

# The Wrong of Mass Punishment

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**Abstract** The increase in incarceration of offenders in the United States over the last 40 years has created a system of mass incarceration or mass punishment. While consequentialist theories of punishment may generate considerable doubts about the value of this system, it seems that retributive theories of punishment lack the resources to criticize mass punishment. Because of their focus on individual desert, it seems that they can say nothing about punishment in the aggregate. Nevertheless, there are good reasons for a certain kind of retributivism to question the justice of mass punishment. When retributive punishment is considered as one of the functions of a state whose task is to create and maintain a system of equal freedom for all, then punishment must be justified not only at the individual level but also at the level of the system of punishment as a whole. If the criminal justice system inflicts excessive amounts of punishment in the aggregate, it becomes unjust, not because individual offenders are treated unjustly, but because a policy of relentless prosecution and punishment is not appropriate for a free society.

**Keywords** Mass incarceration · Mass punishment · Theories of punishment · Retributivism · Kant

## 1 Introduction

The most striking change in the criminal justice system of the United States over the last 40 years has been the increase in incarceration of offenders, in terms of both the number of

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people and the proportion of the population imprisoned.<sup>1</sup> There has, over the same time period, also been a substantial increase in the use of other punishments, such as probation and fines. In light of these changes, U.S. criminal justice is aptly described as a system of “mass punishment” or “mass incarceration.” While utility-based justifications for punishment can provide reasons to doubt the justice of this system,<sup>2</sup> it seems there is one theory of punishment that lacks the resources to criticize mass punishment: namely, retributivism. If the great majority of people who are punished are indeed guilty of the offences they were convicted of, then each of them got what they deserved, and so it seems that retributivism can say nothing about how many people are punished. And so, it seems, we should either reject retributivism or accept that very high levels of incarceration raise no issue of justice. In this paper, I present a retributivist argument against mass punishment. If retribution is not a way of giving individual persons what they deserve from a moral point of view but one of the functions of a state whose task is to create and maintain a system of equal freedom for all, then mass punishment is objectionable for the same reason that forgoing criminal law entirely would be objectionable: while the state may well need to punish some people in order to maintain a system of equal freedom, a system in which massive numbers of people are punished is not a system of freedom. If the criminal justice system inflicts excessive amounts of punishment in the aggregate, it becomes unjust, not because individual offenders are treated unjustly, but because a policy of relentless prosecution and punishment is unjust in a free society.

## 2 Mass Punishment and Retributivism

### 2.1 The Phenomenon of Mass Punishment

The facts concerning mass incarceration in the U.S. are familiar and need be only briefly reviewed.<sup>3</sup> In the early 1970s, the incarceration rate in the U.S. was about 0.16%. But at any given moment in 2012, about 0.71% of the population of the U.S. was incarcerated: that amounts to more than 2 million people and is the highest incarceration rate in the world. In Canada, which is in many respects legally and culturally similar to the U.S., the incarceration rate is somewhat over 0.10%; in the western European countries, it is generally under 0.10%. Moreover, the risk of incarceration is not evenly distributed across the U.S. population. The incarceration rate is much higher for African-Americans than for whites, and very high indeed for African-American men. In 2010, more than 33% of African-American men between the ages of 20 and 39 without a high-school diploma were incarcerated. Looking at the risk of incarceration over time rather than at a point in time, it has been estimated that an American man born in the late 1970s has a 3.3% chance of

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<sup>1</sup> See National Research Council, *The Growth of Incarceration in the United States: Causes and Consequences*, Jeremy Travis, Bruce Western, and Steve Redburn, eds. (Washington, DC: National Academies Press, 2014).

<sup>2</sup> See, for example, Council of Economic Advisors, *Economic Perspectives on Incarceration and the Criminal Justice System* (2016).

<sup>3</sup> The figures quoted in this paragraph are drawn mainly from Travis, Western, and Redburn, *The Growth of Incarceration in the United States: Causes and Consequences*, Chapter 2, but see also Lauren E. Glaze and Danielle Kaeble, “Correctional Populations in the United States, 2013,” U.S. Department of Justice, December 2014, available at <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>; Bruce Western and Christopher Wildeman, “The Black Family and Mass Incarceration,” *Annals of the American Academy of Political and Social Sciences* 621 (2009): 221–242.

being incarcerated at some point during his life; for an African-American man, the chance is around 21%; for an African-American man without a high school diploma, that chance is around 65%.<sup>4</sup>

Now, the fact that the probability of being punished is so much higher for some groups than for others is a very serious injustice in itself.<sup>5</sup> But, in this paper, I am concerned with the injustice of mass punishment as such. The injustice of incarcerating 33% of a particular population is not merely that that population is punished at a much higher rate than other populations; it is also that such a rate of incarceration would be unjust for any population. It would be no answer to this injustice to ensure that 33% of the rest of the population was also incarcerated. And even if an overall incarceration rate of 1%, together with a rate of other forms of criminal supervision of around 2%, was evenly and fairly distributed across the population, it would be troublingly high. It suggests that one in every hundred citizens is so dangerous or anti-social that he or she must be forcibly separated from the rest of his or her fellow citizens, with all of the implications that has for participation in employment, political activity, and family life; and that two more are so dangerous or anti-social that they must be supervised. And a similar point can be made about other forms of punishment, such as probation and fines. Modest fines are a legitimate way of encouraging compliance with prohibitions and raising revenue. But when a government relies so heavily on fines that its police force and judiciary are tasked with raising revenue by punishing people, the citizens will inevitably see their institutions of criminal justice as arbitrary revenue collectors rather than as enforcers of the law; and this will be so even if every fine imposed actually corresponds to a violation of the law.<sup>6</sup>

## 2.2 Mass Punishment's Challenge to Retributivism

For the purposes of this paper, I'll take retributivism to be a two-part claim: punishment is inflicted on an offender because he or she deserves punishment for having committed an offence and not because punishing would promote some other independently defined good.<sup>7</sup> Retributivism, whatever else it might do, provides a constraint on when punishment can justly be inflicted, as it prohibits punishing someone for something he or she didn't do or for a reason other than his or her commission of the offence. But this feature of

<sup>4</sup> It might be thought that these discrepancies can be explained because some populations (e.g., men) commit more offences than others (e.g., women). That is at best only part of the explanation for racial disparities in punishment. The empirical evidence summarized by Travis, Western, and Redburn, *The Growth of Incarceration in the United States: Causes and Consequences*, pp. 94–103, suggests that racial disparities in offending can explain some, but not all, of the racial disparities in arrest rates for violent offences, but cannot account for disparities in arrest rates for drug offences; moreover, their evidence suggests that, once arrested, African-American defendants are treated more harshly than white defendants throughout the criminal process.

<sup>5</sup> On that injustice, see among others Michelle Alexander, *The New Jim Crow* (New York: The Free Press, 2010).

<sup>6</sup> Compare *Investigation of the Ferguson Police Department*, U.S. Department of Justice, Civil Rights Division (2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf), documenting (among other things) one municipality's heavy reliance on fines. This is not even to mention the rule-of-law problems created by giving the police and the courts a specific fiscal task that properly belongs to other parts of government, or the question of whether the fiscal burden of the state would be borne more fairly by a system of just taxation.

<sup>7</sup> Paraphrasing Immanuel Kant, *The Metaphysics of Morals*, in Immanuel Kant, *Practical Philosophy*, Mary Gregor ed. & trans. (Cambridge: Cambridge University Press, 1996): 353–603, p. 6:331 (all citations to Kant's work will be by volume and page number of the Royal Prussian Academy edition, as they appear in the margins of the Cambridge edition).

retributivism is not much of a constraint on punishment in the aggregate: since retributivists hold that punishment is justified by the individual's commission of the crime rather than by the social costs and benefits of punishing, it seems that retributivists should be indifferent to the amount of justified punishment that is inflicted.<sup>8</sup> Vincent Chiao, for example, argues that a strictly deontological retributivism—a retributivism that “(a) purports to provide an explanation of when it is permissible to punish those who commit crimes, and ... (b) does so in terms that exclude the consideration of the expected costs and benefits of punishment”<sup>9</sup>—can say nothing about mass punishment. So, if you are troubled by the phenomenon of mass punishment—and who would not be?—you shouldn't be a strictly deontological retributivist.

One might try to avoid this claim by adopting a hybrid account of punishment, according to which whatever good is generated by retribution could be traded off against other goods; retribution would then be a necessary but not sufficient condition for punishment. Such an account would not be strictly deontological in Chiao's sense and so not subject to his critique.<sup>10</sup> Indeed, one upshot of his argument might be that anyone concerned about mass punishment, retributivists included, should welcome such hybrids. I will offer a different reaction to the argument that strictly deontological theories of punishment cannot object to mass punishment. When the claim that punishment must be retributive is placed in the context of a political account of the role of punishment, it turns out that mass punishment is troubling for the same reason that failing to punish crime at all would be troubling: neither is consistent with the task of the state in a free society.

### 3 The Wrong of Mass Punishment

#### 3.1 A Juridical-Retributivist Account of Punishment

Juridical retributivism is a family of views about punishment with one common element: punishment is justified as a legal response to a juridical wrong, not as a response to a moral wrong.<sup>11</sup> It is therefore connected to one's views about what constitutes a juridical wrong and so to an account of the nature and purpose of the legal order in general. Suppose that the purpose of the legal order is not to promote any particular good but to solve the problem of how a plurality of free, purposive, and equal persons can interact with each other in a way that preserves their freedom, purposiveness, and equality.<sup>12</sup> Since any one

<sup>8</sup> Vincent Chiao, “Mass Incarceration and the Theory of Punishment,” *Criminal Law and Philosophy* (forthcoming 2016); Robert Weisberg, “Reality-challenged Theories of Punishment,” *Marquette Law Review* 95(4) (2012): 1203–1252; Edward Rubin, “Just Say No to Retributivism,” *Buffalo Criminal Law Review* 7 (2003): 17–83. For a suggestion that a dose of retributivism might be part of the cure for the injustice of mass punishment, see Allen W. Wood, “Punishment, retribution, and the coercive enforcement of right,” in Lara Denis, ed., *Kant's Metaphysics of Morals: A Critical Guide* (Cambridge: Cambridge University Press, 2010): 111–129.

<sup>9</sup> Chiao, “Mass Incarceration and the Theory of Punishment,” p. 3.

<sup>10</sup> Chiao, “Mass Incarceration and the Theory of Punishment,” p. 17.

<sup>11</sup> For what might be read, though probably not intended, as a manifesto of juridical retributivism, see Vincent Chiao, “What Is the Criminal Law For?,” *Law and Philosophy* 35(2) (2016): 137–163. For another version of juridical retributivism, see Alan Brudner, *Punishment and Freedom* (Oxford: Oxford University Press, 2009).

<sup>12</sup> This account is based on Kant, *Metaphysics of Morals*, particularly as interpreted by Arthur Ripstein, *Force and Freedom* (Cambridge, Mass.: Harvard University Press, 2009). For another interpretation, which does not always agree with Ripstein's, see B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right*:

person's pursuit of his or her purposes is likely to conflict with someone else's, and since no free person has a right to subordinate another free person to his or her purposes, a multitude of persons requires a structure of entitlements within which each can pursue his or her purposes rightfully, that is, without improperly interfering with others' pursuits of their purposes. If and when such a structure is place, each person can be understood as acting freely in the sense that his or her choices are independent of others' choices. This kind of independence does not mean that each is unaffected by the choices of others; but, by establishing a structure in which the choice of each can be made consistent with the choice of all, it ensures that each is entitled to use the means available to him or her to the extent consistent with the like entitlement of others. As long as each acts within these limits, the choices of each can be understood as subject only to the entitlements of others, not to their choices. The permissions and limits in respect of everyone's use of his or her means must therefore be reciprocal; if not, some would be subject to the choice of another. But since any individual's enforcement of these limits can only appear arbitrary to other individuals, these reciprocal permissions and limits have to be defined and enforced by an agent whose conduct can be understood as having been authorized by all: that is, by the state. The legal order must therefore consist not only of a set of rules that constitutes the reciprocal permissions and limits but also public authorities to enact them, to enforce them, and to decide disputes arising under them. On this view, the task of the legal order is to guarantee "the consistent exercise of the right to freedom by a plurality of persons."<sup>13</sup> It is to take people out of the state of nature, where they are vulnerable to each other's necessarily arbitrary choices, and into a rightful condition, where each can use his or her means consistently with everyone else's use of their means.

If the task of the legal order is to constitute a rightful condition for free and purposive agents, then the point of having rules that function as legal prohibitions on certain kinds of conduct is clear enough, but the point of making the violation of these rules criminally punishable, rather than providing compensatory remedies or encouraging compliance in other ways, is not immediately obvious. If each of us has an entitlement to use our means as we see fit, subject to the limits required by the like entitlement of others, then it follows that each of us will be subject to various prohibitions on interfering with the entitlements of others. But why enforcement might take the form of punishment, rather than, *e.g.*, remediation, is harder to understand. Moreover, in contemporary legal orders, the vast majority of penal law has little or nothing to do with wrongful use of or damage to another private person's means. And one might wonder why punishment, as opposed to other means of encouraging compliance with regulatory law, would be appropriate. These questions are particularly difficult in light of some characteristics typical of strictly deontological retributivism: the claims that liability to punishment depends only on the commission of the crime and that the quantum of punishment is determined by the nature of the crime.<sup>14</sup> This kind of retributivism seems to permit, perhaps even require, punishment where it will

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Footnote 12 continued

A Commentary (Cambridge: Cambridge University Press, 2010). Two accounts of the state that are very much in the same tradition but that de-emphasize their Kantian origins are Julius Ebbinghaus, "The Law of Humanity and the Limits of State Power," *Philosophical Quarterly* 3 (1953): 14–22, and Jacob Weinrib, "Authority, justice and public law: A unified theory," *University of Toronto Law Journal* 64(5) (2014): 703–735.

<sup>13</sup> Ripstein, *Force and Freedom*, p. 9; see also Kant, *Metaphysics of Morals*, pp. 6:232–6:233; Weinrib, "Authority, justice and public law: A unified theory," pp. 707–715.

<sup>14</sup> See, for example, Kant, *Metaphysics of Morals*, p. 6:331.

neither remedy the private or public wrongs in question nor do anything concrete to promote the protection of rights.

Arthur Ripstein, building on the work of other modern juridical retributivists,<sup>15</sup> deals with these puzzles as follows. He argues that criminal punishment in the rightful condition has both a deterrent and a retributive aspect. In its deterrent aspect, it is a threat to those who would consider pursuing their purposes by committing a juridical wrong; in its retributive aspect, it is a response to the commission of a juridical wrong. Deterrence is the prospect of enforcement in case a penal prohibition is violated; retribution is enforcement made actual in particular cases of wrongdoing. A threatened punishment that was incapable of deterring or that was never imposed following the commission of a crime would not be a way of enforcing the law at all. The threat of punishment is the law's announcement of its superiority over the individual's view about the rights and wrongs of his or her conduct, while the imposition of punishment is the law's response to the criminal's attempt to exempt himself or herself from the demands of public law. Accordingly, "[criminal] punishment is nothing more than the supremacy of the law."<sup>16</sup> Indeed, Ripstein argues that the legal order must punish criminals because its failure to do so allows the criminal to effectively assert the superiority of his or her private ends over the public task of creating and maintaining a rightful condition.<sup>17</sup> He justifies retributive punishment as one of the necessary functions of the state in a rightful condition.

### 3.2 The Wrong of Mass Punishment

For the purposes of this paper, I accept the juridical retributive idea at the core of Ripstein's account: criminal punishment is imposed only as the law's response to the crime committed by the offender. But this juridical retributivism seems to have a powerful and troubling implication: it suggests, not only that punishment is a permissible response to whatever happens to be defined as a crime, but that punishment is a mandatory response to juridical wrongs of all kinds. I show why this implication seems to follow, but that demonstration will merely be a foil for showing that an unremitting approach to punishment is itself inconsistent with a rightful condition.

To show how mandatory punishment of all juridical wrongs seems to follow from juridical retributivism, consider the following hypothetical situation. Suppose that an otherwise legitimate state interprets the task of creating and maintaining a rightful condition as requiring it to detect, prosecute, and punish all violations of right. If the reason for punishing is to restore the superiority of the law over the individual who seeks to exempt himself or herself from its demands, then there would seem to be a strong case for criminalizing all intentional violations of right, not just those wrongs like theft and assault that are typically considered to be at the core of criminal law, but also intentional breaches of contract, intentional interferences with status relationships, and intentional violations of

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<sup>15</sup> Notably B. Sharon Byrd, "Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution," *Law and Philosophy* 8(2) (1989): 151–200, and Thomas Hill, *Respect, Pluralism, and Justice* (Oxford: Oxford University Press, 2000), pp. 173–199. For some doubts about whether this line of argument provides the best interpretation of Kant's theory of punishment, see Wood, "Punishment, retribution, and the coercive enforcement of right."

<sup>16</sup> Ripstein, *Force and Freedom*, p. 302; compare Malcolm Thorburn, "Criminal Law as Public Law," in R.A. Duff and Stuart Green, eds., *Philosophical Foundations of Criminal Law* (Oxford, Oxford University Press, 2011), 21–43, p. 41.

<sup>17</sup> Ripstein, *Force and Freedom*, pp. 320–321.

any otherwise justifiable regulatory prohibition.<sup>18</sup> The claim of the juridical retributivist is that “crime is wrongful because of its incompatibility with the form of public lawgiving.”<sup>19</sup> But that form is nothing more than the positive law itself, those legal rules and procedures that are the institutionalized versions of the principles of private law, the “omnilateral public law [that] replaces unilateral private judgment.”<sup>20</sup> The wrong of the criminal “is to exempt himself from the public legal regulation of conduct and resolution of disputes” by deciding for himself what is his, rather than determining what is his by looking to the law and the system for resolving particular disputes under the law.<sup>21</sup> Thus, in principle, any intentional violation of right, private or public, is a potential crime because all intentional violations of right have exactly that character: the person who commits them decides for himself or herself what he or she is entitled to rather than remitting that question to the law. So, to maintain the superiority of the law, the state might decide to punish all intentional violations of right.

One might argue that this hypothetical overstates the proper scope of permissible criminalization and prosecution in the rightful condition.<sup>22</sup> This objection has four branches. First, one might think that, apart from its implications for the level of punishment, the project of criminalizing all intentional violations of private right is itself inconsistent with the idea of a system of freedom. Perhaps there is some principled distinction between private wrongs that are appropriately remedied only in private law and those that are also of public concern<sup>23</sup>; if so, the distinction could be deployed as a restraint on criminalization and therefore on mass punishment. But the legal retributivist position that I have presented does not provide such a distinction because it locates the wrong of any intentional violation of right in its deliberate defiance of the legal order.

The second branch of the objection is that regulatory violations should not be treated the same way as true crimes.<sup>24</sup> If that is right, then one would need an account of how regulatory prohibitions could be enforced without penal sanctions. Perhaps such an account is possible, but I am not aware of one, and it does not figure in the practice of modern states. Moreover, the idea that the purpose of punishment is just to ensure the application of

<sup>18</sup> From a Kantian point of view, there is a difference between violations of private right, which he thought could be shown a priori to be wrongful, and violations of public laws, which do not involve any violation of anyone’s private right, the wrongfulness of which is therefore contingent on the public reasons for creating the prohibition in question. For my purposes in this paper, all regulatory offences belong in the latter category. Whether this distinction tracks the commonly invoked distinction between “true crimes” and public welfare offences is not critical here.

<sup>19</sup> Ripstein, *Force and Freedom*, p. 314.

<sup>20</sup> Ripstein, *Force and Freedom*, p. 312.

<sup>21</sup> Ripstein, *Force and Freedom*, p. 313.

<sup>22</sup> I thank Patrick Macklem and David Dyzenhaus for pressing me on this point. But see Douglas Husak, *Overcriminalization* (New York: Oxford University Press, 2008), for a discussion of the extent to which the penal law of the U.S. is already like this.

<sup>23</sup> Kant, *Metaphysics of Morals*, pp. 6:331, 6:224; Ripstein, *Force and Freedom*, p. 313. See also the account of public wrongs developed by Duff and Marshall; though they use a less austere conception of the state than the one I work with here: R.A. Duff and Sandra Marshall, “Criminalization and Sharing Wrongs,” *Canadian Journal of Law and Jurisprudence* 11(1) (1998): 7–22; R.A. Duff and Sandra Marshall, “Public and Private Wrongs,” in James Chalmers *et al.*, eds., *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh: Edinburgh University Press, 2010): 70–85.

<sup>24</sup> For some thoughts about this possibility, see Brudner, *Punishment and Freedom*, Chapter 5. An argument for the legitimacy of the regulatory state in Kantian terms is made in Hamish Stewart, “Kantian Police: The Limits of Consent in Regulatory Law,” *New Criminal Law Review* 17(1) (2014): 1–22, but the argument deals only briefly with the legitimacy of punishment as a means of enforcing the regulatory state’s rules.

the law fits regulatory offences better than any other part of the penal law. Regulatory offences characteristically do not require proof of any identifiable wrong apart from the violation of the rule itself. So, from the point of view of juridical retributivism, the point of the punishment is precisely the law's reasserting itself. Punishing the jaywalker who unlawfully crosses the street when he or she correctly judges that it is perfectly safe to do so can have no purpose other than the law's demonstrating its own superiority over the individual who seeks to substitute his or her own judgment for its.

Third, perhaps the hypothetical overstates the scope of criminalization in general. Surely a system of equal freedom would not criminalize the exercises of basic political and personal freedoms, such as deciding what political views to express, what books to read, what clothes to wear. That is true, but the hypothetical does not depend on the criminalization of such conduct because such conduct is not juridically wrongful. What drives the hypothetical is not the thought that the legislature could criminalize conduct that is not juridically wrongful; it is rather to investigate what would happen if the state chose to criminalize all intentionally committed juridical wrongs, that is, all intentional violations of private right and of otherwise justifiable regulatory law.

Fourth and finally, it might be said that the hypothetical overlooks the possibility of prosecutorial discretion. And so it does. But that is because prosecutorial discretion is inconsistent with the claim that punishment of all juridical wrongs is mandatory. Any account of prosecutorial discretion appropriate to this account of the rightful condition will face the same problem as an account of criminalization: what kind of reasons are acceptable for failing to prosecute and punish juridical wrongs? If the state understands the creation or maintenance of a rightful condition to require it to punish all intentionally juridical committed wrongs, then it must also prosecute all apparent wrongs; otherwise, some of those wrongs would escape punishment.

So, suppose the state decides to pursue a policy of relentlessly criminalizing and punishing all intentional juridical wrongs. There are two steps the state would have to take to implement this policy. First, the state would review the scope of the existing criminal law and ensure that every intentional violation of right was not only remediable in whatever manner was appropriate to the private or public wrong at issue but also criminally punishable.<sup>25</sup> Second, the state would resolutely prosecute every apparent offender for every apparent offence. Assume that the procedural rules of the legal order have been so perfected that most factually guilty offenders are convicted while wrongful convictions are vanishingly unlikely. Assume further that prosecutorial decisions are made fairly, in the sense that the likelihood of prosecution and punishment is distributed equally across the population of actual offenders. Notwithstanding these restraints, one would anticipate that, in such a legal order, there would be a very large number of criminal convictions and a great deal of criminal punishment. Depending on the extent of offending, it could well be a world of mass punishment; applied to the world we live in, it surely would be.

Life in such a legal order would not be a life of freedom. This hypothetical state would be one in which every person would pursue his or her purposes under the ever-present and very real threat of prosecution and punishment. Given the density of penal law in our hypothetical legal order, it is likely that a very high proportion of the population would commit a penal offence every day, thus justifying punishment, not to mention the likelihood that they would *apparently* commit such an offence, thus justifying prosecution

<sup>25</sup> In one respect, the penal law of this hypothetical state would be more restrained than that of actually existing states. In most jurisdictions, the prosecution is not required to prove fault, or at any rate not subjective fault, for regulatory offences and sometimes not even for true crimes.

(though not punishment). But no-one can live the life of a free and purposive person under the threat of a high likelihood of prosecution and punishment. This is not the life of one who is constrained only by the rules necessary to ensure the mutual consistency of everyone's purposiveness; it is the life of a person constrained by the fear of perpetual interruption of his or her purposiveness. This is not the conduct of a state devoted to securing equal freedom for all; it is the conduct of a state that is obsessed with repeatedly demonstrating its superiority over its own citizens. Resolute criminalization and prosecution of all wrongs—and its inevitable by-product, mass punishment—is itself inconsistent with the task of the rightful condition.

Accepting the claim that mass punishment is inconsistent with the juridical task of the rightful condition requires us to abandon the thought that punishment of juridical wrongs is mandatory. It does not, however, require us to reject the picture of the state based on the idea of equal freedom for all; rather, it shows that punishment is both required and limited by the idea of equal freedom. The threat of punishment—and in some cases, its actuality—is justified by its role in maintaining the rightful condition; but too much punishment is inconsistent with a rightful condition.

### 3.3 What Kind of a Wrong is Mass Punishment?

Mass punishment is not a wrong to any particular individual who is punished. The punishment of particular individuals is justified on retributive grounds. But mass punishment is wrong because it is inconsistent with the idea of the rightful condition. The idea that conduct can be wrongful without wronging anyone in particular is familiar enough, but may seem odd in the context of an account of the state based solely on ideas of right: if an action has violated no-one's right, not even the state's, it seems that the actor has committed no juridical wrong, that is, no wrong relating to rights. But this kind of wrong played an important role in Kant's political philosophy, from which the account of the state given above derives. Kant's terminology for this kind of wrong varied: he called it a "formal wrong" (as opposed to the "material wrong" to the particular victim of the crime), a "wrong in the highest degree," and a "wrong to humanity in general." Three of his examples will illustrate the idea. Kant famously claims that one who lies to a murderer about the whereabouts of the intended victim does no wrong to the murderer but commits "a wrong inflicted upon humanity generally."<sup>26</sup> In discussing the transition from the state of nature to the civil condition, he argues that "human beings do *one another* no wrong at all when they feud among themselves"; nevertheless, if they prefer to remain in the state of nature, "they do wrong in the highest degree"<sup>27</sup> by choosing to remain in a condition where each can secure what is his or hers only by violence rather than by right.<sup>28</sup> And he argues that a ruler who exercises clemency in favour of a criminal who has committed a crime against her wrongs no-one—the only person who might be wronged here is the sovereign, who cannot wrong herself—but "is thereby doing injustice in the highest degree."<sup>29</sup>

<sup>26</sup> Kant, "On a supposed right to lie from philanthropy," in *Practical Philosophy*: 605–615, p. 8:426. For two recent and illuminating discussions of that essay, see Jacob Weinrib, "The Juridical Significance of Kant's 'Supposed Right to Lie'" *Kantian Review* 13(1) (2008): 141–170; Seana Valentine Shffrin, *Speech Matters* (Princeton: Princeton University Press, 2015), Chapter 1.

<sup>27</sup> Kant, *Metaphysics of Morals*, p. 6:307.

<sup>28</sup> *Ibid.*, pp. 6:307–308.

<sup>29</sup> *Ibid.*, p. 6:337.

These three examples have two features in common. First, in each case, the person who acts does no wrong to any particular person but does a wrong to the rightful condition, in the following sense. The person acts on a maxim which, if universalized, would make a rightful condition impossible: founding rightful relations on falsehoods, refusing to punish offenders, or refusing to enter into a rightful condition in the first place. One is tempted to observe that a well-functioning rightful condition can tolerate a limited amount of this behaviour, just as it can tolerate a certain level of crime: the presence of the occasional Freeman on the Land who actively rejects the state's authority,<sup>30</sup> the occasional falsehood, or the occasional act of clemency does not cause the state to collapse. But that is not Kant's point: he identifies the wrong as the inconsistency of the maxim of the action with the possibility of a rightful condition. Second, in each case, the action, though a juridical wrong (a wrong concerning the rights of others) is not itself punishable or amenable to juridical remedy. In the case of persons in the state of nature who refuse to enter into a rightful condition with each other, there is by definition no-one who has the authority to force them into a rightful condition, much less to punish them: the defining feature of the state of nature is precisely the absence of this authority. The ruler who exercises clemency cannot be punished nor can his act of clemency be undone by other institutional actors; one of the features of executive authority, for Kant, is the absence of any other person or institution with the authority to undo its decisions of this kind.<sup>31</sup> The case of the lie is more complex, but the general picture is the same. Kant does indeed argue that a person who lies to the murderer at the door is juridically responsible for the consequences of the lie,<sup>32</sup> but he does not suggest that the liar is punishable for the lie itself, and he recognizes other cases where a liar is not juridically responsible for the consequences of a lie.<sup>33</sup>

Acting on a policy of prosecuting and punishing every juridical wrongdoer has the same two characteristics. First, punishing all wrongdoers is not a wrong to anyone in particular. No-one can complain that he or she, in particular, has been wrongly punished; after all, the offender is proved to have committed the offence in question. Second, punishing all wrongdoers is not action that is readily amenable to legal control. It is properly the task of the legislature to define offences, of the police to investigate crime, of prosecutors to prosecute apparent offenders, of courts to sentence offenders, and of the executive to carry out the sentences imposed. None of these state officials does wrong in any particular case in carrying out these functions; moreover, none of them has the authority to direct any of the others in carrying out their functions. It is true that, in common law systems at least, judges can stop individual prosecutions that have become unfair; but it would be extraordinary for a judge to acquit a guilty thief because enough thieves had already been convicted that day or to issue an injunction limiting the number of prosecutions that could be brought because there had been enough prosecutions already.<sup>34</sup> The wrong of mass punishment, like other wrongs to the rightful condition that have no particular victim, is difficult to regulate by law but can be controlled through judicious decision-making about what conduct to criminalize and what offences to prosecute.

<sup>30</sup> See *Meads v. Meads*, 2012 ABQB 571.

<sup>31</sup> Kant, *Metaphysics of Morals*, pp. 6:316–317.

<sup>32</sup> Kant, “On a supposed right to lie from philanthropy,” p. 8:427.

<sup>33</sup> Kant, *Metaphysics of Morals*, p. 6:238.

<sup>34</sup> *Brown v. Plata*, 131 S.Ct. 1910, 563 U.S. \_\_\_ (2011), a decision that may help to remedy mass incarceration, was not based on a claim, much less a holding, that mass punishment was wrong as such; rather, it was concerned with the conditions under which prisoners were held.

### 3.4 Objections and Remedies

I now turn to some objections that might be made to the claim that mass punishment is unjust. Although those objections must be rejected, they do point to the institutional considerations that can serve to remedy, or better still to avoid, the wrong of mass punishment.

First, perhaps I have too readily assumed that a citizen's behaviour will be unaffected by vigorous enforcement of the penal law. Perhaps it is true that, under current conditions, pedestrians in Paris, Beijing, and New York treat traffic signals as giving mere recommendations rather than as creating legal obligations; but if traffic violations were regularly and rigorously punished, as they are said to be in Singapore, perhaps the law governing pedestrian traffic would be more frequently obeyed. We could have the cake of the rightful condition (compliance with the law) and eat it too (no mass punishment). There is something to this objection, as it is hard to believe that behaviour is entirely unaffected by the extent to which the law is enforced (even if, as the social science evidence indicates, it is not much affected by the severity of punishment). But it is an essentially empirical objection. It does not exclude the possibility that vigorous enforcement may affect the incidence of the activity very little or not at all, as appears to have been the case in the so-called "war on drugs." Thus, it does not exclude the possibility of mass punishment. It does suggest, though, that the decision to punish wrongs, as opposed to using other policy instruments for discouraging and deterring them, should be sensitive to whatever empirical evidence there might be concerning the effectiveness of those instruments. That may sound like an odd conclusion for a retributivist to reach, and for a moral retributivist it would be. But, for a juridical retributivist who is concerned about the effectiveness of right, it is not. As the hypothetical suggests, the idea of punishing to uphold right does not itself limit the conduct that can be justly prosecuted and punished; so, in seeking such limits, the juridical retributivist should be concerned about the effectiveness of criminalization as a way of maintaining a rightful condition.

Second, it might be said that if there is a lot of crime, then of course there will be a lot of prosecution and punishment. To take an extreme example, suppose "half the population steals a kidney from the other half of the population, and that all of the kidney thieves are promptly captured, prosecuted and imprisoned for a few months."<sup>35</sup> To take a more realistic example, if there is a very high incidence of a serious crime like sexual assault that itself seriously interferes with the freedom of all or of a significant portion of the population, one would hope that the government would vigorously prosecute and punish it. The extreme example does not affect the claims I make here. If it really was the case that half the population was disposed to steal kidneys from the other half, then it is unlikely whether a rightful condition could be maintained at all, in which case no question of state punishment could arise. In the realistic example, the objection has some force: if there is more crime, it is reasonable to expect more prosecution and punishment. But the example speaks to the prosecution of a particular crime, and a very serious one; it does not speak to the prosecution of all imaginable wrongs or even of all wrongs that are currently criminalized. And there is no doubt that legislative caution in deciding what to criminalize is one of the possible remedies for mass punishment.<sup>36</sup> My claim is not that there is some ideal level of

<sup>35</sup> Chiao, "Mass Incarceration and the Theory of Punishment," p. 15; he attributes this example to Kit Wellman.

<sup>36</sup> Compare Byrd and Hruschka, *Kant's Doctrine of Right: A Commentary*, Chapter 13, suggesting that for Kant the criminalization of wrongs was optional; though they do not address the question of what conduct

punishment that can be determined independently of facts such as the incidence of crime. Nor do I claim that it would be wrong for the state to choose to vigorously prosecute and punish particular crimes. The purpose of the hypothetical is not to show that vigorous prosecution of particular crimes of public concern is wrongful; it is rather to show that a policy of unremittably prosecuting and punishing all wrongs is inconsistent with the idea of the rightful condition that gives rise to the right to punish in the first place.

Finally, it may be objected that my account is consequentialist: mass punishment is to be deplored because of the bad consequence it brings about: a threat to the rightful condition. This is an objection not to consequentialism as such but to my assertion that I have provided an account of the wrong of mass punishment that a deontological retributivist could accept. Perhaps my account is just another way of abandoning retributivism for a hybrid account of punishment, and so is a suitable response to neither Chiao's critique nor Ripstein's defence of retributivism.

There is a sense in which this objection is correct: the wrong of mass punishment is connected to the state of the world that comes about when the legal order engages in mass punishment. The claim is that a state that punishes excessively, if it is a rightful condition at all, is a less successful exemplar of a rightful condition than a state that punishes moderately, just as a legitimate state that nevertheless enforces some unjust laws is a less successful exemplar of a rightful condition than a state that has no unjust laws at all. A claim of this kind is not consequentialist in the usual sense: it does not judge the value of a decision to criminalize or to prosecute only by its contribution to the achievement of some good. My claim is not that these decisions should depend on an all-things-considered assessment of their likely consequences, but that a policy of resolute prosecution of all possible crimes is wrongful because it is inconsistent with the project of constructing and maintaining a legal order so that it is a rightful condition. And that exercise itself is not a consequentialist one in the usual sense. The good of the legal order is not something that can be maximized or defined independently of the process that constitutes it. And so the wrong of mass punishment is not defined by any particular effect that it is likely to have on the legal order (though that effect is likely to be very bad).<sup>37</sup> Indeed, if mass punishment is the kind of wrong I have described, then both prosecutorial discretion about which (apparent) offenders to prosecute and legislative discretion about which juridical wrongs to criminalize are not just permissible but required. Some rightful conditions are better than others, and one that acts on a policy of unremittable prosecution and punishment is in that respect worse than one that does not. And that is because the practice of mass punishment is itself inconsistent with the idea of a rightful condition. The idea that the state should resolutely punish everyone who has apparently attempted to exempt himself or herself from the demands of the legal order puts the state in the position of using punitive force so regularly against its citizens—routinely depriving them of liberty and property—that it can only appear to those citizens as their enemy rather than as the agent who acts on behalf of all of them to define and preserve their freedom.

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Footnote 36 continued

should be criminally punishable. Duff and Marshall, "Public and Private Wrongs," pp. 77–78, propose five methods of "de- or non-criminalisation," which could be very helpful to the legislature in this respect.

<sup>37</sup> So I have no quarrel with those who have recounted the deleterious effects of mass punishment. Particularly compelling, from the point of view I adopt here, is the criminogenic effect of mass incarceration: see, for example, the summary of research in Daniel S. Nagin, Francis T. Cullen, and Cheryl Lero Johnson, "Imprisonment and Reoffending," *Crime and Justice* 38 (2009): 115–200.

## 4 Conclusion

The phenomenon of mass punishment, whereby a state imprisons or otherwise penally sanctions a significant percentage of its population, is disturbing. It is generally, and probably correctly, criticized on the ground of its inutility. Retributivism, the view that the justification for punishment is individual wrongdoing, does not seem to have the resources to criticize mass punishment: precisely because it focuses on the justification for punishing the individual rather than on the aggregate of punishment, it seems incapable of expressing any concern about how many people are punished. In this paper, I have argued that, despite this appearance, mass punishment is indeed wrongful from the point of view of a political theory that takes the task of the state to be the creation and maintenance of a rightful condition, a legal order in which free individuals can interact with each other on the basis of right. In such a legal order, punishment must be retributive in the sense that it can only be imposed as a response to individual juridical wrongdoing; but, since the purpose of the legal order is not to give everyone what they deserve from some moral point of view but to be a rightful condition, mass punishment is wrongful because it is inconsistent with that purpose. A state that interpreted its mandate as requiring it to criminalize and punish all possible wrongdoing would not be a rightful condition; it would be a condition in which no-one could pursue his or her own purposes without the constant fear of being coercively interrupted by prosecution. No one institution of the rightful condition can, by itself, prevent mass prosecution and therefore mass punishment; but the legislature can help by exercising restraint in the creation of criminal offences, and the executive can help by limiting prosecution to conduct that concretely threatens the legal order.

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