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Invisible Punishment is Wrong – But Why? The Normative Basis of Criticism of Collateral Consequences of Criminal Conviction

ABSTRACT

This paper is concerned with the way in which criminal justice systems cause harms that go well beyond the 'headline' punishment announced at sentencing. This is the phenomenon of 'collateral consequences of criminal conviction.' This phenomenon has been widely criticised in recent criminological literature. However, the critics do not normally explore or defend the normative basis of their claims – as they need to if their arguments are to strike home against sceptics. I argue that the normative basis of the critics' position should be seen as involving important normative claims about the responsibilities that societies have towards those who break the law. Some important strands of criticism, I claim, rest on the view that we have *associative* duties towards offenders (and their dependents and communities) as *fellow participants in a collective democratic enterprise*, duties that are violated when states impose or allow harms that go significantly beyond the sentence.

1.

This paper is concerned with the way in which criminal justice systems cause harms that go well beyond the 'headline' punishment announced at sentencing. This is the phenomenon of 'collateral consequences of criminal conviction,' for which Jeremy Travis has coined the apt term, 'invisible punishment.'[1] In order to introduce the questions we will be dealing with, it will be helpful to start with an analogy.

Say I am asked to examine a PhD thesis. The decision that I make will have significant repercussions for the candidate's future, and for the meaning of the past four or five years that the person has spent working on the thesis. Is the

[1] J. Travis, 'Invisible Punishment: an Instrument of Social Exclusion' in M. Mauer and M. Chesney-Lind (eds), *Invisible Punishment: the Collateral Consequences of Mass Imprisonment* (New York: New Press, 2002), pp. 15-36.

candidate going to proceed into the future with the stamp of approval resulting from a successful doctorate; or will they rather have to live with the public judgement that the time they spent on the thesis was, if not time wasted, then at least radically unsuccessful? I might be very much aware of these facts about how unfortunate it would be for the candidate to fail the thesis; but I might also make a deliberate effort not to allow those facts to cloud my mind as I attempt to weigh up the merits of the thesis. Furthermore, I may think, as I come to make my decision on whether to pass the thesis or not, that my duties in the situation are limited to ensuring the integrity of the decision – that it is made on academic merit – and that the likelihood of bad consequences for the candidate should not count as a decisive reason not to fail the thesis if its academic content merits a fail. Here it seems at least sometimes unobjectionable to exclude many of the wider consequences of the decision from my deliberations, and to make a decision even though I foresee that it will have bad consequences.

This example shows that we do not always have a responsibility to avoid causing foreseeable harms. Sometimes the importance of fulfilling our other responsibilities permits us to allow harms as a side effect. Of course, if I failed the thesis precisely in order to make the candidate suffer in that way I would be doing something seriously wrong. However, sometimes one can be in the situation of knowing that someone will be harmed by one's action and yet be compelled to do it anyway. We could avoid causing these harms, but only at the cost of not fulfilling our other responsibilities properly.

How is this relevant to a paper about the collateral consequences of conviction? Collateral consequences can be understood as the further repercussions of a criminal conviction on an offender's life, as well as those of their dependents and their communities. The initial purpose of this opening example is to point out that it is not enough for critics of collateral consequences of conviction to show simply that punishment regimes *foreseeably cause* these wider repercussions. This might be true, but it might, as with the case of the examiner, simply be a cost that has to be borne in order to carry out the task of punishing (whatever the justification for undertaking that task is).

However, the other purpose of the example is to motivate us to explain *why* criminal justice policy should not be founded on the same attitude to collateral consequences as that taken by the examiner. Critics of 'invisible punishment' urge that matters cannot be so simple as in my depiction of the examiner case – and I agree. Indeed, even in the examiner case, one might think that the sensitive examiner may feel bound to take *some* steps to alleviate the costs of her decision for the candidate. In the case of criminal justice, the critics of invisible punishment argue that those who design and implement sentencing policy should give much more thought to the foreseeable effects of their decisions: decisions such as, for instance, the war on drugs; the removal of judicial discretion and the introduction of mandatory sentencing grids; the expansion of supplementary punishments; the cutting of social security and welfare for ex-offenders. Even where these decisions aim at an end that might be considered reasonable, more thought should be given to the kinds of collateral damage that the chosen ways of achieving that goal are likely to lead to.

The argument of this paper is that, in pressing their case, critics of such 'invisible punishments' are committed to some important normative claims about the responsibilities that societies have towards those who violate their criminal law. Furthermore, I will argue, these claims involve some commitment to the idea that members of such societies, including those of their members who are offenders, are in a special kind of relationship with one another.

To illustrate this point, consider a different case: not that of a PhD examiner, but rather of a PhD supervisor. Say one of my students is working poorly, though I know that they are capable of better. Nevertheless, I might know that telling them this directly will – in the short-term at least – cause them serious hurt, and possibly undermine their sense that they are competent to succeed in their work. In this case it seems that I would have the responsibility to make my judgement known, just as in the examiner case, but I would also have a responsibility to ameliorate as far as possible the bad consequences of their receiving that criticism (consistently with making sure they take it seriously), and to help restore their sense that they can deal with the criticism and come to produce better work in the future. I would have the responsibility to make some uncomfortable truths known, even though this will be painful and have the potential for destabilisation; but also the responsibility to take steps to prevent that destabilisation from wrecking the potential that lies in my student. And the point is: I have these extra responsibilities to my student because, as their supervisor, I am in a different kind of relationship with them than I would if our relationship was one of examiner-examinee. As their supervisor, I have

responsibilities for their academic development as part of my role in that relationship that cannot be given up at the first sign that the student is being distracted from fulfilling their potential. They are in some sense in my hands, and their development has been entrusted to me. Ultimately it will be better for the student – but also for myself, and the academic community as a whole – if I stick with it and help to pick up the pieces. I may thereby be able to help the student to create more productive patterns of work that will have lasting value. That is the basis of my responsibilities in the role of supervisor.

My thought is that the same can be said about responsibilities that societies have not simply to allow the collateral harms of conviction to lie where they fall, but rather to take steps to ameliorate them and prevent them from reverberating through the lives of individuals, their dependents and communities. As we will see, there are a number of ways in which societies have responsibilities to offenders that are violated by 'invisible punishments.' We will see that some collateral harms of one sort or another violate certain basic universal duties that people have to one another: humanitarian duties to offenders, or violate their human rights. However, in line with my opening examples, I will also be interested in exploring the idea that it is in part because of a shared relationship that we have responsibilities towards offenders to ensure, through our political representatives and the mechanisms of the state, that the due punishment does not lead to disproportionate harm. Developing recent work by democratic theorist Elizabeth Anderson, I will argue that the relationship that gives rise to these responsibilities is that of *fellow participants in a collective democratic enterprise*.

This paper therefore does not attempt to add to the already significant empirical evidence that collateral harms occur as a result of criminal conviction – and in particular (mass) incarceration. Neither will I be disputing the claims of those who argue that it is a deep problem that regimes of punishment in apparently democratic societies impose or allow such harms. Rather my approach is philosophical: I will unpack the criticism of 'invisible punishment' and present an argument about how we should understand its normative basis. I will argue that we should see the proponents of such criticism as urging us to recognise *associative* duties that we have towards offenders (and their dependents and communities) as fellow participants in a collective democratic enterprise, duties that are violated when states impose or allow harms that go significantly beyond the sentence.

2.

To start with, we need to fix our target, and explain what the harms of invisible punishment are. To do this we can distinguish three different ways in which punishment can cause harm. First of all, there is the harm directly imposed by the headline sentence itself: call this the *imposed harm announced in the sentence*. Punishment is the practice of intentionally imposing harm in response to infractions of some designated behavioural standards – and philosophers have expended a significant amount of energy in attempts to explain under what circumstances this practice can be justified.[2] If punishment is not justified then

[2] For a good survey, see R. A. Duff, 'Legal Punishment,' *Stanford Encyclopedia of Philosophy* https://plato.stanford.edu/entries/legal-punishment/

the whole topic of responsibility for collateral harms has a simple answer: societies are responsible for collateral harms because they are harms caused in the process of doing something that is in itself evil or wrong. The question of sorting out responsibility for collateral harms becomes challenging when we think that these harms are caused in the process of some necessary and important undertaking that gives us responsibilities to carry it out sympathetically but firmly, as in my cases of the examiner or the supervisor. The main reasons that punishments have been held to be necessary or important are to do with either doing justice or protecting society (or both): that punishments deter crime or disorder; that they incapacitate the dangerous; that they reform or educate; that they give offenders their just deserts; or that they express justified disapprobation of the offence.

Secondly, there are harms that are not part of the 'headline' sentence but are nevertheless like that sentence in being intentionally imposed on the individual offender. In explaining his term, 'invisible punishment,' for instance, Jeremy Travis talks about 'the punishment that is accomplished through the diminution of the rights and privileges of citizenship and legal residency,' by means of 'civil' sanctions or disqualifications such as voting bans, and restrictions on rights to public housing or welfare support.[3] Whether civil or criminal,[4] however, these are still deprivations or harms to which the offender is liable because of their offence, and so it can (justifiably) seem like hair-splitting to insist that the labelling marks an important principled difference. We can call this category

[3] Travis, 'Invisible Punishment,' pp. 15-16.

[4] A. von Hirsch and M. Wasik, 'Civil Restrictions Attending Conviction: A Suggested Conceptual Framework,' *Cambridge Law Journal* 3 (1997), pp. 599-626.

imposed supplementary harms. Travis suggests that these sanctions are 'invisible' in a number of ways: that they are not part of the publicly announced 'headline' punishment; that because of this they are hard to measure, and hence do not tend to attract much attention from policy makers and reformers; that similarly, they tend to be ignored in the main discussions of sentencing policy; and that they tend to be introduced in ways that bypass the main legislative channels for criminal legislation. Yet these below-the-radar sanctions have significant effects on the chances of offenders returning to normal life after completing their headline sentence. In contrast to our first category, this is one of the things that might be meant by '*invisible'* punishment: a sanction that is intentionally imposed by the state as a way of causing a disability or harm in response to some criminal behaviour, which is in some way supplementary to the headline sentence and hence in some way hidden, yet which has a significant and lasting detrimental impact on an offender's life in society.

Thirdly, however, discussions of 'invisible punishment' sometimes point to harms that are not part of the directly and intentionally imposed punishment itself, but are rather a foreseeable effect that punishment has on individuals and their communities. We can call these *foreseeable collateral harms of punishment*. Amongst these harms might be the loss of employment and developmental opportunities suffered by offenders, as well as their subjection to stigmatisation or labelling. But these harms go beyond the offenders themselves. As Donald Braman says:

> 'The impact of incarceration on families ranges from lost income and help with child care to diminished relationships and social isolation. While these impacts are felt within the families of individual prisoners, the broader social impact of mass incarceration reverberates through communities and our society as a whole. When most families in a neighbourhood lose fathers to prison, the distortion of family structure affects relationship norms between men and women as well as between parents and children, reshaping family and community across generations. And, while families in poor neighbourhoods have traditionally been able to employ extended networks of kin and friends to weather hard times, incarceration strains these sustaining relationships, diminishing people's ability to survive material and emotional difficulties. As a result, incarceration is producing deep social transformations in the families and communities of prisoners – families and communities, it should be noted, that are disproportionately poor, urban, and African-American.'[5]

Rather than harms that are intentionally imposed as part of the punishment (albeit not part of the sentence that is publicly announced), the focus in this third category is on harms that are *foreseeable side-effects* of conviction and punishment. These harms can be thought of as 'invisible' in the sense that – unlike the harms directly imposed through sanctions – it is not official or publicly avowed policy to inflict them. Housing restrictions and voting bans may be

[5] D. Braman, 'Families and Incarceration,' in Mauer and Chesney-Lind (eds), *Invisible Punishment*, p. 117-118.

secretive in a number of ways; but when the state imposes such things it does so with the intention of making life harder for certain individuals as a response to their unlawful behaviour. With this third category, however, we are dealing with the wider reverberating effects of punishment that are not intended in this sense, however easily they may be foreseen. The fact that these harms are foreseen and yet allowed to come about rather than intentionally imposed does not make them any less serious to those who suffer them; the side-effects of criminal conviction – particular when someone is sentenced to imprisonment – can be deep and wide-ranging. And it may not necessarily lessen the responsibility of those who allow them that they did not inflict them intentionally. We cannot always wash our hands of the matter and walk away. Nevertheless, as my opening examples suggest, our responsibility to help pick up the pieces can vary with context, and in particular with the relation we stand in to those concerned. We need some account of the positive duties of respect and care that we have towards offenders to foresee and take steps to avoid, mitigate or ameliorate these harms.

3.

What I have suggested so far is that any critique of the wider social effects of criminal justice policies needs to be accompanied by some positive account of the responsibilities that societies have to their members, responsibilities which militate against adopting the attitude of the PhD examiner. Nevertheless, it is a striking fact about some of the most insightful contemporary criminological critiques of 'invisible punishment' that, while they make claims that have normative implications, they appear reluctant to do more than hint at their

underlying normative commitments. For instance, David Garland asks: 'How could offenders have been so thoroughly deprived of their citizenship status and the rights that typically accompany it?'[6] He provides a diagnosis of our current situation that explains how this state of affairs has become possible, indeed actual. But his diagnosis is clearly meant to have a normative bite. He writes:

> 'Today the interests of convicted offenders, insofar as they are considered at all, are viewed as fundamentally opposed to those of the public. If the choice is between subjecting offenders to greater restriction or else exposing the public to increased risk, today's common sense recommends the safe choice every time. In consequence, and without much discussion, the interests of the offender and even his or her legal rights, are routinely disregarded.'[7]

Now one implication of this passage is that the state of affairs Garland points to represents a failure to give offenders' interests and citizenship rights due consideration. It implies that decision-makers (whether that be specific policy makers, legislators, or the democratic public as a whole[8]) are failing in their responsibility to take offenders' interests into account and give them due weight. However, this raises some important questions: how should the interests of offenders be weighted against the interests of the public as a whole; what principles *should* we rely on to make decisions in this area, if not the ones

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[6] D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2011), p. 183.

[7] Garland, Culture of Control, p. 181.

[8] See for instance the claim that 'different choice might have been made, different policies pursued, and different outcomes made more likely' at Culture of Control p. 202 – to which the response might be, 'yes, but which ones?'

Garland is criticising; and in what overall picture of the relation between individual and state do our answers to these first two questions have their home? Many alternatives to the state of affairs Garland is criticising may have been possible, but which ones should we have chosen? Garland does not ignore these questions entirely, but he gives them only a fleeting glance, saying that we have 'allow[ed] ourselves to forget … that offenders are citizens too and their liberty interests are our liberty interests.'[9] These remarks risk coming across as preaching to the converted rather than a sustained argument that is self-aware about its own normative commitments.

It might be said that I am targeting Garland unfairly: either that his work is not representative of critiques of invisible punishment; or that it is his purpose simply to diagnose and explain rather than to make positive recommendations. It is certainly true that some authors in this debate are clearer about their value-base than Garland is.[10] And it is also true that Garland's enterprise of understanding the structural developments that have brought us to where we are now is an essential part of the task. To be clear, my aim is not to criticise Garland or belittle his achievement. However, what I would like to suggest is that the normatively-loaded critique that those like Garland are making in will be stronger if it also involves an explicit defence of its underlying commitments. If it contains some developed normative argument that is capable of engaging with and exposing the weaknesses of those who would defend the status quo it will

[9] Garland, *Culture of Control*, p. 184.
[10] Michael Pinard, 'Collateral consequences of criminal convictions: Confronting issues of race and dignity', *New York University Law Review* 85 (2010), pp. 457–534

have a full explanation of why the picture of offenders' rights embodied in current policies and institutions is so inadequate. After all, there are without doubt people who, unlike Garland, do think that the interests of offenders are at odds with – or at least can safely be sacrificed for – the interests of the public as a whole. A fully developed version of a critique like Garland's has to have something to say to such people that explains why they are wrong to think that offenders have forfeited their rights to due consideration. The present paper is meant as a contribution to that collective enterprise.

The task, then, is to spell out a convincing account of the positive responsibilities that societies have towards offenders. It will be helpful to start off by asking to what extent we have responsibilities to avoid or limit harms in our first category, *imposed harms announced in the sentence*, that is, those directly imposed by the headline sentence given to the offender. The answer to this depends on whether punishment can be justified. If it can't we should not simply be attempting to limit the harms this practice causes but abolishing it altogether. But if (in some circumstances at least) punishment *can* be justified then we have duties to ensure that the punishments that are imposed are proportionate and not excessive. Each of these purposes attributed to punishment will not only explain *why* those who commit criminal actions should be punished, but they will also give us a way of thinking about *how much* punishment would be justifiable. And here the thought is that punishment does not take place in a moral vacuum. Those who punish are not morally free to do anything they like to the offender. Rather punishment takes place against the background of other duties that we have to the offender, and which cannot all be seen as cancelled by the offence.

Punishment may be necessary, for instance, but it has to be carried out in a way that is respectful of the life of the person on whom it is imposed; and for this reason we have duties not to punish more severely than is necessary for those purposes to be fulfilled. In this way, each of these justifications give us a guide as to what a *proportionate* punishment might be for a particular offender and a particular offence: the minimal amount of harm necessary to achieve whatever goals that punishment serves.

The upshot of this is that if punishment can be justified then we do not have a responsibility always to avoid imposing harm. If it is important, for instance, that a society should set out some basic standards for how citizens should treat one another, and mark violations of those standards with a sanction that expresses that no one should have been treated in that way, then we have a responsibility to *cause* the harms of that sanction rather than to avoid them altogether. However, even if some such justification is plausible, it will only cover the imposition of harms that are proportionate rather than excessive. Because we have responsibilities not to harm the offender unnecessarily, we have no mandate to punish beyond what is necessary for whatever purpose it is that might justify punishment in the first place. If punishment is justified, then, those who are charged with imposing it (that is those who design sentencing policy and who implement it) do not have a free hand. Rather they have duties to the offenders they are dealing with: to carry out their roles conscientiously, and impose nothing more harmful than they are entitled to. This gives us a first way in which societies have responsibilities to limit the harms they cause to

offenders: we have a responsibility not to impose harms as part of the sentence that are excessive given the justified purposes of punishment.

What we have said about *imposed harms announced in the sentence* also gives us one reason why *imposed supplementary harms* have attracted so much criticism.[11] Whether 'criminal' or 'civil,' the harms of this second category are straightforwardly like punishments in the sense that they are directly and intentionally imposed with the intention of making life harder for the offender because of their offence. Yet these officially-imposed restrictions on accessing public services, or participating in public office, or voting in elections, are ways in which the harms intentionally imposed in punishment can extend beyond anything that might reasonably be considered proportional to the offence. As Travis puts it, the problem is that 'punishment for the original offense is not enough; one's debt to society is never paid.'[12] The fact that these punishments occur away from the public gaze may mean that their excess does not cause any significant public outcry – at least not amongst those sections of the public whose voices tend to be heard. But, as with any punishment that is disproportionate, the problem here is that those who are charged with imposing the punishments are not carrying out the role allotted to them: they have allowed sanctions to expand disproportionately. They are therefore violating duties to limit harm to offenders, and acting as though they had a morally free hand. Thus one way to interpret criticism of collateral consequences of punishment is to see it as a complaint about the disproportionality of the total

[11] For a philosophical examination of possible justifications of such sanctions, see Z. Hoskins, 'Ex-Offender Restrictions,' *Journal of Applied Philosophy* 31 (2014), pp. 33-48
[12] J. Travis, 'Invisible Punishment', p. 19.

sanction imposed on offenders, when all the hidden restrictions and deprivations are added in to the sum.

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Concerns about whether sanctions are excessive, however, are only part, and perhaps not the main part, of the problem identified by critics of 'invisible punishment.' As I have said, concerns about the excessive nature of sanctions focus on whether those charged with designing and implementing punishments proportionate to their purpose are carrying out their roles properly. However, another ground for criticism is the thought that responsibilities to the offender do not simply end with the conscientious carrying out of proportionate punishment. As with the analogous cases of the supervisor and the examiner with which I started, it would be a failure in the way society administers punishment if it were simply to impose it and walk away: it would be a denial of the kind of relationship that obtains between the one making the criticism and the one receiving it. Rather, this criticism goes, there are positive duties of respect and care that societies have to offenders, and which explain why it is wrong to simply treat it as the responsibility of offenders (and their dependents and communities) to deal by themselves with the consequences of their conviction.

As I have said, I am interested in taking this idea of a special relationship seriously, and below we will look at the way that this might be developed by thinking about the relationship citizens have with one another in a democracy. However, before we get on to that I would like to look briefly at two other ways

of thinking about such positive duties, which do not involve any special relationship that obtains with the offender, but are rather grounded in a universal human relationship. This is to see our responsibilities to offender, for instance, as humanitarian duties to those in urgent need; or as duties arising from human rights.

Humanitarian duties are duties that a) any moral agent has towards any human being, independently of any particular relationship we are or are not in with them, and b) are based on urgent welfare needs. These might be thought of as duties to be a Good (or at least Minimally Decent) Samaritan, and to come to the aid of those who are in desperate need, especially when it will not cost one very much to do so. Important examples of such duties would be Peter Singer's famous case of coming across a child drowning in a pond – regardless of any particular tie or special relationship one has to the child – even imagining that one had no such tie – it would be grossly wrong not to save the child if one were the only passer-by who could do so.[13] This view would say that the reason we should not allow offenders to suffer certain forms of punishment or certain side-effects of punishment is that we have duties to offenders – as we would have towards anyone – to come to their aid of when they are in an emergency situation suffering from basic forms of deprivation, need or harm. One way of seeing this type of duty is as stemming from the compassion that a decent person would feel in the face of suffering.

[13] P. Singer, 'Famine. Affluence and Morality,' *Philosophy and Public Affairs* 1 (1972), pp. 229-243.

Human rights, I will take it, are rights that individuals have simply by virtue of their humanity. These rights, I will assume, include rights not to be subjected to certain forms of treatment, such as killing, torture and enslavement, but also rights to be provided with certain goods, such as a certain level of subsistence, or an education; I will also assume that these human rights can require the existence of certain kinds of political institutions, such as democratic processes to satisfy rights to free and fair elections, or the rule of law to satisfy rights against discrimination, or a centralised police force to satisfy the right to the protection of property. Framing the issue in terms of human rights can be an appealing way for critics of invisible punishment to make their case because these rights are, it is thought, universal and non-negotiable. Human rights standards are a widely accepted measure of adequacy for states, which means that there is an important rhetorical force in being able to show that states are in breach. As regards invisible punishment, critics might, for instance, pursue the argument that such punishments violate rights against discrimination, rights to fair trial, rights to liberty, rights to basic levels of subsistence and so on. Or they might argue that there are socio-economic human rights – often missing from canonical statements of human rights such as the European Convention – such as rights to a decent basic standard of living.[14] Offenders, their dependents and their communities, it might be argued, have a human right to a decent living that is threatened by policies of mass incarceration, or by life-bans on access to basic public welfare services. Where there are rights there are duties: duties on others to avoid the prohibited forms of treatment, or by provide the goods in question. The duties arising from human rights are sometimes said to be owed by any

[14] C. Fabre, *Social Rights Under the Constitution* (Oxford: Oxford University Press, 2000), Ch. 1.

morally competent human being has towards any other human being, simply in virtue of their humanity. However, some human rights could only be satisfied by organisations such as states.

I would argue that some supplementary or collateral harms of punishment can indeed be seen as violating basic humanitarian duties, or as violating human rights. In addition to the points we have already mentioned, the withdrawal of state support may push individuals into extremes of need that violate their human rights; the refusal to rescue them from that plight may breach duties of humanity. Or status as an offender may prevent them, either formally or informally, from seeking the protection of law when others threaten their human rights. Furthermore, the fact that some of these ways in which offenders are treated breach human rights standards, or violate humanitarian duties, are ways of rebutting the charge that, in committing their crimes, offenders have thereby lost the right to the respect and care that we are talking about. Plausibly there are human rights that are inalienable, that is, that one can never lose, such as the right not to be tortured or enslaved; although punishment takes away liberty, offenders are recognised as having other human rights that remain in force and need to be respected.

Looking to basic duties of humanity or human rights are therefore important ways to locate the normative basis of some problems with 'invisible punishments' or 'collateral consequences.' Nevertheless, I will argue that some of the duties that states have towards offenders, and which are violated by the 'invisible punishments' that we have been looking at, are not best accounted for by human

rights or humanitarian duties. Human rights and humanitarian duties are duties that are universal and owed by any human being to any human being. But while we have these basic duties to all human beings, we have richer sets of duties to those with whom we are in particular kinds of relationships. For instance, as a person's PhD supervisor or examiner I owe them a particular kind of treatment and consideration that I do not owe to all others. By analogy, I will suggest, offenders who come within the jurisdiction of our criminal justice system are owed treatment that goes beyond merely fulfilling their basic human rights.

Thus some of our duties to offenders, I will argue, are associative duties.[15] Associative duties are duties that we owe to particular people by virtue of the fact that we are in some relationship, group or association with them – e.g. friendship, family, collegiality, citizenship.[16] Associative duties are not owed by all humans to all humans; rather they are owed by particular individuals to other particular individuals as members of relationships or associations of which they are co-members. The *scope* of the duties – that is, who they are owed to – is therefore limited and determined by membership of the relationship in question. This is not a strange idea: for instance, when I make a promise or enter a contract I do not thereby have duties to all of humanity; rather I have created a

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[15] M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1984), Ch. 2-3; R. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986); J. Horton, 'In Defence of Associative Political Obligations: Part One,' *Political Studies* 54 (2006), pp. 427-443, and 'In Defence of Associative Political Obligations: Part Two,' *Political Studies* 55 (2007), pp. 1-19; J. Seglow, *Defending Associative Duties* (Abingdon: Routledge, 2013). For criticism of the idea, see A. J. Simmons, 'Associative Political Obligations,' *Ethics* 106 (1996), pp. 247-273. For a recent survey and assessment, see B. van der Vossen, 'Associative Political Obligations,' *Philosophy Compass* 6 (2011), pp. 477-487, and 'Associative Political Obligations: Their Potential,' *Philosophy Compass* 6 (2011), 488-496.

[16] Cf. the discussion of political community and its responsibilities in R. A. Duff, *Punishment, Crime and Community* (Oxford: Oxford University Press, 2001), Ch. 3.

new duty that I owe only to the parties of the contract. Nevertheless, the other important distinguishing feature of associative duties is that they are unlike contractual or other duties that arise from some voluntary transaction (like saying 'I promise,' or signing one's name) through which one consciously undertakes those duties. Rather associative duties are duties that arise because of one's social position in a relationship, where that relationship may but need not be one that one has entered voluntarily. Since not all relationships give rise to duties (think of the relationship to an abusive partner) the *basis* of the duties, that is, the reason why the duties exist, is that the relationship is in some way a valuable one. An example of associative duties might be duties that one has towards one's parents: one did not choose for them to be one's parents, or indeed to have parents at all, but it may be that one owes something to one's parents that goes beyond what one owes to others, simply because they are one's parents. Because these duties are not universal, the *content* of the duties is determined, not by universal human interests, but by the nature of the relationship itself. For instance, the duties that teachers owe to their students by virtue of relationship they share, derive from the nature and overall point of that activity they are jointly engaged in and the goods that arise from it.

What kinds of associative duties arise from membership of a valuable relationship? First of all, there are directed duties to *mark* or *acknowledge* the special tie that exists between members in one's interactions: one can wrong a person by failing to treat them as a friend, or as a colleague, or as a fellow citizen, where this means failing to mark them as such in one's dealings with them. What these duties require depends very much on context and the nature of the

relationship. Secondly, there are directed duties of concern regarding the well-being of other members in their role as participants in that relationship. 'Well-being' here means something like the ability to enjoy the goods internal to the relationship. Thus I have a particular concern, as a teacher, for my students' ability to engage with the course; only if I become more a friend than a teacher do I have a non-derivative concern with their welfare more generally. Thirdly, there are non-directed duties that have to do with maintaining the fabric of the relationship and its continued existence, for instance, the material conditions or levels of trust and shared belief that make the relationship possible, and which are not owed to particular individuals. If democracy is an inherently valuable relationship that relies in part on the possibility of trust, hope and even faith in one's fellow citizens, for instance, then there may be duties to promote and not unreasonably to damage the possibility of such attitudes.

The valuable relationship status that grounds associative duties in the political realm is most obviously thought of as that of *citizenship*.[17] Citizenship status involves, not merely being a subject of an authority, but participating in that authority; not merely being a recipient of the benefits of membership in the political community, but in some sense having responsibility for the care and sustenance of that community. Participating in an enterprise in which a group of people govern themselves – that is, take full responsibility for the direction care and upkeep of the community – while competently providing the goods of social union is a valuable thing to spend part of one's life on. So having those

[17] *The locus classicus of this approach is T. H. Marshall, 'Citizenship and Social Class,' in Citizenship and Social Class and Other Essays (Cambridge: Cambridge University Press, 1950), pp. 1-85*.

responsibilities means being in a valuable relationship with the others who are also entrusted with care of the community, and that brings with it special political, civic and social rights. My thought is therefore that shared citizenship – shared responsibilities to care for the political realm – represents a valuable relationship, and that duties to mark and respect that relationship can and should go beyond human rights standards. The overall picture of the normative-political realm that I am suggesting is hence that states have humanitarian and human rights-based duties towards all persons within its compass (offenders and non-offenders alike) and that, in addition, it can have particular duties towards citizens (or at least towards those who are full members of the political community, however that is to be defined) by virtue of the fact that citizens participate in a valuable relationship with one another and with the state.

5.

How does the idea of associative duties apply to collateral harms and invisible punishments? A starting point is to argue that invisible punishment can cause what we can call the Inclusion Problem:

> Some collateral consequences of conviction contribute to social exclusion and make it disproportionately harder for those who have been convicted (and their dependents and communities) to enjoy the benefits of social membership.

The Inclusion Problem is based on the idea that life for an individual person must almost always be lived in the context of a society; and that this is normally

a blessing rather than a curse, since societies can provide myriad benefits and opportunities that would have been unavailable outside of society. Therefore social membership is an inevitability, but not normally to be regretted. Yet punishment regimes can play a significant role in denying individuals the benefits of social membership that they are due. In order to spell out the benefits that individuals are due by virtue of social membership, we need to turn to that which a theory of social justice would claim is owed to *any* member of society.[18] These might include responsibilities on the state to:

1. Provide opportunities for sound housing
2. Provide social security against poverty and its associated ills
3. Provide basic standards of healthcare
4. Provide opportunities for meaningful productive, economically enriching work
5. Provide opportunities to live in a diverse and productive local community
6. Provide opportunities for voting and other forms of democratic participation
7. Provide what John Rawls calls 'the social bases of self-respect'[19]

These responsibilities can be thought of as responsibilities to ensure that offenders share in the benefits of social cooperation that accrue in their society, and do not suffer from forms of social exclusion that mean they are barred from enjoying these benefits and opportunities.

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[18] For a good representative discussion, see Fabre, *Social Rights*, Ch. 1.

[19] J. Rawls, *A Theory of Justice* (Cambridge MA: Harvard University Press, 1971).

However, questions about including offenders in the fair distribution of the benefits of social cooperation are not the only ways in which associative duties might make a difference to our understanding of the normative situation. These problems take on a further dimension, I will argue, in democratic societies, or societies that aspire to be democratic. It is part of the creed of democracy that it is a self-governing form of society. This involves the idea that citizens are not simply subjects of a dominating executive power, and neither are they mere passive consumers of public services. Rather, the idea is that they participate, actively and on equal terms with others, in the government of their state and in the major decisions about its direction. This ideal of participation on terms of equality is not simply about the right to an equal say, a right which is exercised once every few years in elections. Rather it is a matter of having an equal social standing in concrete and repeated social interactions: for democratic equality to be meaningful it must be part of the lived reality of social relations.

To see this, we can follow Elizabeth Anderson in distinguishing three ways of thinking about democracy: first as a membership organization; secondly, as a mode of governance; and thirdly as a way of life.[20] That is to say, democracy might be thought of first of all as a certain group who are organized politically and have a certain kind of sovereignty; secondly, as a way in which that group is governed – that is, by democratic procedures, whatever those are taken to be; and thirdly, as a certain kind of culture and ethos which consists, as Anderson

[20] E. Anderson, *The Imperative of Integration* (Princeton: Princeton University Press, 2010). See also E. Anderson, 'Democracy: Instrumental vs. Non-Instrumental Value,' in T. Christiano and J. Christman (eds), *Contemporary Debates in Political Philosophy* (Oxford: Blackwell, 2009), pp. 213-227.

herself puts it, in the 'freewheeling cooperative interactions of citizens from all walks of life on terms of equality in civil society.'[21] These different ways of thinking about democracy can be distinguished, but they should nevertheless be thought of as three different perspectives on a single working entity, where the idea of democracy as a way of life is central. Democratic decision-making procedures will not work – will not be accepted or implemented or treated as binding – unless they take place against the background of a culture that sees those procedures as a meaningful political expression of the underlying culture and ethos of their way of relating to their fellow citizens.

The key value of democracy is that individuals live on terms of equality. That is, they are able to participate in political society – a society that produces goods such as security and welfare, and allows for the development of all manner of practices and activities that extend forms of human flourishing – on what can meaningfully be called an equal basis. One aspect of this is that we participate in the government of this society on an equal basis, not simply voting but by questioning, arguing, deliberating in the debates that precede any vote, where we are treated as having as much a right to anyone else to work out what we think. But it also involves being given a certain kind of equal authority or recognition in social interactions: we are not dependent on the goodwill of others, but have an independent equal standing.

In this way we can see membership in a shared democratic way of life as giving us associative duties to our fellow members. These include duties to ensure they

[21] Anderson, 'Democracy,' p. 214.

can participate in formal procedures of governance, but also duties to include them in deliberative procedures, and most fundamentally, to give them equal standing in our interactions with them. We owe it to our fellows to treat them as agents with whom we are engaged in working out how our democracy should go forward. That is an important project, dealing with the issues that any political society faces, and trying to do so in a way that maintains or works towards conditions of equality. It gives us a special tie to those with whom we must try to make this work, and with whom we must continue the conversation. This goes beyond human rights, even though human rights are also rooted in an ideal of equality. Whereas human rights is rooted in some notion of fundamental human interests, or fundamental dignity, that we all share, the equality of democracy is participation on equal terms in a certain kind of cooperative relationship. In a similar way, one might aspire to equality in one's relationship with a life-partner: this would of course go beyond simply recognizing their human rights to include the way one sees and treats them as sharing responsibility with you for organizing your life together.

If we accept this ideal of democracy (in some form), punishment regimes face a further version of the Inclusion Problem. For democracy's ideal of equality means that a society that aspires to be democratic cannot tolerate the idea of a semi-permanent body of second-class citizens. Second-class citizens would be mere subjects of state power and/or mere consumers of state services; they would not be equal partners in the enterprise of self-government. Thus the ideal of equality pushes towards inclusion. A society cannot claim to be democratic and yet put its citizens in a position in which they are denied the basis of equal

standing. Yet the ability to stand as an equal in social interaction is threatened by the collateral harms of conviction that we have been looking at in a number of ways. As Elizabeth Anderson has written, supplementary sanctions – which offenders often have to carry with them for life – can have the effect of denying a large class of citizens the basic protections of the rule of law, and hence of relegating them to the status of 'outlaws.'[22] She argues that this expresses and reinforces an attitude according to which there is a neat and relatively permanent division of citizens into the criminal and the non-criminal. Being a member of the criminal class, or having a criminal status, comes to be thought of as a permanent designation according to which one is not owed the basic concern and benefits owed to other citizens. Furthermore, as we have seen, officially 'deserved' and 'proportionate' punishments are often accompanied by further hidden burdens that can undermine the official position that offenders are being treated as free and equal participants in a democracy. Consequences of conviction – such as reduced employment possibilities, restrictions on voting rights and political participation, restrictions on the use of public services, housing and benefits, as well as effects on one's family life, work prospects, and the lives of one's dependents – can undermine the offender's status as a citizen. Since this status must be more than merely formal but must enter into the lived reality of social interaction; and since, in order to enter into lived reality, it must have some material basis that provides citizens with certain really-existing capabilities; a society cannot on the one hand claim to be democratic and on the other hand deny its citizens what they need to be independent and active participants. As Uggen, Manza and Thompson say:

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[22] E. Anderson, 'Outlaws,' *The Good Society* 23 (2014), pp. 103-113.

> 'The citizenship status and social position of felons raise important questions about the meaning and practice of democracy. The barriers to full polity membership faced by convicted felons are substantial and wide ranging, although they are usually ignored in public debates. A dizzying array of informal barriers also impedes the performance of citizenship duties, in particular those related to employment, education, and re-establishing family and community ties … [T]he civil penalties imposed with a criminal conviction effectively deny felons the full *rights* of citizenship. This denial, in turn, makes performing the *duties* of citizenship difficult.'[23]

Thus democracies face a distinct form of the Inclusion Problem. It is crucial that this version of the Inclusion Problem is not simply about being able to participate in the formal duties of citizenship as a mode of governance. It is also about one's place in the democratic way of life. We can call this the Democratic Inclusion Problem:

> Some collateral consequences of conviction make it significantly less likely, both that citizens can benefit from social membership, and that they can actively play their role in a democratic polity, participating as equals in a wide range of social interactions.

[23] C. Uggen, J. Manza and M. Thompson, 'Citizenship, Democracy and the Civic Reintegration of Criminal Offenders,' *Annals of the American Academy of Political and Social Science* vol. 605 (2006), pp. 281-310, at p. 283.

The Democratic Inclusion Problem rests on a view in which members of democracies have associative duties to one another. These are duties to treat one another as equals in the organisation of political life, and in the sustaining and developing of the democratic way of life. It is to see them and treat them as agents to whom one is bound in cooperative relations.

6.

I have argued that the duties that we have looked at in this section of the paper a) are genuine duties, and b) go beyond humanitarian duties or human rights. This certainly seems true for humanitarian duties, which are minimal duties to rescue people from desperate circumstances: they are addressed to basic needs and are often thought of as temporary rather than permanent commitments (once the emergency has been addressed, the duty is fulfilled and cancelled). What of human rights – how much do human rights standards demand? This is a much-debated issue in political philosophy at the moment, with proponents of 'basic rights' holding that human rights standards are fairly minimal,[24] while those who argue that human rights are rights to a 'decent' standard of living claim that there are more ambitious positive human rights of meaningful choice and access to valuable activities.[25] If human rights are merely basic rights then it seems clear that our duties to offenders go well beyond duties to meet their human rights. However, it might be argued that the basic rights approach is inadequate, and that recognising the equal value of human beings means recognising that each person has an equal right to a substantively decent life.

[24] H. Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton NJ: Princeton University Press, 1980).
[25] See Fabre, *Social Rights*.

Resolving this debate is beyond the scope of this paper, of course, but it is worth noting that the proponents of the more ambitious approach to human rights might argue that all of society's duties to offenders can in fact be accounted for by suitably ambitious human rights standards, without the need to appeal to associative duties. For this argument to work, it would have to be shown that all the rights of offenders can be explained in terms of more basic human rights standards. By contrast, the suggestion of this paper is that we get a richer and more generous account of the rights of offenders if we see them as fellow citizens to whom we have particular demanding duties as fellow members of a valuable association, and that such an approach is attractive and plausible.

My argument has proceeded at a fairly abstract level. However, one way to illustrate the benefits of the associative view in more practical terms is to look at some of the claims made by Lerman and Weaver in their book, *Arresting Citizenship*.[26] The argument of the book is complex, but in part it involves the claim that patterns of interaction with criminal justice officials such as stop-and-search (which the authors call 'custodial citizenship') should be seen as the infliction of indignities, particularly when they are repeated and racially motivated; and that repeated subjection to such indignities can undermine the democratic fabric through the way in which they contribute to shaping the attitudes of those affected towards the public power in at least two ways. First of all, they undermine the sense that criminal justice officials are responsive and accountable to those whom they are stopping; and secondly, they undermine the

[26] A. E. Lerman and V. Weaver, *Arresting Citizenship: The Democratic Consequences of American Crime Control* (London: University of Chicago Press, 2014).

sense that the public power is in some sense under the control of citizens – that these citizens in particular might have a voice that could be brought to bear on the affairs of their polity. I believe that Lerman and Weaver's normative claims can neatly be analysed in terms of the schema of associative duties that I sketched earlier, and that they therefore give some evidence in favour of the associative view. For instance, the associative view can explain why repeated subjection to stop-and-search should be regarded as an indignity. It is an indignity because it is incompatible with recognition as a member of the valuable collective enterprise of democracy. To be recognised as a member of that valuable enterprise is in part to be afforded a degree of *trust*, trust in one's competence and willingness to play one's part in upholding and sustaining that enterprise. Yet to be continually and disrespectfully stopped and searched is to be distrusted in a way that expresses and communicates a view of oneself as second-class rather than as a full citizen whose status it is to help uphold the enterprise. Furthermore, according to my sketch, associative duties also comprise duties to promote the well-being of fellow participants in ways that connect with their participation in the shared enterprise. For instance, if the associative duties view were correct one would expect there to be duties to ensure that fellow citizens are given opportunities to develop the capacities to be full citizens, and given opportunities to exercise those capacities. It is a sign that we take there to be such associative duties that we are outraged by the fact that patterns of stop-and-search stymie such capacities. Finally, we could also observe that the actions of criminal justice officials reported by Lerman and Weaver seem to violate a basic democratic associative duty: treating citizens as people to whom one is, as a public official, accountable and responsive. Rather

than being treated as full citizens, those subject to 'custodial citizenship' regimes are made to feel as though they are the enemy against whom citizens are to be protected. This brief discussion of the expressive power of stop-and-search shows that in various ways there can be a practical and explanatory pay-off to the appeal to associative duties.

7.

Finally let me turn to an objection to the associative account of duties towards offenders. I have been exploring the idea that duties a) not to impose certain sorts of supplements to punishment, and b) to protect offenders from certain bad consequences of offending both derive from the identity of offenders as our fellow citizens. This, the objection proceeds, is all very well for those offenders who are citizens. However, what of offenders who do not have citizenship, who are illegal immigrants, or visitors? The implication of my argument seems to be that these offenders are not due the same consideration: we do not have the same duties towards offenders who are non-citizens as towards those who are. For instance, in Norway – where the famously liberal criminal justice system operates a 'normality' rule according to which those imprisoned lose rights to liberty but retain as far as possible all other civil rights – benefits such as conjugal visits can be granted to offenders who are Norwegian citizens that are not granted to non-citizens. Is that unacceptable? Now this objection is perfectly correct to point out that it is a premiss of the argument of this paper that, if democratic citizenship matters as something valuable we have in common, it should make a difference to the way we treat one another. Hence it follows that those with whom we are building a democracy can legitimately have a privileged

place of some sort in our deliberations and policies. However, there are at least three ways to deflect concern about this conclusion. The first is that, while the argument implies the need for some differential treatment of co-citizens, we have not yet specified what that treatment should be. We have special duties to co-citizens to mark the tie between us, to uphold their capacity to participate in the relationship we share, and non-directed duties to care for the fabric of the relationship. Whether that issues in a potentially troubling and discriminatory 'duty' to favour co-citizens depends on which forms of treatment are plausibly necessary to do justice to the special tie. At the very least, that depends on a further elaboration of the position set out here. Secondly, the position defended here is not the 'cosa nostra' idea that one owes nothing to those outside the relationship: rather, we should recognise a range of general duties that we would have towards non-citizen offenders. Therefore even if we have no associative duties to non-citizen offenders, we would still have humanitarian duties, duties to respect human rights, and so on. Thirdly, even if there are no direct associative duties towards non-citizen offenders, there may still be good reasons not to treat them differently from citizen offenders; and some of those reasons may be associative reasons to do with the character and health of the democratic fabric. True, it might be said, there is no duty to extend the benefits of citizenship to non-citizens in our criminal justice system. Nevertheless, a polity that works too hard to divide non-citizens from citizens, and that flaunts benefits that it grants to citizens while depriving non-citizens of them, is not a tolerant, welcoming and inclusive democracy, and risks breeding justified resentment of its practices. Even if, as I have argued here, the basis of some central duties to

offenders is associative, there may nevertheless be strong reasons to model the treatment of non-citizen offenders closely on that of citizen offenders.

8.

In this paper I have argued that those who are concerned about the wider social effects of criminal justice regimes should do more to consider and spell out the normative basis of their position. In doing so, they will better able to address the attitudes of their opponents, and engage those who see no problem with they ways things currently operate. I provided two analogous cases, the PhD examiner and the supervisor, and suggested that we need to show that criminal justice should be conceived more along the lines of the latter than the former. To make that argument, I have claimed that we need to show that we are in a relationship to offenders such that we have responsibilities to help them deal with the aftermath of conviction, just as the supervisor has responsibilities to help a student deal with the aftermath of justified criticism. One way to do so – the way that in this paper I have recommended – is to take the idea of a special relationship at face value, and to look to the responsibilities one has within one's role in that relationship. On this approach, the responsibilities we have towards offenders are in part associative duties. This is not to deny that there are also such duties as humanitarian and human rights-based duties, which we have a duty to apply to our dealings with all human beings; but it is to insist that political community brings with it duties to recognise others as citizens that go beyond those human-wide standards. Citizenship, I claimed, can be seen as a shared relationship in which one interacts in an open and 'freewheeling' way with one's fellows on equal terms, both in dealings specific to matters of

governance, but also in the way in which one appears and acts in civil society. Taking the associative-citizenship approach, I have suggested, can help us in our attempts to argue that interactions with the criminal justice system (from imprisonment to collateral consequences to stop-and-search) violate basic democratic values.[27]

[27] ACKNOWLEDGEMENTS