"We do not live in society in order to condemn, though we may condemn in order to live."[1]

Criminal Law in the Age of the Administrative State

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What is the criminal law for? One influential answer is that the criminal law vindicates pre-political rights and condemns wrongdoing. On this account, the criminal law has an intrinsic subject matter—certain types of moral wrongdoing—and it provides a distinctive response to that wrongdoing, namely condemnatory punishment. This understanding of the criminal law sets the stage for familiar debates in the philosophical literature on punishment, and informs the methodological framework in which that question is pursued. The philosophy of criminal law is, from this point of view, essentially an exercise in applied moral philosophy. Its concepts and preoccupations are familiar from interpersonal morality: desert, wrongdoing, excuse, blame and so forth.

I defend a contrasting account. The criminal law and its associated institutions are, I claim, subject to the same principles of institutional and political evaluation that apply to public law and public institutions generally. The criminal law is a public institution that has a profound impact on people's lives. It therefore seems appropriate to see how it stacks up under familiar principles of political justification, particularly those that pertain to the role of public institutions in shaping life chances. Criminal law is public law, whether or not it vindicates private right.[2]

A public law conception starts with an account of punishment as a means of fostering social cooperation, an idea familiar from game theory, evolutionary biology and classical sociology. Punishing rule-violating conduct fosters social cooperation by providing assurance to those who are willing to cooperate that they will not be taken advantage of by those who choose to defect. Punishment promotes the development of attitudes of reciprocity and the willingness to engage with others on shared terms of social cooperation. It is not that punishment terrifies people into doing things they would not otherwise be inclined to do, as classical deterrence theory would have it. Rather, by stabilizing cooperative attitudes, punishment makes cooperation not just reasonable, but rational as well.

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[1] HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. (Oxford University Press 2008) at 172.

[2] The "public law" label is not original to me; I draw here upon the important work of Malcolm Thorburn. See "Criminal Law as Public Law," in RA Duff & Stuart Green, eds., *Philosophical Foundations of Criminal Law* (Oxford University Press 2011): 21-43; and "Justifications, Powers and Authority," *Yale Law Journal* 117 (2008): 1070-130. Thorburn would probably deny that his view is a "public law" view in my sense.

The cooperative basis of punishment provides a fresh vantage point on the project of justifying the criminal law. The cooperative basis of punishment suggests that the justification of criminal law cannot be separated from a justification of the forms of cooperation that the criminal law fosters. By the same token, our reasons for valuing social cooperation provide a normative platform for evaluating the criminal law. After all, that cooperation is valuable and worth supporting does not imply that just anything goes so long as it promotes cooperation. The means we select for fostering cooperation should themselves be consistent with our reasons for valuing cooperation in the first place. What this suggests is that a normative theory of the criminal law should live up to a fully political standard of justification: the same values and ideals that explain our reasons for valuing social cooperation under law apply to the moral evaluation of the criminal law.

Criminal law as public law thus stands at some distance from the highly individualistic account of rights and wrongs that motivates most forms of contemporary retributivism, whether of a moralistic or a Kantian strain. The criminal law is a means to an end, not an end in itself. It draws its value from the value of the public institutions and practices it supports. The value and justification of punishment cannot be drawn directly out of our everyday norms of interpersonal morality. The relevant concepts and principles of interpersonal morality carry weight in the justification of criminal law only insofar as they are incorporated within a broader account of justice in public law and public institutions.

Criminal law as public law is consistent with a wide range of approaches to normative political theory. It is not my aim in this book to defend any one approach over all others. I do aim, however, to illustrate how the demands of a fully political standard of justification can be met. I do this by considering a form of democratic egalitarianism, and unpacking how an account of social and political equality along those lines might be extended into the context of the criminal law. Drawing on work by Phillip Pettit, Elizabeth Anderson and Niko Kolodny, I sketch an egalitarian ideal of "anti-deference"—an ideal of a society of peers in which, in Pettit's evocative phrase, each person can look every other person in the eye without fear or deference.[3] I give a particular interpretation to this idea, one that is loosely consequentialist, egalitarian but not equalizing, and centered on a form of freedom—effective access to central capabilities—as its currency of evaluation. Public institutions should strive to protect each person's effective access to a range of central capabilities, where a central capability is one that is required, in a given social context, to live as a peer among peers. Access is effective when a person is able to exercise those capabilities without having to show undue deference to another.

An important feature of this conception of social equality is that a person does not lose her standing as an equal in virtue of having committed a crime. Were it otherwise, the category of criminal wrongdoing would in effect be given a pre-political significance that limits our commitment to social and political equality. But this is to look at matters the wrong way around: from a public law perspective, the category of criminal wrongdoing is analyzed in terms of basic political values, not *vice versa*. People do not lose their status as equals in virtue of their crimes. The central question for an egalitarian theory of the criminal law is to explain the conditions under which a society equals may reasonably rely

[3] Elizabeth Anderson, "What is the Point of Equality?" *Ethics* 109 (1999): 287–337; Philip Pettit, *On the People's Terms* (Cambridge University Press 2013).

on punitive measures to sustain egalitarian social relations. While egalitarian institutions might sometimes punish people for committing crimes, they should not for that reason consider a person's basic equality to be waived or defeated.

Punishment under the criminal law is most consistent with a commitment to social and political equality when it gives those who are subject to it an equal opportunity for influence in defining the law and setting policy, and, subject to that constraint, when it optimally protects effective access to central capability for all. The equal opportunity for influence principle is grounded in the thought that for some to have the unilateral power to call the shots when it comes to making criminal justice policy—what kind of conduct to criminalize, which neighborhoods to police, whom to search, whom to prosecute and what counts as an appropriate punishment for a crime—is for those people to have unjustified social power and authority over others.[4] This power and authority gives them a status that others lack, and is prone to generate objectionable patterns of deference. Perhaps this might be less problematic in areas of public policy that are less overtly coercive, or where the possibility of opting out is more realistic. But the criminal law is both highly coercive and mandatory. Allowing for equal opportunity for influence over the criminal law meliorates the concern that the criminal law boils down to gussied up bullying, however fair and effective it may otherwise be.

Subject to this constraint, capability-impairing policies of enforcement and punishment should be a last resort, employed only when no other reasonably available cooperative strategy does as well at protecting effective access to central capability for all. Since egalitarians should not view it as easier to justify a criminal law intervention simply because those who bear the brunt of its force have committed, or are suspected of having committed, criminal acts, a decision to rely on criminal sanctions to enforce a legal norm must be justifiable to all, victim and accused alike. By the same token, the criminal law should not be used, even as a means of protecting central capability, in ways that reflect humiliating judgments about those who are subject to the law. Doing so would be plainly contrary to the commitment to social equality that lies at the heart of anti-deference as a political ideal.

These concerns occupy the first half of the book (chapters one, two and three.) The remaining chapters are devoted to applying the egalitarian theory of criminal law to a range of important problems in contemporary criminal law and policy. In chapter four, I consider the phenomenon of mass incarceration. Starting in the 1970s, the United States has experienced unprecedented growth in incarceration rates, to the point where it currently houses 20% of the world's inmate population despite constituting only 5% of the world's population. Although most retributivists bemoan current incarceration levels, I argue that standard forms of retributivism—focused exclusively on the moral liability of individuals to punishment, and expressly marginalizing the significance of the social costs and benefits of punishment—have a difficult time explaining what is wrong with mass incarceration. I argue that, from an egalitarian point of view, social investment in punishment becomes excessive once the marginal gains to universal and effective access to central capability are overshadowed by the losses (including opportunity costs) to that

[4] Niko Kolodny, "Rule Over None I," *Philosophy & Public Affairs* 42(3) (2014): 195-229; "Rule Over None II," *Philosophy & Public Affairs* 42(4) (2014): 287-336.

same egalitarian value. It is plausible that the current rate of incarceration in the United States significantly exceeds any reasonable estimate of this value.

Chapter five considers questions of criminalization. I criticize the prevailing "subject matter" approach, which treats the criminal law as centered upon a pre-politically specified subject matter (*mala in se*, natural moral rights, etc.) From the point of view of a public law conception, the criminal law does not have an intrinsic subject matter. Or, at least, any specification of the criminal law's subject matter rests on a political judgment about when social cooperation is preferable to private ordering. When should some type of conduct actually be criminalized? I argue that we have good reason to criminalize conduct if doing so is essential to promoting each person's ability to securely and effectively exercise basic capability. In contrast, I argue that the fact that conduct is morally wrongful is neither necessary nor sufficient for criminalization. In other words, we should reject moral wrongfulness as a principle of criminalization.

Chapter six turns to questions of criminal procedure and constitutional law. The United States Supreme Court has consistently adopted a formalistic approach to defining criminal law: a law is "criminal" if it does not merely seek to discourage, prevent or otherwise regulate conduct, but rather is intended to condemn it by means of expressive punishment. Because many procedural rights—for instance, access to a lawyer, the ban on double jeopardy and retroactive application of a law—are limited to people facing criminal prosecutions, the result is to sharply limit the scope of those procedural rights on the basis of a court's judgment as to whether a legislature intended to punish when it enacted some law. Drawing upon the concept of a central capability familiar from the work of Amartya Sen and Martha Nussbaum, I suggest that a law which has the effect of burdening a person's effective access—access on terms befitting a peer—to central capabilities should be treated as effectively a criminal law. Whether or not such laws are "truly" criminal law should be irrelevant from a constitutional point of view. A formalistic understanding of the criminal law should not regulate access to procedural rights, particularly in an era in which legislatures have been attaching increasing numbers of ostensibly non-criminal "collateral" consequences to a criminal conviction. From the point of view of public law, the central question remains one of determining what kind of process is due. That question should be resolved on the basis of what kinds of capabilities are actually in jeopardy, rather than an estimation of a legislature's potentially punitive motives.

Finally, in chapter seven I turn to questions of responsibility. Equality may seem to be at odds with responsibility, and nowhere more so than in the criminal law. The egalitarian theory of criminal law that I articulate in this book may give the impression of denying that people are responsible for the choices they make. Taking responsibility seriously implies respecting the choices people make, even when they are poor ones. That seems, in turn, to suggest that when people engage in conduct that is ill-considered, culpable or blameworthy, we have powerful, responsibility-based reasons to blame and punish them for doing so. I defend a contrasting account. I argue that we can have responsibility without resentment: taking responsibility seriously does not inevitably require blaming and punishing people for their wrongful acts. I suggest that one way of taking responsibility seriously is by strengthening the social, emotional and cognitive conditions under which responsible agency is developed and exercised. Instead of punishing people for crimes once they are committed, public institutions can instead develop initiatives (such as early childhood education and youth employment) that prevent crime by developing the capacity

for responsible agency. Since neither criminal punishment nor social programs of this kind are self-executing—both consume scarce resources and political attention—a principle of distributive justice is required to adjudicate between them. Hence, rather than denying responsibility, egalitarian principles can help navigate a responsibility-responsibility trade-off.

The political approach I defend in this book is not *sui generis*. The ambition and, in many ways, the conclusions that I defend in this book flow out of David Garland's *The Culture of Control* and, especially, John Braithwaite and Philip Pettit's *Not Just Deserts*. Like Garland, I emphasize the connections between criminal justice and the welfare state, both in terms of how the criminal law was once understood to be part of a broader panoply of state-provided services, social insurance programs and welfare-oriented policies, and in terms of its character as a retributive, moralistic and condemnatory institution as the welfare state has been rolled back. Like Braithwaite and Pettit, my ambition is to develop a comprehensive and loosely consequentialist approach to criminal justice. And, like Braithwaite and Pettit, my preferred framework draws upon republican ideas, particularly as they have been developed by Pettit in his subsequent political philosophy.

Other important political theories of punishment include the contractualist and Rawlsian theories developed by Matt Matravers and Sharon Dolovich, respectively; Lindsay Farmer's historicist account of criminal law and civil order; Malcolm Thorburn's Kantian constitutionalism (from whom the label "criminal law as public law" is borrowed); and, most foundationally, HLA Hart's efforts, in *Punishment and Responsibility* to show how the philosophy of criminal law could avoid a moralistic retributivism without falling into an oppressively technocratic conception of crime and punishment.[5]

Hart's central insight in *Punishment and Responsibility* was that the criminal law could be interpreted from the point of view of basic political values, rather than the thick norms of interpersonal morality. However, despite Hart's stature in the field, the last generation of English-language scholarship has been dominated by the steady growth of retributive theories of punishment and, more generally, of highly individualistic theories of criminal law. Although social scientists have generally appreciated the institutional character of criminal law and criminal justice—its trade-offs and uncertainties, its relation to other types of social policy, the significance of institutional design and incentives, and its role in entrenching patterns of deprivation and subordination—among philosophers and legal theorists, institutional approaches have remained a decidedly minor literature. That tide now seems to be turning. After a generation of attempts to explain why people who have committed crimes have no reason to complain when we punish them for doing so, and after a generation of unremitting and ultra-harsh penal policies, the place of criminal justice institutions in a putatively liberal and democratic society is finally beginning to receive

[5] Matt Matravers, *Justice and Punishment: The Rationale of Coercion* (Oxford University Press 2000); Sharon Dolovich, "Legitimate Punishment in Liberal Democracy," *Buffalo Criminal Law Review* 7(2) (2004): 307-442; Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press 2016); Malcolm Thorburn, "Criminal Law as Public Law"; HLA Hart, *Punishment and Responsibility*.

serious attention from a wide range of political philosophers. My hope is that this book will, in some small way, contribute to furthering that conversation.