_type=&duration_category=&page_number=1).
- 14 Kant, Immanuel. 1785. *Grounding for the Metaphysics of Morals*. Translated by James W.
15 Ellington. Indianapolis: Hackett.
- 16 Kant, Immanuel. 1793. *Religion within the Limits of Reason Alone*. Translated by Theodore
17 M. Greene, and Hoyt H. Hudson. New York: Harper & Row.
- 18 Kelly, Erin I. 2018. *The Limits of Blame: Rethinking Punishment and Responsibility*. Cam-
19 bridge, MA: Harvard University Press.
- 20 Kelly, Erin I. 2019. "The Ethics of Law's Authority: On Tommie Shelby's *Dark Ghettos:
21 Injustice, Dissent, and Reform*." *Criminal Law and Philosophy*. [https://doi.org/10.1007/
22 s11572-019-09498-5](https://doi.org/10.1007/s11572-019-09498-5).
- 23 Kisolo-Ssonko, Joseph. 2019. "Race and the Responsibility to Abide by the Norms of
24 Unchosen and Unjust Social Roles." *The Monist* 102 (2): 172–86. [https://doi.org/10.1093/
25 monist/onz004](https://doi.org/10.1093/monist/onz004).
- 26 Kleinfeld, Joshua. 2016. "Two Cultures of Punishment." *Stanford Law Review* 68 (5):
27 933–1036.
- 28 Locke, John. 1689. "Second Treatise of Government."
- 29 Massey, Douglas S. and Mary J. Fischer. 2000. "How Segregation Concentrates Poverty."
30 *Ethnic and Racial Studies* 23 (4): 670–691.
- 31 Miller v. Alabama, 132 S. Ct. 2455 (2012).
- 32 Pattillo, Mary. 2003. "Extending the Boundaries and Definition of the Ghetto." *Ethnic and
33 Racial Studies* 26 (6): 1046–57. <https://doi.org/10.1080/0141987032000132487>.
- 34 Rabuy, Bernadette and Daniel Kopf. 2015. *Prisons of Poverty: Uncovering the Pre-
35 Incarceration Incomes of the Imprisoned*. Northampton, MA: Prison Policy Initiative.
36 <https://www.prisonpolicy.org/reports/income.html>.
- 37 Raj, Anita, Jennifer Rose, Michele R. Decker, Cynthia Rosengard, Megan R. Herbert, Michael
38 Stein, and Jennifer G. Clarke. 2008. "Prevalence and Patterns of Sexual Assault across
39 the Life Span among Incarcerated Women." *Violence Against Women* 14 (5): 532–538.
40 <https://doi.org/10.1177/1077801208315528>.
- 41 Rawls, John. 1999. *A Theory of Justice*. Rev. edn. Cambridge, MA: Harvard University Press.
- 42 Richie, B.E. and C.E. Johnson. 1996. "Abuse Histories Among Newly Incarcerated Women
43 in a New York City Jail." *Journal of the American Medical Women's Association* 51 (3):
44 111–114.
- 45 Roper v. Simmons, 543 U.S. 551 (2005).
- 46 Rothstein, Richard. 2017. *The Color of Law: The Forgotten History of How Our Government
Segregated America*. New York: W. W. Norton and Co.
- Rovner, Josh. 2017. *Juvenile Life without Parole: An Overview*. Washington, D.C: The
Sentencing Project. [http://sentencingproject.org/doc/publications/jj_Juvenile_Life_Without_
Parole.pdf](http://sentencingproject.org/doc/publications/jj_Juvenile_Life_Without_Parole.pdf).
- Shankar, Subramanian. 2018. *Does America Have a Caste System?* Boston, MA: The
Conversation. <http://theconversation.com/does-america-have-a-caste-system-89118>.

- 1 Shelby, Tommie. 2016. *Dark Ghettos: Injustice, Dissent, and Reform*. Cambridge, MA:
2 Harvard University Press.
- 3 State v. Patterson, 131 Conn.App. 65 (2011).
- 4 The Sentencing Project. 2018. *Report of the Sentencing Project to the United Nations Special*
5 *Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and*
6 *Related Intolerance: Regarding Racial Disparities in the United States Criminal Justice*
7 *System*. Washington, D.C: The Sentencing Project. [https://www.sentencingproject.org/
8 publications/un-report-on-racial-disparities/](https://www.sentencingproject.org/publications/un-report-on-racial-disparities/).
- 9 Whitman, James Q. 2003. *Harsh Justice*. Oxford: Oxford University Press.
- 10 Widom, Cathy Spatz. 1989. "Child Abuse, Neglect, and Adult Behavior: Research, De-
11 sign, and Findings on Criminality, Violence, and Child Abuse." *American Journal of*
12 *Orthopsychiatry* 59 (3): 355–67. <https://doi.org/10.1111/j.1939-0025.1989.tb01671.x>.
- 13 Widom, Cathy Spatz. 1992. *The Cycle of Violence*. Washington, D.C: National Institute of
14 Justice. U.S. Department of Justice.
- 15 Yaffe, Gideon. 2018. *The Age of Culpability: Children and the Nature of Criminal Responsi-*
16 *bility*. Oxford: Oxford University Press.
- 17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46