Lisa Coleen Kerr*

HOW THE PRISON IS A BLACK BOX IN PUNISHMENT THEORY†

The field of punishment theory promises to deal with the question of whether state punishment can be justified and on what grounds. In this field, punishment is rarely conceptualized as imprisonment. Even in the more practical subfield of sentencing theory, the realities of prison conditions rarely appear. Legal actors borrow the vocabulary of punishment and sentencing theory, proceeding as if theories speak to and justify the practice of imposing custodial sanctions and imprisonment generally. This article tries to explain how the fields of punishment and sentencing theory largely avoid the prison. The question, in a sense, is how a field can evade what is ostensibly its own subject matter. What this critique means is that sentencing authorities and other legal actors should turn away from punishment theory – or should look well beyond its boundaries – when they are thinking through the legitimacy and severity of the custodial sanctions they are imposing and administering.

Keywords: criminal law, criminology, prison law, punishment theory, sentencing, sentencing theory, sociology of punishment

> I had come to think of Iraq as a kind of black box. Not the black box engineers analyze after a plane crash to determine how the disaster occurred – though such a device would have some metaphoric relevance to Iraq – but rather the black box engineers speak of in describing a mechanism with a known function and an unknown method. The pig goes in one end, the sausage comes out the other, and what goes on in between is no one's business
>
> – Luke Mitchell, 'The Black Box: Inside Iraq's Oil Machine'

The field of punishment theory is concerned with the moral claims or social goals that might justify the state's power to punish. In today's criminal justice system, particularly when it comes to serious offences, the power to punish means the power to incarcerate. Yet the prison is not much of a topic in the punishment theory literature. Even where theories clearly depend on a particular institutional capacity – like the delivery of a penalty that is proportionate to wrongdoing or one that communicates censure to a moral agent – that capacity is presumed or stipulated rather than investigated.

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Punishment theory generally neglects the topic of prison conditions and administration,[1] how imprisonment can affect individuals in vastly different ways,[2] and the fact that prisons vary a great deal from one another.[3] Even consequentialist theories, which are thought to be forward-looking and concerned with the outcomes of punishment, rarely focus on topics like variation across and within custodial models or the experience and effects of incarceration. Theorists of all stripes do not address the legitimacy or proper quantum of state punishment in light of the known features and limitations of actual prisons and jails. Neglect of the qualitative aspects of imprisonment also appears in the more applied subfield of sentencing theory.

The prison is largely a black box in the fields of punishment and sentencing theory.[4] Functions are presumed, but the internal workings are unknown. Theorists attempt to justify inputs into the box, and they advance claims about whether its various putative functions might be legitimate. They limit their attention to the political conditions or moral claims that might justify the imposition or announcement of a state sanction, but not its administration. Theorists ask when the box can be used, on what grounds, and

1 On the range of moral, emotional and policy climates that can appear in contemporary prisons, See e.g. Alison Liebling, *Prisons and Their Moral Performance: A Study of Values, Quality, and Prison Life* (Oxford: Oxford University Press, 2005); Ben Crewe, *The Prisoner Society: Power, Adaptation and Social Life in an English Prison* (Oxford: Oxford University Press, 2009).

2 On the impact and experience of imprisonment, See e.g. Ben Crewe, 'Inside the Belly of the Beast: Understanding and Conceptualising the Experience of Imprisonment' (2015) 4:1 International Journal for Crime, Justice and Social Democracy 50; see also Lori Sexton for an approach that 'allows punishment to be examined *in situ* rather than in its ideal, articulate or abstract form.' Lori Sexton, 'Penal Subjectivities: Developing a Theoretical Framework for Penal Consciousness' (2015) 17:1 Punishment and Society 114 at 131. On the impact of imprisonment on vulnerable groups, See e.g. Ben Crewe et al, 'The Gendered Pains of Life Imprisonment' (2017) 57 British Journal of Criminology 1359.

3 In a landmark study by Jeremy Travis, Bruce Western & Steven Redburn, eds, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, National Academies of Science (Washington, DC: National Research Council, 2014) [Travis, Western & Redburn, *Growth of Incarceration*], the authors emphasize that prisons 'vary widely in how they are structured and how they operate.' Further, 'as prisons vary significantly, so, too, do their normative conditions and their consequences for those who live and work within them' (at 157–9).

4 Of course, imprisonment is only one form of state sanction. It may well be that fines, probation, community service, restitution, and home confinement are also under-theorized in the same way. This article focuses on imprisonment, partly because it is considered the most serious sanction and partly because institutional confinement – the carrying out of an entire life inside a locked facility – raises the most obvious and difficult questions of qualitative variation in the delivery and experience of punishment. As one US court put it, the prison is a complex of physical arrangements and measures, 'all wholly governmental, all wholly performed by agents of government' which determine the existence of human beings 'from sundown to sundown, sleeping, waking, speaking, silent, working, playing, viewing, eating, voiding, reading, alone, with others.' *Morales v Schmidt*, 340 F Supp 544 at 550 (WD Wis 1972).

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for how long, but its inner workings and methods remain unexamined and untheorized.[5]

The problem is that, despite the limited ground that punishment theory covers, these theories are put to wide use. The theoretical purposes of punishment figure in policy debates and sentencing legislation,[6] are used by judges at sentencing and appellate review of sentences,[7] and inform the adjudication of the constitutional rights of prisoners.[8] In sum, punishment theories 'furnish vocabularies and concepts that determine how we talk to each other about what the law should be.'[9] Punishment and sentencing theory influence legal argument and judicial reasoning, shape legislative categories, and provide metrics by which legal outcomes are assessed and law reform projects are advanced.

These fields also wield significant authority in legal education, which regularly expounds to students the main theories of punishment. Every criminal law or sentencing casebook contains a chapter that discusses the aims or purposes of punishment. Readers are left with the impression that these theoretical aims roughly organize, describe, and justify the system of imprisonment that we have. Students emerge from law school confident that these purposes govern the sentencing portion of a criminal case and the punishment to follow. Yet prisons are scarcely mentioned in these chapters, let alone described in a way that could shed much light on the legitimacy of the system we have, its latent as well as formal functions, or the regulatory problems it generates and leaves unresolved.

5 One notable exception is Richard Lippke, who tries to combine normative thinking on punishment with empirical work on the character of imprisonment. Richard Lippke, *Rethinking Imprisonment* (Oxford: Oxford University Press, 2007) [Lippke, *Rethinking Imprisonment*]. The novelty of Lippke's approach, which I address more fully later, underscores many of the claims made in this article about the field in general.

6 US federal judges can pick from a variety of aims of punishment when they impose sentences, including crime prevention, rehabilitation, imposing just punishment, and promoting respect for the law. *Imposition of a Sentence,* 18 USC § 3553(a). Canadian legislation similarly tells sentencing judges to pick from the standard, hybrid list of purposes. See *Criminal Code*, RSC 1985, c C-46, s 718.

7 In *Ewing v California*, 538 US 11 (2003), the Supreme Court upheld a twenty-five-year-to-life sentence for the theft of golf clubs, imposed pursuant to California's three-strikes legislation, reasoning that punishment is not excessive so long as it can be justified under one of the traditional justifications for punishment: incapacitation, deterrence, retribution, or rehabilitation. In *Graham v Florida*, 130 S Ct (2011), the Supreme Court struck down life imprisonment without parole for juveniles, reasoning that an inadequate theory of punishment can render a sanction unconstitutional.

8 In *Sauvé v Canada (Chief Electoral Officer)*, [1996] 1 FC 857 at 866, 132 DLR (4th) 136, rev'd 2002 SCC 68, [2002] 3 SCR 519, punishment philosopher Jean Hampton testified at trial, arguing that the loss of voting rights for those convicted of federal offences accords with an expressive theory of retribution.

9 Dan Kahan, 'The Secret Ambition of Deterrence' (1999) 113 Harvard L Rev 413 at 419. Kahan's specific claim is that arguments that appeal to the aim of deterrence have a particular function: they serve to displace and abstract from pervasive, but more socially unacceptable, expressive judgments. In other words, citizens defend punishment in the name of deterrence, which allows them to avoid a more contentious expressive idiom that actually drives punishment but is contrary to social norms, strategic calculation, and liberal morality.

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Most significantly, lawyers and judges at sentencing – partly because they draw from, and are informed by, the vocabulary and methods of punishment and sentencing theory – ask only how long imprisonment should last. Theorists signal to legal actors that questions of prison quality and prison administration are technological or administrative issues, not relevant to the task of ensuring a fit sanction. Public debates about sentencing focus on length, and in all but exceptional cases, sentencing courts across North America do not consider concerns about the administration or quality of the prison system at the time they impose custodial sanctions. Legal actors ground arguments and reasoning in the language furnished by these fields, but without asking what concepts like rehabilitation, denunciation, proportionality, or just deserts amount to in the institutional realm of sentence administration.

A call to reduce unwarranted disparities in sentencing has motivated several decades of intense law reform in the United States and, to a lesser extent, in Canada.[10] Sentencing scholars, not to mention politicians, all agree: '[W]hen offenders appear to have been unfairly singled out' in the punishment they receive – whether in the direction of leniency or severity – 'respect for the law and law enforcement suffers.'[11] Despite widespread and enthusiastic agreement on the need for proportionality and uniformity across cases, punishment and sentencing theorists have been largely silent on the extraordinary disparities generated by prison conditions.[12]

Identifying the legitimate formal aims of state punishment remains important, but such aims can be properly considered only when normative and empirical issues are combined. Since state punishment is a practice that 'claims to be structured by certain definite aims and values,' philosophies must be assessed 'not merely as they appear on the page, but as they are (or could practicably be) realized in specific practices.'[13] A first step, which is the goal of this article, is to point out the features of punishment and sentencing theory that allow these fields to

10 See e.g. Marvin Frankel, *Criminal Sentences: Law without Order* (New York: Hill and Wang, 1972); Michael O'Hear, 'The Original Intent of Uniformity in Federal Sentencing' (2006) 4 U Cin L Rev 749. Under the 1984 *Sentencing Reform Act*, Congress directed the US Sentencing Commission to establish the US Sentencing Guidelines. The goal was to achieve '*uniformity* in sentencing . . . imposed by different federal courts for similar criminal conduct,' as well as '*proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.' *Rita v United States*, 551 US 338 (2007) at 349 [emphasis in original]. For an example of the impact of uniformity discourse on Canadian sentencing debates, see Anthony Doob & Cheryl Webster, 'The "Truth in Sentencing," Act: The Triumph of Form over Substance' (2013) 17:3 Can Crim L Rev 365.

11 Richard Frase, 'Punishment Purposes' (2005) 58 Stanford L Rev 67 at 80.

12 While a significant literature has emerged on the collateral consequences of incarceration, little is even known about the lived experiences of inmates, particularly in the United States: '[E]xisting data do not provide even the most basic information regarding the conditions of confinement faced by prisoners.' Travis, Western & Redburn, *Growth of Incarceration*, supra note 3 at 431.

13 Antony Duff & David Garland, 'Introduction: Thinking about Punishment' in Antony Duff & David Garland, eds, *A Reader on Punishment* (Oxford: Oxford University Press, 1994) 1 at 1 [Duff & Garland, 'Introduction'].

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avoid the inner workings of the prison system. The question, in a sense, is how a field can work around a significant dimension of what is ostensibly its own subject matter. The explanation offered here confirms the problem – the rather surprising problem that normative thinking on state punishment scarcely discusses prisons – and offers insight into how this works.

Three prominent habits allow punishment theorists to avoid the prison as an object of analysis. First, theorists engage in an abstract mode in which punishment is not given a time or place. Punishment is defined abstractly and discussed without reference to actual practices or historical periods, eliding the evolution of penal methods and the emergence of the penitentiary. Second, in the more applied field of sentencing theory, theorists employ a duration focus where punishment is defined as imprisonment, but the view is that its severity can be measured and distributed in units of time. Third, the overarching habit is the separability presumption, which is the pervasive notion that it is possible to divide questions about the legitimacy of punishment between matters of allocation and matters of delivery, with the field of normative theory being concerned only with legitimate allocation. The separability presumption insists that we can separate the question about the grounds for state punishment from whether and how it is possible to administer a sanction linked to those grounds.

The article is organized as follows. First, I outline the field of punishment philosophy and its recurring focus on resolving the debate between retributive and utilitarian views. Second, I expand on my introductory remarks about the disconnect between standard theoretical approaches and the basic empirical portrait of contemporary prison systems. Then comes the heart of the article, which identifies the three habits that enable punishment theorists – and, in a different way, sentencing theorists – to treat the prison as a black box. Only once we see the standard parameters of these narrow fields can we see how unsuitable they are for generating normative frames applicable to the legal system and to the work of legal actors.

The central aim of this article is to explain or map how these fields avoid the prison – in other words, to name the moves that enable the black box treatment of the prison. There is an important, additional question that is raised but not thoroughly pursued here. What might it look like for punishment and sentencing theory to include the prison? Scholars like Richard Lippke and Sharon Dolovich offer an answer, and I conclude with a discussion of their contributions and some of my own ideas. But my primary task is to analyse and critique the standard features of the far more plentiful mainstream contributions in the Anglo-American tradition. The goal of this critical diagnosis is largely practical: to caution legal actors against borrowing uncritically from theories that treat the prison and other state sanctions as a black box, because these approaches do not answer or even pursue the most pressing normative questions raised by criminal law and the prison system.

I *The task of punishment philosophy*

Punishment philosophy is a branch of political philosophy that is focused on the question of when coercion exercised by government or a dominant group is justified. It is shaped around the settled idea that state punishment entails a coercive

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intervention into the life of an individual that must be positively justified.[14] The justification debate occurs along two broad veins of liberalism. There is, first, the retributive or deontological tradition associated with Immanuel Kant, which is most often construed to emphasize the need to punish in ways that respect the moral autonomy of offenders.[15] Second, there is the utilitarian or consequentialist tradition associated with Jeremy Bentham, which tends to be used to support punishment that maximizes a practical social good like crime control.[16] These basic theoretical orientations draw their adherents toward well-known positions on the death penalty, life sentences, clemency, and so on. The discussion circulates around these two poles, with few exceptions.

The stalemate was reframed by the publication of Herbert Hart's *Punishment and Responsibility*, which proposed a mixed theory of punishment.[17] Hart's innovation was to suggest that utilitarian or rehabilitative rationales may apply differently at distinct stages – namely, that the prevention of crime is the justification for the institution of punishment, but retributive concerns should limit who may be punished and to what extent.[18] It follows, for Hart, that the institution of criminal law might be justified on the basis of the harm principle, while punishment in

14 'Punishment requires justification because it is morally problematic. It is morally problematic because it involves doing things to people that (when not described as 'punishment") seem morally wrong.' Duff & Garland, 'Introduction,' supra note 13 at 17; see also Richard Burgh, 'Do the Guilty Deserve Punishment?' (1982) 79 Journal of Philosophy 193 at 193, stating that punishment 'involves the deliberate and intentional infliction of suffering' and that 'it is in virtue of this that the institution requires justification in a way that many other political institutions do not.'

15 But see Arthur Ripstein, who extends the discussion of Immanuel Kant beyond the typical citation to moral agency and desert and connects it to a larger Kantian portrait of public law: '[A] Kantian account must analyze punishment as a fundamental aspect of legality, and show how each of deterrence and retribution is partial constitutive of a system of equal freedom under law.' Arthur Ripstein, 'Public Rights IV: Punishment' in Arthur Ripstein, *Force and Freedom* (Cambridge, MA: Harvard University Press, 2009) 300 at 301. There is also a body of Kant scholarship that tries to integrate retributive principles with explicit references to deterrence in Kant's work. See e.g. Sharon Byrd, 'Kant's Theory of Punishment: Deterrence in Its Threat Retribution in Its Execution' (1989) Law and Philosophy 8 at 151–200; Thomas E Hill, Jr, 'Kant on Punishment: A Coherent Mix of Deterrence and Retribution' in Thomas E Hill, Jr, ed, *Respect, Pluralism, and Justice: Kantian Perspectives* (Oxford: Oxford University Press, 2000) 173.

16 Jeremy Bentham, 'An Introduction to the Principles of Morals and Legislation' in Wilfred Harrison, ed, *A Fragment of Government with an Introduction to the Principles of Morals and Legislation* (Oxford: Basil Blackwell, 1960) 281.

17 Herbert LA Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 1978) [Hart, *Punishment*].

18 But see Malcolm Thorburn, who argues that Hart's claim to being a retributivist about the distribution of punishment rings hollow, since Hart does not deploy a retributivist reason to punish (namely, an idea based on moral agency) but, rather, articulates a constraint on punishment that is implied from an old retributivist idea (that punishment can only follow where someone had a fair opportunity to conform his conduct to the law's demands, utilitarian reasons notwithstanding). Malcolm Thorburn, 'The Radical Orthodoxy of Hart's Punishment and Responsibility' in Markus Dubber, ed, *Foundational Texts in Modern Criminal Law* (Oxford: Oxford University Press, 2014) 279.

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a specific case could involve the evaluation of moral culpability.[19] Most accounts of punishment now employ some version of a mixed theory,[20] and most sentencing codes embody a similar hybridity of aims.[21]

At its core, punishment theory and practice continues to contain two impulses: that we should punish behaviour because it is wrong and the offender is responsible (retribution)[22] or that we should punish behaviour because it is socially useful to do so (utilitarianism). Retributivists claim moral advantage as they argue that utilitarians would punish offenders more than they deserve in order to serve some other social end (like general deterrence), thereby making immoral use of the offender. Some have argued, however, that the distinction between the two camps is unsustainable, given that almost any deontic value can be recharacterized in terms of its instrumental value.[23] A great deal of the discussion concerns the degree of consequentialism that retributivism should

19 A further elaboration to Hart's moderated retributivism came in 1974 from Norval Morris, who added a theory of 'limited retributivism' that combined retributive and utilitarian elements, with upper and lower bounds of sentences determined by culpability and with utilitarian justifications allowed elsewhere. See Norval Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press 1974); see also Richard Frase, 'Limiting Retributivism' in Michael Tonry, ed, *The Future of Imprisonment* (Oxford: Oxford University Press, 2005) 83 [Frase, 'Limiting Retributivism'].

20 Hart began the trend by pointing out that any retributive theory of punishment that promises relevance to a modern system must allow a role for a utilitarian justification of crime prevention. Hart, *Punishment*, supra note 17 at 235–6. Many others are similarly balanced to some degree. Even Andrew von Hirsh, who led the shift to retributive thinking in the 1970s, contemplates a role for the utility consideration of crime prevention: 'Had punishment no preventive value, the suffering it inflicts would be unwarranted.' Andrew von Hirsh, *Past or Future Crimes* (New Brunswick, NJ: Rutgers University Press 1985) 54. Duff also thinks integration is possible – that punishment could be goal directed while still justified generally by retributive principles. See Antony Duff, *Trials and Punishment* (Cambridge, UK: Cambridge University Press, 1986) at 7.

21 There are serious conflicts between theories that emphasize practical versus desert-based aims, and yet most systems endorse all of these theories at once. As Frase puts it: 'no jurisdiction in the United States or elsewhere' has ever adopted a 'one-dimensional approach.' Frase, 'Limiting Retributivism,' supra note 19 at 76. Frase praises systems with a mixture of aims. Others are more critical. Duff and Garland describe how penal decision-makers tend to draw eclectically from the aims of punishment – whatever suits the case at hand – with little attempt to reconcile contradictions between retributivist and consequential modes of reasoning. Duff & Garland, 'Introduction,' supra note 13 at 17.

22 See e.g. Michael Moore, *Placing Blame: A Theory of Criminal Law* (Oxford: Oxford University Press 1997). Or Jeffrie Murphy, who describes a retributivist as 'a person who believes that the primary justification for punishing a criminal is that the criminal deserves it.' Interestingly, in his 2007 address to the American Philosophical Association, Murphy questions his earlier enthusiasm for retribution, with its emphasis on 'settling scores.' He admits his view may have been an extension from 'what Nietzsche called 'a soul that squints' – the soul of a shopkeeper or an accountant. If I had been a kinder person, a less angry person, a person of more generous spirit and greatness of soul, would robust retributivism have charmed me to the degree that it at one time did? I suspect not.' Jeffrie Murphy, 'Legal Moralism and Retribution Revisited' (2007) 1:1 Criminal Law and Philosophy 5 at 11, 18.

23 Mitch Berman, 'Two Kinds of Retributivism' in Antony Duff & Stuart Green, eds, *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011) 433 at 442.

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incorporate.[24] These debates reveal little about what theory requires of the prison, and they tend not to grapple with whether the prison could ever deliver upon the commitments of one's theory of choice.

For example, consider the prominent argument from Jean Hampton that legal punishment is justified because it stands in for victims.[25] A crime, for Hampton, entails a false claim of superiority communicated by the criminal to the victim of the offence. Punishment annuls that false claim. Hampton's account does help to identify a reason to punish, but it says nothing about what ways, and to what extent, punishment may occur. The justification does not help us choose between custodial and non-custodial sanctions, and it does not speak to the intensity or length of a custodial sanction should one be imposed. One must ask whether Hampton's account can even count as a 'justification,' given how little it says about the thing that is being justified.

Of course, some conclude that punishment cannot be justified. Antony Duff, for example, argues that punishment might not be justified in the face of systemic conditions of social inequality. Duff suggests that 'moral, justice-based bars' might apply to punishment of a person who has faced 'serious, persisting, and systemic injustice at the hands of the polity.'[26] Michael Tonry has a similar critique, directed at retributivists, asking whether it can be legitimate to impose an 'illusion of equality of suffering' on individuals who have not received equal treatment in many other aspects of their lives.[27] Even these more sceptical accounts focus on the features of the society from which the offender is drawn, rather than on doubt about the institutional potential to administer a suitable sanction.

Importantly, most modern theories and sentencing codes contain a commitment to proportionality.[28] The idea that a sanction must be tied to the severity of the offence is a vital part of both utilitarian and retributive views, along with being a tenet of modern constitutionalism.[29] But, while the principle is widely endorsed, it is hard to put into practice. First, it is difficult to apply the concept of proportionality to the issue of sentence length. It is easy to agree on the idea of ordinal proportionality – that penalties should be graded in relation to the

24 Robert Weisberg, 'Reality-Challenged Philosophies of Punishment' (2011–12) 95 Marquette L Rev 1203 at 1225–8 [Weisberg, 'Reality-Challenged Philosophies'].

25 See e.g. Jean Hampton, 'The Moral Education Theory of Punishment' (1977) 13 Philosophy and Public Affairs 208; Jeffrie Murphy & Jean Hampton, *Forgiveness and Mercy* (Cambridge, UK: Cambridge University Press, 1988).

26 Antony Duff, 'I Might Be Guilty, But You Can't Try Me: Estoppel and Other Bars to Trial' (2003) 1 Ohio State Journal of Criminal Law 245 at 258; see also Rocio Lorca, 'Punishing the Poor and the Limits of Legality,' Law, Culture and the Humanities [forthcoming].

27 Michael Tonry, 'Proportionality, Parsimony, and Interchangeability of Punishments' in Antony Duff et al, eds, *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* (Manchester: Manchester University Press, 1994) 59.

28 *R v M(CA)*, [1996] 1 SCR 500, endorses a standard reading of proportionality: a sentence must be commensurate with the gravity of the offence committed and the moral blameworthiness of the offender. *Criminal Code*, supra note 6, s 718.1 also reads: 'A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.'

29 See e.g. Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge, UK: Cambridge University Press, 2012); Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge, UK: Cambridge University Press, 2016) at 215–16.

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severity of crimes. Cardinal proportionality is far more difficult to resolve. Even if we could agree on how to rank every crime in a scale from least to most serious, the principle of proportionality cannot by itself tell us where to start, or what punishment is deserved, for any single crime.[30]

Nicola Lacey and Hanna Pickard make this point in their historically driven critique of proportionality, arguing that the retributive revival of the 1970s was founded on an exaggerated idea of what proportionality could offer.[31] Contemporary desert theory requires that the distribution and quantum of punishment be linked to an offender's blameworthiness, but the problem is that there is no objective system of cardinal proportionality. Proportionality may have a clear formal meaning, but it only has a substantive upshot where everyone agrees on, and can enforce, the substantive criteria of equivalence or comparability.[32] Lacey and Pickard show, through comparative study, that proportionality generates no consensus for sentencing. Across jurisdictions that are formally committed to the principle, sentence lengths are influenced by the standard real-world factors: convention, politics, and expediency.[33] What Lacey and Pickard call the 'chimera' of proportionality is problematic enough on the temporal dimension of a prison sentence, which is the focus of their discussion. The problem that Lacey and Pickard point out is compounded when we add my concern with the qualitative dimension of a prison sentence. Variation in the quality of imprisonment is not controlled by any principle either; disparities caused by prison conditions are scarcely even perceived by sentencing authorities, let alone responded to, as they work to design fit sentences.

Punishment theory promises to analyse the legitimacy of state sanctions and generate principled reasons to punish, but it largely fails – or declines – to fulfil that task when it comes to imprisonment. Now, theorists might respond by saying that they are interested in a prior question: what justifies the state in punishing people at all. But that question can hardly be answered with only a placeholder definition of punishment. The practical capacity of state institutions to deliver treatment of a particular kind seems plainly relevant to the question of whether an individual has done something to warrant being subjected to that treatment. Nevertheless, theories explaining why punishment might be justified greatly outnumber moments of attention to what custodial regimes actually are or ever could be. A legal actor imposing a custodial sentence or drafting a legislative provision, or a commentator analysing the legitimacy of our system as a whole, has a great deal more to consider.

II *A disconnected universe: punishment theory and prison systems*

The startling distance between punishment theory and our institutions of punishment has not gone unnoticed. Scholars who are attentive to the social and historical realities of criminal justice have become downright irritated by, and suspicious

30 David Dolinko, 'Three Mistakes of Retributivism' (1992) 39 UCLA L Rev 1623 at 1624–5.

31 Nicola Lacey & Hanna Pickard, 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems' (2015) 78:2 Modern L Rev 216 at 225.

32 Ibid at 219.

33 Ibid at 235.

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of, the narrow confines of punishment theory.[34] The disconnect is particularly striking in the US context where rates of incarceration – and the negative attendant effects on the quality of the prison system – now greatly exceed historic and comparative records.[35] Robert Weisberg laments that the forms and levels of US mass incarceration have barely registered in the legal and academic commentaries concerned with the purposes of punishment.[36] Weisberg describes a disciplinary divide wherein the work of punishment philosophy appears as a 'disconnected universe,' particularly in contrast to scholarly work being done in other fields:

> Over the past decade, the humanities and social sciences have yielded substantial literature examining the rise of mass incarceration from various perspectives, ranging from econometric analyses of contributory factors to cultural critiques of American exceptionalism in penal policy. At the same time, in an oddly parallel but disconnected universe, legal and academic commentators have continued their long engagement in jurisprudential debates

34 As Weisberg puts it, modern punishment theory is marked by an 'insularity whereby theorists worry mostly about their own internal coherence or about their conceptual differentiation from others' theories; theorists' feints in the direction of fact-based challenges to their theories are chiefly rhetorical or abstract gestures meant to shore up claims of internal coherence.' Weisberg, 'Reality-Challenged Philosophies,' supra note 24 at 1233. Lucia Zedner similarly argues that debates about the purposes of punishment reveal 'more about the sociology of academic professions' than about the actual practices or ideas of contemporary punishment. To Zedner, the purposes of punishment are an intellectual industry upon which academic reputations are made, but the debates are of little practical relevance to those who punish, 'other perhaps than as post-hoc justificatory devices for decisions reached by other means.' Lucia Zedner, *Criminal Justice* (Oxford: Oxford University Press, 2004) at 74 [Zedner, *Criminal Justice*]. Lindsay Farmer offers that punishment theory can seem like simply an attempt to describe and justify the system we already have and the intuitions already at play in it. Lindsay Farmer, 'What Has the Philosophy of Punishment Got to Do with the Criminal Law?' (1992) 3:2 Law and Critique 241. Farmer argues elsewhere that we should cease the reproduction of traditional binary debates – such as exclusive concerns with either 'retribution' or 'utilitarianism' – and settle on a critical approach that analyses changing forms of legal practice over time, the circumstances under which definitions were formulated, and the deficiencies from which they now suffer. Lindsay Farmer, 'The Obsession with Definition: The Nature of Crime and Critical Legal Theory' (1996) 5:1 Social Legal Studies 69. Like Farmer, Richard Sparks also laments the 'endlessly recurrent arguments' about which philosophical principles might animate or justify punishment. Richard Sparks, 'Can Prisons Be Legitimate: Penal Politics, Privatization, and the Timeliness of an Old Idea' (1994) 34 Brit J Crim 14 at 16. Finally, David Garland observes that these recurring debates can have an ideological, legitimating effect because they produce the impression that state punishment is or can be justified, one way or another. David Garland, 'Philosophical Argument and Ideological Effect' (1983) 7 Contemporary Crises 79.

35 From 1973 to 2009, the state and federal prison populations rose from about 200,000 to 1.5 million, declining slightly in the following four years. In addition to those serving prison time for felonies, another 700,000 are held in local jails. With nearly one of every 100 adults in prison or jail, the US rate of incarceration is five to ten times higher than rates in Western Europe and other democracies. Travis, Western & Redburn, *Growth of Incarceration*, supra note 3 at 2.

36 Weisberg, 'Reality-Challenged Philosophies,' supra note 24 at 1204.

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about the purposes of punishment (retribution, general and specific deterrence, incapacitation, and rehabilitation).[37]

Weisberg focuses on the troubling correlation between the rise of retributive theory and the expansion of US incarceration in the post-1970s period and how the field failed to sound the alarms and failed to acknowledge how its primary commitments were easily debased in the political arena.[38] These are important observations, but the problem I point to here runs deeper than any one school of thought. Punishment theorists of all stripes are mainly preoccupied with *a priori* speculation about what, if anything, justifies punishment. But they do not grapple with the essential facts associated with confinement as punishment.

What are the essential facts about imprisonment that theory neglects? At minimum, a prison sentence must be understood as a period of time living within what Erving Goffman called the 'total institution' – a place where similarly situated people, cut off from the wider community, live and work in an enclosed, formally administered setting.[39] The qualitative terms of imprisonment in total institutions are shaped by an extraordinary range of factors. Variation occurs in matters of health care, employment, privacy, physical safety, access to reading material, family visits, and many other factors. Differences in penal intensity flow from structural features like the size and age of an institution, levels of crowding, and staffing. The regulatory task is profoundly broad, and these are settings that tend to resist both oversight and the enforcement of legal rules.

A great deal of work in sociology and ethnography proves this point – namely, that the substance of prison life can be as significant as the question of sentence

37 Ibid. Lippke similarly notes the 'voluminous philosophical literature on the general justification of legal punishment,' which gives 'scant attention' to the 'restrictions and deprivations that may legitimately be imposed' as part of imprisonment. A separate field, more empirical or comparative in nature, studies the character of imprisonment: 'Criminologists and legal scholars have made invaluable contributions to our understanding of prisons and the treatment of their inhabitants. Their research demonstrates the considerable variation in penal practices that exists throughout the world. . . . But their work does not provide us with a normative of imprisonment – that is, a theory about justified prison conditions.' Lippke, *Rethinking Imprisonment*, supra note 5 at 1.

38 On the rise of retributive theory in the 1970s, see also Cheryl Webster & Anthony Doob, 'Penal Optimism: Understanding American Mass Imprisonment from a Canadian Perspective' in Kevin Reitz, ed, *American Exceptionalism in Crime and Punishment* (Oxford: Oxford University Press, 2018) 121 at 121–78, 166. Like Weisberg, Doob and Webster point to shifts in punishment theory as a partial explanation for the spike in US incarceration rates from the 1970s on, after the rehabilitative logic of imprisonment came under widespread attack. The 'new value system' that emerged was based largely on deterrence and incapacitation. When imprisonment is being used for deterrent purposes, Webster and Doob write, '[n]o one needs to justify the sentence in terms of what it does for or to the offender; offenders are simply being sacrificed for the rest of the community' (at 167).

39 Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Garden City, NY: Anchor Books, 1961).

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length.[40] In one leading study, David Downes refers to the 'depths of imprisonment' to describe the potential for multiple levels of penal intensity in the custodial experience.[41] The idea of 'depth' is a metaphor for the variable conditions of imprisonment and for how prison regimes impose particular levels of 'psychological invasion' on inmates depending on factors such as staff relations, relations with other prisoners, rights and privileges, material standards and conditions, and the overall quality of life that the prison regime makes possible or withholds.[42]

In sum, while all imprisonment involves a form of exclusion, it will be more or less severe – and will pursue different kinds of aims – according to a stunning range of factors. As Norval Morris says of the experience of imprisonment across cases, 'in common is the sense of banishment, but little else.'[43] Even in a maximum security institution, some prisoners will spend less time in segregation and will have more movement and privileges than other prisoners. Differences are caused almost entirely by personal and institutional factors rather than by the offence a prisoner stands convicted of. As David Garland puts it, there is an immense gap between the worlds of sentencing and sentence administration: 'Whatever meanings the judge, or the public, or the penitentiary reformers meant to convey by sending offenders to prison, it is the day-to-day actualities of

40 Notes 1 and 2 above indicate that empirical prison studies seem to be thriving in England today. For an overview of changes to US prison ethnography and sociology from the 1950s until 2000, see Jonathan Simon, 'The "Society of Captives" in the Era of Hyper-Incarceration' (2000) 4:3 Theoretical Criminology 285. Simon describes how the great tradition of studies in prison social organization, which began with Donald Clemmer and Gresham Sykes in the 1950s, has largely ceased in the last twenty years, just as incarceration rates sharply increased (at 289). And while classic studies self-consciously situated themselves in the ordinary life of institutions, contemporary work focuses on signal events like riots or court orders. For my purposes, the relevant point is that punishment philosophy pays no attention to the developments that Simon points out: how prison regimes have changed in quality alongside changes to incarceration rates, how the fields that study these settings have themselves changed, and so on. For more on the causes of change to the field of prison sociology, particularly in the United States, see Derek A Kreager & Candace Kruttschnitt, 'Inmate Society in the Era of Mass Incarceration' (2018) 1 Annual Review of Criminology 261.

41 David Downes, *Contrasts in Tolerance: Post-War Penal Policy in the Netherlands and England and Wales* (Oxford: Oxford University Press, 1988) at 166, 179 [Downes, *Contrasts in Tolerance*]. For recent work building on this concept from Downes, see Ben Crewe, Alison Liebling & S Hulley, 'Heavy-Light, Absent-Present: Rethinking the "Weight" of Imprisonment' (2014) 65:3 British Journal of Sociology 387.

42 Downes, *Contrasts in Tolerance*, supra note 41 at 179.

43 Norval Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974) at 2. Margo Schlanger once made a similar remark about the lack of generalizability of prison research: '[I]f you study one prison, you know about one prison.' Travis, Western & Redburn, *Growth of Incarceration*, supra note 3 at 158, echo this view, noting: '[N]ot all "prisons" are created equal. Not only are correctional institutions categorized and run very differently on the basis of their security or custody levels, but even among prisons at the same level of custody, conditions of confinement can vary widely along critical dimensions – physical layout, staffing levels, resources, correctional philosophy, and administrative leadership – that render one facility fundamentally different from another.'

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the internal regime which do most to fix the meaning of imprisonment for those inside.'[44] This raises another crucial point – namely, that variation in penal intensity is not tethered to an inmate's convicted offence or formal sentence length. There may be times when the features of imprisonment are shaped by the details of a criminal record, but these occasions tend to be caused by correctional policy rather than by the sentencing authority.[45] For theorists of punishment committed to proportionality – as nearly all are – the disconnect between formal culpability and the important terms of imprisonment raise a serious challenge for the endeavour to justify state punishment.

This is not a call for punishment philosophers to be trained as ethnographers nor as wardens. Nor is it a critique of the very project of punishment theory, which can help to generate a conception of what criminal punishment ought to be and, ideally, supply a critical standard for existing practices.[46] But legal actors should be aware that these fields make little to no effort to address or engage with the penal institutions and practices we currently have. Most punishment and sentencing theory does not supply a relevant normative framework for sentencing because of its various habits – which are, at times, implicit and, at other times, explicit – of avoiding the prison.

III *The habits of punishment and sentencing theory*

I turn now to offer a critical diagnosis of the methods that punishment and sentencing theory employ to neglect the prison. The aim is to point out how theorists avoid the prison as a relevant topic of normative inquiry by way of the abstract mode, the duration focus, and the separability presumption. These habits overlap and interact, but each of them also has its own pronounced features.

A THE ABSTRACT MODE

Punishment theory in the abstract mode treats punishment as an unwanted experience divorced from time and place. The theorist relies upon a generic placeholder notion of hard treatment rather than identifying a specific form of punishment. This approach elides, among other things, the evolution of penal methods, such as the modern transition from widespread reliance on corporal and capital punishment to the abolition of such bodily forms of sanction in most

44 David Garland, *Punishment and Modern Society* (Chicago: University of Chicago Press, 1990) at 261 [Garland, *Punishment and Modern Society*].

45 Consider, e.g., the long-standing 'two years in a max' policy of the Correctional Service of Canada. Inmates convicted of first-degree murder must spend the first two years of their confinement in a maximum-security facility, even if they would otherwise qualify for a lower security designation. If the prison authority were to cancel the policy, or, say, change it to 'four years in a max,' that would not influence the legislative or judicial analysis of a fit sentence for murder. See the discussion of Policy Bulletin 107 in *Kahnapace v Canada (Attorney General)*, 2009 FC 1246 at paras 21–6, 360 FTR 229.

46 Antony Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001) at 175 [Duff, *Punishment, Communication*].

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liberal democracies.[47] Theory in the abstract mode neglects the nineteenth-century emergence of the modern penitentiary[48] and its twentieth-century transformation from bare warehouse to a progressive, law-governed site that aims to deliver health care and reform inmates through social programming.[49] This also means, of course, little emphasis on several pronounced US trends that have had a major impact on conditions of confinement over recent decades.[50]

Works in punishment philosophy employ the abstract mode by beginning with a vague definition of their subject, only to rapidly move on. For example, in her work affirming the legitimacy of punishment as expressive retribution, Jean Hampton defines punishment as 'disruption of the freedom to pursue the satisfaction of one's desires,' which may or may not involve the subjective experience of pain.[51] In the abstract mode, punishment is not even as specific as imprisonment.

Others define punishment as 'hard treatment,'[52] 'unpleasant consequences,'[53] something 'painful or burdensome,'[54] 'probably the most awful thing that modern democratic states do to their citizens,'[55] the 'intentional deprivation' of

47 On the history of penal methods and capital punishment, see David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Cambridge, MA: Harvard University Press, 2012). Some punishment theorists do contemplate whether the death penalty is justified. See e.g. Thom Brooks, *Punishment* (New York: Routledge, 2012) at 151–72.

48 See e.g. Adam J Hirsch, *The Rise of the Penitentiary: Prisons and Punishment in Early America* (New Haven, CT: Yale University Press, 1992); David Garland, *Punishment and Welfare: A History of Penal Strategies* (New Orleans: Quid Pro Books, 2017) [Garland, *Punishment and Welfare*]; Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750–1850* (New York: Pantheon Books, 1978); John Langbein, 'The Historical Origins of the Sanction of Imprisonment for Serious Crime' (1976) 5 Journal Legal Studies 35.

49 See e.g. James Jacobs, *Stateville: The Penitentiary in Mass Society* (Chicago: University of Chicago Press, 1977); Robert Perkinson, *Texas Tough: The Rise of America's Prison Empire* (New York: Metropolitan Books, 2010).

50 Travis, Western and Redburn identify six separate, but related, trends that have changed prison conditions over recent decades: (a) increased levels of prison overcrowding; (b) substantial proportions of the incarcerated with mental illness; (c) a more racially and ethnically diverse prisoner population; (d) reductions in overall levels of lethal violence within prisons; (e) early litigation-driven improvements in prison conditions followed by an increasingly 'hands-off' judicial approach to prison reform; and (f) the rise of a 'penal harm' movement. Travis, Western & Redburn, *Growth of Incarceration*, supra note 3 at 159–64.

51 Jean Hampton, 'The Moral Education Theory of Punishment' (1984) 13 Philosophy and Public Affairs 3.

52 Uma Narayan, 'Appropriate Responses and Preventative Benefits: Justifying Censure and Hard Treatment in Legal Punishment' (1993) 13 Oxford J Leg Stud 166.

53 Hart defines punishment as 'pain or other consequences normally considered unpleasant, inflicted by an authority constituted by the legal system against which the offence is committed.' Hart, *Punishment*, supra note 17 at 4–5.

54 Antony Duff, 'Alternatives to Punishment – or Alternative Punishments?' in W Cragg, ed, *Retributivism and Its Critics* (Stuttgart, Germany: Franz Steiner, 1992) at 43–68. Duff points out that the pains of punishment are not 'mere unintended side effects' of punishment, but are its main objectives (at 49).

55 Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011) at 1.

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'normally recognized rights by official institutions,'[56] the 'authorized imposition of deprivations because the person has been found guilty of some criminal violation,'[57] and so on.[58] The authors give us no historical location and they do not grapple with whether all forms of imprisonment necessarily or only entail suffering or hard treatment. Garland and Duff object to this habit by pointing out that punishment is not the 'abstract ahistorical structure' of punishment theory but, rather, is a 'social institution' that takes different forms in different social contexts.[59]

To take one example in more depth, Duff is the leading proponent of expressivist punishment theory. He endorses state punishment as an act of communication that displays the censure or disapproval that offenders deserve.[60] He argues that punishment is a necessary accompaniment to the declaration of culpability in criminal law. Indeed, a failure to express censure through punishment 'casts doubt upon the sincerity of my declaration that such conduct is seriously wrong.'[61] Duff's influential claim is that punishment is justified when it communicates to offenders that they are blameworthy on account of their crimes. In an account that emphasizes the moral agency of the offender, Duff envisions a communicative process that must persuade offenders to repent, to try to reform themselves, and, thus, to reconcile themselves with those whom they have wronged.[62] In this way, the process of punishment must be a two-way communication; the object of punishment must be able to understand, internalize, and respond to that communication. Punishment must convey a message of blame, but it must also respect the offender as a moral agent – as someone capable of getting the message.[63]

Clearly, several features of Duff's theory speak directly to the action and effects of the punishment he is endorsing. Duff describes an ambitious and

56 Carlos Nino, 'A Consensual Theory of Punishment' (1983) 12:4 Philosophy and Public Affairs Reader 289 at 289.

57 Hugo Adam Bedau & Erin Kelly, 'Punishment' in *Stanford Encyclopedia of Philosophy* (Stanford: Stanford University, 2015) 1 at 6.

58 Some definitions are even more formal and inherently rationalizing than the preceding examples. See e.g. John D Mabbott, 'Professor Flew on Punishment' (1955) 30: 114 Philosophy 256 at 257–8: '[M]ost punishments nowadays are not inflictions of suffering, either physical or mental. They are the deprivation of a good . . . Imprisonment and fine are deprivations of liberty and property. The death sentence is deprivation of life; and in this case extreme case every attempt is made to exclude suffering.'

59 Duff & Garland, 'Introduction,' supra note 13 at 23.

60 Antony Duff, *Trials and Punishments* (Cambridge, UK: Cambridge University Press, 1985) [Duff, *Trials and Punishments*]; see also Andrew von Hirsch, *Past or Future Crimes* (New Brunswick, NJ: Rutgers University Press, 1985).

61 Duff, *Trials and Punishments*, supra note 60 at 28.

62 Ibid at xvii.

63 Lucia Zedner applauds Duff for dissolving the long-standing divide between backward- and forward-looking theories of retributivism and consequentialism. As Zedner notes, Duff's elegant theory has multiple aims: to respect the offender as a rational moral agent; to acknowledge that hard treatment may be necessary to communicate censure adequately; to communicate, not merely to condemn; to convey a message proportionate to the offence; and yet also to pursue ends beyond the punishment itself, not least the reintegration of the offender back into the moral community. Zedner, *Criminal Justice*, supra note 34 at 109.

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complex process wherein the state and the offender encounter one another in a productive way through the punitive experience. The theory demands, by implication, that the features of the hard treatment recognize and respect the offender and contemplate his return to the moral community. And yet, even here, there is limited engagement with the prison and its institutional limits and possibilities. Duff is rare in that he pauses to ask whether punishment could ever be so organized and administered to fulfil the commitments of his theory. The profound challenge of delivering such culturally loaded messages and administering such a complex psychological process causes Duff to admit that his theory demands a 'serious collective commitment to reform the content and operations of the penal system.'[64] But, while his conclusions are appropriately cautious, the prison remains a black box in Duff's account. He does not tell us how punishment as a two-way communication relates to a period of residence inside a punitive total institution nor how it relates to issues of security classification, in-cell time, family visits, institutional violence, and so on. Duff does not explain how the communication of public sentiment at the heart of his account works.

In truth, prison employees do not tend to carry moral or nuanced messages but, rather, work in socially and physically isolated environments with minimal training and resources. They tend to represent their operations in 'neutral, technical terms and adopt a managerial posture rather than a moral one.'[65] While the occasional staff member brings a punitive or retributivist or rehabilitative attitude to work, most prison staff have reason to focus exclusively on the peace of the facility rather than on the offences that brought the particular inmates to it.[66] Similarly, the future reintegration of offenders might be among the formal goals of today's prisons, but it is, at best, secondary to the daily institutional task of secure management. Conveying public sentiment is often explicitly not among the formal goals of staff: '[S]trong community feelings are deliberately neutralized within this institutional process. Institutional staff see themselves not as moral condemners but as impartial managers, committed to unemotive conduct and bureaucratic regimes.'[67] The point is that prisons are unlikely places for the expression of public sentiment, both because the focus of staff lies elsewhere and because there is little public engagement with them. Public engagement is itself marked by a duration focus and a willingness to perpetuate the separability presumption that I discuss below; the public asks about the length of the sentence and whether the length, but not the details,

64 Ibid at 200.

65 Garland, *Punishment and Welfare*, supra note 48 at 72.

66 On this point, people are often surprised to learn that solitary confinement or administrative segregation is not a treatment reserved for inmates convicted of serious offences. Rather, long-term segregation tends to be imposed because of an inmate's performance, status, or vulnerabilities from inside the prison. The point is this: the most severe institutional treatment is not tied to the judicial concerns that underpinned the legal sentence. For discussion, see Lisa Kerr 'Sentencing Ashley Smith: How Prison Conditions Relate to the Aims of Imprisonment' (2017) 32:2 JL & Soc'y 187.

67 Garland, *Punishment and Welfare*, supra note 48 at 72.

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of the punishment are satisfactory.[68] Duff is representative of a broader trend: ideal accounts of punishment that lack a minimal fit with realities of prison administration.

Even scholars who only dabble in punishment theory tend to reproduce this kind of approach. In *Philosophical Explanations*, Robert Nozick gives another expressivist account of retributive punishment.[69] Nozick holds that retributive punishment is designed to convey a message of reform to the offender – to show rather than simply to hurt. The aim of punishment, for Nozick, is to 'connect the offender with correct values' from which his behaviour reveals him to be 'un-linked.'[70] Nozick does not explain the mechanisms by which this corrective communication should occur, but he holds that the purpose is to 'negate' or lessen the 'flouting' of 'values' that inheres in the criminal offence. A deserved punishment will depend on the wrongness of the act and the person's degree of responsibility for it. If retributive punishment conveys a message of wrongdoing, as Nozick suggests a legitimate sanction must, then it serves a purpose of re-linking offenders with correct values. It seems, then, that Nozick's notion of punishment depends upon what must be a sophisticated institutional capacity to re-link an offender with a proper circuitry of shared values. Nozick does not tell us how this might work, even as he assumes that it can and builds his normative justification of punishment on that basis.[71]

Bernard Williams criticizes this approach by saying that Nozick discusses punishment in a way that is 'vastly removed from any actual social institution.'[72] As Williams notes, 'there are one or two desultory references to the law, but virtually nothing that focuses on the fact that punishment is inflicted by some actual authority in some actual social circumstance.' As a result, Nozick's rationale moves in a very tight circle; it is 'so utterly wrapped in itself that it is not going to give much insight to anyone who was previously puzzled by the idea of retributive punishment.'[73] What is more, Nozick's vision of reforming offenders would be a highly complex and ambitious task. To achieve it in a setting resembling most contemporary prisons and jails would be incredible, but most punishment theory fails to underscore the legal, economic, and political frameworks that shape prisons

68 As Garland puts it, '[t]he normal focus of community feeling is not concerned with determining the range of penal practices, so much as with whether or not individual offenders are appropriately sentenced within the conventional range. The public's concern with punishment, and the rise and fall of "passionate reactions", tend to centre around the deployment of the available sanctions – who gets what sentence? – rather than with the details of what goes on in penal institutions.' Ibid at 74.

69 Robert Nozick, *Philosophical Explanations* (Cambridge, MA: Harvard University Press, 1981).

70 Ibid at 363–5.

71 For one glimpse into the complex processes by which character might be reformed in this way, see the work of developmental psychologist Erik Erikson. Among other contributions, Erikson tries to show how 'ego modification' depended on exterior political, economic, and social systems that mould a person's interior life. Erik Erikson, 'Ego Development and Historical Change' (1946) 2 Psychoanalytic Study of the Child 359.

72 Bernard Williams, 'Cosmic Philosopher,' *New York Review of Books* (18 February 1982) at 32.

73 Ibid.

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today and how these dynamics make the pursuit of the ideas underlying retributive punishment all but impossible. Punishment theory that fails to contemplate and incorporate these frameworks into normative accounts is unhelpful at best.

B THE DURATION FOCUS

Sentencing theory is a subfield in which scholars translate the concerns of punishment theory into more specific technical ideas relevant to sentencing policy (for example, how a retributive commitment might entail offence-based sentencing). Here, punishment is often more concretely understood to be imprisonment, but the problem flows from how imprisonment is formally conceptualized as the deprivation of liberty and from how that conception is paired with the duration focus. The duration focus entails a view that imprisonment can be measured and fairly distributed by scaling particular amounts of time – the time in which liberty will be deprived – in response to wrongdoing.

A great deal is often left out of this under-inclusive conception of incarceration. For starters, Garland observes that the 'deprivation-of-liberty' concept implies a suspension of individual rights rather than a regime of bodily containment and physical deprivations.[74] Rather than grappling with the features of imprisonment that can impact the depth or intensity of the sanction, this approach encourages courts (and sentencing theorists) to focus on questions of temporal duration. Garland writes:

> It is as if imprisonment were a kind of license-suspension that lasts for a set period of time, during which it denies to the individual some specified liberties to which he or she would otherwise be entitled. As a consequence, the only issue for the law, and the only question for sentencing theory, is how long should this imprisonment last?[75]

Not only is the bodily aspect avoided, the question of which individual rights are suspended tend to remain unclear in jurisdictions that rely on the deprivation of liberty concept.[76] Rather than grappling with the central features of imprisonment, the duration focus accepts and reproduces the official narrative of the modern prison – the official, but misleading, narrative that the prison is able to deliver uniform, proportionate sanctions that can be measured and evenly distributed in units of time. So the story goes; since imprisonment is nothing more or less than the deprivation of liberty, the severity of the sanction can be measured by selecting the amount of time in which liberty will be deprived.[77]

74 David Garland, 'The Problem of the Body in Modern State Punishment' (2011) 78:3 Social Research 768 [Garland, 'Problem of the Body'].

75 Ibid; see also Lippke, *Rethinking Imprisonment*, supra note 5 at 4, noting that the practices of many countries make clear that imprisonment is not simply the deprivation of liberty.

76 In her excellent comparative study, Liora Lazarus systemically explores how the overarching 'deprivation of liberty' conception fails to stabilize concrete rights for incarcerated people in England. Liora Lazarus, *Contrasting Prisoners' Rights: A Comparative Examination of England and Germany* (Oxford: Oxford University Press, 2004) [Lazarus, *Contrasting Prisoners' Rights*].

77 For a powerful meditation on law's impoverished conception of time at sentencing, see Linda Ross Meyer, *Sentencing in Time* (Amherst, MA: Amherst College Press, 2018).

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Even in this more applied branch of the field, we see sentencing theorists avoid the issue of the quality or depth of imprisonment and how severity might flow from factors beyond time. Paul Robinson, for example, tries to articulate a sentencing scheme that can accommodate principles of both 'crime control' and 'desert.'[78] To that end, Robinson argues that a range of sentencing options be open to judges, including imprisonment, house arrest, fines, and community service. Robinson explicitly asks how to select an appropriate sanction within that range of possible sanctions. Moreover, he asks the critical question of how to measure levels of what he calls 'punitive bite' between the different types of sanctions. Robinson's concern with measuring 'punitive bite' is illuminating, but he could take it further. Robinson compares the 'bite' of house arrest and imprisonment, though he does not consider differences in 'bite' that might be internal to the sanction of imprisonment. He devises a way to measure the relative punitive effect of various methods of sanction, but his conclusions do not address the fact that variation is possible within a sentence of imprisonment as well as between custodial and non-custodial sentences.

While, in Duff's account, the prison does not appear at all (the abstract mode), in Paul Robinson's work, the prison is pervasive and yet unexplored (the duration focus). Robinson wants to ensure that the correct type of penalty is applied to individuals whose blameworthiness has been carefully assessed, but he does not consider that imprisonment itself has various types. Even when prison is being 'measured' against other levels or modes of punishment, it is conceived of as a one-dimensional site of hard treatment – a place where punishment can be rationally meted out in blocks of time. The prison appears in Robinson's account, and it is compared to other types of sanctions, but it appears on a single dimension; the theorist presumes that its bite can be measured along the temporal dimension alone. The concern is with the duration of the bite rather than with the sharpness of the teeth or the force of their grip.

Andrew von Hirsch observed in 1991 that even this duration question – how long imprisonment should last – is an issue that theorists have tended to overlook. The field had spent a great deal of time on the question of justification while neglecting other issues; theories that focused on initial justification tended to overlook further questions of quantum. Von Hirsch offers helpful insight into what he sees as the disciplinary divide between 'the philosophical and the penological discussions': 'The philosophers have looked into the idea of desert chiefly to explain why the institution of punishment should exist at all. Penologists have, for the most part, assumed punishment's existence and have been interested in what guidance the desert concept gives in distributing sanctions.'[79] He emphasizes the need for a more comprehensive philosophical approach, one that is sensitive to the difference between justifying punishment and deciding its proper

78 Paul Robinson, 'Desert Crime Control, Disparity, and Units of Punishment' in Antony Duff et al, eds, *Penal Theory and Practice: Tradition and Innovation in Criminal Justice* (Manchester: Manchester University Press, 1994) 93 at 94.

79 Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment: From "Why Punish" to "How Much?"' (1991) 25 Israel L Rev 549 at 550.

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quantum or severity. But Von Hirsch's attention is fixed on the moment that the punishment is announced and on the temporal quantum of the punishment. He surveys the 'various purported justifications for legal punishment' in order to examine their 'bearing on the question of how much to punish.'[80] The importance of the question of duration of prison time is highlighted, but Von Hirsch does not raise the need for, or prospect of, uniformity in terms of the time as administered.

Another important voice on the issue of the quantum of punishment is Adam Kolber, who has forcefully argued that the experience of confinement should factor into punishment theory.[81] Kolber says that if theorists ignore subjective experience, 'they cannot justify the amount of distress that punishment inflicts on offenders, and so they cannot justify punishment more generally.'[82] Kolber thinks retributivists are in real trouble here because, without considering the subjective experience of inmates, retributivism loses its claim to proportionality and, thus, to superiority over consequentialism.[83] He explains that we must measure things like the baseline opportunities, financial assets, and emotional states that precede incarceration so as to calibrate sentencing in light of the effects it will have on specific defendants. The idea is to adjust sentence lengths in response to the individual propensity to be negatively impacted by confinement.[84]

Kolber's work has done a great deal to highlight the facts of inequity in the distribution of punishment, particularly in the United States today. He thinks carefully about the relationship between the commitments of punishment theory and the prison experience, and he shows that the proportionality that retributivists claim to be committed to is thinly conceived and unrealized in practice. In terms of remedy, however, Kolber seems to reprise the duration focus. He rightly notes that, due to their personal biographies and traits, some people will suffer more in prison than others. But he offers one solution: give them shorter sentences. Likely because of the practical appeal of this approach, he proposes to handle qualitative variations only with quantitative adjustments. Once we expand our lens beyond the duration focus, we might be better able to argue for other ways of mitigating excess suffering for vulnerable inmates, ways having to do with the

80 Ibid at 580.

81 Adam Kolber, 'The Subjective Experience of Punishment' (2009) 109 Colum L Rev 182 [Kolber, 'Subjective Experience']. In another article, Kolber explains why theories of punishment must pay close attention to the unintentional burdens of punishment. Adam Kolber, 'Unintentional Punishment' (2012) 18 Legal Theory 1. As Kolber notes, Jeremy Bentham was alert to this topic, cataloguing a remarkable list of possible impacts of imprisonments on individuals. See Jeremy Bentham, *An Introduction to the Principles of Law and Morals* (1789), ch XIV, rule 6, 'Attend to Circumstances Influencing Sensibility.' More recently, the impact of punishment has been explored by Andrew Ashworth. See the discussion of the 'equal impact principle' in Andrew Ashworth, *Sentencing and Penal Policy* (London: Weidenfeld and Nicolson 1983) at 277–98.

82 Kolber, 'Subjective Experience,' supra note 81 at 184.

83 Ibid at 215.

84 Kolber's approach has some practical appeal. He points to how sentencing judges, at least in the federal system, have had discretion to decide sentence lengths significantly restored since the US Supreme Court's decision in *United States v Booker*, 543 US 220 (2005) (holding that the US Sentencing Guidelines are advisory and cannot constitutionally bind sentencing judges). Ibid at 185.

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design and day-to-day operation of prisons. We might also become more attentive to the fact that prison administration itself produces arbitrary inequities, even amongst individuals with similar histories and traits.

C THE SEPARABILITY PRESUMPTION

The separability presumption is the most general and pervasive habit of the field, and it presumes that an account about the normativity of exacting punishment can be given without considering the conditions for its delivery. This is a commitment – at times implicit, at other times explicit – for punishment theory to focus exclusively on the question of the legitimate allocation of punishment. This commitment means that the field does not need to ask the adjacent question: whether we can administer the punishment in a way that accords with the justification underpinning the allocation. This presumption is so deeply embedded in the work of both punishment and sentencing theory – and legal practice – that to point it out is somewhat like showing water to fish.[85]

Retributivist David Gray voices an explicit commitment to the separability presumption in an article written in response to Kolber.[86] Gray argues that the most influential contributors to the retributivist canon are ‘scrupulously objectivist and carefully avoid subjectivism,’ meaning that matters related to the experience or carrying out of punishment are intentionally avoided.[87] The field is concerned with punishment as a normative institution and formal, intended sanctions, not ‘nettlesome practical considerations relating to penal technology.’[88] The most ‘persuasive and coherent’ approach to punishment theory is to ‘maintain a firm line between “punishment” defined in objective terms, and the contingent effects of punishment, including the subjective experiences of offenders.’[89] However, Gray does endorse the canonical retributivist commitments: that punishment should follow only where an offender deserves it and that it must be proportionate to culpability in individual cases and between cases.[90] Fidelity to these principles, Gray admits, is ‘not satisfied by the imposition of any old punishment.’[91] The punishment imposed must be ‘deserved in its form and dimension – it must fit the crime and reflect the offender’s culpability.’[92] But the separability presumption kicks in as Gray insists that the ‘quantum of suffering’ that follows from the punishment in an individual case is not the punishment.

For Gray, the ‘indiscriminate suffering’ that some individuals face in the prison system may well be a problem that should be stopped, but such topics

85 See David Foster Wallace, *This Is Water* (New York: Little, Brown and Company 2009) at 1.

86 David Gray, ‘Punishment as Suffering’ (2010) 63 Vand L Rev 1619; see also Dan Markel & Chad Flanders, ‘Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice’ (2010) 98 Cal L Rev 907.

87 Ibid at 1640.

88 Ibid at 1626.

89 Ibid at 1640.

90 Ibid: ‘If desert is determined by objective standards, then equally culpable offenders who commit the same crime should receive the same punishment in the normal course.’

91 Ibid at 1642.

92 Ibid.

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have nothing to do with retributive theory.[93] He posits further that hiving off the discussion of penal methods and their effects will ensure that improper methods cannot draw any sustaining authority from a theory of punishment. Theories that stay cleanly separate from penal methods will put us in the best position to 'condemn and remedy sadistic penal practices, prison sexual assault, and discrimination against convicts post-release precisely because those theories clearly identify these practices as *not* punishment.'[94] We might doubt Gray's suggestion that excluding certain practices from a normative definition makes it more likely that society or the legal system will swiftly adjudicate them as unacceptable. But, for my purposes, the more important point is to emphasize that 'scrupulously objectivist' punishment theory excludes from an account of punishment a great deal more than just sadistic or clearly unconstitutional penal practices. Gray's kind of account does not grapple with any aspect of imprisonment. This sort of view does not address, for starters, how a retributive commitment to proportionality interacts with variations in conditions of confinement across facilities nor with the fact that some inmates will be able to access positive or desired opportunities while incarcerated. The issue is not only with the 'quantum of suffering' – or with plainly egregious or unconstitutional state conduct – but with all of the features of the sanction of confinement.

In an article that systematically explores the sexual dimensions of the punishment of incarceration, Alice Ristroph warns against views that deny the 'complexity of punishment and its status as a set of practices.'[95] Ristroph grounds her concerns in a discussion of *Farmer v Brennan*,[96] a 1994 case in which the Supreme Court of the United States confirmed that rapes and physical assaults are not 'part of the penalty' that the legal system imposed on a transsexual prisoner.[97] As Ristroph describes, prisoners' rights organizations have since adopted the phrase 'not part of the penalty' or similar language to insist on the protection of inmates. But, while the majority in *Farmer* wanted to establish that violent assaults in prison were cognizable under the Eighth Amendment, the majority's insistence that sexual violence is not part of the penalty 'has become part of a broader Eighth Amendment jurisprudence based on an overly narrow conception of punishment, one that obscures the details of real prison practices.'[98]

As Ristroph elaborates, Justice Clarence Thomas is an extreme example of where a view like this can lead. In many dissenting opinions, he writes that only acts that are specifically authorized by a state's own definition of punishment are governed by constitutional law. So, if state law does not explicitly authorize sexual assault as part of a prison sentence, the Eighth Amendment does not apply. Less

93 Gray admits, moreover, that 'empirical observations' may require abandoning some penal practices because they produce 'large and unavoidable amounts of incidental suffering.' Ibid at 1627.

94 Ibid [emphasis in original].

95 Alice Ristroph, 'Sexual Punishments' (2006) 15 Colum J Gender & L 139 at 167–8 [Ristroph, 'Sexual Punishments'].

96 511 US 825 (1994).

97 Ristroph, 'Sexual Punishments,' supra note 95 at 162–8.

98 Ibid at 162. US Const, amend VIII.

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extreme, but similarly problematic, positions have formed part of many majority decisions, like the rule that the Eighth Amendment only applies where prison officials act with 'deliberate indifference' to the risks and needs of inmates. This is a requirement of 'actual knowledge' on the part of prison officials that has often proven to be 'an insurmountable hurdle for inmate plaintiffs.'[99] Ristroph argues that the Eighth Amendment doctrine's focus on official intent counts very little as 'the penalty,' based as it is on a conception of punishment as a 'mere deprivation of liberty.'[100] Ristroph is, in effect, lamenting the separability presumption as it operates in legal doctrine: how 'the means' by which this deprivation is 'implemented' are themselves excluded from the account of 'the penalty.'[101]

The separability presumption also raises the prospect of unintended consequences. Theories that remain too far outside the black box of penal methods are not only silent on important issues, but they also risk generating consequences that run contrary to their own primary commitments. Duff raises this important possibility when he asks whether a communicative system of penitentiary punishment is only consistent with the values of a liberal polity in theory. In practice, 'it could too easily be destructive of those values – bullying and demeaning those whose autonomy it should respect, excluding those whom it should include, intruding into what should remain private.'[102] Theory may produce a reason to punish, and that reason may be relied upon when punishment is imposed. But the punishment as administered may defy or defeat that animating purpose.

Nicola Lacey and Hanna Pickard make a similar point regarding the desert-based theories that became prominent in the 1970s and continue to dominate the discussion today.[103] These theories insist that hard treatment is required to communicate culpability to an offender, but the problem is that the hostile emotions and stigma that often underpins hard treatment in prisons are counter-productive. Rather than inducing reform, the negative emotions that constitute affective blame often generate resistance within offenders, setting up barriers to reform. Lacey and Pickard posit that we need evidence-based forms of punishment; we need penal methods that could actually work so as to generate a productive sense of responsibility within offenders, without triggering defence

99 Ibid at 166. But see Margo Schlanger, 'The Constitutional Law of Incarceration, Reconfigured' (2018) 103 Cornell L Rev 357 [Schlanger, 'Constitutional Law']. Schlanger endorses the case of *Kingsley v Hendrickson,* 135 SCt 2466 (2015), for a more promising approach to the liability standard for official uses of force against pretrial detainees. The *Kingsley* court deployed a more objective analysis by returning to 1970s precedent, avoiding 'subsequent case law that had placed undue emphasis on the subjective culpability of prison and jail officials as the crucial source of constitutional concern.' Schlanger argues that 'constitutional doctrine should follow *Kingsley's* lead and center on the objective experience of incarcerated prisoners, rather than the culpability of their keepers' (at 361).

100 Ibid at 167.

101 Ibid at 167–8.

102 Duff, *Punishment, Communication,* supra note 46 at 178.

103 Nicola Lacey & Hanna Pickard, 'From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility without Blame into the Legal Realm' (2013) 33 Oxford J Leg Stud 1.

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mechanisms.[104] Theories marked by the separability presumption cannot assist us in this project and likely distract us from pursuing it.

Another example of unintended consequences in the penal field – and of the disconnect between formal theoretical aims and practical effects – can be drawn from Lynne Haney's work on mother–child prison programs in California. Haney did ethnographic fieldwork at one facility in 1992 and at another in 2002. Both facilities, run by non-governmental organizations, receive women sentenced to incarceration and allow them to live with their children for the duration of their sentences.[105] Haney chronicles the distinct forms of governance deployed at each place and shows how these programs operated in ways that defied their feminist and therapeutic origins. In 1992, the focus of the programming for inmate mothers was on the need for them to improve their economic situations. The women were told, in various ways, to reduce their bad habits of 'dependency' and become financially self-sufficient.[106] In 2002, the programming ethos that Haney documents was very different. Here, inmate mothers were required to verbally confess their personal mental pathologies on a regular basis. They were exposed to heavy psychological surveillance and were enrolled in mandatory 'therapeutic' programs.[107] In sum, Haney shows how, in distinct ways in each period, the 'institutional realities of punishment met the imperatives of care work.'[108] What began as a promising alternative to punishment 'morphed into its own form of power and control.'[109]

More generally, the presence of mother–child programs means that, for some women and for reasons largely unrelated to criminal culpability, imprisonment can entail residing in a facility with custody of their children. These 'alternatives' can be just as diverse as straight imprisonment. Haney shows how California inmates can encounter a dizzying array of psychological and economic programs designed to compel them to internalize new norms. Other inmate mothers will have no access to these facilities or to their children. While the duration focus and related debates about sentencing disparity focus on how to achieve uniformity in sentence lengths

104 Ibid at 5–11. On this issue, I am grateful to Martin Stone for pointing me to the thinking of psychoanalyst Hans W Loewald, who explains that the communication of blame can generate defensive forms of resistance that stand in the way of the acceptance of responsibility: 'Punishment, whether inflicted by others or by oneself, is too much in the service of repression of the sense of guilt.' Hans Loewald, 'The Waning of the Oedipus Complex' (1979) 27 Journal of American Psychoanalytic Association 751 at 759. Loewald's student Stephen Mitchell helps to interpret the claim, which is that certain forms of guilt, even where strongly felt, can trigger a disavowal of responsibility within the guilty individual. The punished person may be inclined to avoid experiencing what is too difficult to bear, but which is essential to integration and change. Stephen Mitchell, 'You've Got to Suffer If You Want to Sing the Blues: Psychoanalytic Reflections on Guilt and Self-Pity' (2008) 10:5 Psychoanalytic Dialogues: The International Journal of Relational Perspectives 713 at 728.

105 Lynne Haney, *Offending Women: Power, Punishment, and the Regulation of Desire* (Berkeley: University of California Press, 2010) [Haney, *Offending Women*]; Lynne Haney, 'Motherhood as Punishment: The Case of Parenting in Prison' (2013) 39:1 Signs 105 [Haney, 'Motherhood as Punishment'].

106 Haney, *Offending Women*, supra note 105 at 106.

107 Ibid at 178–206

108 Haney, 'Motherhood as Punishment,' supra note 105 at 107.

109 Ibid at 107.

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for similar offences, the punishment of mothers raises serious and far-reaching disparity problems that go largely unmentioned by legal actors, whether a sentence is served in the 'big house' or the 'semicarceral arena.'[110] Haney's study shows that penal regimes do occasionally respond to the unique issues raised by the incarceration of pregnant women or women with dependent children but in ways that the legal system scarcely contemplates. Within these penal 'alternatives,' there can be an extraordinary range of governance methods and modes of treatment that apply to women and their children. Sentencing theorists and courts do not formally consider and may not even know about the range of mother–child programs available in their own jurisdiction. Judges do not make key decisions about matters of access and administration, and little in the way of constitutional law applies.[111]

A judge may not be able to predict and address all aspects of the custodial experience in a sentencing decision. And it is important to acknowledge that some of the experiences that inmates have in custody will be idiosyncratic, personal, unrelated to imprisonment, *de minimus*.[112] Even gold-standard prison regulation will have to leave some aspects of the confinement experience unregulated and other aspects subject to discretion. As Jonathan Simon notes, there is a chronic shortfall in legal rules for the total institution – an inevitable 'void between legislated tasks.'[113] But punishment theory operating under the separability presumption neglects more than individual issues and unavoidable bits of variance and discretion in prison life. This mode of philosophical inquiry denies the normative relevance of most of what follows from the imposition or announcement of a term of imprisonment, including those topics that would raise constitutional concerns and all the rest of the major and minor terms of imprisonment.

IV *Theory that speaks to imprisonment*

The analysis of the legitimate aims of punishment remains vitally important; it can provide an indispensible metric with which to navigate and critique a complex and reactive legal field. But theorists must engage in some minimal way with the fact that imprisonment is a variable social institution with certain kinds

110 Haney situates her work as analysing the 'semicarceral arena.' As she writes, '[g]one are the days when "doing time" necessarily meant going away to the "big house" situated in some far-off location. For many, time is now served by attending mandatory counseling sessions, submitting to ongoing drug tests, and doing stints in halfway houses, group homes, or community-based programs.' Haney, *Offending Women*, supra note 105 at 15. The black box of state punishment extends well beyond prison walls.

111 For discussion, see e.g. Lisa Kerr, 'Making Prisoner Rights Real: The Case of Mothers' in Sharon Dolovich & Alexandra Natapoff, eds, *The New Criminal Justice Thinking* (New York: New York University Press 2017) 168.

112 For one account of the various kinds of pain that can follow from state punishment, which decision-makers could use to respond to the subjective experience of punishment, see David Hayes, 'Proximity, Pain and State Punishment' (2017) 20 Punishment and Society 1.

113 Jonathan Simon, 'The "Society of Captives" in the Era of Hyper-Incarceration' (2000) 4 Theoretical Criminology 285 at 294. The unavoidable regulatory shortfall that Simon is pointing to flows, again, from the 'total institution' character of modern prisons in countries like the United States and Canada.

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of possibilities and problems. An article by Sharon Dolovich, which analyses the legitimate aims of state punishment using the work of John Rawls, is a good example of work that ventures inside the black box of the prison, while still contributing to debates about the legitimate grounds for state punishment.[114] Crucially, Dolovich takes care to explicitly reject what I have called the separability presumption. She argues that the conditions under which a convicted offender is confined are as much a part of the punishment as the duration of the official sentence: '[T]hey are therefore as much a concern of the principles of punishment as official sentencing policies.'[115] Dolovich addresses the actual possibilities and risks associated with prison regimes as we know them, and she connects these issues to the political theory that underpins her view of legitimate punishment. Her work signals to legal actors – whether sentencing judges or wardens – that specific conditions of confinement bear upon the legitimacy of a sentence.[116]

In Rawls, state power over citizens is only legitimate when it is exercised on the basis of a collective agreement that all citizens may reasonably be expected to endorse under fair deliberative conditions. In his own work, Rawls did not apply his original position/veil-of-ignorance model to the problem of punishment, so Dolovich endeavours to translate Rawls for punishment theory.[117] Along with her unique theoretical source, Dolovich considers how the theory relates to specific problems that tend to arise within prisons. Legitimate incarceration in the Rawls/Dolovich paradigm can be imposed for a range of reasons, but it mandates 'humane conditions of confinement' that are safe, healthy, and as comfortable as possible. This is because, for Rawls, the capacity to develop and pursue a meaningful conception of the good is part of what makes us moral persons. Authorizing inhumane forms of punishment is to authorize the state 'actively and affirmatively to strip away the essential components of the target's moral personhood.'[118] Legitimate punishment cannot do that.

Dolovich accepts that restrictions on freedom of action will follow incarceration in any form and that these restrictions may be appropriate. But legitimate forms of imprisonment cannot interfere with the very capacity of prisoners to 'recognize their own interests and know how to pursue them.'[119] The translation for specific prison policies is that prisoners must be free to form bonds with others, maintain contact with family and friends in the community, and identify and pursue other interests connected to an individual conception of the good. Under inhumane

114 Sharon Dolovich, 'Legitimate Punishment in Liberal Democracy' (2003–4) 7 Buff Crim L Rev 307 [Dolovich, 'Legitimate Punishment'].

115 Ibid at 437.

116 There may be a biographical explanation of why Dolovich stands out in this field. Dolovich is trained in political philosophy, but she also teaches prison law at University of California Los Angeles and has conducted ethnographic research in Los Angeles county jail. Dolovich has a rare combination of theoretical and empirical knowledge and practical experience. See Sharon Dolovich, 'Strategic Segregation in the Modern Prison' (2011) 48 Am Crim L Rev 1 [Dolovich, 'Strategic Segregation']; Sharon Dolovich, 'Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail' (2012) 102 J of Crim Law & Criminology 965; Sharon Dolovich 'Teaching Prison Law' (2012) 62 J Leg Educ 2.

117 Dolovich, Legitimate Punishment,' *supra* note 114 at 315.

118 Ibid at 412.

119 Ibid at 409–10.

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conditions, such as living in fear of physical abuse or sexual assault, the prisoner has to focus on the basic interest of survival and 'would lack even the capacity to understand himself as a subject of interests worth fulfilling.' This particular 'form of violation' would make punishment inhumane and violate the conditions of justice under the theory.[120] Let us compare Dolovich's ideas to a run-of-the-mill punishment theory book by Ted Honderich, which begins with the observation that 'prisons are grim and usually hellish places.'[121] In its introductory pages, this book casually observes that those with mental health disorders see their conditions worsen in prison and that risks of suicide and sexual assault are pervasive. There are no citations for these claims and no sense of whether these problems have been better or worse in different historical periods or at different institutional locations. Later in the book, Honderich uses his understanding of prison rape to defeat a theory of incapacitation as a justification for imprisonment, observing that imprisonment only incapacitates crime in the community since assaults continue in the prison itself.[122] For Honderich, prison rape is a taken-for-granted and one-dimensional fact, which he mentions in order to defeat a justification for punishment offered by a competing theoretical school. Honderich conveys to his reader that rape is an inevitable feature of prison life, even though rape does not occur in all prison systems. There is clear evidence that the risk of prison rape is elevated in certain settings and that it can be significantly reduced through appropriate cell assignments and physical infrastructure, external oversight, and staff training.[123]

120 Ibid. Dolovich's approach to punishment theory seems compatible with that of Malcolm Thorburn, who argues that punishment should be understood as an act of public law carried out by the state. Thorburn suggests that the details of punishment as administered must be subject to the same principles of justification as all other exercises of state coercion. The question, then, is not only how much punishment the offender deserves (the central question of punishment theory) but also what the state can do in response (a larger question of public law). Under this kind of view, it seems that Thorburn would take the position that the justification of punishment is closely related to the question of the institutional capacity to administer a suitable sanction. Malcolm Thorburn, 'Criminal Law as Public Law' in Antony Duff & Stuart Green, eds, *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011) 21; Malcolm Thorburn, 'Punishment and Public Authority' in Antje du Bois-Pedain, Magnus Ulväng & Petter Asp, eds, *Criminal Law and the Authority of the State* (Oxford: Hart Publishing 2017) 7.

121 Ted Honderich, *Punishment: The Supposed Justifications Revisited* (London: Pluto Press, 2006) at 4.

122 Ibid at 77.

123 Establishing rules that would reduce prison sexual assaults was the central task of the *Prison Rape Elimination Act of 2003,* Pub L No 108–79, 117 Stat 972, online: <https://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea/> [*PREA*], which was passed in 2003, and the commission and rulemaking process that followed. There is a large literature on the causes of prison rape and reform initiatives, including Robert Schuhmann & Eric Wodahl, 'Prison Reform through Federal Legislative Intervention: The Case of the Prison Rape Elimination Act' (2011) 22 Criminal Justice Policy Review 111; Marjorie Rifkin, '*Farmer v. Brennan*: Spotlight on an Obvious Risk of Rape in a Hidden World' (1995) 26 Colum HRLR 273. For descriptive and evaluative research conducted on a particular program designed to reduce sexual victimization in the Los Angeles county jail, see Dolovich, 'Strategic Segregation,' supra note 116. For a critique of the *PREA* reform model, which emphasizes the prosecution of prison rapists and increased surveillance, see Ristroph, 'Sexual Punishments,' supra note 95 at 182–3.

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In her treatment of incarceration as a sexual punishment, Ristroph not only explores how prison can include the risk of forcible assault but also how it will encompass a loss of sexual privacy and the complicated use of sexual roles to navigate inequality and establish and demarcate hierarchies within incarcerated populations.[124] Unlike the empirically informed and nuanced work undertaken by Ristroph, works like that of Honderich do not grapple with the range of lived experiences that can unfold at particular institutional sites under particular regulatory regimes. Rather, this kind of standard punishment philosophy fare is founded on stereotypes and fantasies – another iteration of the black box. It confirms for readers a prefabricated vision of prisons as 'irretrievably demented,' only to engage in the same old debate as to whether punishment can be justified on retributive or utilitarian grounds.[125]

Richard Lippke also stands out as an exception for his work using retributive theory to generate an ethics of imprisonment. In the first half of *Rethinking Imprisonment*, Lippke defends a mixed theory of punishment with some standard features. Lippke's account is largely retributive, but he endorses a further justifying aim of crime prevention. Punishment should be proportionate to the seriousness of crimes, with seriousness determined by the harm and culpability that inheres in the offence. Lippke also addresses real-world factors like social deprivation and the diminished opportunities or capacity of many offenders, allowing for mitigating circumstances to fit within a retributivist view.[126] For Lippke, imprisonment is justified only where offenders with a high degree of culpability inflict, or threaten to inflict, serious harm on victims. That is where most books on punishment theory would end.

In the second half of his book, Lippke turns to the 'justifiable conditions of prison confinement – that is, the restrictions and deprivations that can be legitimately imposed on serious offenders in the name of punishment.'[127] He develops two ideal types of penal style: "minimum conditions of confinement" (minimally restrictive and reasonably humane conditions) and "extreme conditions of confinement" (severe restrictions and deprivations, including prolonged isolation and substantial sensory deprivation).[128] Lippke concludes that extreme conditions can violate retributivist constraints as inmates are subject to 'so much idleness, monitoring, and social isolation' so as to impair moral agency.[129] To facilitate moral agency, prison life should closely resemble ordinary life in civil society, with opportunities to work, exercise civil and political rights, access recreation and entertainment, and receive visitors.[130] Lippke shows how standard

124 Ristroph, 'Sexual Punishments,' supra note 95 at 184.

125 See Jonathan Lethem, a novelist who describes how the mind flinches from the fact of prisons: 'When the mind does find its way there, it wants the whole subject covered in hysteria and overstatement. Let prisons be one simple thing–either horrific zoos for the irretrievably demented and corrupt, or inhumane machines which grind down innocent men.' Jonathan Lethem, 'Introduction' in Malcolm Braly, *On the Yard* (New York: New York Review of Books, 2002) vii at vii.

126 Lippke, *Rethinking Imprisonment*, supra note 5 at 98–101.

127 Ibid at 104.

128 Ibid at 110.

129 Ibid at 113.

130 Ibid at 105.

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arguments for extreme conditions betray a 'superficial understanding of the logic of both retribution and crime reduction.'[131] In substantial detail, Lippke outlines legitimate prison conditions and the extent of moral and political rights that inmates should retain. The work is framed by Lippke's normative commitments but refers throughout to empirical prison studies, standard problems in prison governance, the political economy of state punishment, and the constitutional law of prisons in comparative perspective. Lippke allows that certain of his arguments may not be entirely convincing, but he trusts that they have shown 'how numerous and diverse the issues are that must be addressed by a normative theory of imprisonment.'[132]

V *Conclusion*

Currently, a great deal of punishment theory does not define or analyse the punitive mechanism upon which the view depends. Mainstream works generate claims about the legitimate aims of punishment but without addressing whether or how those aims could be realized. This means that normative work on punishment does not furnish the concepts and principles appropriate to the task faced by legal actors on the ground – actors who consign individuals to prison and who make innumerable consequential decisions while overseeing the administration of their sentences. For punishment theory to generate more useful tools for the assessment and reform of criminal justice, it would have to consider topics like the impact of imprisonment on individuals and the variation across and within penal institutions.

Legal actors who borrow uncritically from these fields may be convinced of the legitimacy of a prison sentence when it is imposed, without considering how quickly it may be rendered illegitimate behind the scenes of the legal system. A judge might cite denunciation as a normative basis for a particular term-of-years sentence without considering how the prison experience will itself convey a message to either the offender or the wider society. When purporting to impose a denunciatory sentence, courts ask only how many years of confinement should be announced (exhibiting the duration focus). The legal decision ordering commitment to custody is profoundly under-specific, and the aim of denunciation relates only to one aspect of the sanction – its length.[133] If length is not the only or most meaningful determinant of severity, then the aim of denunciation does not animate the sanction in anything like a full or real sense.

At sentencing, we think of imprisonment abstractly as the deprivation of liberty and proceed with the duration focus and the separability presumption. We

131 Ibid at 264.

132 Ibid.

133 And, as Justice David Cole points out, even that may not be a good proxy for severity since a shorter sentence can potentially be linked to worse conditions. In Canada, e.g., a sentence of less than two years means placement in a provincial facility, which tends to be less regulated and professionalized than the federal system. See e.g. David Cole & Anat Cole, 'The Least Is Not Always the Best,' For the Defence: The Criminal Lawyers' Association Newsletter [forthcoming].

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imagine the prison experience as being uniform across cases – nothing more or less than the deprivation of liberty – such that adjustments to sentence length can be considered the levers of severity. Judges grapple with sentence severity in a vacuum; even defence counsel rarely argue that prospective issues should be brought to bear on the sentencing task.[134] Then, in prison law, we ignore the concerns of sentencing when we adjudicate prisoner claims. Inmate litigation does not consider whether the sentence is being administered in a way that accords with culpability or with the other aims that have animated the sentence, and courts do not insist on the robust equality and uniformity with respect to conditions of confinement that the duration focus assumes.

One step forward would be to agree that most leading theories on the purposes of punishment do not describe or justify the system of imprisonment that we have and to recognize that most do not even aim to. At most, theorists concede that irregularities and abuse in the prison context are wrong, but they maintain that those topics belong to some other branch of legal theory or to some other group of actors in the system. We may have many reasons to want to separate people from society, and we certainly have many accounts that explain why some individuals deserve hard treatment by the state. But we are in short supply of theories of punishment that engage with our system of imprisonment. Most punishment theorists are in fact explicit that this is not their job. They argue, in effect, that the separability presumption is an important feature of their field.

Another step forward might be to repurpose the commitments and vocabulary of punishment and sentencing theory and to put them to use in a new, more rigorous way. For example, we could try to turn the deprivation of liberty conception of imprisonment from a false description into a demand. Garland was concerned that this 'licence suspension' notion of imprisonment allows the disavowal of the bodily containment and physical deprivations that go beyond the mere loss of liberty.[135] In sum, this can enable a promise of proportionality (at sentencing) that need not be delivered (in sentence administration). But Dirk van Zyl Smit reminds us that the 'formally uniform prison sentence' established the foundation for the important modern assertion that, except for the loss of liberty, prisoners retain all basic rights.[136] Recall the well-known line from the early twentieth-century English prison commissioner that inmates are sent to prison as punishment, not for punishment. It follows that 'the prison regime may not deliberately be organized to be punitive in any other way.'[137] Following

134 These philosophical and judicial habits are underpinned by the fragmentation of penal process in modern societies. Courts are the forum where 'justice is done' and to which public attention is directed; other penal institutions are the 'technical apparatuses.' Garland, *Punishment and Modern Society*, supra note 44 at 71–2.

135 Garland, 'Problem of the Body,' supra note 74 at 768.

136 Dirk van Zyl Smit, 'Degrees of Freedom' (1994) 13:1 Criminal Justice Ethics 31.

137 Ibid. Along these lines, Lazarus points to the *German Prison Act*, which contains this robust guiding principle: '[L]ife in prison should, as far as possible, reflect the general relationships of the outside world.' Lazarus, *Contrasting Prisoners' Rights*, supra note 76 at 84; Not surprisingly, this does not mean the German prison system always lives up to the principle, as Lazarus explores. But the standard generates more robust commitments than the largely ideological 'deprivation of liberty' conception that Lazarus traces in England.

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van Zyl Smit, reformers might use the phrase to insist that prison not include extra punishment, while being cognizant, in the way Ristroph warns, that this notion can also be deployed to deny that prison includes extra punishment.

These insights are relevant to both sentencing and prison law. Sentencing procedures could do better to perceive and control variation in the qualitative terms of imprisonment. This work could be done under existing legal categories and normative frames, like proportionality. The challenge is broader and more complex than recognizing variety in the subjective experience of pain, although that is an important component. Kolber's argument for sentence-length adjustments is an important part of the picture. But the answer cannot be only to adjust sentence lengths, which repeats the idea that time is the only or most meaningful control on the severity of imprisonment. Courts dealing with inmate litigation could insist that prisoners retain all rights that are not necessarily removed by the liberty-depriving features of life in a closed facility.[138] This means that prisons will have positive duties toward prisoners: to facilitate family relationships, to deliver community-level health care, to staff and fund facilities in ways that eliminate differential impacts on vulnerable groups, and so on.[139]

Sentencing courts do operate under some practical limits in that they cannot dictate to prison officials how to operate institutions and because some topics will have an unknown, prospective dimension. That does not mean judges must segregate all concerns about prisons from the scope of their sentencing authority (as they largely do now). Courts regularly receive evidence and decide legal issues about matters that will unfold in the future and where other branches of government have concurrent or adjacent authority. When it comes to the field of punishment theory, it would be better if claims about the legitimacy of punishment depended on the potential for law and the legal system – and the

138 Inmate litigation in countries like the United States and Canada – while plentiful – has generated only a minimal set of constitutional limits on abuse, discrimination, and extreme neglect. And it has generated very little in the way of positive rights. For discussion, see Schlanger, 'Constitutional Law,' supra note 99 at 359–60. Schlanger describes how court oversight of US prisons grew in the 1970s, only to decline again by the late 1980s. During the period of decline, Congress and the US Supreme Court imposed numerous practical and legal obstacles to prisoner rights litigation. On the judicial deference to prison officials that has characterized a great deal of inmate litigation in Canada, see e.g. Debra Parkes, 'A Prisoners' Charter? Reflections on Prisoner Litigation under the Canadian Charter of Rights and Freedoms' (2007) 40:2 UBC L Rev 629; Lisa Kerr 'Contesting Expertise in Prison Law' (2014) 60:1 McGill LJ 43.

139 Dolovich calls this 'the state's carceral burden,' referring to the price society pays for the decision to incarcerate convicted offenders. The idea is that if a society wants the benefits of incarceration, the choice obliges the state to provide for the needs of people in prison in ways it routinely fails to do for needy people in the free world. Sharon Dolovich, 'Cruelty, Prison Conditions, and the Eighth Amendment' (2009) 84 NYU L Rev 881 at 892. The Supreme Court of Canada held, in a pre-*Charter* decision, that inmates retain all rights other than those expressly or impliedly taken from her by law. See *Solosky v the Queen*, [1980] 1 SCR 821. That important principle was used to decide *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, 298 CRR (2d) 35 a highly significant trial decision on the right of incarcerated mothers to retain custody of infants so as to breastfeed and bond, giving rise to a positive state duty to maintain a nursery program in its jails.

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presumptions upon which law and the legal system are based and from which they draw authority – to govern both the articulation of punishment (a single moment which is focused on offender culpability) and the administration of it (a span of time which involves multiple acts of discretionary power exercised within a total institution). Theory produces the outlines of arguments that courts and other legal actors respond to: that punishment should be distributed fairly, that it should correspond in severity to wrongdoing, or that it should produce socially productive outcomes. We could bring these arguments to bear on the question of the specific form the punishment will take. For now, it is important to know that we usually do not.

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