SOCIAL JUSTICE/CRIMINAL JUSTICE: ASSESSING THE LEGITIMACY OF STATE-IMPOSED PUNISHMENT

WILLIAM C. HEFFERNAN*

I. INTRODUCTION

What is the relationship, if any, between social justice and criminal justice? None, it might be argued—or at least none worth serious consideration. When thinking about social justice, someone asks about the fair distribution of resources and opportunities in a given community. In thinking about criminal justice, a person asks about the fairness of state-imposed punishment for acts that violate the obligations essential to social life. One might argue that criminal justice can, and should, be pursued without regard to social justice. Under this position, even if an offender is poor, the full weight of punishment is due if the offender has maliciously interfered with the security rights of another person.

But what if offenders are unable to avail themselves of the legal rights asserted by defendants charged with similar crimes? Or what if an offender successfully claims the full range of rights available to others but receives a longer sentence than other defendants convicted of the same crime? These are questions about comparative justice. In some circumstances, the comparisons at stake might have nothing to do with social justice. They can, however, be classified as issues of social justice if financial or racial factors have contributed to the disparate outcomes. Whenever factors such as these influence a legal result, it is reasonable to say social justice impinges on criminal justice. Punishment may still be in order, but the legitimacy of the state's exercise of authority is called into question by the state's failure to attend to issues of social justice that have a bearing on criminal justice.

And what if the state's authority to punish is deployed in such a way as to favor the prosperous over the poor? For example, what if resources are allocated in such a way as to de-emphasize crimes typically committed by the rich—income tax evasion and securities fraud are pertinent here—with the result that such crimes aren't disregarded altogether but are investigated only when flagrant examples come to light? Or what if resources are allocated in such a way as to de-emphasize corporate crime—fraudulent misrepresentation, for instance, or environmental pollution—again, not disregarding this kind of crime altogether but responding only to cases of egregious misconduct? Questions such as these are also concerned with the social justice/criminal justice connection, though they address it in a different way. These questions are concerned with incommensurable variables—the apples and oranges of criminal law—in that they require

* John Jay College of Criminal Justice City University of New York.

consideration of allocative issues associated with illegal acts undertaken within the upper, rather than the lower, echelons of society.

And what about another issue pertinent to the social justice/criminal justice connection: the debilitating effect of poverty on a defendant's capacity to conform to the law? There are many different settings when this may merit consideration. Some involve relatively minor crimes, such as when a homeless person violates a municipal ordinance by sleeping in a public place, but some involve major crimes. For instance, if it's agreed that the government has a social justice obligation to address problems of severe mental illness confronted by those who cannot pay for treatment, then punishment for an act of aggression attributable to a failure to address the psychiatric problems associated with the act is problematic as a matter of criminal justice. Punishment may not be wholly illegitimate in this context; after all, difficult questions of degree concerning an offender's capacity to exercise self-control are at stake. But if one were to say that government has an obligation to address mental illness issues when someone's ability to pay for treatment is impaired, one might also say that failure to provide support taints its exercise of punitive authority—without, perhaps, wholly undermining it.

This Article examines each of the social justice/criminal justice connections already noted, plus others yet to be mentioned. It does so by focusing on issues of comparative justice—in particular, by focusing on the justifiability of disparate outcomes in the exercise of the state's power to punish. Disparate access to resources and opportunities stands in need of justification. Penal outcomes that differ as to class and race also require justification. In each instance, it may be possible to justify the disparities at stake; it may be possible, in other words, to provide a convincing rationale for the inequalities generated by public institutions. The need for justification cannot be evaded, though. Above all, it cannot be evaded when thinking about the intersection of social and criminal justice, for it is here that we encounter settings where the socially disadvantaged routinely encounter further disadvantage through the exercise of the state's penal power.

On this reckoning, questions about social justice have an urgent connection to criminal justice. Do they take priority over it? Is social justice so important that convictions for violating the state's penal laws should be viewed as wholly illegitimate if these are tainted by its failure? Someone adopting the *override hypothesis* holds that, at least in principle, a substantial percentage of criminal convictions should be deemed unjust. Until the conditions of social injustice are corrected, criminal justice in these cases is impossible: continued deployment of the state's punitive power (which, as a realist would note, will continue to be deployed despite criticism of it as unjust) amounts to nothing more than an exercise in raw oppression.

At the other end of the spectrum, one might grant that state-imposed punishment is tainted—severely and routinely tainted, perhaps—by the government's failure to remedy numerous social injustices. But, they still might contend that this should have no bearing on questions about the exercise of state penal power. Someone adopting this position endorses the

independent-track hypothesis, which doesn't deny the possible significance of social justice claims when considered on their own but holds that they have no bearing on the legitimacy of criminal convictions.

This article defends a middle ground: the *partial reconciliation thesis*. This thesis aims at addressing social justice deficits whenever this can be done without undermining the operation of criminal law. As is true of all middle ground positions, this approach is not fully satisfactory. It leaves numerous issues of social injustice unaddressed, thus accepting (though on a qualified basis) the compromised legitimacy of criminal law in these instances. On the other hand, it points to many remedies that can be adopted so as to reduce iniquities produced by administration of the criminal law. Access to legal rights can be substantially enhanced under this approach; racial disparities in sentencing can be reduced. Class disparities in the administration of criminal law that favor the prosperous over the poor can also be addressed under this approach. Even the most challenging feature of the social justice/criminal justice connection—the individual incapacitation issues associated with the government's failure to address class and racial disparities—can be partially addressed under the proposed approach. One must concede that this last category cannot be addressed in a wholly satisfactory way. However, the remedies advocated here suggest that social justice and criminal justice are at least partially reconcilable.

This Article is divided into four sections. Section One addresses general issues by examining John Rawls' remarks in *A Theory of Justice*.[1] Rawls comments at length on social justice; in contrast, he has surprisingly little to say about criminal justice. Section One also extends the Rawlsian framework, showing that its concern with justifiable disparities in the distribution of resources is pertinent to criminal law. Section Two applies the justifiable disparities framework to two institutional settings, one regarding the distribution of grades in college courses, the other with the distribution of penal outcomes. When disparities are not justifiable, it's reasonable to speak of systemic taint. Even if an institution performs a worthwhile social function (identifying intellectual merit, for instance, or punishing wrongdoing) the problematic disparate outcomes it generates are troubling in themselves, thus prompting questions about the proper response to its tainted outcomes.

Section Three is concerned with different responses to these outcomes. Even if it's agreed that the administration criminal law produces tainted outcomes, someone might contend that these are relatively modest and that criminal law should be administered without regard to considerations of social justice. Section Three goes on to examine this independent-track hypothesis alongside the override hypothesis, suggesting that each offers a helpful way to think about criminal law in certain settings. It further suggests, though, that given the overwhelming racial and class disparities in American law, the partial reconciliation hypothesis merits serious consideration as the soundest approach to the social justice/criminal justice connection today. The third section then proposes a framework of partial reconciliation. Section Four applies that framework by proposing ways to correct social justice

[1] John Rawls, A Theory of Justice (rev. ed., 1999).

deficits in the operation of criminal law. It addresses issues both internal and external to criminal law. It doesn't claim that reconciliation of the two kinds of justice is invariably possible. However, it does suggest that consistent attention to questions of social justice would markedly improve the quality of criminal justice.

II. THE ISSUE OF PRIORITY

"[I]n a reasonably well-ordered society those who are punished for violating just laws have normally done something wrong," Rawls remarks in *A Theory of Justice*.[2] Because Rawls addresses questions about the distribution of resources and opportunities at substantial length while commenting only briefly on criminal law, his remarks on the latter subject have to be classified as something of an afterthought. They are relatively clear, however, for Rawls unmistakably distinguishes between two different principles—the state's obligation to ensure the fair distribution of goods and services and the individual's duty to refrain from acts of wrongful force. The state's obligations are identified through a process of collective deliberation, one that Rawls calls "the original position." On the other hand, natural duties arise by virtue of someone's status as a participant in social life. As Rawls puts it, "in contrast with obligations, it is characteristic of natural duties that they apply to us without regard to our voluntary acts."[3] Furthermore, Rawls insists, natural duties "have no necessary connection with institutions or social practices; their content is not, in general, defined by the rules of these arrangements."[4]

Given his distinction between institutional obligations and natural duties, Rawls might be said to endorse the independent-track hypothesis as to the relationship between social and criminal justice. Institutional obligations are binding on the state, and natural duties are binding on individuals, so on Rawls's reckoning it appears that the state may punish individuals even if it has failed to provide them with the requisite social justice. Rawls's general comments on criminal law seem to support this conclusion, for he remarks that "the purpose of the criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end."[5]

Upon closer inspection, though, it turns out that the aforementioned passages do not mandate an interpretation of Rawls that makes him exclusively an advocate of the independent-track hypothesis. The first passage relies on qualifying words (*a reasonably well-ordered society*, *just laws*, and *normally done something wrong*, for instance), thus suggesting the possibility of a tension between social and criminal justice when a society is *not* reasonably well-ordered. Furthermore, each passage presupposes a state

[2] *Id.* at 276.
[3] *Id.* at 98.
[4] *Id.*
[5] *Id.* at 276.

committed to honoring natural duties—for instance, a state unwilling to tolerate slavery and dispossession of ancestral lands, since practices such as these are manifestly incompatible with the natural duties to which Rawls alludes. The passages also assume that state officials will act in an unbiased way when enforcing just laws—that they will apply prohibitions such as those dealing with murder and rape in a way that doesn't favor one class or race over another.

Once these qualifiers are taken into account, Rawls's remarks are compatible with all three hypotheses. The independent-track is applicable if the requisites of social justice have been honored; the override is pertinent when these have been massively violated; and partial reconciliation should be considered when the deficits are substantial, but not so serious as to override the natural duty to refrain from force and fraud. It has to be conceded, of course, that this interpretation of Rawls goes beyond his thin remarks on criminal law and criminal justice. It is entirely compatible with them, though. Moreover, it has the essential merit of clarifying the social justice/criminal justice connection—an issue not directly addressed in *A Theory of Justice*, but one that is critical to its focus given the book's overall concern with justifiably disparate outcomes attributable to the state's exercise of power.

In extending Rawls's remarks, we should provide a definition of criminal justice, rely on his conception of social justice, and forge a connection between the two concepts, thereby making it possible to ask whether one type of justice can properly take priority over the other. The term *criminal justice* has a double focus. Its immediate concern is the cluster of natural duties each person owes others. These include many specific duties to refrain from unprovoked acts of violence and further duties to refrain from acts of fraud—the wrongful force and fraud thesis ("WWF"). Criminal justice isn't merely concerned with WFF; it also addresses questions about the proper way to respond to acts that violate these duties. On a Lockean account, individuals who are not subject to government authority may act on their own authority by retaliating against acts of WFF.[6] Locke claims that by agreeing to the social contract, individuals vest in government the authority to punish wrongdoers in return for protection against WFF (the vesting thesis).[7]

It is somewhat perplexing that Rawls doesn't examine this second, state-centered feature of criminal justice, for he openly acknowledges his debt to Locke;[8] and Locke views the possibility of a coordinated response to violations of WFF as the core consideration that justifies vesting the state with the authority to punish acts of wrongdoing.[9] Nonetheless, it's

[6] JOHN LOCKE, *An Essay Concerning the True Original, Extent, and End of Civil Government*, *in* TWO TREATISES OF GOVERNMENT 142, 147 (5th ed. 1728) ("For in that *State of perfect Equality*, where naturally there is no Superiority or Jurisdiction of one, over another, what any may do in Prosecution of that Law, every one must needs have a Right to do.").

[7] *Id.* at 149 ("the Magistrate, who by being Magistrate, hath the common right of punishing put into his Hands…").

[8] RAWLS, *supra* note 1, at 10 ("My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant.").

[9] LOCKE, *supra* note 6, at 156 ("To avoid this State of War (wherein there is no Appeal but to Heaven, and wherein every the least Difference is apt to end, where there is no Authority to decide between the

undeniable that Rawls incorporates into his own framework Locke's analysis of the legitimacy of the government's authority to impose proportionate punishment. This is because there is no other way to make sense of Rawls's remark, quoted earlier, that "the purpose of the criminal law is to uphold basic natural duties,"[10] for by adopting laws that punish WFF, the government gives concrete expression to its role as the public's protector. On this Lockean/Rawlsian account, the state acts as a surrogate for the public when it exercises its power to punish.[11] It acts justly when it impartially deploys this power while meting out proportionate punishment. It acts unjustly when it violates the terms of its surrogacy role by favoring one citizen—or one bloc of citizens—over another or by imposing disproportionate punishment.

And what about social justice? Many versions of the term are possible. At a minimum, the term *social justice* refers to measures that must be taken to correct the morally arbitrary features of birth. Rawls places this issue at the center of his framework. "We do not deserve our place in the distribution of native endowments," he remarks, "any more than we deserve our initial starting place in society."[12] Because we do not deserve our initial starting place, he suggests, deliberators reasoning behind a veil of ignorance (the metaphor Rawls employs to emphasize the importance of impartial reasoning when thinking about the social distribution of holdings[13]) will identify measures the state must adopt to ensure that the least-advantaged members of society fare no worse than they would under any alternative scheme governing access to resources and opportunities. In particular, two measures are critical here. One is to provide each person with fair equality of opportunity—to undertake proactive steps, as Rawls puts it, that "mitigate the influence of social contingencies and natural fortune on distributive shares."[14] The other measure, which relies on what Rawls calls the difference principle, redistributes wealth so as to maximize benefits for the least fortunate members of society.[15]

Taken together, these two measures do not ensure wealth equality. On the contrary, they are compatible with adoption of a social structure in which inequalities develop through each individual's response to incentives that permit the accumulation of private assets. On Rawls's analysis, inequalities generated in this way are justified as long as the least advantaged are better off than they would be under any other scheme. It is in this sense that Rawls can be classified as a theorist of justifiably disparate outcomes. The disparities produced by social institutions are justified when there is no better

Contenders) is one great *Reason of Mens putting themselves into Society*, and quitting the State of Nature.").

[10] RAWLS, *supra* note 1, at 276.

[11] For elaboration of this account of the state's surrogacy role in providing criminal justice, *see* WILLIAM C. HEFFERNAN, RIGHTS AND WRONGS: RETHINKING THE FOUNDATIONS OF CRIMINAL JUSTICE, 15–29, 31–32 (2019).

[12] RAWLS, *supra* note 1, at 89.

[13] For Rawls's discussion of the veil of ignorance, see *id.* at 118–23.

[14] *Id.* at 63.

[15] See *id.* at 72 for a one-sentence synthesis of each criterion of social justice: "Social and economic inequalities are to be arranged so that they are both (a) to the greatest expected benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."

design that would benefit the least well-off. The disparities are not justified when a better distributive scheme would have this effect.[16]

Bearing these definitions in mind, we can forge a connection between criminal and social justice. Both types of justice are administered by the state. The former, however, is concerned with the natural duties each person owes others, the latter with obligations the state owes its citizens. Although the state doesn't create natural duties but merely enforces them, its role is critical. As noted earlier, the state acts as a surrogate for both the public and for victims when imposing punishment. Because the state imposes punishment *and* is also responsible for providing fair distributive shares, it's reasonable to say that its failure regarding social justice calls into question the legitimacy of its role in imposing punishment on those who have not received their fair share. To put the point differently, we can say that the state's failure to provide appropriate access to resources and opportunities can produce *social justice deficits*—life-course disadvantages attributable to the morally arbitrary features of birth—that infect the administration of criminal law. Furthermore, in returning to the hypotheses outlined earlier, we can add: (1) these deficits may be modest (in which case the independent-track hypothesis may be appropriate in thinking about the social justice/criminal connection); (2) they may be massive (thus the override hypothesis should be applied); or (3) they may be substantial, but not necessarily overwhelming (thus, the partial reconciliation hypothesis is most appropriate). Needless to say, this is a connection Rawls does not forge. In particular, he never uses the term *social justice deficit* to discuss the relationship between the two types of justice.[17] Nonetheless, the points just made are unmistakably relevant to his overall framework.

Each of the three hypotheses about the social justice/criminal justice connection relies on a different claim about the priority of one type of justice over the other. On the independent-track hypothesis, punishment comes first; it has priority over social justice. A proponent of this position might grant that social justice deficits should be corrected, but the state's failure to correct these has no bearing on the legitimacy of the punishments it imposes. On the override hypothesis, social justice takes priority; punishment is illegitimate if the requisites of social justice have not been met. Needless to say, a proponent of this hypothesis would probably recognize that punishment will almost certainly be imposed by a state with massive social justice deficits, so the argument here deals primarily with the issue of punishment's legitimacy while anticipating the possibility of a world where social justice deficits have been reduced or eliminated. On the partial reconciliation hypothesis, priority issues are avoided whenever this is reasonably possible, with the result that many, though not all possible, social justice considerations are incorporated into the administration of criminal law.

[16] *Id.* at 80 ("The index problem largely reduces . . . to that of weighting primary goods for the least advantaged. We try to do this by taking up the standpoint of the representative individual from this group and asking which combination of primary social goods it would be rational for him to prefer.").

[17] Although Rawls does not use the term *social justice deficit*, he does remark that a just state aims at "correct[ing]" distributions attributable to the arbitrary features of birth. *See id.* at 63.

The next section offers a way to think more concretely about priority issues. However, before turning to this subject it will be helpful to explain why the examples used so far and those used throughout the rest of the article deal primarily with race and class. It's possible to imagine social justice deficits that extend beyond this. After all, the category *morally arbitrary features of birth* includes other factors that call for correction by state action—gross physical disabilities, for example, and genetic abnormalities that don't manifest themselves as physical difficulties but that profoundly affect individual functioning nonetheless—and it is always pertinent to ask whether those in authority actually have adopted corrective measures in this context. But race and class are the obvious candidates for discussion as far as criminal law is concerned. Although other factors will be mentioned on those occasions when we venture beyond criminal law, we will concentrate on race and class when discussing that subject. Indeed, most discussion of criminal justice reform is conducted in the shadow of concern about race and class. In this respect, the social justice/criminal justice connection, far from being a side issue, has to be at the forefront of any discussion of the proper administration of criminal law. Indeed, it seems reasonable to say that this connection, when considered in light of issues of race and class, provides the indispensable lens for thinking about criminal justice reform in contemporary America.

III. PRIORITY DEBATES: TWO EXAMPLES FROM EVERYDAY PRACTICE

Two examples help illustrate the issues at stake in priority debates about social and criminal justice. One of them—grading in college courses—has no direct bearing on criminal law. The second is concerned with criminal law itself. A distinction must be drawn between the burdens imposed by punishment and the benefits and burdens associated with college grades. Even when the soundness of such a distinction is acknowledged, one can reasonably assert that both examples converge on a single concern: the justifiability of disparate outcomes which are produced by the evaluative judgments decided by authorities who are granted the discretion to make discriminating judgments about the proper application of previously announced rules. The two examples examined in this section make it possible to consider different ways to think about the relative priority of institutional integrity and social justice.

A. DISPARATE GRADING OUTCOMES

Imagine a college course in which the instructor awards different grades to enrolled students, thereby establishing a rank-order among them. It's possible to avoid this kind of hierarchy—possible to award no grades at all, for example, or to give the same grade to everyone enrolled. However, the typical course consists of differential grading; the instructor (the distributing official vested with discretion to evaluate students' work) acts as a spokesperson for their institution by adopting a rank-order framework that

generates an inequality among the students enrolled. A justification for the disparities has three components:

(1) *A Social-Function Justification for the Institutional Practice.* Hierarchical ranking by grades, when based on tests consisting of short-answer and essay questions plus term papers, performs a useful social function in that it relies on individualized judgments of intellectual ability, thereby making it possible for educational institutions and, ultimately, employers to make informed personnel decisions.

(2) *An Internal Justification for Procedures Followed in Producing the Institution's Outcomes: Ensuring Equality of Opportunity.* The disparate outcomes produced are justifiable only if procedures are adopted that ensure each student's performance is evaluated according to the same criteria. At a minimum, this internal justification for disparate outcomes mandates that instructors alert students in advance what grading instruments will be employed (short-answer questions and term-paper assignments, for instance), explain what standards will be used when grading, and adhere to these standards impartially when awarding grades.

(3) *An External Justification for Procedures Followed in Producing the Institution's Outcomes: Ensuring Fair Equality of Opportunity*. Furthermore, grading disparities are justified only if adjustments have been made for external factors that, if unaddressed, would deprive members of a disadvantaged class a chance of as favorable an outcome as the chance enjoyed by members of an advantaged class. At a minimum, this means that students' disabilities are addressed in a way that doesn't affect grading. The physically disabled must have no greater difficulty coming to class, for example, than the physically able. Similarly, neurologically disabled students (dyslexia is a case in point) must receive accommodations that make it possible to compare their performance fairly with the performance of others without such disabilities.

This is a presumptive justification for grading disparities. Why only presumptive—why not an unequivocal justification? Two answers are possible here, each important in its own right. The first is that the three-stage scheme outlined above is aspirational; although it identifies key features of a just rank-order distribution, there is no guarantee these features will be honored in practice. A grader is expected to exercise impartial judgment, for example, but the grader may not do so. Similarly, a grader may not ensure full access for physically disabled students or that all dyslexic students

receive the extra time they need. In short, invocation of the justification's aspirations can never be a substitute for demonstrating that it's actually honored in practice.

Second, even if the aspirations are achieved, one might argue that they are inadequate. Each stage of the scheme is open to criticism along these lines. As for (1), there may be a better way to rank students by intellectual ability. Multiple-choice questions are arguably preferable to those that ask for short answers, since the latter allow for subjective grading and thus for unjustifiable disparities. As for (2), one might be contend that if grades are based on responses to short-answer questions and term papers, the procedures mentioned in this section cannot be adequate for ensuring impartiality. Blind grading is needed, a critic might claim—perhaps even blind grading by a person other than the instructor. As for (3), someone might argue that factors besides those mentioned above must be considered. What about a student whose original language isn't English (typically the language used in American colleges for writing assignments)? What about a student who encounters grammatical difficulties when writing and who thus needs the help of a writing lab? If these kinds of language-aids are not provided, the aspirational scheme, even if faithfully implemented, may be fatally flawed in design. The critic might say it isn't wholly illegitimate, but it is tainted and might be.

Discussions of justice are often pitched in uncompromisingly binary terms (*this is just; that is unjust*). As a result, the scalar conclusions noted above (*the practice may be tainted but is perhaps acceptable nonetheless*) may at first seem jarring. However, once allowance is made for different dimensions of justice (different types of justice—substantive vs. procedural, for example—and different degrees of adequacy within the different types), it can readily be seen that tensions and even antinomies are likely in many contexts, making it necessary to settle on case-by-case priorities in some instances and on general priority rules in others. Allowance for degrees of legitimacy may thus be in order as far as course-grading is concerned, sometimes because the aspirational nature of a distributive scheme is undermined (partially, but not completely) by flawed application, sometimes because, despite full realization of its basic aspirations, further sound criticisms of it have not been adopted.

These points are also pertinent to class-based and racial disparities in course outcomes. Imagine, for instance, that grades break down on class-background lines—in particular that grades are higher for students who attended private rather than public high schools. This inquiry might dovetail with a further inquiry into family educational backgrounds. Students with college-educated parents, it might turn out, tend to have higher grades than students with parents who did not attended college. Educational advantages conferred on students at earlier stages in their lives might be reflected in college grades, in other words.[18] If it were also established that state

[18] Arguments in favor of income equality complement arguments in favor of fair equality of educational opportunity. *See, e.g.*, BRIAN BARRY, WHY SOCIAL JUSTICE MATTERS 58 (2005) ("The first demand of social justice is to change the environment in which children are born and grow up so as to

investments in public education have been consistently lower than the cost of private education by independent schools[19] and that children of college-educated parents are more likely to do well in college than the children of non-college educated parents,[20] someone might contend that disparate course outcomes are attributable, at least in part, to social justice deficits. For example, the state's failure to address life-course disadvantages attributable to the morally arbitrary features of birth. It might be argued that inferior elementary and secondary education is analogous to a physical disability or dyslexia, thus mandating an effort by the government to correct inequalities attributable to the accidents of birth.

Because this Section aims only at diagnosing arguments about the priority to be accorded considerations of social justice, there is no need to think about the remedy appropriate for the possible deficits just noted. It is enough to say that each of the claims outlined above is sufficiently strong to merit attention. That is, given what's been said already, any professor thinking about the relationship between the rank-order of course grades and the educational background of the students receiving them should be concerned about the possibility that the grades awarded are tainted by social justice deficits beyond the classroom.

If a professor, discerning this pattern, nonetheless concludes that no compensatory measures should be taken to correct for accumulated educational disadvantage, that teacher can be said to have adopted an independent-track approach to course-grading disparities. That is, the professor might agree that social justice deficits in student backgrounds should be remedied, but the professor would add that priority should be given to the practice of ranking by intellectual merit as far as course-grading is concerned. Alternatively, the professor might conclude that the practice is irredeemably tainted by social justice disparities. In adopting this version of the override hypothesis, the professor might resign their position, saying that hierarchical course-grading reproduces already existing social justice deficits—or the professor might abandon hierarchical grading and instead give everyone an "A." And finally, a professor might adopt a partial reconciliation approach—and so attempt to address social justice deficits as much as possible within the framework of hierarchical grading.

make them as equal as possible, and this includes (though it is by no means confined to) approximate material equality among families.").

[19] The following findings have been reported concerning this: "Public schools spend, in dollars adjusted for both region and inflation, more than Christian Association Schools (CAS) and Catholic schools, but less than Hebrew or independent [] schools: nearly $15,000 per pupil for independent schools, over $12,000 for Hebrew schools, $7,743 for Catholic schools, and approximately $5,727 for CAS. For public schools, the comparable average spending figure was $8,402." BRUCE D. BAKER, PUBLIC SCHOOLING IN THE U.S.: EXPENDITURES, SUPPLY, AND POLICY IMPLICATIONS (2009), https://www.researchgate.net/publication/228624805_Private_schooling_in_the_US_Expenditures_supply_and_policy_implications.

[20] For a study that reaches this conclusion, see Emily Forrest Cataldi et al., *First-Generation Students: College Access, Persistence, and Postbachelor's Outcomes*, STATS IN BRIEF, Feb. 2018, at 1, https://nces.ed.gov/pubs2018/2018421.pdf.

B. DISPARATE PENAL OUTCOMES

The example just outlined has an obvious relevance to the administration of criminal law. Prosecutors act as authoritative representatives of the state when charging people with crimes; judges play a similar role when sentencing convicted offenders. The burdens imposed are unequally distributed in that some members of the population (typically the poor and members of racial minorities) are more heavily represented in the group charged with crimes and also are more heavily represented among convicted defendants.[21] These disparate outcomes might be defended as presumptively justified on the basis of the three-stage framework already discussed:

(1) *A Social-Function Justification for the Institutional Practice.* By claiming for itself exclusive power to impose lawful punishment for violating the natural duty to refrain from force and fraud, the state forecloses violent retaliation for grievances about WFF, thus promoting a uniquely important public good. The state's foreclosure of violent retaliation has many ramifications. One is that government, in imposing punishment for malicious acts, acts as a surrogate for the public, sanctioning wrongdoing by responding to violations of security rights.

(2) *An Internal Justification for Procedures Followed in Producing the Institution's Outcomes: Ensuring Equality of Opportunity.* Disparate punitive outcomes are justified only if procedures are adopted that ensure each defendant's case will be impartially evaluated according to criteria that are consistently applied. At a minimum, this internal justification for disparate outcomes mandates alerting citizens to the standards that will be employed when people are charged with crimes.

(3) *An External Justification for the Procedures Followed in Producing the Institution's Outcomes: Ensuring Fair Equality of Opportunity.* Furthermore, disparate penal outcomes are justified only if adjustments have been made for factors that, if unaddressed, would deprive members of a

[21] As for race, the findings are beyond dispute. "African-Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to experience lengthy prison sentences." *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENTENCING PROJECT (Apr. 19, 2018), http://sentencingproject.org/publications/un-report-on-racial-disparities/. As for class, the findings are clear if we rely on statistics concerning defendants' access to appointed counsel. "Over 80% of felony defendants charged with a violent crime in the country's largest counties and 66% in U.S. district courts had publicly financed attorneys." CAROLINE WOLF HARLOW, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), http://bjs.gov/content/pub/pdf/dccc.pdf.

> disadvantaged class a chance for as favorable an outcome as the one enjoyed by members of an advantaged class. This means, for example, that the state must provide indigent defendants with legal representation so as to ensure that their chance of acquittal is approximately similar to that of non-indigent defendants.

As was the case with the framework proposed for rank-order grading, this three-stage framework offers a presumptive, not a conclusive, justification for disparate outcomes. It is presumptive for the same two reasons that disparate grading outcomes merited this label. One reason is that the framework is aspirational: it identifies factors essential to a justification of disparate penal outcomes, but it is possible officials fail to honor it in practice. Second, and also as before, the aspirations themselves are open to criticism as inadequate. A critic might say the framework asks too little of the government and that more needs to be done if racial and class-based disparities are to be deemed justified.

Think first about the aspirational features of the framework. As far as criminal law is concerned, there are particularly serious reasons to worry that the aspirations for impartial exercise of state power may not be realized in practice. The aspirational premise of criminal justice hinges on the vesting thesis, i.e., that the state will act as an impartial surrogate in enforcing each person's natural duty to refrain from WFF, imposing proportionate punishment (but no more) for acts that violate this natural duty. But the state can be captured—that is, the organs of government can be appropriated (either systematically or sporadically) by one faction of citizens in order to undermine the interests of others.[22] State officials *ought to* serve as surrogates for the public, a critic might say, but there is ample reason to fear that they will not. In particular, there is reason to worry that they will fail the impartiality criterion essential to (2).

And what about the aspirations themselves? Although it is sound to say that the state should act as a surrogate for the public, a critic would say (1) falls short since it doesn't treat punishment as a last resort in the state's response to wrongdoing. Those who commit WFF are properly held accountable for their acts, the critic would agree, but this doesn't mean that they must be punished for what they've done, and it certainly doesn't mean that they must be imprisoned for their acts. State-imposed punishment, i.e., a condemnatory deprivation administered by government officials, should be reserved for seriously malicious acts, the critic would suggest, and imprisonment should be reserved for a small subset of this already limited class. Whenever possible, government should use its power in non-punitive ways, with the result that numerous acts currently classified as misdemeanors (and many even classified as low-grade felonies) are decriminalized and instead addressed as public-health and public-safety issues. An argument along these lines has no direct bearing on class and

[22] *See, e.g.*, Joel S. Hellman et al., *Seize the State, Seize the Day: State Capture and Influence in Transition Economies*, 31 J. COMP. ECON. 751 (2003). Hellman's article has been the catalyst for research in comparative politics and economics. Remarks on state capture in the remainder of this article focus on state capture in the United States, in particular on control of the administration of criminal law.

racial disparities. However, it has an important indirect effect once it is granted that the poor and racial minorities are disproportionately affected by the state's exercise of power.[23]

Proposition (2) is open to the same kind of criticism. A critic might say that its aspiration is sound, but it doesn't go far enough in implementing impartiality. In particular, limits must be placed on the exercise of discretionary power. Numerous rules of criminal procedure are framed in race- and class-neutral terms, but because they grant officials broad enforcement discretion, they lend themselves to biased application.[24] If the framework's aspirations are to be honored, discretionary enforcement of the law must be stringently restrained.

In thinking about the aspirations associated with propositions (1) and (2), a critic focuses on social justice deficits that operate *within* the operation of the criminal law. In turning to (3), the critic considers deficits that exist *beyond* it, but that can be made worse by its operation. Essential to criticism of this kind is the following chain of reasoning: (a) the government is obligated to correct accumulated disadvantages attributable to the morally arbitrary features of birth; (b) those disadvantages, when left unaddressed by the government, can make it likelier that a person will suffer an unfavorable penal outcome than someone not suffering from them; so (c) the social justice deficit generated by the government's failure to act taints the results reached by criminal law. As noted earlier, the rule requiring the government to provide indigent defendants with counsel in some criminal cases can be taken as an example of an effort to address a social justice deficit.[25] However, other deficits are not addressed under current law; among them are disparities relating to cash bail,[26] offenses with a close connection to indigence (sleeping in public places,[27] for instance), and behavior attributable to the government's failure to provide therapeutic services (such as psychiatric counseling[28]). When the government fails to act in instances such as these, criminal law is tainted, the critic would say, for the very institution that ought to correct social justice deficits is the one that imposes punishment on those it should have aided.

---

[23] In adopting the position outlined in this paragraph, the National Research Council endorses the principle of penal parsimony as a guide to sentencing—i.e., "the punishment imposed should be the minimum necessary to achieve sentencing goals." THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 341 (Jeremy Travis et al. eds., 2014). Because the principle of parsimony has no direct bearing on class and race disparities in the administration of criminal law (it is applicable to prosperous as well as criminal defendants, for instance), it is not discussed further in this article. Adoption of the principle as a constraint on the exercise of state power would, however, have a disproportionately beneficial effect for racial minorities and for the indigent.

[24] The possibility of racially biased application of rules framed in race-neutral terms is explored in the final section of this article. *See infra* notes 84–88 and accompanying text.

[25] For discussion of the assistance of counsel issue, *see infra* notes 54–63 and accompanying text.

[26] For discussion of cash-bail, *see infra* notes 64–69 and accompanying text.

[27] For discussion of criminalization of sleeping in public places, *see infra* notes 93–98 and accompanying text.

[28] For discussion of indigence and the need for psychiatric counseling, *see infra* notes 106–07 and accompanying text.

IV. A DEFENSE OF THE PARTIAL RECONCILIATION HYPOTHESIS

How serious is this taint? Quite severe, I argue in this Section. I further argue that the value of state-imposed punishment is substantial as well—in particular, social life is critically improved when there is a central enforcement agency that discourages retaliatory violence through the fair resolution of grievances about WFF. In thinking about the social justice/criminal justice connection, we confront the possibility of a trade-off, then—a trade-off between two kinds of justice administered by the same entity (i.e., the state) where, at least on some occasions, one kind of justice is administered at the expense of the other.

Someone might, of course, wax indignant about the possibility of a trade-off in this context. To some, punishment comes first; to others, social justice. The argument advanced in this Section avoids these extremes. It relies on the partial reconciliation hypothesis and suggests that disparate penal outcomes are unjustifiable when accommodations can be effectuated between the requisites of social and criminal justice while also suggesting that when no reasonable reconciliation is possible, punishment is sometimes in order despite the social justice deficits that may accompany it. This partial reconciliation hypothesis can be contrasted with its rivals in that it openly confronts, and seeks to resolve, tensions between each kind of justice. It can also be contrasted with them, though, in that it accepts the possibility of the tainted legitimacy of state-imposed punishment. It suggests there are tensions between different types of justice—tensions that can be tamed but not eliminated entirely. Because this approach acknowledges that there can be trade-offs between the various dimensions of justice (social and criminal justice, for instance, and procedural and substantive justice), it avoids the crude binary conclusion associated with statements such as *this is just* or *that is unjust*. Instead, it aims at achieving an optimal degree of legitimacy in the exercise of state power.

The Section begins by considering the polar hypotheses. It argues that although there are occasions in which each is plausible, they both lose credibility to the extent their proponents attempt to apply them to all issues pertinent to criminal law. The Section concludes by outlining a framework for resolving the tension, whenever possible, between social and criminal justice. The Article's final section applies this framework to specific problems in today's criminal law.

A. THE INDEPENDENT-TRACK HYPOTHESIS

As noted earlier, Rawls's comments on criminal law might be said to support the claim that punishment should be imposed without considering the social justice deficits incurred when doing so.[29] But a sounder reading of *A Theory of Justice* establishes that Rawls merely contrasts the natural duties enforced by criminal law with the distributive obligations of a state committed to social justice—and so establishes that he does not address the priority issues associated with the two types of justice.[30]

---

[29] *See supra* notes 2–3 and accompanying text.
[30] *See supra* notes 4–5 and accompanying text.

Rawls's silence on the subject is not unusual. A lack of concern with the tension between the two types of justice is typical of much commentary on criminal law. Commentators taking this approach treat the administration of punishment as a self-contained subject—one that doesn't require special concern for the social justice claims of the many defendants subject to state-imposed punishment. If pressed, scholars, practicing lawyers, and judges reasoning in this vein often adopt the independent-track hypothesis and say that, whatever the evidence of problematic disparities in the criminal process, this is only modestly relevant, and perhaps not relevant at all to state-imposed punishment.

Although it is possible to extend the independent-track hypothesis too far, there are occasions on which it is sound. Many criminal defendants have no occasion to complain about social justice deficits; they have access to bail, they have the resources to secure vigorous defense assistance for themselves, they have no worries about being viewed as marginal members of their communities, and they can enlist support from others if the time comes during sentencing following conviction. When this is the case, the independent-track hypothesis makes eminent sense. Thus, if a defendant in this position is charged with, say, murder (force) or tax evasion (fraud), it's reasonable to think entirely within the parameters of this hypothesis.

What is *not* reasonable, however, is to generalize broadly on the hypothesis. An example of a broad extension can be found in Senator Orrin Hatch's comments on the use of social science statistics when assessing the justifiability of disparate penal outcomes that correlate with race or class. "Statistics have no place in the criminal justice equation," Hatch remarked; "[m]urderers must be judged and sentenced without regard to statistics."[31] On this analysis, racial and class disparities in sentencing are immune from scrutiny: punishments (even of defendants convicted of the same crime) can't be compared because criminal justice operates on a track that's distinct from social justice.

A different rationale for the independent-track hypothesis can be found in Justice Powell's opinion of the Court in *McCleskey v. Kemp*. "If arbitrary and capricious punishment is the touchstone of the Eighth Amendment," Powell remarked, "a claim [concerning unjustifiable disparities in sentencing] could—at least in theory—be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the [] victim. . . ."[32] Inquiry into the justifiability of disparate outcomes opens statistical floodgates, in other words: better to stick to independent tracks than to think about the relationship between the morally arbitrary features of birth and penal outcomes. Both the Hatch and Powell comments are examples of willful blindness. An alternative is possible, of course: not willful blindness but a complacent un-inquisitiveness. But whatever the

[31] David C. Baldus et al., Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of its Prevention, Detection, and Correction, 51 WASH. & LEE L. REV. 359, 381 n. 101 (1994) (quoting 136 CONG. REC. S6902 (daily ed. May 24, 1988) (statement of Sen. Orrin G. Hatch)).

[32] McCleskey v. Kemp, 481 U.S. 279, 317 (1987).

source of a commentator's myopia, the answer is clear: the independent-track hypothesis may be apt in some instances, but it is implausible to extend it to the entire domain of criminal law.

Indeed, if we turn our attention from punishment that is actually imposed to punishment that might be, but typically is not, imposed, we encounter a particularly serious cost associated with hasty extension of the independent-track hypothesis. Although criminal justice's core concern is WFF, most discussion is concerned with wrongful force ("WF") rather than fraud ("F"). This is understandable—fear of aggression against one's person is inescapably greater than fear of deceitful acquisition of one's property. This said though, the latter topic is an appropriate subject for the criminal sanction. It is also a topic of special relevance to the social justice/criminal justice connection, for there is reason to believe not only that the government's allocation of resources slights the investigation of cases of fraud in favor of the investigation of cases of force, but also that decisions concerning this allocation are influenced by political pressure brought by the socially advantaged to protect themselves.

Think first about the imbalance between investigative resources employed for the two types of wrongdoing. Fraud is almost invariably committed stealthily and so is hard to detect. Reliable statistics about its incidence—tax and securities fraud, for instance—are non-existent.[33] Educated guesses have been made, but because these are speculative,[34] they have to be approached cautiously. What we do know is that in recent years, government investigators have often failed to crack cases of white-collar crime on their own initiative but instead have stumbled upon egregious acts of wrongdoing and have then used their investigative powers to begin prosecutions—thus the significance of the Bernard Madoff case[35] and "Operation Varsity Blues" (the college-admissions cheating case in which high net-worth parents falsified their children's applications).[36] Even tax

[33] Statistics about fraud arrest rates are readily available. *See, e.g.*, Gary Warner, *FBI Fraud Arrests by Field Office, 2018*, CYBERCRIME & DOING TIME (Oct. 3, 2019), http://garwarner.blogspot.com/2019/10/fbi-fraud-arrests-by-field-office-2018.html. However, statistics about the *incidence* of fraud are non-existent. "The true extent and expense of white-collar crime are unknown." CYNTHIA BARNETT, THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA 6 (2000), http://ncjrs.gov/App/Publications/abstract.aspx?ID=202866.

[34] "The evidence reveals the incidence of fraud and financial scandal to be historically contingent and skewed towards certain sectors, particularly banking and finance, facilitated by complex group structures and international capital mobility, and mediated by managerial incentives and ownership concentration." Steven Toms, *Financial Scandals: A Historical Overview*, 49 ACCT. & BUS. RES. 477, 477 (2019).

[35] For an account of the many missed opportunities to discover Madoff's fraud, see DIANA B. HENRIQUES, THE WIZARD OF LIES: BERNIE MADOFF AND THE DEATH OF TRUST (2011).

[36] For an account of the way in which investigators, while looking into an entirely different matter (a stock fraud), happened upon the scheme for fraudulent misrepresentation of the background of well-off adolescents applying to elite colleges, see Joel Rubin et al., *The Bizarre Story of the L.A. Dad Who Exposed the College Admissions Scandal*, L.A. TIMES (Mar. 19, 2019), https://www.latimes.com/local/lanow/la-me-morrie-tobin-college-admissions-scandal-20190331-story.html.

fraud, which may well be widespread,[37] is often discovered by chance rather than systematic investigation.[38]

Now consider the allocative decisions related to this pattern of inadvertent discovery. There is good reason to believe that combatting fraud has always received less support by way of legislative appropriation than has combatting aggressive force. This allocative decision is perhaps defensible. What's problematic, however, is the federal trend in recent years to invest even less in the investigation of fraud than in the past. Allocations for Internal Revenue Service investigations into tax fraud are a case in point. Money Congress has appropriated for investigating this has declined not only in real terms but also by comparison with the amount allocated a decade ago.[39] Why? It is hard not to see the influence of the already advantaged in this trend, for there is an obvious benefit to be realized in reducing the volume of tax audits since this is likely to reduce the number of prosecutions for tax avoidance and outright fraud.

The points just made should not be taken to suggest that fraud cases merit the same degree of attention as cases of aggressive force. Nor do they even suggest that there is a metric that can determine the proper allocation for one kind of criminal act rather than the other. They do, however, point to the danger of relying on the widespread premise that criminal justice is primarily a matter of wrongdoing by the socially disadvantaged, for even though statistics are lacking, it is reasonable to assume that a sizable portion of fraudulent acts go undetected. Once the social justice/criminal justice connection is taken seriously, it can readily be granted that fraud merits substantial attention alongside acts of wrongful force.

B. THE OVERRIDE HYPOTHESIS

In its most straightforward formulation, the override hypothesis relies on the "clean hands" metaphor to analyze the legitimacy of punishment. Because the state is obligated to correct social justice deficits, someone employing this metaphor would say that the punishments the state imposes are illegitimate if its hands have been "dirtied" because of its failure to correct those deficits.[40] An argument along these lines doesn't entirely reject the exercise of state penal power. In particular, it's compatible with the points

[37] For speculation on this, see William G. Gale & Aaron Krupkin, *How Big Is the Problem of Tax Evasion?*, BROOKINGS INST. (Apr. 9, 2019), http://brookings.edu/blog/up-front/2019/04/09/how-big-is-the-problem-of-tax-evasion.

[38] *See, e.g.*, Ben DiPietro, *Corruption Currents: From Stumbling Upon Fraud to Smuggling Into China*, WALL ST. J. (Jan. 9, 2014), http://blogs.wsj.com/riskandcompliance/2014/01/09/corruption-currents-from-stumbling-upon-fraud-to-smuggling-into-china.

[39] Richard Rubin, *U.S. Tax Compliance Rate Holds Flat at 86%*, WALL ST. J (Sept. 26, 2019), http://wsj.com/articles/u-s-tax-compliance-holds-flat-at-86-11569520800 ("[T]oday's IRS employs fewer people and audits fewer taxpayers than it used to. That is the result of Congress giving the tax agency more responsibilities while cutting its budget or leaving it flat. In fiscal 2018, the tax agency had 73,519 employees, down 22% from 2011. That same year, the IRS audited just 0.59% of individual tax returns, marking the seventh straight decline in that figure and the lowest rate since 2002.").

[40] Erin Kelly uses the metaphor of standing rather than that of clean hands to make this point. ERIN I. KELLY, THE LIMITS OF BLAME: RETHINKING PUNISHMENT AND RESPONSIBILITY 169 (2018) ("I conclude that the state's role in perpetuating or failing to address social injustice undermines its standing to blame criminal wrongdoers for their criminal acts.").

just made about the need to investigate white-collar crime more thoroughly.[41] It does, however, treat social justice as a requisite to criminal justice.

Standing alone, this is a less than persuasive line of reasoning, because it treats the possibility of tension between social and criminal justice—even a modest degree of tension, occasioned by a relatively minor social justice deficit when contrasted with a gravely serious act of wrongdoing—as a reason to accord unconditional priority to the former over the latter. It might be argued (in a Lockean vein) that, when the state forfeits its authority to punish, victims and their families nonetheless may do so[42]—but to take this position is to discount the social good associated with the centralization of penal power and so to open the door to retaliatory violence. The better response is to adopt the partial reconciliation hypothesis: to accommodate social justice considerations within the criminal process whenever this is reasonably possible.

The override hypothesis is plausible, however, in a more extreme setting. If state penal power is deployed to devalue the natural duty to refrain from force and fraud—in particular, if it's deployed to enable one faction of the community to secure control of the organs of government to authorize, whether explicitly or implicitly, acts of force and fraud against another faction—then the state fails egregiously to perform its surrogacy role. When this occurs, it's reasonable to speak of *state capture*—reasonable, in other words, to say that state power is deployed to terrorize one portion of the community so as to further the interests of another. Under these circumstances, there is no possibility of criminal justice: the criminal process is a tool—sometimes a masked one, sometimes one that's openly acknowledged—for preserving social injustice.

Although many examples of state capture might be cited in this context, the Jim Crow South is paradigmatically illustrative of this in America. The natural duty to refrain from force and fraud was systematically disregarded by government officials in the post-Reconstruction South so as to further the goal of white supremacy. Needless to say, Southern States implemented Jim Crow rules that went beyond criminal law (by mandating segregation in public places, for instance). However, criminal law performed a special function because state-imposed punishment affirmed, as mere separate-but-equal rules could not, the degraded status of African Americans in the social order.[43]

---

[41] Professor Kelly does not make this distinction, however. Her book contains no discussion of white-collar offending. *See id.* It is possible she is opposed to state-imposed punishment even of people who cannot complain about social injustice, but it is also possible she is opposed to this only for those legitimately complaining about social justice deficits, in which case a bright line would be needed as to whom to punish.

[42] Locke allows for self-help in the absence of state jurisdiction: ". . . in that *State of perfect Equality*, where naturally there is no Superiority or Jurisdiction of one, over another, what any may do in Prosecution of that Law, every one must needs have a Right to do." LOCKE, *supra* note 6, at 147.

[43] "[T]he police system of the South was originally designed to keep track of all Negroes, not simply of criminals; and when the Negroes were freed and the whole South was convinced of the impossibility of free [] labor, the first and almost universal device was to use the courts as a means of re-enslaving the Blacks. It was not then a question of crime, but . . . of color, that settled a man's conviction on almost any charge. Thus Negroes came to look upon courts as instruments of injustice and oppression, and upon those convicted in them as martyrs and victims." W.E.B. DU BOIS, THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES 121, 178–79 (Brent Hayes Edwards ed., 2007) (1903).

Jim Crow isn't just notionally important. On the contrary, the fact that it defined the legal order in Southern States for more than three generations underscores its significance as a symbol of something more general—the possibility of state capture in any time and place, with criminal law used as a tool for entrenching social justice deficits. This theoretical point is clear; nonetheless, someone might ask whether Jim Crow has any practical significance today. Is Jim Crow worth considering, in other words, not merely as a case study in state capture in the past but also because its vestiges continue to be felt in the present?

To some, the answer is clear: although Jim Crow appears to have been dismantled, it actually still lives on today in the post-*Brown v. Board of Education* era under the guise of race-neutrality. Michelle Alexander, one of the many commentators who have adopted this version of the override hypothesis, speaks of *the new Jim Crow* and so explicitly connects past and present. "Everything has changed," Alexander writes, "and yet nothing has." This is because "[t]he politics of white supremacy . . . have continued unabated—repeatedly and predictably engendering new systems of racial and social control."[44] In particular, Alexander contends that drug laws are best understood in terms of the Jim Crow analogy, for they have led to the mass imprisonment of Blacks and thus have perpetuated patterns of racial subordination, though this time under the pretense of colorblind law.

There is much that's disquieting in Alexander's indictment of contemporary law. Whether it hits its targets convincingly is another matter, though, once a distinction is drawn between Alexander's criticism of the mass-imprisonment effects of drug laws and her analogy between Jim Crow criminal law and today's law. Her alarm about incarceration for drug violations is entirely sound, though it can be answered in race-neutral terms. This is because the criminalization of drug-possession is unjust for the same reason the criminalization of alcohol- or tobacco-possession is unjust, for in each case the government goes beyond the criminal law's core function of punishing WFF and adopts sanctions that aim paternalistically at improving moral character. An anti-paternalistic critique provides a race-neutral rationale for the decriminalization of recreational drug use,[45] a rationale of particular significance since a majority of those currently incarcerated for drug crimes are Hispanic or white.[46] In other words, Alexander's indignation about the "war on drugs" merits support, but the support it deserves is unrelated to race. Rather, its core appeal is a race-neutral critique of the state's paternalistic use of its penal power.

If we turn now to Alexander's analogy (as shown from her comments on incarceration for drug offenses), we can see that it rests on a problematic foundation. The evil of Jim Crow is understandable in terms of government's failure to enforce the natural duties to refrain from WFF. That evil is not

[44] MICHELLE ALEXANDER, THE NEW JIM CROW, at xiv (10th anniversary ed. 2020).

[45] For a critique of the paternalistic premises of drug prohibitions, see DOUGLAS HUSAK, LEGALIZE THIS!: THE CASE FOR DECRIMINALIZING DRUGS (2002).

[46] One study actually found lower levels of drug use among African-Americans than among whites. Michael Friedrich & Timothy P. Johnson, *Race/Ethnicity Differences in the Validity of Self-Reported Drug Use: Results from a Household Study*, 82 J. URB. HEALTH 67 (2005).

entirely absent today. Nonetheless, the repudiation of Jim Crow that has occurred in the last half-century can be expressed in terms of an elementary proposition—that the state must function as a race- (and class-) neutral surrogate for enforcement of the natural duties at the core of criminal law. Now that this principle is entrenched in modern law,[47] a genuine tension has to be considered—a tension between the value of reliance on a central enforcement agency charged with the authority to punish acts of wrongful force and fraud and social justice deficits that bear on the exercise of this punitive power. In other words, once it's agreed that a "reasonably well-ordered" institution (to use Rawls's term)[48] exists for the purpose of adjudicating grievances about wrongdoing, it's best to blend indignation about the past with a focus on resolving tensions between criminal and social justice. This, of course, is the framework essential to the partial reconciliation hypothesis, to which we now turn.

C. THE PARTIAL RECONCILIATION HYPOTHESIS

Essential to the partial reconciliation hypothesis is a claim that is rarely denied by proponents of the override hypothesis but that also tends not to be openly affirmed. It is the simple proposition that, absent egregious cases of state capture, an essential dimension of justice is promoted when government acts as a surrogate for the public by punishing acts of wrongful force and fraud.[49] This proposition embraces the two components of criminal justice noted earlier: the natural duty to refrain from acts of WFF (the natural duty thesis) and the authority of the state to punish such acts on behalf of the public (the vesting thesis).

In defending each thesis *while also* holding the state responsible for social justice deficits, one must show that the state performs its surrogacy role tolerably well—that it usually (if not invariably) lives up to the aspirations associated with the criminal justice function. One does not have to show more. On the contrary, a proponent of the partial reconciliation

[47] A contrast between the general principle and its ramifications is in order here. The principle of race- and class-neutrality is indeed now entrenched in modern law, but the significance of that principle for the administration of criminal law is deeply contested. For an example of this contrast, consider the difference between the conclusions reached in *Swain v. Alabama*, 380 U.S. 202 (1965) and *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Swain*, the Court announced the general principle that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." 380 U.S. at 203–04. The *Batson* Court stated: "We reaffirm [this] principle today." 476 U.S. at 84. However, *Batson* rethought *Swain's* application of its race-neutrality principle, holding (as *Swain* had not) that a Black criminal defendant can challenge the pattern of peremptory challenges by the prosecution in order to establish the possibility of racial discrimination by state officials. *Id.* at 93–94. The *Batson* rule has transformed pre-trial procedure. Nonetheless, it is fair to say that the principle of race-neutrality in administering criminal law predated *Batson* and that the rule it announced amounted only to a (welcome) application of an already-recognized general principle.

[48] *See* RAWLS, *supra* note 1, at 276.

[49] Proponents of penal abolition actually do argue in favor of the elimination of state-imposed punishment. For example, Allegra McLeod looks to a future "where punishment is abandoned in favor of accountability and repair, and where discriminatory criminal law enforcement is replaced with practices addressing the systemic bases of inequality, poverty, and violence." Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616 (2019). It is by no means clear what this would amount to in practice. At a minimum, though, it is clear that Professor McLeod rejects on principle the legitimacy of state-imposed punishment even when offenders have no cause to complain about social injustice.

hypothesis recognizes that social justice deficits are likely to persist even when the state performs its surrogacy role adequately. The challenge is to find ways to integrate concerns about social justice into the administration of criminal law. However, because that challenge may not (and indeed, probably will not) always succeed in resolving the tension between the two, a proponent of the hypothesis will assess the legitimacy of penal outputs while granting that they are sometimes tainted. This conclusion is not entirely satisfactory. Nonetheless, it's preferable to an approach that disregards the tension between the two types of justice, as well as to one that relies on indignation about social justice deficits while either sidestepping questions about the appropriate response to acts of wrongdoing or imagining a utopian future in which wrongful force and fraud simply disappear.

The distinction between justifiably and unjustifiably disparate outcomes is indispensable to the reconciliation process. Disparities along racial and class lines are justifiable, a proponent of this hypothesis contends, if it's possible to show that they are compatible with the three-stage framework employed in the preceding section—that is, if (i) it can be shown that the punishment imposed is appropriate given criminal law's function in sanctioning WFF; (ii) the procedures employed were impartially followed; and (iii) fair equality of opportunity was provided to correct, as much as possible, social justice deficits. If an outcome is unacceptable under one or more of these criteria, it's tainted—and change is appropriate whenever this is compatible with the underlying purposes of a just scheme for punishing WFF (though even then some taint will remain). As will be seen, this approach opens the door to a great deal of change, but it also preserves criminal justice's core function—to vindicate the natural duties each person owes to others.

Under the partial reconciliation hypothesis, the changes proposed can be effectuated by legislatures and, in some instances, by courts. The route to legislative change is obvious: just as statutes have done a great deal to generate social justice deficits, statutes can now be adopted to reduce these deficits. The route to court-imposed change may at first seem less clear; a moment's thought should be sufficient, however, to establish that courts have brought about change in the administration of criminal law by threatening to deny state officials (prosecutors but also the police) the possibility of convictions if they fail to conform to judicially established standards. The possibility of judicial issuance of conditional threats will frequently be considered in the section that follows. It complements the simpler route to change that can be brought by statutory reform.

V. REDUCING (BUT NOT ELIMINATING) SOCIAL JUSTICE DEFICITS WHILE ADMINISTERING THE CRIMINAL LAW

A familiar feature of contemporary criminal procedure can be used to introduce discussion of remedies in this context. At the time the Constitution was adopted, no one appears to have believed that the state is obligated to provide indigent defendants with counsel at criminal trials. The Sixth

Amendment, ratified in 1791, provides that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence,"[50] which might be said to impose an affirmative obligation on the government—an obligation to ensure legal representation for all criminal defendants. However, the text was not interpreted in this way. Rather, the Sixth Amendment was originally understood to prevent government interference with a defendant's decision to retain a lawyer; it was believed, in other words, to impose an obligation of restraint, not an obligation to provide aid.[51]

In the mid-twentieth century, the Supreme Court adopted the latter interpretation.[52] As a result, the social justice deficit of leaving the indigent without legal representation was reduced (though by no means eliminated)—and as a further result, state legislatures began to appropriate funds to pay (less than adequately, though) for this kind of representation.[53] The enforcement mechanism that made this change possible was a conditional threat issued by the courts: convictions would be reversed on appeal if secured in the absence of counsel. As we will see in this Section, this kind of threat—conditional, not absolute, but specific in scope and thus relatively hard to evade—serves as a template for understanding the possibility of remedying numerous social justice deficits. We will consider many such deficits—pertaining to cash bail, stop and frisk, and sentencing, for instance. Sixth Amendment case law serves as an essential starting point, for in considering it one encounters a clear-cut example of a remedy that can be crafted for correcting social justice deficits.

A. ADDRESSING SOCIAL JUSTICE DEFICITS: THE SIXTH AMENDMENT TEMPLATE

In using modern terminology to talk about an eighteenth-century text, we can say that the assistance of counsel clause was originally understood to impose an equal opportunity ("EO") obligation on the government. On this originalist reckoning, the Sixth Amendment assigns the government a passive role in counsel selection, offering all criminal defendants an equal chance to retain lawyers of their choice but not requiring the government to provide a lawyer for those who can't afford one. In contrast, the modern Supreme Court has turned to (though it hasn't unequivocally adopted) a fair equality of opportunity ("FEO") version of the Sixth Amendment that supplements the EO version. The premise underlying this FEO version is that wealth disparities should not influence criminal law outcomes. As we saw in reviewing Rawls's account of social justice, government provision of FEO corrects for wealth disparities, making it possible for the disadvantaged to have access to roughly the same goods as those with greater wealth when an

[50] U.S. CONST. amend. VI.

[51] *See* WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 14–22 (1955).

[52] For discussion, *see infra* notes 56–59 and accompanying text.

[53] Legislative appropriations have typically been inadequate. As a result, "[t]he U.S. criminal system is not truly adversarial because prosecutors possess broad, unchecked power and therefore determine results in criminal cases with little or no input from the defense." Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance after* Gideon v. Wainwright, 122 YALE L. J. 2150, 2150 (2013).

important social good is at stake.[54] In the Sixth Amendment context, an FEO initiative corrects for—or at least, it should correct for, if adequately implemented—the inability of indigent defendants to secure representation for themselves.

The qualifying language in the preceding sentence is needed because Sixth Amendment decisions rendered by the Court typically have not provided anything close to full FEO for criminal defendants. Indeed, because dissenting opinions by originalist members of the Court[55] have questioned the constitutional propriety of even the modest steps taken by the late-twentieth-century Court to supplement EO with FEO, it is essential to realize that the comments in this section are informed by a concern with the social justice/criminal justice connection, not by a concern with constitutional doctrine. Given these conflicting currents in assistance-of-counsel cases, it would be wise to survey the interpretive issues at stake before turning to the social justice rationale for providing counsel to all indigent defendants.

In *Powell v. Alabama*, decided in 1932, the Court held on due process grounds that indigent defendants are entitled to representation in capital cases.[56] Three decades later, in *Gideon v. Wainwright*, the Court concluded, relying this time on the Sixth Amendment assistance of counsel clause, that all indigent felony defendants are entitled to representation.[57] In *Argersinger v. Hamlin*, decided in 1972, the Court extended this to all misdemeanor defendants who confront the possibility of incarceration.[58] But the Court has declined to go further. In *Scott v. Illinois*, decided in 1979, it held that states are not required to provide counsel to the indigent when there is no prospect of incarceration in a given criminal case[59]—and *Scott* continues to be the law four decades later.

It might be argued that *Scott* is at odds with the text's use of the adjective *all*—that is, it might be contended that, once the Sixth Amendment is applied to the states, it mandates government provision of counsel to indigent defendants in each and every criminal prosecution—not merely counsel at criminal trials but also counsel prior to and following trial. But this interpretation, while textually plausible, is at odds with eighteenth- and nineteenth-century applications of the Sixth Amendment. Originalist justices

[54] *See supra* notes 12–15 and accompanying text.

[55] *See* discussion of these dissenting opinions *infra* notes 60–62 and accompanying text.

[56] Powell v. Alabama, 287 U.S. 45, 71 (1932) ("[U]nder the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trail court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment.").

[57] Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

[58] Argesinger v. Hamlin, 407 U.S. 25, 37 (1972) ("We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.").

[59] Scott v. Illinois, 440 U.S. 367, 373 (1979) ("Even were the matter *res nova*, we believe that the central premise of *Argesinger*—that actual imprisonment is a penalty different in kind from fines or mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.").

(e.g., Scalia,[60] Thomas,[61] and Gorsuch[62]) have drawn on this point to contend, in dissenting opinions issued over the last decade, that cases such as *Gideon* and *Argesinger* are doctrinally suspect—and imply that the government is *never* constitutionally obligated to provide indigent defendants with counsel. Originalists have championed EO, in other words: they have scorned even the partial attempt at FEO undertaken in mid-twentieth century opinions.

Because interpretive disputes between originalists and non-originalists loom large in modern constitutional law, it is critical to distinguish between debates about constitutional interpretation and commentary on the best way to correct social justice deficits. As an interpretive matter, there is a plausible argument in the Sixth Amendment context (and there are plausible arguments with respect to other deficits that will be subsequently reviewed) for the constitutionality of FEO remedies. As a matter of social justice, on the other hand, there is an overwhelming—and not merely a plausible—argument to prefer FEO supplements to EO on a stand-alone basis, for criminal law is severely and irredeemably tainted if government fails to correct deficits in its administration attributable to class or racial disparities. If an originalist Court were someday to conclude that the Constitution offers no remedy for social justice deficits related to assistance of counsel, that will be a blot on the nation's basic law (and also on the justices reaching this conclusion). It will not, however, occasion doubt as to the soundness of the argument for correcting social justice deficits.

In building on this point, we can identify two possible criticisms of the Court's conclusion in *Scott*. The first has to do with constitutional interpretation. Because *all* should not be confused with *some*, a critic might say *Scott* mistakenly declined to extend *Gideon* and *Argesinger*. There is certainly something to be said for this claim. It is incompatible with original understandings of the assistance of counsel clause, however, so it is best to say that, as a doctrinal matter, the constitutional case for extending *Scott*—indeed, the case for preserving *Gideon*—is inconclusive as a doctrinal matter.

On the other hand, because the social justice case for assistance of counsel in all criminal proceedings is overwhelming, we can add that courts should extend *Gideon's* conditional threat to all criminal cases. If this extension is not grounded in the Constitution, it should be adopted as a legislative matter—as a matter of comparative justice incorporated into a statute that ensures FEO for indigent defendants in any criminal proceeding.[63] An argument for this extension relies on the framework for assessing the justifiably disparate outcomes proposed earlier. If social justice deficits can be corrected while nonetheless honoring the legitimate function of the criminal law, the government is obligated to do so. And the deficits

[60] Padilla v. Kentucky, 559 U.S. 356, 389 (2010) (Scalia, J., dissenting) ("The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use the volunteered services of counsel.").

[61] Garza v. Idaho, 139 S. Ct. 738, 757 (2019) (Thomas, J., dissenting) ("Read against this backdrop [of eighteenth century American legal practice], the Sixth Amendment appears to have been understood at the time of ratification as a rejection of the English common-law rule that prohibited counsel, not as a guarantee of government-funded counsel.").

[62] See id.

[63] For development of this point, see Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, Gideon's Broken Promise: America's Continuing Quest for Equal Justice (2004). *See also* Bright & Sanneh, *supra* note 53.

can easily be corrected in this context, for counsel can, and should, be made available to indigent defendants in *Scott*-type settings. This argument does *not* depend on a claim about constitutional interpretation. Rather, it is an argument for legislative relief when constitutional claims prove unavailing.

If we step back, we can discern a general principle at stake in assistance of counsel settings—*steps should be taken whenever possible to ensure that wealth disparities don't influence criminal law outcomes*—and three concrete measures that can be adopted to implement this principle. The first measure was adopted in cases such as *Powell*, *Gideon*, and *Argesinger*: threaten the government with loss of a conviction if it fails to provide an indigent defendant with representation. The second measure relies on constitutional interpretation: show that the text justifies this threat and so extend it to *all* criminal cases. The third measure relies on a fallback argument: even if the text cannot be said to justify this extension, legislation should be adopted that implements the general principle of correcting for wealth disparities.

B. A FURTHER APPLICATION OF THE TEMPLATE: WEALTH DISPARITIES AND CASH BAIL

Each of the points just made is pertinent to cash bail: a framework is needed to correct wealth disparities in determining eligibility for pre-trial release. Such a framework might arguably be derived from the Constitution;[64] but if this option is rejected, the framework should be established through legislation. As for the constitutional route, no modern Supreme Court opinion has examined the text as a possible source of law.[65] The Fifth Circuit considered constitutional questions at length, however, in *O'Donnell v. Harris County Sheriff's Office*,[66] a 2018 case concerned with disparate treatment of indigent and non-indigent misdemeanor defendants in the county that includes Houston, Texas. In reviewing *O'Donnell*, we will have an opportunity to extend the template beyond assistance of counsel issues while continuing to address wealth disparities in criminal law.

The secured bail schedule examined in *O'Donnell* took a one-size-fits-all approach to pre-trial release decisions concerning misdemeanor charges. Writing for the court, Judge Clement held that this framework imposed constitutionally unacceptable disadvantages on the indigent. "[T]ake two misdemeanor arrestees," her opinion states,

> (4) who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is

[64] The Eighth Amendment provides: "Excessive bail shall not be required…." U.S. CONST. amend. VIII. The word *excessive* might be construed, when linked to the *bail*, to refer to any conditions, monetary or non-monetary, pertaining to pre-trial release. Alternatively, it might be said to refer only to monetary conditions. Either approach might be used to ban cash bail for most misdemeanors.

[65] In *U.S. v. Salerno*, 481 U.S. 739, 754 (1987), the Court stated that the Eighth Amendment requires that the "conditions of release or detention [must] not be 'excessive' in light of the perceived evil," but it said nothing about the provision's bearing on the use of cash to determine the conditions of pre-trial release.

[66] O'Donnell v. Harris Cty., 882 F. 3d. 528 (5th Cir. 2018).

> wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart.[67]

By treating misdemeanor defendants alike, the bail schedule honored EO, but not FEO. The distinction is crucial, for in piercing the veil of formal equality of opportunity, one sees how a document that treats everyone alike produces unjustifiably disparate results. In citing these disparities, Judge Clement held the bail schedule unconstitutional as applied. She added that it not only violates the Constitution, but also produces perverse consequences as far as public safety is concerned, for research conducted in connection with *O'Donnell* established that "release on personal bond [i.e., with no cash bail required] would have resulted in 1,600 fewer felonies and 2,400 fewer misdemeanors within the . . . eighteen months" for low-risk misdemeanor defendants.[68]

At stake, then, was a clear-cut social justice deficit in the administration of criminal law. The question before the court was how to remedy this deficit while continuing to implement the legitimate function of setting conditions for pre-trial release. Judge Clement's answer was disappointing. Because her opinion notes the perverse consequences of detaining misdemeanor defendants who pose a low risk (as calculated on a predictive scale) of failing to show up at trial, she might have held that there is a strong presumption that such defendants are entitled to release on their own recognizance. She recoiled from even this, however. Instead, she held only that all misdemeanor defendants are entitled to individualized bail determinations. This conclusion invalidates cookie-cutter bail schedules such as the one employed by Harris County, but it leaves trial judges with broad discretion under the Constitution to settle on conditions for release—further disadvantaging the already disadvantaged by comparison with wealthy defendants.

An alternative, constitutionally grounded framework is readily apparent. In citing the very factors mentioned in Judge Clement's opinion, someone might advance a plausible equal protection argument in favor of a presumption of pre-trial release for all misdemeanor defendants. Anything less could leave the "poor arrestee . . . [to] bear the social costs of incarceration."[69]

---

[67] *Id.* at 546.

[68] *Id.* at 545, citing Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 786–87 (2017).

[69] *O'Donnell*, 882. F. 3d. at 546.

No court has adopted this equal protection-based framework, though, so it is essential to consider the possibility of adopting it in statutory form. In any event, a statute might be preferable, for it could deal comprehensively with the numerous issues at stake in a way that case-by-case judicial review only can accomplish incrementally. For example, a statute could require judges to rely on objective evidence pertaining to a defendant's likelihood of appearing at trial, establish a commission that would develop risk-assessment criteria that do not rely on data contaminated by class and racial biases, and establish the burden-shifting stages trial courts must follow when questions about the propriety of release are contested. A statutory framework of this kind would ensure the release of most low-risk misdemeanor defendants. In honoring the framework, judges would place the burden on prosecutors to show by a preponderance of the evidence why defendants in higher risk categories should be detained. This is an evidentiary burden that can sometimes be sustained—flight-risk has to be considered, for instance, as well as the risk (often present in domestic violence cases) of harm to a complaining witness. A defendant's wealth could thus be rendered largely irrelevant as a factor bearing on pre-trial release.

C. ANOTHER APPLICATION: RACIAL DISPARITIES IN STOP-AND-FRISK

The two examples considered so far have dealt with class disparities; this one is concerned with race. Class differences lurk in the background here, but because the available data are more definite with respect to race rather than class, it will be best to focus on this while realizing that issues of class bias may influence outcomes as well.

In *Terry v. Ohio*,[70] the Court concluded that brief seizures of the person (*stops*) followed by searches for weapons (*frisks*) when needed for an officer's safety are permissible when supported by reasonable suspicion of criminal activity. No case had previously permitted this. Although stop-and-frisk on reasonable suspicion may well have been a common practice throughout the twentieth century, it was *Terry* that authorized adoption of a reduced standard (reasonable suspicion rather than probable cause) for police power to detain a suspect for questioning. Protesting *Terry's* dilution of original understandings of the Fourth Amendment, Justice Douglas warned in his dissent that "giv[ing] the police greater power than a magistrate is to take a long step down the totalitarian path."[71]

Even the *Terry* majority appears to have had misgivings about the rule it announced. The judiciary, Chief Justice Warren's majority opinion concedes, can exercise only limited control over "the myriad daily situations in which policemen and citizens confront each other on the street."[72] Moreover, Warren noted that the exclusionary rule is a relatively ineffective deterrent, remarking that the "wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently

[70] Terry v. Ohio, 392 U.S. 1 (1968).
[71] *Id.* at 38 (Douglas, J., dissenting).
[72] Id. at 12.

complain, will not be stopped by the exclusion of any evidence from any criminal trial."[73]

To accept the soundness of Warren's comment about exclusion's ineffectiveness as a deterrent in the stop-and-frisk context is not to say that the suppression threat never discourages police illegality. On the contrary, exclusion certainly does loom as a critical threat when the evidence police are after is essential to building a criminal case, as in a homicide investigation. Stop-and-frisk stands at the other end of this spectrum, however: brief police encounters with citizens are only sometimes concerned with evidence-collection, their primary aim is to preserve public order, and this can be ensured in a police-citizen setting only by establishing an officer's control over the person being stopped. It is arguable that the Court took a wrong turn in *Terry*. Although the exclusionary rule remains valuable as a deterrent to police illegality, *Terry*'s authorization of stop-and-frisk on reasonable suspicion rather than probable cause unwisely altered the balance of police-citizen relations. The *Terry* Court's acknowledgement of the possibility of wholesale harassment of African Americans indicates that the justices themselves were uneasy about their extension of police authority.

In examining stop-and-frisk in light of the social justice/criminal justice connection, then, we should forgo the premise that guided inquiry concerning assistance of counsel and judicial determination of the conditions for pre-trial release. These are wholly legitimate components of criminal law, so it was proper to ask in those contexts how to preserve the core values associated with the practices under consideration while minimizing the social justice deficits associated with them. Stop-and-frisk, in contrast, at least when based on reasonable suspicion rather than probable cause, is a deeply problematic practice. Given its questionable standing, it should be used sparingly, if at all—and the racial disparities resulting from its implementation make it more troubling still.

By the early twenty-first century, a concern with the disparities produced by stop-and-frisk had come to the fore in debates about its legitimacy. This point is best considered in the context of *Floyd v. City of New York*,[74] a 2013 federal case in which extensive evidence was compiled about the city's reliance on stop-and-frisk. In 2002, Michael Bloomberg's first full year as mayor, New York police executed slightly less than 100,000 stops.[75] Nine years later, that number increased to 686,000.[76] Altogether, more than 4.4 million stops were conducted between 2004 and 2012.[77] Of this total, 1.5 percent produced a weapon and 6 percent led to arrest.[78] Although Blacks and Hispanics accounted for less than half the city's population during this decade, they comprised 83 percent of those stopped.[79] Members of minority groups were disproportionately targeted by the police. A practice of dubious merit when viewed apart from the social justice/criminal justice connection

[73] *Id.* at 14–15.

[74] Floyd v. City of New York, 959 F. Supp. 540 (S.D.N.Y. 2013).

[75] The exact number recorded was 97,296. *Stop-and-Frisk Data*, NYCLU: ACLU OF NY, https://www.nyclu.org/en/stop-and-frisk-Data (last visited Oct. 12, 2020).

[76] *Floyd*, 959 F. Supp. at 558.

[77] *Id.*

[78] *Id.* at 558–59.

[79] *Id*.

could properly be challenged, then, for increasing social justice deficits through its implementation.

Might judicial oversight be helpful in reducing, or perhaps even eliminating, these deficits? It's possible that the result announced at the conclusion of the *Floyd* trial—a court-appointed monitor who would oversee police practices[80]—would have had a beneficial effect. There is no way to be certain of this, however, for in 2013, the very year of the suit, Bloomberg's successor, Bill de Blasio, rendered the *Floyd* court's order largely moot by honoring a campaign pledge to cut back on stop-and-frisk. The resulting change was dramatic. By 2016, de Blasio's third full year as mayor, fewer than 12,500 of these interventions were conducted[81]—a drop of more than 96 percent from the high point reached five years earlier. Moreover, the stop-and-frisk decline was *not* accompanied by a rise in violent crime; indeed, the rate of major felonies known to the police continued to decline in New York City *along with* the precipitous drop in stop-and-frisk.[82]

Because New York City's experience has been positive, one might be tempted to view stop-and-frisk positively as well. But there is good reason to reach a different conclusion; the experience of the Bloomberg years makes it clear that there is nothing in *Terry* to limit mayors and police chiefs from ramping up the rate of stop-and-frisk when they deem this politically expedient. The exclusionary rule is unlikely to show deterrent effects, even if a policy of intensive stop-and-frisk is actually adopted. The de Blasio administration may have tamed stop-and-frisk—and so may have made it palatable for New Yorkers—but the possibility of an aggressive policy of stops and frisks remains a real one. The needed change is to rethink *Terry*, preferably by reinstating the probable cause threshold that previously prevailed but, as a second choice, by fortifying the criteria of reasonable suspicion. As New York City's Bloomberg-era experience demonstrates, the burden of police interventions is disproportionately felt by racial minorities. Although this burden was lifted in 2013 for New York's residents, it continues to pose a structural threat given *Terry*'*s* deference to government authority.

D. A FURTHER APPLICATION: RACIAL DISPARITIES IN SENTENCING

With sentencing, we return to a function whose status as a legitimate component of criminal law is not in doubt. But here, as with stop-and-frisk, our concern must be racial disparities, not class disparities, given the shortage of evidence bearing on the latter category as far as sentencing is concerned. Class disparities almost surely figure as a background

[80] Id. at 666–67.

[81] The exact number recorded was 12,404. *Stop-and-Frisk Data*, *supra* note 75.

[82] The New York Police Department reported 154,809 incidents of major felonies (murder and non-negligent homicide, rape, robbery, felony assault, burglary, grand larceny, and grand larceny of motor vehicle) in 2002, the first year discussed in text and *Stop-and-Frisk Data*, *supra* note 75. It reported 106,669 in 2011, the high-point for stop-and-frisk. It reported 101,716 in 2016—that is, it reported a lower rate of violent crime despite a 96% drop from the 2011 high-point of stop-and-frisk. CITY OF NY, SEVEN MAJOR FELONY OFFENSES (2020), https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/historical-crime-data/seven-major-felony-offenses-2000-2019.pdf.

consideration here—thus Judge Clement's *O'Donnell* comments on indigent misdemeanor defendants are significant,[83] since an indigent misdemeanor defendant's chance of release under standard bail schedules depends on their access to money. Our focus in thinking about sentencing will be race, however, given the abundance of data bearing on racial disparities in non-capital and capital cases.

Think first about non-capital sentencing. In monitoring federal court practices, the United States Sentencing Commission concluded in its 2017 report that "[b]lack male offenders received sentences on average 19.1 percent longer than similarly situated [w]hite male offenders during the Post-Report (fiscal year 2012-16), as they had for the prior four periods studied."[84] The Commission also found that "[v]iolence in an offender's criminal history does not appear to account for any of the demographic differences in sentencing."[85]

It is somewhat surprising that these findings have not been widely noted. The legitimacy of any evaluative scheme, whether it involves grading papers or imposing punishment, hinges on its claim to impartiality, a claim that not only relies on an aspiration to impartiality but on its achievement in practice. The federal sentencing process does not satisfy this elementary criterion of justice. Indeed, the Commission report concedes that the federal courts have not satisfied this criterion *for twenty years*. Social justice deficits have tainted federally imposed punishment for at least two decades, and perhaps for an even longer period of time.

What about capital sentencing? The pattern is similar here, though the data categories are more abundant, for research on this issue is concerned not only with the defendant's race but the victim's as well. In remarking on their own study and those conducted by others, David Baldus and George Woodworth state: "[W]e consider it highly plausible that the statistically significant race-of-victim effects documented in the literature reflect a devaluing (conscious or unconscious) of [B]lack murder victims."[86] A later study confirmed this conclusion. In examining the sentences Baldus and Woodworth had initially studied, Scott Phillips and Justin Marceau found that actual executions also were strongly correlated with victims' race. "Among defendants who were sentenced to death for killing a white victim, 22.22% (22/99) were executed," Phillips and Marceau discovered and "[a]mong defendants who were sentenced to death for killing a Black victim, 10% (2/20) were executed."[87]

And which officials charged with administering the death penalty devalue the lives of Black victims? The authors of a study conducted by the

---

[83] *See supra* note 67 and accompanying text.

[84] U.S. SENTENCING COMMISSION, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 2 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

[85] *Id.* For a study that established substantial racial disparities in the disposition of pleas entered by criminal defendants with no prior records, see Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C.L. REV. 1187 (2018).

[86] David C. Baldus & George Woodworth, Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception, 53 DEPAUL L. REV. 1411, 1450 (2004).

[87] Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L.L. REV. 585, 606 (2020).

General Accounting Office addressed this issue in a 1990 report. "The race of victim influence," they stated,

> (5) was found at all stages of the criminal justice system process, although there were variations among studies as to whether there was a race of victim influence at specific stages. The evidence for the race of victim influence was stronger for the earlier stages of the judicial process (e.g., prosecutorial decision to charge defendant with a capital offense, decision to proceed to trial rather than plea bargain) than in later stages.[88]

Put differently, these findings confirm the Baldus/Woodworth comment about the devaluation of Black victims' lives and also the Phillips/Marceau data about disparities in execution rates. They do so by exploring the different roles of prosecutors, jurors, and clemency-granting officials in the capital sentencing process, suggesting that decisions by the former have led to greater disparities than decisions by the latter. But of course, disparities were found at every stage, so the differences are merely those of degree—and what matters above all is that outcomes *always* varied in a way that left Blacks disadvantaged by comparison with similarly situated whites. A college-course grading system would be viewed as profoundly tainted in light of such a finding. The same can be said about criminal sentencing.

Two complementary options merit consideration for removing the taint: reducing the range of discretion open to decision-makers and establishing appellate review of the exercise of whatever discretion remains. The first of these possibilities is particularly appropriate for capital punishment. That is, even those who are uncertain about the soundness of the death penalty when it is considered without regard to race should be open to the possibility of abolishing it, given the racially disparate outcomes produced by the exercise of prosecutorial and juror discretion in administering it. One might argue, as Justice Stevens did in his *McCleskey* dissent, that if the death penalty should be reserved for "the worst of the worst," it might then be administered in a race-neutral way.[89] But this option is open to two objections. One is that efforts to operationalize terms such as *heinous* or *egregious* defy precise application. The other is that, under well-established case law, sentencing juries always have discretion to *not* impose the death penalty, thus making it possible to perpetuate racial disparities in capital punishment's administration even if some formula could be developed for identifying *the worst of the worst*. Once the Baldus/Woodworth finding about routine

[88] U.S. Gov't Gen. Accounting Office, GAO-GDD-90-57, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities 5 (1990), https://www.gao.gov/products/GGD-90-57.

[89] "One of the lessons of the Baldus study [concerning Georgia capital punishment sentencing patterns] is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated." McCleskey v. Kemp, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting).

devaluation of Black lives is taken seriously, then, the only sensible option is to impose a ceiling on decision-maker discretion in imposing capital punishment—and thus to abolish the death penalty.

But this is not enough—it is insufficient as a shield against racial disparities in this context, since even if the death penalty were abolished, it would not ensure that sentencing outcomes for Blacks would be corrected vis-à-vis whites, given the discretion that would still be available to prosecutors, judges, and jurors. A parallel point is in order for the exercise of discretion in less serious cases. Discretion is indispensable to avoid cookie-cutter decision-making, but the exercise of discretion can routinely produce the kind of racial disparities just examined. If these disparities are to be avoided *while continuing to rely on the discretionary authority needed for individualized decision-making*, appellate oversight is needed to guard against disparities that disadvantage the already disadvantaged.

A constitutional justification might be offered for according oversight authority to appellate courts. Alternatively, a statute might confer this power on appellate courts. As a constitutional matter, it might be argued that the racial disparities just outlined are intolerable under the equal protection clause—and that the appropriate remedy is for appellate courts to make sure that problematic racial disparities are avoided in sentencing practices by trial courts. The Supreme Court has resisted this approach. It has insisted on proof of individual bias in specific criminal cases[90] and so has shied away from statistical patterns that suggest systemic flaws but that offer no proof of discriminatory intent on the part of prosecutors or jurors.[91] Here, then, as was the case for other issues discussed here, legislation may be needed. Moreover, legislation might actually be preferable to a judicially crafted remedy. A statute is often better suited to development of a comprehensive remedy than a court order. Whatever the source of the initiative, it is clear that one is needed given the gap between race-neutral aspiration and actual outcomes that runs throughout criminal sentencing.

E. A FURTHER APPLICATION: CRIMINAL LIABILITY

The comments so far have examined procedural flaws attributable to social justice deficits. What about criminal liability itself? As noted in the section on Jim Crow, punishment is irredeemably tainted when the organs of state power are deployed by one faction to entrench the social justice deficits they have established for others, for criminal law is then used as a tool of political oppression. But as also noted in that section, in a "reasonably well-ordered society" (to use Rawls's term once again),[92] state-imposed punishment has a worthwhile function, one that must be purged as much as possible of social justice deficits but that is otherwise legitimate if the state performs its surrogacy role moderately well in protecting the public from WFF. When the state's performance is adequate in this regard, punishment

[90] Thus, the significance of the Court's comment about Warren McCleskey's burden of proof concerning an equal protection violation: "McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* at 292 (emphasis in original).

[91] Thus, the significance of a further comment by the *McCleskey* Court about statistical correlations: "At most, the Baldus study indicates a discrepancy that appears to correlate with race." *Id.* at 312.

[92] RAWLS, *supra* note 1, at 276.

is a genuine social good. It displaces individual retaliation, substituting for it an impartial response that is superior to the one produced by vengeful victims.

Under what circumstances, then, is the forfeiture framework discussed in the previous portions of this section also pertinent to issues of criminal liability? The answer is that it is of limited use. An examination of its limits is instructive, though. We thus should begin by considering an extension of the forfeiture framework to issues of criminal liability since this will set the stage for explaining why it is inappropriate in other settings.

Think first about a well-known epigram concerned with the social justice/criminal justice connection. "[T]he majestic equality of the laws," Anatole France remarks in *The Red Lily*, "forbid[s] rich and poor alike to sleep [under] bridges, to beg in the streets, and to steal their bread."[93] France's remark links criminal and social justice by emphasizing the law's application to *rich and poor alike.* In referring sardonically to the law's *majestic equality*, France's comment suggests that the law is a sham: it may apply to rich and poor alike, but its function is to regulate the poor.

In the late nineteenth century, when *The Red Lily* was published, only a small circle of critics gave any thought to the possibility of correcting social justice deficits through the provision of government services. Today, housing benefits (and other measures that correct these deficits) are common features of modern life, thus making it reasonable to ask whether government can properly impose—or even threaten—punishment when it has failed to provide a service related to the act being punished. We need not pose this question as a hypothetical, for the Ninth Circuit confronted it directly in *Martin v. City of Boise*, a 2018 case.[94] At stake in *Martin* was a challenge brought by six homeless residents of Boise to the constitutionality of a city ordinance that made it a misdemeanor to use "any of the streets, sidewalks, or public places as a camping place at any time." The court upheld this challenge but included conditions. It stated that an ordinance such as Boise's is incompatible with the Eighth Amendment punishments clause "insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors on public property, when no alternative shelter is available to them."[95]

The *Martin* court resolved the case by relying on the conditional threat framework outlined earlier, a framework that relies on FEO to correct the social justice deficits attributable to application of a rule framed solely in terms of the language of formal EO. *If* the state provides a benefit required as a matter of social justice (in *Martin*, shelter for the homeless; in *Gideon*, defense counsel for the indigent), and this framework holds, *then* the state may achieve its interest in imposing punishment. On the other hand, if the state fails to provide the requisite benefit, it forfeits the possibility of a conviction. FEO is thereby integrated into criminal justice. The state is offered an inducement to honor the requisites of social justice—and criminal

[93] ANATOLE FRANCE, THE RED LILY (Wildside Press, 2007) (1894).
[94] Martin v. City of Boise, 902 F.3d 1031 (9th Cir. 2018).
[95] *Id.* at 1048.

justice is ensured through the state's correction of the social justice deficit the state has failed to address.

To what extent can this conditional-threat framework be extended to other branches of criminal law? If we return to *The Red Lily's* examples, we will be able to discern its limited potential. *The Red Lily* epigram refers not only to sleeping under bridges (i.e., sleeping in public places) but also to begging in the streets and to stealing bread. Extending the framework to begging, e.g., to rule out its criminalization, is entirely plausible.[96] When we turn to stealing bread, however, the extension becomes problematic. In *Les Miserables*, Anatole France's predecessor, Victor Hugo, described a Paris so filled with misery as to make it seem justifiable for Jean Valjean to steal bread to feed his family.[97] Implicit in Hugo's novel is a claim that Valjean acted justifiably—that property rights can be infringed (in the absence of violence to others) to address extreme privation. Similar claims can be imagined in other settings. Trespassing on private property in order to secure food or to find a place to sleep, it might be argued, is justified (and thus not a proper subject for criminal liability) given an indigent person's dire need.[98] Needless to say, it is unlikely a criminal court would accept a justification defense in either a Jean Valjean-type setting or in one where a homeless trespasser pleads extreme privation. This said, though, there is considerable plausibility to such a defense—or, to put the point more cautiously, there is considerable plausibility from the standpoint of social justice, if not of law—given a backdrop of severe deprivation.

It might, however, be argued that a different legal strategy—an excuse rather than a justification—should be considered here. When a defendant asserts an excuse, that person makes no claim that the conduct was right. Instead, the defendant claims that the act, though impermissible if undertaken by someone capable of honoring the law's constraints, is excusable given specific disabilities that impair proper functioning. Insanity is the classic criminal excuse. In pointing to a mental disease or defect that has undermined a defendant's ability to conform to the law, the defendant claims that this made it very difficult, if not impossible, to conform to the natural duties imposed by the law.[99] A successful insanity plea deflects criminal liability; it exempts a defendant from punishment in light of the impairing condition that interfered with the capacity to act lawfully.

---

[96] The Supreme Court has held that the First Amendment protects "charitable appeals for funds." Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980). The Court has not, however, addressed the question of whether begging in public places is protected by the First Amendment. As for other courts, there is a decision by the highest court of the state of Washington which holds that, under First Amendment public forum doctrine, a municipal ordinance generally prohibiting begging is facially overbroad. City of Lakewood v. Willis, 375 P. 3d 1056, 1064 (Wash. 2016).

[97] VICTOR HUGO, LES MISÉRABLES (1862) (Jean Valjean spends 19 years in prison for stealing bread in order to feed his family).

[98] For an account of trespassing convictions of the homeless during the nineteenth and twentieth centuries, see MARK ALDRICH, DEATH RODE THE RAILS: AMERICAN RAILROAD ACCIDENTS AND SAFETY, 1828–1965 (2006).

[99] The Model Penal Code's insanity provision is framed in terms of this inability-to-conform-to-the-law criterion. It goes beyond this, however, by holding out the possibility of excusing from criminal liability someone who is unable to appreciate the wrongfulness of his/her act. The provision states: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." Model Penal Code § 4.01(1) (AM. L. INST. 2020).

In building on this, it might be suggested that extreme privation is an excusable condition, at least in some settings, as far as criminal liability is concerned.[100] The state's failure to address social justice deficits makes it responsible for an individual's behavioral disabilities. Clearly, an extreme privation defense has ramifications beyond the modest-harm cases (theft of food and trespassing) considered earlier. Indeed, it is potentially relevant to all criminal acts, even the most serious, for a defendant who advances an extreme-privation excuse to contend that they were so incapacitated by poverty (or perhaps racism) as to be unable to comply with the law. In advancing an argument of this kind, a defendant does not argue that society *caused* him or her to act in a certain way. Rather the defendant contends that the government's failure to provide the requisites of social justice undermined his or her capacity to conform to the law.[101]

If this line of reasoning has any appeal at all, it is because social justice deficits are so frequently a backdrop to criminal behavior. But an extreme privation defense is open to two objections and so is best avoided, at least when considered in light of the stark terms just employed. The first objection is that it defies empirical confirmation at the level of individual behavior. A correlation can be drawn at the societal level between poverty and violent crime.[102] A claim of societal causation sweeps too broadly, however, for macrosocial correlations do not account for actual individual behavior—and, indeed, even at the macro level, it has to be recognized that macrosocial explanation is less than convincing in this context, given the fact that violent crime *decreased* in the years following the financial crisis of 2008.[103] The sounder approach is to grant that violent crime is modestly correlated with poverty at the macro level while recognizing that this point is insufficient to establish why individuals engage in violent crime. In adopting this position, someone avoids the profoundly insulting thesis that poverty causes violence, for if one were to take this position, one would ignore the huge number of victims of social justice deficits who refrain from acts of violence. Put differently, we can say that a claim of incapacitation must point to something other than poverty in order to account for a criminal act. Poverty is inadequate on this front, as is racism.

The other objection to this approach has to do with the consequences that would follow from its adoption. If an extreme privation defense were

---

[100] For analysis of the distinction between justification and excuse and its relevance in this context, see William C. Heffernan, *Social Justice/Criminal Justice*, *in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF THE CRIMINAL LAW 47 (William C. Heffernan & John Kleinig eds., 2000).

[101] A defendant claiming an extreme privation would substitute, then, for the Model Penal Code's *as a result of mental disease or defect* the phrase *as a result of extreme privation attributable to the state's failure to act. See supra* note 95 for the original Model Penal Code provision being varied here.

[102] Using excess infant mortality as a criterion for poverty, it is possible to establish a positive correlation between this and rates of violent crime. *See, e.g.*, William A. Pridemore, *Poverty Matters: A Reassessment of the Inequality-Homicide Relationship in Cross-National Studies*, 51 BRIT. J. CRIM. 739 (2011).

[103] Between 2006 and 2014, the rate per 100,000 of reported murder and non-negligent manslaughter throughout America went down in each consecutive year, from 17,309 in 2006 to 14,164 in 2014. *Number of Reported Murder and Nonnegligent Manslaughter Cases in the United States from 1990 to 2019*, STATISTA, https://www.statista.com/statistics/191134/reported-murder-and-nonnegligent-manslaughter-cases-in-the-us-since-1990 (last visited Oct. 12, 2020).

incorporated into the law, a defendant might be exempted from criminal liability—but that same defendant might be classified as dangerous and thus subjected to civil commitment. Judge Bazelon considered this option in an opinion he wrote a half-century ago: "We cannot escape the probability, if not absolute certainty, that every effort to diminish the class of persons who can be found criminally responsible will produce a concomitant expansion in the class of persons who can be subjected to involuntary civil commitment," Bazelon wrote; "The price of permitting" this kind of excuse, he stated, "may be the unleashing of a detention device that operates, by hypothesis, at the exclusive expense of the lowest social and economic class."[104] An extreme privation excuse might *worsen* the condition of the indigent, in other words. It might exacerbate the public's conception of the indigent as "the dangerous class"[105]—and so leave them worse off.

What about a more modest version of this argument, one that allows for criminal liability but that calls on sentencers to address the conditions that influence—even if they don't wholly eliminate—the exercise of self-control? This is more promising. An approach along these lines grants that there is a social taint whenever the government imposes punishment on someone suffering from a remediable social justice deficit. However, it also holds that a society's failure to remedy this kind of deficit is insufficient, standing alone, to justify exempting someone from liability. In taking this stand, someone grants the interconnectedness of social and criminal justice. At the same time, though, this person affirms the imperative of enforcing the natural duties each person owes others.

An example illustrates how the partial reconciliation approach can be applied to sentencing. Clinical researchers have established that violent offenders suffer disproportionately from axis one psychiatric disorders.[106] It is reasonable to assume that many indigent offenders are unable to secure psychiatric help for themselves while outside prison—reasonable, in other words, to assume that government lapses in providing mental health counseling can be classified as a social justice deficit.[107] To note this is not to suggest that every indigent person who has sought but been denied mental health counseling for financial reasons should be exempt from liability. The argument presented here is more nuanced: it allows for punishment for a wrongful act (and so does not hold that the very notion of wrongfulness

---

[104] United States v. Alexander, 471 F. 2d 923, 964 (D.C. Cir. 1973) (Bazelon, J., dissenting).

[105] *See, e.g.*, KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO (Samuel H. Beer ed., Appleton-Century-Crofts 1955) (1848) (Karl Marx comments on the "'dangerous class,' the social scum (*Lumpenproletariat*), that passively rotting mass thrown off by the lowest layers of old society. . .").

[106] Controlling for sociodemographic characteristics and other comorbidity, "the odds of violent behavior were significantly increased ($p > 0.05$) among individuals with substance abuse disorders; pathological gambling; major depressive disorder; bipolar disorders; panic disorder without agoraphobia; specific phobia; and paranoid, schizoid, histrionic, and obsessive-compulsive personality disorders." Attila J. Pulay et al., *Violent Behavior and DSM-IV Psychiatric Disorders: Results from the National Epidemiologic Survey of Alcohol and Related Conditions*, J. CLINICAL PSYCHIATRY 12, 12 (2008).

[107] "At midyear 2005 more than half of all prison and jail inmates had a mental health problem, including 705,600 inmates in State prisons, 78,800 in Federal prisons, and 479,900 in local jails. These estimates represented 56% of State prisoners, 45% of Federal prisoners, and 64% of jail inmates." DORIS J. JAMES AND LAUREN E. GLAZE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), https://www.bjs.gov/content/pub/pdf/mhppji.pdf. *See also* Liz Szabo, *Cost of Not Caring: Nowhere to Go*, USA TODAY (Jan. 12, 2015, 5:58 PM), https://www.usatoday.com/story/news/nation/2014/05/12/mental-health-system-crisis/7746535/ (quoting former Congressman Tim Murphy: "We have replaced the hospital bed with the jail cell, the homeless shelter and the coffin.").

dissolves in the face of a social justice deficit), but it calls for punishment leavened by a mitigating concern for the circumstances in which a wrongful act occurred. Extend this approach to other acts that have occurred against a backdrop of social justice deficits, and it becomes possible to understand why an approach that continues to insist on the importance of natural duties can also take into account the mitigating effect of the state's failure to address those deficits prior to the commission of criminal offenses.

A related point needs to be considered. Throughout this section, discussion of corrective measures has been grounded in the assumption that remedies for social justice deficits might reduce the incidence of crime: the argument has implied that enhanced FEO may contribute to a decline in crime.[108] If this assumption is sound, measures that correct social injustice might be justified on consequentialist grounds, for the provision of FEO could promote the likelihood that members of society will honor their natural duties to one another. However, a qualification to this consequentialist claim is needed because exclusive emphasis on the crime-reduction benefit of providing social services has the effect of devaluing the concept of social justice. Social justice is intrinsically valuable: a society that fails to attend to it also fails to address the morally arbitrary features of birth—and so fails to ensure the FEO to which every person is entitled as a matter of right. If provision of FEO reduces crime, this is all to the good, but this is best viewed as an extra benefit generated by the achievement of social justice. In other words, the core rationale for social justice focuses on its intrinsic, not its instrumental, value. It is possible that measures facilitating access to counsel or reducing sentencing disparities will reduce the incidence of crime. This is not the primary reason for adopting them, though. Rather, they matter because they are intrinsically right, not because they are socially expedient.

VI. CONCLUSION

Commentators on criminal law rarely discuss the social justice/criminal justice connection. However, that connection is critical because social justice deficits—i.e., life-course disadvantages that can be corrected through government intervention that address the morally arbitrary features of birth—routinely influence criminal outcomes. Criminal law has sometimes been deployed to perpetuate social justice deficits. When this has occurred, state-imposed punishment has been used as a tool to preserve a system of unjust advantage for some over others. Even when this is not the case, though—even in a reasonably well-ordered society—social justice deficits often taint the administration of state-imposed punishment. Because remedial steps can be taken to reduce the taint, it is essential that these be

[108] No researcher has addressed this issue in light of the concept of fair equality of opportunity. Indirect support for the FEO/less crime hypothesis can be found in James Heckman's research on the Perry Preschoolers of Ypsilanti, Michigan. Heckman contends that provision of "high-quality preschool experience to socioeconomically and developmentally disadvantaged children" is linked to "significant reductions in criminal activity, especially violent crime, increases in earnings and employment, better health and better executive functioning and socioeconomic skills." *Perry Preschoolers: Intergenerational Effects Frequently Asked Questions*, HECKMAN (May 2019), https://heckmanequation.org/www/assets/2019/05/F_Perry-FAQs_051319.pdf.

integrated into the law. This Article has proposed a framework for enhancing the legitimacy of criminal outcomes by reducing the social justice deficits that affect them and has identified concrete measures to promote the same.