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## Punishment and Justice

You argue that insanity destroys, undermines, diminishes man's capacity to reject what is wrong and to adhere to what is right. So does the ghetto—more so.<sup>1</sup>

Contemporary penal philosophers have in general not been much concerned with the consequences of general injustice for their “ideal” theories of just punishment.<sup>2</sup>

Should the state punish its disadvantaged citizens who have committed crimes? In his book *Punishment, Communication, and Community*, Antony Duff suggests not, as he sets out what he takes to be the preconditions of a legitimate system of punishment, namely, the elimination of social injustice.<sup>3</sup> Duff's strategy can be seen as a radical departure from previous ways of understanding the relationship between social disadvantage and just punishment: Norval Morris's comments, quoted above, colorfully characterize a school of thought on the issue as developed by Judge David Bazelon in a series of papers.<sup>4</sup> On this view, we should see deprivation as undermining the *capacity* of certain individuals, *qua* citizens, to be held to account.<sup>5</sup> Duff, on the other hand, asks us instead to see such conditions of deprivation as undermining not the disadvantaged individual's capacity, but rather *the state's* punitive authority.

I here scrutinize Duff's argument for the claim that social justice is a precondition for the legitimacy of a penal system. While I sharpen an

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<sup>1</sup>Norval Morris, “Psychiatry and the Dangerous Criminal,” *Southern California Law Review* 41 (1968): 514-47, p. 521.

<sup>2</sup>Matt Matravers, “‘Who's Still Standing?’ A Comment on Antony Duff's Preconditions of Criminal Liability,” *Journal of Moral Philosophy* 3 (2006): 320-30, p. 320.

<sup>3</sup>R.A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001).

<sup>4</sup>See David L. Bazelon, “The Morality of Criminal Law,” *Southern California Law Review* 49 (1976): 385-405, esp. p. 389; and “Foreword: The Morality of the Criminal Law: The Rights of the Accused,” *The Journal of Criminal Law and Criminology* 72 (1981), pp.1143-70.

<sup>5</sup>See also Richard Delgado, “‘Rotten Social Background’: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?” *Law and Inequality* 3 (1985): 9-90.

objection to Duff's argument,<sup>6</sup> I then go on to set forth a new line of argument in support of the claim that deprivation can threaten the state's legitimate punitive authority. I argue that a penal system must incorporate certain proportionality principles, and that these principles cannot be met in conditions in which citizens suffer from deprivation. The framework I provide focuses on an individual's blameworthiness, and the justness of the state's corresponding punishment. While arguing that deprivation can diminish *blameworthiness*, I argue, this does not entail that it diminishes *responsibility*: I thus provide an alternative to the framework in which debates about deprivation and justice have tended to be framed.

Considerations of social justice have sometimes been mentioned as relevant to the justness of certain *applications* of punishment,<sup>7</sup> or aired as a problematic *consequence* of the institution,<sup>8</sup> or as a difficulty with the justness of *procedures* within the penal system.<sup>9</sup> But with the exception of Duff, the consequences of social inequalities for the *legitimacy* of the institution as a whole have not yet been adequately addressed in the philosophical literature, as the quotation from Matt Matravers, above, indicates. I undertake to address these issues here.

My strategy is as follows: I first set out the preconditions that Duff briefly outlines, focusing on his claims that social disadvantage may undermine the legitimacy of a penal institution (section 1). I then set out and sharpen the challenge to Duff's argument for this precondition (section 2). I then advance an independent argument for this precondition, which requires attention to the proportionality constraints on the institution of punishment, and a revision of the framework in which theorists have thought about the relationship between deprivation and just punishment (sections 3 and 4).<sup>10</sup>

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<sup>6</sup>See Matravers, "Who's Still Standing?"

<sup>7</sup>See Wojciech Sadurski, "Distributive Justice and the Theory of Punishment," *Oxford Journal of Legal Studies* 5 (1985): 47-59. He expresses the concern that punishment only serves to make the already disadvantaged worse off.

<sup>8</sup>See Jean Corston, *The Corston Report: Review of Women with Particular Vulnerabilities in the Criminal Justice System* (2007), <http://www.homeoffice.gov.uk/documents/corston-report> (accessed February 19, 2009).

<sup>9</sup>See Baldus's study presented in *McCleskey v. Kemp*, 481 U.S. 279 (1987); see also J.L. Eberhardt, P.G. Davies, V.J. Purdie-Vaughns, and S.L. Johnson, "Looking Death-worthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes, *Psychological Science* 17 (1987): 383-86.

<sup>10</sup>Sarah Buss has advanced a quite different line of argument for a similar conclusion, namely, that individuals who have suffered certain deprivations may be excused; see "Justified Wrongdoing," *Noûs* 31 (1997): 337-69. Her argument focuses on the claim that such individuals may, given the entire circumstances of their lives, in fact have reason to engage in behavior (e.g., violent fending-off of a threat) that, given different histories, they would not have. Her argument focuses on the extent to which the agent's belief that the wrongful action was necessary is reasonable (its justification being found in past cir-

## 1. Duff on the Preconditions of Punishment

Theorists have engaged with the question of what conditions must hold for a particular application of punishment to an individual to be just. Insofar as punishment involves the imposition of hardship or suffering of some kind upon individuals, and insofar as the *state* is charged with imposing such hardships, such justification is urgent, for if no adequate justification can be given, the state is committing gross harms upon its citizens. The question of what justifies the application of a particular punishment might be understood as a “first-order question”—a question pertaining to the conditions for just punishment *within* any particular system of punishment.

Duff draws our attention, albeit briefly, to the matter of what the *pre-conditions* are for the legitimacy of the state’s punitive authority.<sup>11</sup> This is not a question of what, according to any particular theory, the conditions for just application of punishments are. Rather, it is a question of what conditions must obtain for it to be appropriate for the state to be involved in the meting out of punishments in the first instance. Thus Duff connects the question of justifications for punishment with that of political obligation. While it is clear that the preconditions specified are of particular relevance to the communicative theory of punishment that Duff advocates, it is plausible that his comments apply to other theories of punishment.

To gain a clearer view of the conditions at issue, and how they connect up with questions of social justice, I briefly set out those specified by Duff. The precondition of particular interest here is that concerning the standing of the state, and the dependence of this upon social justice.<sup>12</sup>

### 1.1. *Background, and the focus on preconditions for legitimacy*

Duff offers us an ideal theory justification for the punishment of criminal offenders: he sets out a model of a political community in which the punishment of those individuals who have broken the law and been con-

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cumstances of the agent’s life, in which (e.g.) threats have indeed been followed by abusive behavior). My argument differs significantly from Buss’s, as I focus on the reasons that an agent may have for acting in a particular circumstance, without addressing the life history of the agent—but my claims are not inconsistent with hers. It is also worth noting that Buss does not directly focus on the legal framework, but rather on moral justification and excuse.

<sup>11</sup>Duff, *Punishment, Communication, and Community*, pp. 179-97.

<sup>12</sup>A note of caution: my argument should be taken in the conditional form: if any institution of punishment is to be legitimate, it must satisfy this precondition pertaining to social justice (amongst others). This leaves open the possibility that no adequate justification exists for penal institutions.

victed in the criminal justice system is justified. What does this community look like, and what does the justificatory work in explaining why imposing hardships on some of its law-breaking citizens is acceptable in such a community?

Duff envisages a liberal political community of individuals who share a commitment to certain core social values (such as autonomy, privacy, freedom; commitment to these values leaves room for a pluralism of values to be consistent with, and pursued beyond, this core). These individuals are deserving of respect, and as such (ought to) engage with each other, as the mechanisms of state (ought also to) engage with them, with a certain reciprocal regard.<sup>13</sup> This community of mutually respecting agents, with a shared set of common values, rationally assents to formal structures (such as the law) that express, and enable pursuit of, those values.

Criminal action shows not only disregard for the individual wronged (by a theft or assault, say), but also disrespect for the values of the community. This calls for a public response: a condemnation of the action that expresses this dual disregard, and a calling to account and censuring of the wrongdoer. The law enshrines a condemnation of certain kinds of action, and criminal proceedings against a law-breaking individual thus provide a systematic and authoritative way of condemning such actions. If convicted, punishment of the individual is justified, Duff maintains, by the need to communicate censure to the offender—imposing hardships upon individuals may be a justified vehicle of communication, which aims to provide the offender with the opportunity to recognize the wrongness of her action. Importantly, this communication is not unidirectional: punishment also provides the offender with an opportunity to convey, through the undertaking of the punishment, an apology, and thus repair relations with her community.

This cursory outline enables us to see the importance of the role of community on Duff's view. Certain conditions must hold true of a community for criminal law and subsequent punishment by the state for infractions of it to be justified; namely, the community must be one in which its members are normatively included, and addressed as rational agents. These preconditions for the justification of the state's punitive authority, which I set out shortly, are instructive in enabling us to see how near—or far—our present polities are from the ideal justificatory

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<sup>13</sup>The emphasis on individual respect is what makes unacceptable for Duff the consequentialist justifications, on which punishment of offenders serves as (uses them as) a means of deterring others. Likewise, so that the autonomy and choice of individuals can be respected, Duff tends to be against reform views of punishment, according to which the individual must come to accept certain values. This also explains his emphasis on punishment as providing the opportunity for apology and reparation—the offender must always be able to choose not to take up that opportunity.

theory Duff articulates. In particular, they ask us to consider whether certain facts of our societies—such as the presence of disadvantage and circumstances of deprivation—are departures from the ideal that undermine punitive legitimacy.

### ***1.2. The establishment of political obligation***

How does Duff, then, get to the claim that social justice is a precondition for legitimate state punishment? It is relevant, he claims, to the matter of whether or not the state has standing: standing to impose obligations upon its citizens, and to call them to answer if those obligations are not met.

In order that the state can threaten punishment of or impose it upon its citizens, it must be the case that the state can legitimately bind its citizens—that individuals do in fact stand obliged to obey the laws. An action can only be counted as a violation of some political obligation if the individual is indeed under obligation not to so act in the first place (this is not to say that, in the absence of political obligation, there are not *moral* obligations that are violated). What considerations might undermine political obligation? States that are not legitimate—that perpetrate gross human rights violations, for example, or governments who seize power by brutal force—surely lack the authority to impose political obligations upon their citizens (although they may have the power to enforce compliance). Duff’s concern here is that if the state excludes citizens, then those excluded may not be bound to obey the state.

One other way in which exclusion may occur is by suffering social disadvantage: “someone who ... has been unjustly disadvantaged and excluded by the polity whose law it is, is not bound to regard the law as a source of authoritative requirements.”<sup>14</sup> Now, Duff draws attention to different kinds of exclusion: political, material, normative. Perhaps individuals are denied voting rights, or are not addressed or treated as moral agents, or the state fails in its most minimal but pressing obligations to protect and provide for them. It would be illegitimate to treat such individuals as bound by obligation, Duff claims. Let us consider his claims in more detail, for this kind of social disadvantage, and what it means for the legitimacy of penal systems, is of central concern here. While Duff mentions both cases in which the state inflicts gross rights violations upon its citizens and less overtly brutal failures, such as the failure to alleviate social disadvantage, the focus here will be on the latter.<sup>15</sup> This is

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<sup>14</sup>Duff, *Punishment, Communication, and Community*, p. 184.

<sup>15</sup>Of such cases, Duff writes: “Suppose we come to believe ... that the offenders had suffered not only ‘social disadvantage’ but *serious, persisting, and systemic injustice*. They had been excluded from participation in the political life of the community, having no real chance to make their voices heard ... They had been excluded from a fair share in,

because, first, it is plausible to think that the state loses its legitimacy if it brutalizes its citizens; and second, the claim that social injustice or disadvantage undermines the state's authority to punish is more contentious; third, as noted, this would provide a quite different framework for thinking about justice and disadvantage—one that moves away from a focus on an individual's diminished responsibility. Consider, then, the claim:

(F) Any significant failure of the state to meet its obligations towards its citizens undermines the claim that those citizens are obliged to the state (and in particular to obey the law).

This claim is supported by the following comments from Duff:

Consider some crimes of the disadvantaged. An impoverished single parent steals clothes from a supermarket for her children or defrauds the social security system by concealing her earnings ... A homeless couple looking for somewhere to sleep break into an empty office building, where they cause some damage to property. Such cases as these rightly worry those who are concerned about the problem of doing penal justice in an unjust society. Can we honestly say that these people are justly punished if they are brought to court for their actions ... But why should we be uneasy about their punishment?<sup>16</sup>

Those of the Bazelon school of thought, according to which deprivation undermines the wrongdoer's responsibility, might maintain that the disadvantaged individuals are not fully responsible for their actions. But, in contrast, the rhetorical question on which Duff ends here is intended to push us towards the conclusion that (F), above, is true: namely, the failure of the state with regard to these individuals undermines any obligation that might otherwise bind them to obey the law. Thus, he claims, it is a precondition of any system of punishment that the state can bind its citizens, and hold them under obligation to obey its laws. Accordingly, it must secure whatever conditions are necessary for the inclusion of citizens in a community that makes demands of and binds under obligation individuals to each other and the state. These conditions, Duff thinks, plausibly include conditions of social justice, and, in particular, the alleviation of social disadvantage, deprivation, and impoverishment that pre-

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or a fair opportunity to acquire, the economic and material benefits that others enjoy. They ... had not been treated, by the state or by their fellow citizens collectively, with the respect and concern due to them as citizens ... Can we still say that they are bound by the laws of the polity that treats them thus?" (*Punishment, Communication, and Community*, p. 183; my italics). Again, we can suppose that the rhetorical question is intended (although Duff expressly notes that there are no simple answers to such a question) to make persuasive for us the thought that unless a citizen, or group of citizens, is treated justly, and hence is under obligation to the state—specifically, to obey the laws—the penal system and its punishments cannot be applied to them. Duff is clear in noting that this does not mean that there are not moral evaluations to be made.

<sup>16</sup>Ibid., pp. 182-83.

vent participation in the community. (I return to the matter of social and distributive justice shortly.)

### ***1.3. The position of the state***

The second precondition Duff sets out helps us to see more clearly *why* it is that he thinks the state loses standing if its citizens suffer from disadvantage and deprivation. This issue turns on the state being in a position to call the wrongdoer to account. Duff maintains that the offender in question must be answerable for her action. One side of this is that the individual must have the capacity to answer—to understand the laws, and the charges to which she is subject. This thought is familiar. But of course answering requires that one answer *to* someone. In this case, it is to the state. Here, as in other small-scale relationships of answerability, Duff claims, the state must be *in a position to demand an answer* for wrongdoing. But what must be true of the state if it is to be an institution that is *in a position to call for* an answer? Duff holds that the state must itself abide by the values that it, with its laws, seeks to promote and enforce. We would not deem a persistent liar the appropriate party to call to answer, for her action, an individual who has lied. To have the standing to do so requires holding and respecting the values to which one is holding the offender to account. Likewise, if the state fails to abide by the values that it demands its citizens to respect—in general, or, as above, with respect to the particular citizen in question—then it cannot legitimately call the individual to answer for the alleged wrongdoing.<sup>17</sup>

Clearly, this second precondition and the first are closely related. If the state cannot impose political obligations upon its citizens (first precondition), then it cannot hold them to answer (second precondition) for failing to meet those (inapplicable) political obligations. This is in part because those obligations don't apply, and in part because the state has lost its standing to call its citizens to account. Duff's comments suggest that the state will lose its standing to call its citizens to answer not only if it has perpetrated gross injustices, but also when it fails its citizens by allowing some of them to suffer disadvantage and deprivation. That is, when the state systematically and pervasively fails to adhere to the values it requires its citizens to adhere to (at base, respect for persons), or when the state to some significant degree fails to do so, its standing is diminished to the extent that the demand for answerability is undermined. It is with this matter of “standing” that problems arise, as I will

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<sup>17</sup>Matravers (“‘Who’s Still Standing?’”) raises worries with this strategy, to the effect that when it is an institution that is calling to account, the integrity of the component individuals (or lack thereof) does not affect the integrity of the institution. I set aside this worry for now.

briefly set out below. First, however, I briefly set out the third precondition that Duff articulates.

#### *1.4. The language of the law*

Finally, if individuals are to be held answerable to the state, if the state is to make demands of its citizens and punish them for violations of these demands, all this must be conducted in a manner that is transparent and understandable to those involved. This means that the state must ensure that those involved in the process—in particular, the citizens called to answer—are able to comprehend it fully. Thus the onus is on the state to ensure that the terms used are not ones alien or incomprehensible to those engaged and asked to speak with it.

#### *1.5. Summary*

These preconditions are particularly apt in the context of Duff's communicative theory of punishment, which places emphasis on the notion of political and social inclusion. But it is important to note that these preconditions are not implausible requirements for any theory of punishment: a relationship between the state and the citizen, whereby each is in a position to (respectively) impose and undertake clearly understood obligations, might be necessary for any account of the state's punitive authority. One way of understanding Duff's argument is as an attempt to provide support for the fairly widely held liberal intuition that there is some serious injustice in punishing those individuals who are already seriously disadvantaged, especially where that disadvantage has played some causal role in the criminal act.

Should we explain this intuition with reference to the diminished responsibility of the wrongdoer? Perhaps there are some cases in which an agent's responsibility-relevant capacities are undermined by the dire circumstances of disadvantage.<sup>18</sup> But there is something troubling and insulting to suppose that, generally speaking, the responsibility and capacities of individuals in poverty are diminished. Moreover, the importance of an inclusive political community should disincline us from claiming that those disadvantaged individuals are not fully responsible agents; rather, on Duff's view, it is *the state* whose standing is undermined—hence the injustice of the state's punishment of disadvantaged citizens. However, in the following section, I will show that Duff's way of substantiating this intuition is unsatisfactory.

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<sup>18</sup>For a sensitive and careful outlining of how this might occur, see Richard L. Lippke, "Diminished Opportunities, Diminished Capacities: Social Deprivation and Punishment," *Social Theory and Practice* 29 (2003): 459-85.

## 2. Matravers on Calling to Account

Whether or not the state has the standing to impose an obligation upon its citizens, and call them to account for subsequent violation of this obligation, is an all-or-nothing matter. A state either can or cannot impose an obligation—it cannot impose obligation “more or less.” Likewise, the state either can or cannot call its citizens to answer and subsequently (if determined by the judiciary) punish those who have culpably broken the law. Consider the state that systematically and pervasively fails its citizens. States that have failed, or perpetrated gross rights violations upon their citizens, or systematically excluded individuals from participation, surely lose their political legitimacy *tout court*, and with it any legitimate authority to call their citizens to account and impose punishments upon wrongdoers.<sup>19</sup> Duff’s claim to the effect that such a state, which so radically departs from the ideal, has lost its legitimacy either in imposing obligations or calling its citizens to account, is plausible.

But, Matravers asks, to what extent is this also the case for states—states such as the U.K.—that are surely not failed states or gross violators of citizens’ rights, and thus are not wholly illegitimate, but nonetheless contain significant distributive injustice, and in particular, significant degrees of deprivation.<sup>20</sup> Phrases such as “social exclusion” are apt for certain groups or individuals in contemporary U.K. social and political community. In such contexts, is it plausible to maintain that the state has lost its standing (to impose obligations, to call its citizens to account via the judicial and penal system)? Such a claim is required if we are to maintain that *social or distributive justice* is a precondition for a legitimate penal system, in addition to other conditions of *general legitimacy*. Moreover, this claim, about distributive justice as a precondition, is required to make sense of those cases that Duff cites as ones in which the state may lose its standing (as mentioned above). Thus the plausibility of Duff’s stronger claim, that social disadvantage and deprivation can undermine the state’s standing to call to account and punish, is under scrutiny here.

### 2.1. Standing in contexts of distributive injustice

Such scenarios of deprivation are envisaged and considered (albeit briefly) by Duff, so let us here (following Matravers’s strategy) focus on

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<sup>19</sup>As Duff emphasizes, to maintain that the state cannot call individuals to account and punish them for crimes is not to deny that the crime was wrong, nor that the victim has been seriously wronged. The issue is rather that the state’s subsequent role in addressing that wrong is undermined.

<sup>20</sup>For detailed statistical analysis of data on poverty in the U.K., see <http://www.poverty.org.uk/summary/key%20facts.shtml>.

one such case.

Case 1: An impoverished single parent steals clothes from a supermarket for her children or defrauds the social security system by concealing her earnings.

Let us for now grant that the state may lose its standing to call the individual in Case 1 to account for her theft. Even if we grant this, we should surely not accept the general claim that the state loses its standing. Matravers comments that

even if one thinks that the UK is blighted by significant distributive injustice [such as in Case 1], it is surely not, at least yet, the case that the situation is so bad that general legal and moral obligations between citizens and between citizens and the state have broken down.<sup>21</sup>

Rather, the state's loss of standing is only plausible if it is restricted in the following ways.

*Value-relative claim:* While standing may be all or nothing, it is also *domain specific*. That is, while the state might have lost its standing with respect to the crimes of theft or fraud that flow from the parent's impoverishment, it surely has standing to hold her answerable for other crimes (such as assault, murder). More generally, we might say that a state may lose standing in one domain, with respect to the relevant value(s) in that domain. But it can maintain standing with respect to other values. Thus the loss of standing of the state should be understood as pertaining only to some value—a value that it is plausible to see both the alleged offender and the state as disregarding (thus explaining why it is unreasonable for the state to hold the individual to account, with respect to that value).

We should also add to Matravers's claims the following observation:

*Person-relative claim:* The standing of the state to call individuals to account will surely vary from individual to individual. While the state might not have the standing to hold answerable the parent in Case 1 (with respect to certain crimes such as theft), we surely want to maintain that the state can hold other affluent and privileged individuals in society answerable for thefts. More generally, then, we might say that if the state loses standing, it will do so only in relation to those individuals with respect to whom the state has shown no regard for the relevant value.

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<sup>21</sup>Matravers, “Who's Still Standing?” p. 328.

These considerations are instructive in helping us to see what is wrong with the case that Duff makes for social justice as a precondition of legitimate penal systems. If his claim that the state loses its standing to call citizens to account as a result of such injustice is to be at all plausible, this will be a value-specific loss of standing; and, I have added, it will plausibly be a loss of standing with respect to one particular person (or group). That is to say, it will be a loss of standing with respect to *this* individual, and *this* particular crime committed.

With these clarifications in mind, we can now turn to look at one of Matravers's key claims. He writes:

[I]t is critical to ask whether the [parent] can properly deploy the argument that she is not answerable to this state given its treatment of her. How might she do this? One way would be to try to show that the state has violated the very same values that it now appeals to in calling her to account [see the value-relative claim, above].

This, though, is quite difficult. Grant that the woman is impoverished as a result of distributive injustice that the state does nothing to correct. Unless the account of that injustice involves something like the thought that "all property is theft," the connection between the value flouted by the [mother] and that flouted by the state will only hold at some fairly abstract level. The state, it could be said, has violated the value of equality—or equal respect—in allowing an unjust distribution of social and economic goods, and that has *some* connection with the value violated by the shoplifter, but the precise relationship is unclear.<sup>22</sup>

Matravers thus concludes that "the analysis is unworkable"; he doubts that there is a systematic and consistent way of working out when the state has standing, with respect to what value, and which individuals. Let us get this worry into sharper focus. We have seen (and added to) the limitations that apply to the loss of standing of the state in situations of distributive injustice: of particular relevance are the value-relative claim and the person-relative claim. These claims, and the intuitions that support them, indicate that the loss of standing occurs only in a fairly restricted manner—in certain circumstances, with respect to certain individuals (or groups) and for certain crimes.

But as we have seen, the kind of value that one can specify as one that *both* the individual and the state disregard (the former in the criminal act; the latter in its prior treatment of the alleged offender) is very general: the value of equality, or equal respect. Indeed, we will see that insofar as the values in question are so general, the account is not merely unworkable due to complexity and lack of systematicity, but such generality yields claims in conflict with the two plausible claims outlined above.

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<sup>22</sup>Ibid., p. 327.

## 2.2. Problems meeting the value-relative and person-relative claim

Suppose the parent maintains that the state has disregarded the value of equal respect. This will mean that the state has lost its standing not just with respect to these particular crimes of theft, but with respect to a range of other crimes that are based on the value of equal respect (including assault, for instance). In discussing the value-relative claim and Case 1, we noted that while the individual may not be answerable for the theft, she surely would be for an assault or murder. But if the state has lost its standing with regard to *all* claims concerning equal respect, then the state could not hold her answerable for assault or murder.

Moreover, insofar as the state has not treated the parent with equal respect, this value has been violated generally. Insofar as the state has treated just one individual with less respect than its other citizens, *each citizen* can now complain that they have not been treated with equal respect (they have each been accorded a greater amount of respect than another). Of course, this treatment will not be acutely felt by those whom the unequal treatment has not harmed (and has perhaps benefited). But in principle, each citizen could now claim that, as the state had disregarded the value of equal respect—in its treatment of them as much as its treatment of the disadvantaged parent—the state has also lost its standing to call them to account for crimes pertaining to equal respect.

Note that structurally, this latter claim will also obtain if the matter in question is that “all property is theft” (and hence that the state lost its standing by promoting or permitting the negative value of a capitalist system of private property, perhaps). Insofar as the state has lost its standing by permitting such disvalue (all have been wronged by the capitalist system permitted, say), *each citizen* can disavow the state with respect to this value. Thus an oil baron and the impoverished parent can both claim not to be answerable to the state for thefts or frauds.

Let us recap the structure of the argument here. In short, the claim that the state loses its standing in contexts of distributive injustice only appears plausible if restricted to loss of standing with respect to particular crimes, and particular individuals. But when it comes to specifying why the state has lost its standing with respect to a particular individual who has committed a particular crime, things get tricky: we cannot satisfactorily specify a value that the state has failed to adhere to, such that it also makes sense to claim that the state cannot call the individual to account for her crime (which also violated that value). If the value is one that both the individual and the state have violated, its specification is so general that the person- and value-relative claims cannot be met.

This challenge from Matravers is persuasive. Moreover, by bringing his worries into sharper focus, we have seen that the claim that a disad-

vantaged individual could not be called to answer (due to the state's lack of standing) cannot be reconciled with certain plausible restrictions on any loss of standing. I think this challenge does enough to undermine Duff's argument for the claim that the institution of punishment relies for its legitimacy on preconditions of social justice, in which the state demonstrates sufficient integrity to call its citizens to account. That any failure of accountability seems to be particular, and not general, perhaps gives plausibility to the Bazelon school of thought, whereby a particular individual is identified as suffering diminished responsibility as a result of the conditions of deprivation.<sup>23</sup>

However, I think we ought not to reject Duff's general strategy in favor of the Bazelon—"diminished-responsibility"—framework, for an independent line of argument can be given for the precondition Duff articulates. In the following sections, I advance this line of argument. A crucial premise of the argument is that any institution of punishment must be constrained by a principle of proportionality. I briefly spell out this constraint, before utilizing it in argument.

### 3. Proportional Punishment

The consideration I raise here is not a precondition of legitimate punishment, but rather a constraint on the application of punishment. It is a constraint that any practicable legal and penal system should incorporate, for the intrinsic and instrumental reasons I set out in this section. In the cases in which it has been determined that an individual ought to be punished, the question remains: how much punishment should be imposed? Different theories will yield different answers to this question, but all should adhere to the following structural constraint:

- (P) The amount of punishment should be assigned systematically, and not be disproportional.

This principle requires more detailed spelling out. The first issue to address is the question of between what relata the proportionality relation is supposed to hold. Theories that are purely consequentialist may take one relatum of the proportionality relation to be some consideration other than desert—such as deterrent effect. I will not be concerned with those theories here.<sup>24</sup>

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<sup>23</sup>See Bazelon, "The Morality of Criminal Law," p. 393.

<sup>24</sup>The inability for such views to rule out absolutely victimization ("punishment" of innocents for the sake of deterrent effect) is sufficient to justify our focus upon theories that incorporate desert-based constraints. But I will briefly return to such views later, showing how my argument also applies to these accounts.

A number of theories of punishment give some role to desert, claiming that a necessary condition for just punishment is that it is deserved—namely, that punishment is only justly applied to some individual when this is because of some crime she has been found guilty of committing. It is quite usual to think of certain crimes as more serious than others, and hence as deserving more severe punishment. But against what measure is the *deserved* punishment established? Ted Honderich has focused on the grievances of the victim (and wider society) as an indicator of the seriousness of the crime; the just amount of punishment is that necessary to appease these grievances.<sup>25</sup> Alan Goldman maintains that it is possible to measure seriousness in terms of the extent of the rights-violation involved in the criminal action; proportional punishment then requires that the punishment exacts a commensurate amount of rights-violation upon the wrongdoer.<sup>26</sup> Any account faces difficulties in spelling out how the deserved amount of punishment is to be identified, but accounts such as these two are certainly problematic: there is no reason to think the grievances of the victim will provide a consistent measure of deserved punishment, and Goldman's claims about comparing rights-violations are somewhat opaque.

As our focus is on Duff's claims, and as his remarks on the issue of proportionality are more illuminating than those just aired, let us focus on these. On the view he advocates (consistent with prevailing orthodoxy), proportional punishment is a matter of fit between seriousness of crime and severity of punishment.<sup>27</sup> The seriousness of the crime, he writes, is a function of harm (not simply material harm, but the harm of the moral wrong in the crime) and the culpability of the wrongdoer. Call the output of this function (S). The punishment appropriate to a crime of seriousness (S), Duff claims, will be that able to communicate the appropriate amount of censure for that kind of crime.<sup>28</sup> The appropriate punishment, then, communicates the amount of censure deserved by the offender. In ascertaining what punishments fall within the range of proportionality (thereby avoiding disproportionality), there are two specifications of (P) that must be considered:

(P1) Absolute: A punishment should not be disproportional to the crime (i.e., should not be too severe or too lenient, relative to (S)).

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<sup>25</sup>Ted Honderich, *Punishment: The Supposed Justifications* (London: Hutchinson, 1969).

<sup>26</sup>Alan H. Goldman, "The Paradox of Punishment," *Philosophy and Public Affairs* 9 (1979): 42-55.

<sup>27</sup>See Duff, *Punishment, Communication, and Community*, pp. 135-37.

<sup>28</sup>The communicative element is crucial to Duff's view. There must be an attempt to communicate with the offender if the ideals of normative inclusion central to liberal polities are to be met.

This is in large part a matter of judgment, but we do have a sense of when certain punishments are not fitting (perhaps this is clearer than settling when punishments are fitting). For example, a punishment of one week for homicide, or 20 years for a traffic violation, would violate this principle.

Second, proportionality involves also:

(P2) Relative: A punishment should not be disproportional to punishments for similar crimes (i.e., should not be too severe or too lenient relative to the punishments for like crimes).

For example, suppose A and B each commit comparably serious assaults. If one wrongdoer is sentenced to 5 years, the other to 15 years, (P2) is violated. Now, (P2) plays an important role in subsequent argument, so it is worth spelling out in a little more detail the significance of its role in the penal justice system. First, relative proportionality is an important part of public justice: justice must be seen to be done, and this requires that citizens have a clear sense of when this has and has not occurred.<sup>29</sup> Moreover, there is a need for the legal and penal systems to remain transparent: individuals should have a clear sense of the nature and extent of treatments that the state may impose upon them as a consequence of certain criminal undertakings.

Duff brings a further consideration to the table: crimes and deserved punishments must be dealt with at a certain level of generality, as too much attention to the specifics of the circumstances of the crime and the wrongdoer would mean the state could “intrude into matters that should not concern the law.” Thus a general scheme of relatively proportional punishments should “protect citizens from such overintrusive inquiries.”<sup>30</sup> I will return to this point later.

Matters of procedural justice are also relevant here: in the absence of clear guidelines, offenders may be subject to discriminatory and biased treatment (perhaps due to implicit biases of those involved). Within existing systems with clear guidelines, in the instances in which discretion is permitted there is evidence that this is exercised to discriminatory effect (again, this may or may not be the result of conscious decision). For

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<sup>29</sup>For instance, in a recent case in which a city banker subjected his wife to horrific assaults, his relatively low sentence was met with significant outcry. See <http://www.guardian.co.uk/uk/2007/aug/24/ukcrime.gender>. There was an important sense in which justice was not seen to be done. This case is important for thinking about punishment and its role; part of what is so egregious about the lenient sentence is, I think, the message it sends out about the acceptability of perpetrating domestic violence. This highlights that one key role we believe to be important in the legal and penal system is its role in shaping norms of behavior. Cf. Joel Feinberg, “The Expressive Function of Punishment,” *The Monist* 49 (1965): 397-423.

<sup>30</sup>Duff, *Punishment, Communication, and Community*, p. 157.

example, a study by David Baldus, analyzing sentencing for homicides in Georgia over a decade, indicated that racial bias played a role in the sentencing process, to devastating effect: black citizens convicted of murder were four times as likely to receive the death sentence if their victim was white rather than black.<sup>31</sup> For all these reasons, the principle of relative proportionality (P2) plays an important role in a legitimate penal system.

This principle plays an important part in my argument. I now proceed directly to the argument for the claim that a precondition of legitimate punishment is distributive justice.

#### 4. Proportionality in Contexts of Deprivation

The argument I present is straightforward. It can be presented as follows:

- (1) A just legitimate institution of punishment contains, and is able to meet with sufficient regularity, principles of absolute and relative proportionality (P1) and (P2) above.
- (2) Meeting these principles (with sufficient regularity) requires sentencing guidelines for different kinds of crime (to ensure relative proportionality), specifying the severity of punishments appropriate to the seriousness of the kinds of crimes committed (to achieve absolute proportionality).
- (3) In a context of significant distributive injustice, particular instances of crimes of broadly the same kind will differ significantly in seriousness.
- (4) In contexts of significant distributive injustice, the absolutely proportional punishment may differ significantly from the relatively proportional punishments: (P1) and (P2) cannot both be met with sufficient regularity.

(C) The justness and legitimacy of a penal system is threatened by conditions of significant distributive injustice.

The rest of this section will be spent spelling out in more detail the crucial claims in these premises. I have already commented in some detail on the notion of proportionality, which features in premises 1 and 2, and its role in penal systems. Thus my attention will be focused on the remaining two premises. In particular, I will spell out in more detail the following claims: first, why contexts of significant distributive injustice affect the seriousness of particular instances of crime; second, why these

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<sup>31</sup>For the data from Baldus, see *McCleskey v. Kemp*. The significance of such data for retributivist arguments against the death penalty is rigorously scrutinized in Thom Brooks, “Retributivist Arguments against Capital Punishment,” *Journal of Social Philosophy* 35 (2004): 188-97.

differences in seriousness mean that (P1) and (P2) cannot both be met.

First, a brief note on the matter of distributive injustice, and how we should understand this, is in order. Duff does not give a full account of social or distributive justice, but rather supposes that it is clear that there is some injustice that befalls individuals who suffer severe deprivation, or who are disadvantaged in the ways described in the example. The matter of what theory of distributive and social justice we should accept, and what levels of distributive and social justice are required for normative and material inclusion in a community (and penal legitimacy more generally) is an important one. However, it is too large a task to be undertaken here. Rather, I will suppose that such conditions of disadvantage are unjust, and that an adequate theory of social justice would diagnose them as such. I think this is a plausible assumption, and one that is supported by, for example, Rawls's notion of the "constitutional essentials"—those basic rights and liberties that any reasonably just institution will secure. These constitutional essentials include freedom of movement, of choice of occupation, and a social minimum that secures the basic material needs of all citizens.<sup>32</sup> Moreover, this thought is consistent with Duff's emphasis on normative inclusion in the ideal political community—that justice in that community must ensure a level of provision for each citizen means that it will likely involve some level of redistribution. We can thus see the range of theories of social and distributive justice that will be in play.

Further, we can append the example (of the impoverished parent, considered above) to make clear that the circumstances of want (as is the case in many instances of disadvantage or deprivation) result not from foolishness or poor motivation on the part of the disadvantaged, but rather from bad circumstantial luck, or more likely, a cumulative and pervasive infrastructural (and sometimes overt and personal) bias.<sup>33</sup> We need only to consider the data that report that, for example, in the U.K. around two-fifths of people from ethnic minorities live in low-income households—twice the rate for white people—to see the plausibility of this assumption.<sup>34</sup> That disadvantage tracks identity traits such as race, gender, and class should confirm the injustice it entrenches.

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<sup>32</sup>See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 227-30.

<sup>33</sup>For a comprehensive and forceful case that gender inequalities are perpetuated by structural features of our society (the work place and familial structures in particular) see Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989).

A further note on this point: I do not think it is clear that justice does not demand redistributive measures even when the disadvantage results from foolish measures or poor motivation. However, I turn attention away from these cases as they are more controversial.

<sup>34</sup>See <http://www.poverty.org.uk/06/index.shtml?2> (accessed May 1, 2009).

Finally, I will focus here on contexts in which citizens are existing in conditions of deprivation. These cases are those that will most clearly and unequivocally be identified by a number of theories of social or distributive justice as unjust disadvantage. Moreover, it is plausible that, whatever the obligations of the state to its citizens, it is obliged to prevent its citizens from falling into or occupying such conditions of deprivation. From now on, therefore, I will focus on such cases of deprivation, and argue that the eradication of these is necessary for the legitimacy of a penal system. Precisely what measure of distributive justice is required beyond this for the legitimacy of the penal system is a question I set aside for another occasion.

#### **4.1. *Crime in context: justification and excuse, moral and legal***

I here provide support for the premise that certain contexts can affect the seriousness of particular instances of crime. The thought that the context in which a wrong has been perpetrated can affect our moral evaluations is not unfamiliar. Indeed, it is a thought that most undergraduate philosophy students meet and embrace in the form of Kant's murderer at the door: most agree that lying is wrong in many circumstances, but are willing to maintain (contra Kant) that it is significantly less blameworthy (somewhat excused), and perhaps even permissible (wholly justified), to lie when that lie is told to a potential murderer, and when the lie is intended to avert a murder. In such circumstances, an action that is generally wrong might be less blameworthy if undertaken, or perhaps even justified (and so not blameworthy at all). That features of particular circumstances might alter the moral worth, or even the permissibility, of an action type (such as lying) is a common feature of our moral thinking.

While it is a common feature of our moral evaluations, Nomy Arpaly points out that "this distinction between moral desirability [of an action] and moral worth [praise or blameworthiness of the agent] is often ignored in casual (and sometimes serious) philosophical discussion."<sup>35</sup> Care must be taken, she thinks, in separating out the moral character of an action (we might find the action of fraud morally undesirable and legally criminal) and the moral character of the agent who so acts—our evaluation of whom might differ according to the circumstances in which they act (on Arpaly's view, this differs according to the reasons to which they were responding).

So we might acknowledge both that lying is morally undesirable, but also that the agent who tells a lie in order to alleviate suffering (say, by concealing upsetting information) is less blameworthy (if at all so) than

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<sup>35</sup>Nomy Arpaly, *Unprincipled Virtue* (Oxford: Oxford University Press, 2003), p. 69.

an agent who lies because she enjoys deception. The circumstances of our actions, then, sometimes provide reasons for performing an undesirable action that can reduce the blameworthiness of an agent who so acts. This feature of the moral landscape can be captured by saying that sometimes, circumstances *excuse* certain actions—where by this we mean that they reduce, or wholly remove, blameworthiness for performing a morally undesirable act. It is important to note that nothing in our lying example indicates that the agent is less than a fully responsible agent. The circumstances do not lead us to judge that she is not responsible, but rather that, as a responsible agent responding to reasons, she is less blameworthy for so acting than she might otherwise be.

Now, Duff endorses the claim that “the exculpatory concepts of justification and excuse used in criminal law should, at least in principle, be intelligible as formalised, perhaps modestly adapted versions of the exculpatory concepts of justification and excuse as used in extra-legal moral contexts.”<sup>36</sup> We should ask, then, in what ways the notions of justification and excuse differ in the moral and legal realms, and whether there is room for the distinction between the desirability of an act and the blameworthiness of the agent.

One way in which the legal notion of excuse differs from our moral notion is with regard to the notion of intention. In moral contexts, “I didn’t intend to x” or “I didn’t realize/believe I was x-ing” serves as an excuse that usually exculpates wholly from moral responsibility from x-ing, so far as the belief is reasonable. (Perhaps one didn’t realize one’s utterance was a lie, say—then we don’t hold one responsible or blameworthy for lying, insofar as that belief is reasonable.) In contrast, in law *mens rea* (roughly, intention to perform the criminal action) is a requirement for a case being brought to trial. Thus, if relevant, this will have already been established, and will not be one of the eligible candidates for *legal excuse*.<sup>37</sup>

However, there are similarities with respect to other excuses in legal and moral contexts, namely, excuses of irrationality (the agent (perhaps temporarily) lacking the rational capacities to understand that her action was wrong) or hard choice (such as under conditions of coercion) are present in both domains.<sup>38</sup> Note the slightly different nature of each excuse: the first (irrationality) excuses by showing that the agent simply was not a responsible agent at the time of committing the criminal of-

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<sup>36</sup>R.A. Duff, “Excuses, Moral and Legal: A Comment on Marcia Baron’s ‘Excuses, Excuses’,” *Criminal Law and Philosophy* 1 (2007): 49-55, p. 50.

<sup>37</sup>Strict liability is the exception.

<sup>38</sup>For a full discussion of legal excuses, and their theoretical underpinnings, see Stephen J. Morse, “Excusing and The New Excuse Defenses: A Legal and Conceptual Review,” *Crime and Justice: A Review of Research* 23 (1998): 329-406.

fense. The second kind of excuse (hard choice) need not entail that the agent lacked responsibility—rather, it encapsulates a substantive moral judgment that it is not appropriate to *blame* someone (who may be a fully rational, responsible agent) for an action performed under significant duress (such as in “gun to the head” and other coercive situations).

Now, if excuses in legal contexts are to correspond to the way we excuse in nonlegal contexts, as Duff suggests, then there will be a third role that excuse might play, similar to the second: excuses might be offered to indicate that the agent is *less blameworthy* for acting in the circumstances she did, for the reasons she did—but, she is nonetheless responsible for so acting, and is *to some degree* blameworthy.

This kind of excuse sits between the “hard or coerced choice” excuse, and the claim that, under the circumstances, the conduct was in fact wholly justified. It is a familiar thought that countervailing considerations might, in exceptional cases, serve to wholly override a usually wrongful action. Justification for so acting may serve to relieve the alleged wrongdoer from all charges of criminal conduct. A case of this kind recently received much media attention in the U.K. Climate camp activists at King’s North power station were acquitted of charges of criminal damage. Having written a slogan encouraging the prime minister to refrain from re-activating the coal burning power station (“Gordon, bin it!”) on the side of the coal power station, it was deemed that such an act was justified by the urgency of the environmental reasons on which they were acting.<sup>39</sup>

To summarize, then: an agent’s criminal action may be justified, or excused. If justified, it is determined that the usually wrongful action was in fact not, under the circumstances, wrongful. There are three different ways in which criminal action might be excused, all three of which presuppose that the action performed was criminally wrongful:

- (E1) The agent may be excused on grounds of irrationality, in which case she is exonerated from guilt for so acting, for she was not at the time of the crime a responsible agent.
- (E2) The agent may be excused due to coercive circumstances, in which case we acknowledge that she was a responsible agent, but judge it understandable that responsible agents so act under circumstances of duress, and so do not hold such agents legally culpable and do not subject them to blame or censure for doing so.
- (E3) The agent may be excused due to the circumstances of her action, in which case we acknowledge that she was a responsible agent, and indeed blameworthy to some degree, but less blameworthy for

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<sup>39</sup>The activists did not succeed in inscribing the entire message, thus the chimney stack remained a totemic homage to the prime minister: “Gordon.” For more details, see <http://www.guardian.co.uk/environment/2008/sep/11/activists.kingsnorthclimatecamp>.

so acting than she might have been in different circumstances, for different reasons.

The former two roles, (E1) and (E2), that excuse might play, in legal contexts, address the question of the agent's guilt—whether she should be punished at all for her action. The third kind of excuse, (E3), however, is relevant to the issue of *how blameworthy* an agent is for so acting. As such, in legal contexts, this becomes a matter of *how much* an agent should be punished.<sup>40</sup> That is to say, excuses of this kind will play a role as mitigating factors, at the stage of sentencing.

I want to argue that conditions of disadvantage or deprivation can play a role in excusing in the third way—as a mitigating factor at the stage of sentencing—and suggest that this poses difficulties for the two proportionality constraints. Perhaps sometimes deprivation will be so severe that it is appropriate to treat these cases as ones of “hard choice” or duress. However, I focus here on the role of disadvantage as a mitigating factor, for many cases of disadvantage will, while thoroughly unpleasant, fall short of being cases of “do or die” absolute necessity or duress.

#### **4.2. *Excuse in contexts of distributive injustice***

Recall that the severity of a punishment should fit the seriousness of the crime, and that seriousness is a function of harm (H) and culpability (C). Now, if culpability—or blameworthiness—is lessened due to contexts of disadvantage, then (assuming H is a positive integer) it will follow that the output of the function (S) will also be reduced, and the punishment ought to be less severe.<sup>41</sup>

I now want to argue that in some—perhaps many—cases, the seriousness of a crime is lessened due to conditions of deprivation. On the basis of the above considerations, two kinds of claim might be offered:

- (1) The alleged criminal wrongdoing was in fact justified in that context.
- (2) The alleged criminal wrongdoing should be excused, in some measure, in that context.

If either of these claims is true, then conditions of disadvantage and deprivation may lessen the seriousness of the crime (insofar as excuse lessens or removes blameworthiness). I think it plausible that (1) can be true,

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<sup>40</sup>(E2), if offered as partial defense, can also play this role.

<sup>41</sup>Note that because seriousness of a crime is a function of harm and culpability, we must say that the seriousness is reduced when culpability is reduced (or else the coerced and noncoerced agents should be punished alike). This is not, of course, to say that the victim was any less harmed (this goes for excuses of the “hard choice” kind as well as those I argue for here).

although perhaps only in contexts of very severe social injustice or deprivation. For example, acts of civil disobedience such as those engaged in in the civil rights movement in the U.S. can surely be justified, although they technically amount to cases of criminal wrongdoing.

However, I think that (2) is true where the relevant contexts fall short of gross social injustice but nonetheless contain significant deprivation. This will include a far broader range of cases. Ordinary moral thinking supports this claim. Consider the following comparison cases:

(A) Deprivation: A person without access to income or the resources to provide herself with food or shelter persistently steals food from a supermarket.

Comparison: A person with adequate resources to provide herself with food and shelter persistently steals food from a supermarket.

(B) Deprivation: An underemployed single parent of three children defrauds the benefit and taxation system.

Comparison: An adequately employed and generally well-off single parent of three children defrauds the benefit and taxation system.

Suppose that the cases are straightforwardly as I describe them, and there are no complicated explanations for the wrongdoing in each comparison case. Let us for now focus on our *moral* evaluations of the actions in different contexts. Thus described, it is not in any way revelatory to note that the moral evaluation of the comparable actions in A, B—of theft and fraud—differs significantly, and this is due to the context in which that action occurs. The agents in “deprivation” cases, who are unable to provide for themselves, or others, have (presumably) reasons for so acting that are quite different from those of their more fortunate counterparts in “comparison” cases. Concern for sustenance, provision, and safety motivates the criminal acts in each deprivation case, in a way that is not so in each comparison case of relative adequacy. The differential contexts mean that there are countervailing considerations that may go some way towards mitigating blame for the criminal wrongdoing.

If we are to account for this intuition, how best should we understand the claim that deprivation lessens blameworthiness? Those of the Bazelon school of thought would maintain that deprivation provides an excuse of kind (E1)—it undermines the capacities of individuals, thus making it inappropriate to hold the agent responsible. I have already aired reasons for which this understanding is unappealing. Alternatively, we might maintain, in line with (E2), that the conditions of disadvantage are coercive to the extent that all blame is removed for so acting (structurally analogous to a “gun to the head” coercion). This may be true of some conditions of disadvantage—but as mentioned, there will be many

cases of disadvantage that, albeit pretty dreadful, are not “do or die” situations. In these cases, we should say that (E3) the agent is responsible for her action, but is simply less blameworthy than she might be in other circumstances (say, in circumstances of relative privilege). This claim does not entail that the action performed is not wrong (morally or criminally). Nor does it entail that the agent involved was not morally responsible for so acting, or that the agent is not liable to any degree for the criminal act. Nor does it deny that they ought not have so acted, or that serious consequences may ensue.

Rather, the claim is rather that *the agent's culpability for so acting is reduced*, and that this is due to the circumstances of deprivation. This is the way I think that contexts of deprivation can affect criminal justice: namely, in such contexts of distributive injustice, the relative seriousness of crimes committed will vary (with culpability) across contexts. If this is right, then we should accept (2)—the alleged criminal wrongdoing should be excused, in some measure, in that context—in contexts of deprivation. In a legal framework, this entails that deprivation can serve as a mitigating factor at the sentencing stage.

Should we also accept the stronger claim (1)—the alleged criminal wrongdoing was in fact justified in that context? I mentioned that there may be some extreme cases in which we should. However, I will focus mainly on claim (2), for this kind of case is plausibly more common, it is weaker, and, moreover, it is all that I need for my argument. It is worth noting, though, that there are surely conditions in which the boundary between excuse and justification are slim. That is to say, we can surely imagine cases of deprivation in which, while we want to maintain that the conduct was in fact unjustified, the urgency of the situation was such that the wrongdoer is almost entirely blameless. I next defend the claim that these considerations ought to be taken into account when assigning punishment.

#### **4.3. Incorporating deprivation as a mitigating condition**

I have suggested that conditions of deprivation might excuse the wrongdoer to the extent that her blameworthiness for so acting is significantly reduced. This point is in line with our moral evaluations, I have argued, and moreover, can be incorporated into a legal framework. We can maintain that a particular kind of action is sufficiently harmful that laws should be instated to govern conduct with respect to that act (to discourage so acting, to deter individuals from doing so, perhaps); we can identify that action as a criminal act. But fully responsible agents who so act may do so for a range of reasons, and the reasons for which they do so might radically alter the blameworthiness of the agent, and the sentence thus deserved. This, again, is a familiar feature of moral thought: we

think that an agent who stole in order to gain malicious satisfaction at violating another's property is significantly more blameworthy than an impoverished agent who stole to gain sustenance. Indeed one might think that under the latter circumstances, theft is wrong, but the agent is only minimally blameworthy for so acting. These discriminations in moral worth—in the degree to which the agent is blameworthy—can be mirrored in our evaluations of how much punishment is deserved.

Why should the sentence that an individual receives reflect the extent to which she is blameworthy? First, we have seen the claim that the seriousness of the crime is a function of harm and culpability. Insofar as it is plausible to see culpability (blameworthiness) as reduced by excuse (in accordance with (E3)), and insofar as circumstances of deprivation serve to mitigate blameworthiness, it is plausible to maintain that the legal structures can make room for the kind of nuances that characterize our moral thinking. Second, the legal frameworks *ought* to make room in this way. For if the penal system is concerned with the application of the deserved amount of punishment, establishing the blameworthiness of the wrongdoer is required. On Duff's view, the concern is to ensure that the right amount of censure is communicated in the punishment: insofar as an individual is less blameworthy, less censure will be required. Third, the "ought" here is morally urgent—the state ought to take into account the amount of punishment deserved, and punish accordingly. If the state punishes too severely, it will be unjustly imposing the excess punishment. Thus, if the state is to avoid such unjust punishments, it ought to attend closely to the matter of how much punishment is deserved; that is, it ought to attend to the blameworthiness of the wrongdoer. I will shortly show how doing so, however, can pose difficulties for a penal system regarding the proportionality constraints that I set out in section 3. First, however, it is worth briefly noting why it is that this move from reduced moral blameworthiness to reduced legal culpability, with respect to offenders in contexts of deprivation, has not been adequately elucidated.

When considerations of social injustice have been considered with regard to punishment, the role of excuse has predominantly figured in the sense of (E1); namely, in accordance with the Bazelon line of thought, attention is paid to the responsibility of the wrongdoer. For example, in a recent discussion of the relation and consequences of a "rotten social background" on criminal justice, Matravers focuses on the extent to which such a background undermines the agent's *responsibility* for so acting. His focus is on the effect of social background upon the responsibility related capacities of the agent (ability to understand and respond to considerations of right and wrong, very roughly put). Thus he writes that "unless past deprivation can be shown to have a continuing effect on the agent's capacity [to grasp and apply reasons], it is irrelevant to judgments

of responsibility.”<sup>42</sup>

Likewise, Stephen Morse has argued to the effect that deprivation does not impact upon desert, and is concerned with rebutting arguments that purport to show such conditions undermine *responsibility*. In setting up the issue, he writes that “the law and morality alike exculpate either because an agent has not violated a moral prohibition or obligation we accept, or because the agent has violated a norm but is generally or situationally normatively incompetent.”<sup>43</sup> Thus Morse concludes that we should not regard deprivation as an excusing factor, because “the excuse would tend pejoratively to label large numbers of citizens as less than full moral agents ... Social justice ... will not be furthered by treating deprived people as if they were not morally accountable agents.”<sup>44</sup> But in framing the issue in this way, Morse does not permit the more nuanced distinction I have drawn out between agents who while fully responsible (and normatively competent) differ significantly in degree of blameworthiness.

With this distinction in hand, we have a different way of framing of the relationship between deprivation and culpability: we ought to say that the agent in disadvantaged or deprived circumstances is (*ceteris paribus*) *responsible*, and so she is blameworthy, and liable to be held answerable before the courts. Rather the extent of her blameworthiness for so acting, *in this case*, may be less than that of other agents who so act, and who have not suffered such deprivation. This is not because the deprivation or disadvantage in any way impinges upon the capacities of the agent, their standing as a responsible agent (I agree with Morse that the suggestion is somewhat distasteful and likely to have pernicious consequences). Rather the claim is simply that contexts of deprivation or disadvantage provide agents with *significantly different reasons for action*, and that these might sometimes, to some extent, excuse the criminal action, thus reducing the individual’s liability.

It is important to note that this distinction is relevant to U.K. law as it now stands. The specification of considerations that might reduce culpability runs together factors that remove responsibility for so acting with factors that do not remove responsibility, but rather reduce blameworthiness. These factors include: (a) exploitation by others, (b) mental illness or disability, (c) youth or age, where it affects the responsibility of the individual defendant, (d) the fact that the offender played only a minor role in the offense.<sup>45</sup>

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<sup>42</sup>Matt Matravers, *Responsibility and Justice* (Cambridge: Polity Press, 2007), p. 130.

<sup>43</sup>Stephen J. Morse, “Deprivation and Desert,” in William C. Heffernan and John Kleinig (eds.), *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law* (Oxford: Oxford University Press, 2000), pp. 114-60, at p. 121.

<sup>44</sup>Ibid., p. 154.

<sup>45</sup>See the sentencing guidelines website: <http://www.sentencing-guidelines.gov.uk/>

While exploitation and the degree of involvement in the crime are factors that might serve to excuse (reduce blameworthiness), mental-health problems or age-relevant considerations typically involve the claim that the agent was not fully responsible ((E1)-type excuse). There are two problems with this aspect of the sentencing guidelines: first, it fails to properly distinguish between factors that remove responsibility and those that accept responsibility but diminish blameworthiness. Second, and perhaps *because* of the failure to distinguish diminished responsibility from diminished culpability, there is no attention to deprivation as a factor that can reduce blameworthiness ((E3): mitigating factors).

#### 4.4. Dealing with objections

Is there reason to resist the move from judgments of reduced blameworthiness in the moral realm to comparable judgments in the legal realm? Jeremy Waldron has suggested, in considering precisely the kinds of cases under discussion here, that moral evaluations and judicial determinations on this matter should come apart. He suggests that while the criminal action of an impoverished person may be morally justified, it cannot be legally justified. Were motives of deprivation-based necessity accepted as justificatory (in cases of, say, theft), he claims, the notion of property rights itself would be challenged:

The law ... is not about to recognize a class of defense [“indigence-based necessity”] whose general tendency, in the cases in which it would be most directly applicable [cases of deprivation], would be to call into question the legitimacy of the general rules of property in a society.<sup>46</sup>

Waldron is perhaps correct to claim that the courts could not, insofar as they retain a commitment to property rights, allow that conditions of deprivation *justify* acts of theft. That would indeed be to call into question the entitlement rights operative in our current system of property. But the argument I have given would not have this consequence of “unraveling” the state’s laws. I have claimed not that the act of (e.g.) theft is justified (claim (1), above), but rather that an individual’s impoverished condition can mean that she is significantly less blameworthy for this theft (claim (2), above).

William Heffernan likewise argues against accepting that considerations of social justice could play an excusing role.<sup>47</sup> This is precisely because, he claims, such considerations are contentious; one individual

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guidelines/council/final.html.

<sup>46</sup>Jeremy Waldron, “Why Indigence is not a Justification,” in Heffernan and Kleinig (eds.), *From Social Justice to Criminal Justice*, pp. 98-113, at p. 99.

<sup>47</sup>William C. Heffernan, “Social Justice/Criminal Justice,” in *ibid.*, pp. 47-83.

might see unequal access to healthcare as a failing of social justice, another might see taxation as a social injustice. If wrongdoers can defend their actions by claiming that it was justified “as a matter of social justice,” this will justify the criminal action of the rich tax-evader as well as that of the impoverished fraudster. Once again, the claims I have made can avoid this concern. First, I do not suggest that the action is justified; rather, blameworthiness is reduced. Second, the claim is not that the wrongdoer’s culpability is reduced because her action is in accordance with what social justice demands. Rather, my claim is that the reasons for which the individual so acted (survival, meeting of basic needs, say), are such that it is inappropriate to blame the agent to the same extent as an individual who acted for less urgent reasons. Debates about the correct theory of social justice need not now be engaged in (although I think they ought to be, elsewhere); one need only accept that such reasons are morally urgent, and so can serve to reduce culpability.

Finally, it is worth noting that the problems that face Duff’s account do not pose problems for the claims I have made. Duff faces difficulties in that his argument generates the conclusion that, in a context in which some citizens are socially disadvantaged, the state could not hold those disadvantaged individuals to answer for *any* crime; nor could the state hold other nondisadvantaged individuals responsible for their crimes. The framework I have proposed avoids this difficulty, by focusing not on *the state’s standing* with respect to individuals in particular, or in general, but rather on the justness of the punishments imposed upon individuals who exist in conditions of deprivation. While the focus is squarely on the individual, thus enabling fine-grained claims about individual blameworthiness, we need not claim that the individual’s responsibility is reduced. Moreover, the claim I have made has significant implications for the state’s punitive authority in contexts of social disadvantage. In the next section, I go on to show that, in the presence of such mitigating factors, difficulties arise with regard to the proportionality conditions.

#### ***4.5. Distributive injustice and proportionality***

Thus far I have argued for the following claim: culpability for particular crimes may vary in contexts of significant distributive injustice (such that some individuals suffer deprivations). Thus the seriousness of crimes will differ. This provides support for premise 3 of the argument above. In this subsection, I will provide support for premise 4, namely, the claim that in contexts of significant distributive injustice (i.e., those including deprivation), the proportionality constraints cannot be met.

Insofar as punishment must be proportional absolutely and relatively (P1) and (P2) above), significant distributive injustices threaten propor-

tionality; in such contexts, both conditions cannot simultaneously be met. Why not? Consider the claim that the agent's blameworthiness for an act of theft in a context of significant disadvantage is reduced. She is significantly less blameworthy for so acting than were she in a context of relative privilege or stability, insofar as such contexts provide quite different reasons for so acting; these reasons for acting serve to excuse, thus reducing culpability.

Now, if we accept the claim (which I think we should, for the reasons given above) that there are significantly varying degrees of blameworthiness for criminal actions of the same kind (e.g., thefts of a certain value), then we should also accept, according to (P1), the following claim:

(D1) The punishment, in terms of absolute proportionality, ought to differ.

Recall that in reflecting on the degree of culpability of the agents who committed crimes in contexts of deprivation, I noted that we can imagine contexts so urgent that the strength of the excusing reasons are strong—pertaining to survival or meeting of basic needs, for example. In such a case, the blameworthiness of the wrongdoer is almost wholly reduced (although responsibility remains); we admit they did wrong, but acknowledge that they are hardly blameworthy for so acting. If this is so, then the absolutely proportional punishment would be fairly light. Consider how we might frame this on Duff's view: if the amount of punishment required is that which communicates the appropriate amount of censure, then when the agent is almost wholly blameless for her crime, there is very little censure to be communicated.

However, this places the constraint on absolute proportionality ((P1), above and its contextualized version, (D1)) in tension with the constraint on relative proportionality (P2). If the severity differs significantly, then there will be difficulty in reconciling (P1) and (P2)—for a punishment that is absolutely proportional (attuned to the circumstances of the crime) may be quite different from punishments for similar criminal acts in quite different contexts (namely, contexts of stability or privilege). That is to say, two instances of the same kind of crime (theft, say) might differ significantly in their seriousness, (S), due to significant differences in the wrongdoer's culpability.

We might (somewhat artificially) specify that a kind of crime (theft) might require a certain amount of punishment according to (P2):  $n \pm 10$ , say, where  $n$  is the starting point for the sentence guidelines, with  $\pm 10$  being a matter of how much leeway there is for more or less severe punishment, in accordance with the presence of aggravating or mitigating factors, respectively. Now, the particular instance of the crime committed in conditions of deprivation might deserve, as a matter of absolutely pro-

portionality, a punishment of n-20.<sup>48</sup> That is to say, the usual variation in seriousness of crimes (due to the usual range of culpability) may permit certain upper and lower limits. But in cases of severe distributive injustice, we have seen, blame can be almost wholly mitigated—thus it is likely that the usual range is narrower than would be required to reflect the severity of punishments appropriate to such crimes. In short, even the most lenient of the recommended sentences (n-10) is likely to correspond to a greater degree of blameworthiness than is present for certain crimes committed in contexts of deprivation. Accordingly, in a case in which the deserved punishment is n-20, then if the punishment inflicted is n-10, the differential punishment is unjust; the person has been punished *more than is deserved*. Proportionality constraint (P1) is not met and unjust suffering has been imposed upon the wrongdoer, who is too severely punished.

Alternatively, the wrongdoer could be punished to the degree that is absolutely deserved (say, n-20). But then the principle of relative proportionality (P2) cannot be met. Unless for certain crimes the guidelines for sentencing are expanded so as to make the most lenient sentence reflect the near lack of blameworthiness, they will not correspond to the degree of culpability in some of the cases of deprivation we have discussed.

This concludes my elaboration of the premises of the argument; I have undertaken to show:

- (3) In a context of significant distributive injustice, particular instances of crimes of broadly the same kind will differ significantly in seriousness (due to differences in blameworthiness).

I explained that, by looking at clear cases of injustice (conditions of deprivation) we could see that culpability for criminal wrongdoing could be reduced; the conditions serve to excuse, to a certain extent, the wrongdoing, and thus serve to significantly reduce liability.

I then explained that, given significantly varying degrees of blameworthiness, both proportionality principles could not be met. Insofar as absolutely proportional punishments are applied, they will not be relatively proportional, across kinds of crime. And insofar as relative proportionality for the relevant kinds of crime is met, absolute proportionality will not be:

- (4) In contexts of significant distributive injustice, the absolutely proportional punishment may differ significantly from the relatively propor-

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<sup>48</sup>This is especially so if we consider what is taken as the starting point of seriousness corresponding to n: “the assumption that the offender was motivated by greed.” Guideline on Theft and Burglary in a Building Other than a Dwelling, <http://www.sentencing-guidelines.gov.uk/guidelines/council/final.html>, p. 5 (accessed February 19, 2009).

tional punishments: (P1) and (P2) cannot both be met with sufficient regularity.

Thus injustices will be perpetrated if states continue to punish wrongdoers for crimes in which the demands of absolute proportionality are less than those of relative proportionality. It is important here to note the inclusion of the clause “met with sufficient regularity”; any penal system will no doubt on occasion involve error, and these errors will be potentially devastating for those involved. This clause is intended to rule out those cases of error—the legitimacy of a system should not be undermined by the occasional mistake, so long as those errors are guarded against and their occurrence not catastrophic. A penal system can be legitimate when the maladministered justice is restricted to closely guarded against error. In a context of deprivation, it seems clear that such mal-administration will occur much more frequently; thus the legitimacy of a system in such a context is threatened. I thus conclude that in contexts of significant distributive injustice, a just and legitimate penal system is threatened.<sup>49</sup> This is not to say that no punishments within that system are just; we are able to identify the particular cases of injustice, and thus avoid the failings of Duff’s view. Rather, the conclusion is that if a penal system is to operate justly in *all* cases (or as many cases as permitted, given human error), conditions of deprivation and disadvantage must be eliminated. This conclusion places the failing, in cases of deprivation, where it belongs: not with the individual and her capacities, but rather with the state that has failed to meet the basic needs of its citizens.

## 5. Concluding Remarks

Is this right? I here consider two alternative options that might seem appealing, in order to avoid the conclusion that social injustice is a precondition of penal legitimacy. I show that neither is feasible, and thus the remaining option—to alleviate such injustices—is morally urgent.

The problem, as I have set it out, is that some individuals—those in contexts of deprivation—are punished too severely for their crimes. Perhaps steps can be taken to avoid this. One strategy would be to extend the sentencing guidelines (extend the range or relative proportionality for

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<sup>49</sup>This conclusion applies to consequentialist deterrence theory views of punishment also. In brief, in contexts of severe injustice, the strength of the threat (corresponding to the threatened amount of punishment) needed to deter an individual from criminal action will presumably vary greatly depending upon the individual’s circumstances. For instance, greater threat is needed to deter an impoverished and starving individual from theft than a well provided-for individual. The structure of the argument is somewhat different, in application to these views, but the point still applies.

that kind of crime), so that the most lenient sentences are those that are absolutely proportional to the particular, reduced culpability crime (the range therefore being  $n+10/-20$ ).

Could the range of sentences be extended so that the minimum sentence is of this form? Perhaps, but I think there are difficulties with this strategy. These difficulties pertain to the role of proportionality in public justice. In particular, consider the role of punishment in ensuring that public justice is seen to be done. An important part of this is surely that the state is seen to take a stance on the wrongness of certain behaviors, perhaps in solidarity with the victims of crime. Moreover, the penal system must be transparent and systematic: citizens should have a clear sense of the punishments that they may face.

If the range of sentences is too broad (the minimum being extremely lenient), neither of these purposes can be served. First, a crime for which the sentencing guidelines are very broad in the way described might fail to convey adequately the state's condemnation of that kind of crime, and its concern to protect citizens from becoming victims of crime. A state must both administer just punishments, and condemn certain criminal action. But it cannot adequately fulfill both of these functions where its citizens exist in conditions of deprivation. If the former function is served (just punishments meted out, taking into account disadvantage as a mitigating factor), then we might worry that adequate condemnation cannot be thereby expressed. And punishments severe enough to so convey condemnation would be, for many disadvantaged citizens, unduly harsh.

Second, citizens may feel insufficiently clear on the kind of punishment they could reasonably expect for a certain course of action, if the range of punishments extends from very lenient (in cases in which excuses are present) through punishments as severe as is deserved in cases in which no excuses mitigate culpability and cases in which aggravating factors increase it. To attempt to incorporate such lenient sentences as are absolutely proportional could not provide the clarity and systematicity that is required of such an institution.

An alternative strategy would be to leave the sentence guidelines (fairly) restrictive, so as not to accommodate such lenient sentences in general. Instead, the state might, in cases it deems appropriate, make inquiries into whether the case in hand should be seen as exceptional, and hence falling outside of those guidelines. However, Duff has already presented us with reasons to be wary of such a strategy: for the state to investigate the specific causes of a criminal act is for it to "intrude into matters that should not concern the law." I have suggested that, in fact, such considerations are of concern to the law, insofar as they affect culpability. Nonetheless, one might agree with Duff that such inquiries are intrusive, and that the state should "protect citizens from such over-

intrusive inquiries.”<sup>50</sup>

An additional, and I think as pressing, concern pertains to the procedural injustices that may be given rein if a “case by case” approach is adopted. I have already mentioned that racial bias has been shown, in the U.S., to influence sentencing. In the U.K., the rate of custodial sentencing for first conviction with female offenders is twice that for males on their first conviction. For female offenders, when both custodial sentences and more lenient ones (such as fines or community orders) are available, there is a tendency to give the former.<sup>51</sup> Thus the potential for such injustices in the process, where discretion is permitted, speaks in favor of a systematic approach in accordance with general guidelines.

Further, a difficulty that faces both of these strategies pertains to the difficulty of ascertaining precisely *when* disadvantage is a mitigating factor. I have been supposing throughout that we can ascertain that the conditions of hardship play a motivating factor in the commission of the crime—and no doubt this is true of many cases. But perhaps this will not always be so; some agents may be motivated by ill will or disregard for the law, rather than hardship, and it will not always be easy to ascertain when this is so. In particular, where an agent’s condition falls short of absolute necessity (where we might reasonably infer that desperate hardship motivated the criminal activity), it will be incredibly difficult to untangle her reasons for action. The difficulty here is acute: first, agents often act for a number of reasons, and it is not easy to prise apart their contributing roles. If an agent is motivated to theft in part by hardship, but in part by ill will, to what extent should each motive be given weight in ascertaining blameworthiness? Second, agents sometimes act for reasons that are not readily available on conscious reflection. Even with reflection, agents are prone to rationalization, or confabulation. This makes determination of reasons for action (one’s own no less than another’s) a difficult task. Recall Kant’s remark that

in actual fact it is absolutely impossible for experience to establish with complete certainty a single case in which the maxim of an action, in other respects right, has rested on moral grounds and on the thought of one’s duty ... for when moral value is in question, we are concerned, not with the actions which we can see, but with their inner principles, which we cannot see.<sup>52</sup>

The thought that our reasons for action are opaque to us finds further support in recent psychological findings on the prevalence of confabula-

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<sup>50</sup>Duff, *Punishment, Communication, and Community*, p. 157.

<sup>51</sup>37 percent of female offenders with no previous convictions were given custodial sentences. See Corston, *The Corston Report*, p. 18.

<sup>52</sup>Immanuel Kant, *Groundwork of the Metaphysics of Morals*, Part 2, Ak. 26:406.

tion and rationalization in agents' reporting on reasons for action.<sup>53</sup>

Third, and related, even were an agent able to discern accurately her reasons for action, sometimes even sincere agents are not reliable reporters of their reasons for actions. This may be a problem in particular if agents are unable to clearly articulate their reasons for action.

Thus the connection I have been supposing—namely, that conditions of deprivation will contribute to an agent's commission of crime—will be incredibly difficult to discern in a court of law. This is not to deny that there is such a connection, but rather to deny that it is the kind of evidence that is readily available, and reliably submitted, as part of the criminal justice proceedings.

It should also be noted, of course, that to allow appeal to disadvantage as a mitigating factor is to risk exploitation of this strategy by insincere and disingenuous individuals. To punish such insincere individuals too leniently is problematic for reasons Richard Lippke raises, in considering whether we should punish the socially deprived at all. Such a strategy, he writes “would be to ... abdicate our responsibilities to the victims of their crimes, many of whom are themselves socially deprived.”<sup>54</sup>

For these reasons, approaches that require great sensitivity to individual motivation—quite apart from concerns pertaining to the propriety of the state's intrusion into the private lives of its citizens to establish such matters—rely on access to facts about agents that are notoriously difficult to discern. When we add to these difficulties the concerns about bias, and the possibility of this informing evaluations of an agent's motives, we see the full extent of the problems facing either approach.

Given these constraints, a surer route to securing justly proportional punishment at the same time as meeting considerations of public justice and procedural fairness is to alleviate the conditions of deprivation that serve to reduce culpability. Moreover, Lippke's comment quoted above enables us to see that insofar as the circumstances of disadvantage (which lead to criminal activity, or make it appear a feasible option) remain, taking disadvantage into account as a mitigating factor does not do enough for those citizens who may be subject to such crimes in future. The state's protective responsibilities towards potential victims of crimes should lead us to endorse the elimination of those conditions that contribute to criminal activity—in particular, those conditions of disadvantage or deprivation. Only this strategy can serve both punitive justice, and take seriously the state's responsibilities to protect all its citizens, both from severe hardship and from crime.

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<sup>53</sup>William Hirstein, *Brain Fiction: Self-Deception and the Riddle of Confabulation* (Cambridge, Mass.: MIT Press, 2005).

<sup>54</sup>Lippke, “Diminished Opportunities,” p. 480.

Until conditions of poverty and deprivation are eliminated, a legitimate and systematic penal system is not possible: for some already disadvantaged individuals will be punished too severely. As long as citizens suffer deprivation, the state is not merely failing its citizens by failing to provide the constitutional essentials, but punishing unjustly those individuals who commit crimes due to such circumstances, and failing in its protective responsibilities. Thus my argument provides urgent moral reason for states to alleviate such conditions of impoverishment.<sup>55</sup>

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