Death and Other Penalties

Philosophy in a Time of Mass Incarceration

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Punishment, Desert, and Equality: A Levinasian Analysis

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The last forty years have witnessed a spectacular increase in the number of incarcerated Americans. In 1970 the U.S. penal population stood at 330,000; it now stands at over 2.4 million. This is a 700 percent increase, measured against a population increase of 150 percent. Our current level of incarceration is far out of line with almost every other country in the world. The United States imprisons 743 out of every 100,000 citizens, while Germany imprisons 85 per 100,000. The United States' closest competitor is Russia (607 per 100,000), followed by Cuba (487) and Ukraine (360).[1] This dubious achievement is made possible by the popularity of "getting tough on crime" by means of three-strikes laws and mandatory minimum sentencing schemes. And tough these schemes are, though their draconian punishments are often wildly disproportionate to the corresponding offences. Consider the not unusual punishment meted out to Leo Andrade. Andrade, a father of two, stole five children's videotapes worth $85 from a California Kmart and was caught by a security guard as he was leaving the store.[2] Two weeks later, he stole four more children's videotapes worth $69 from a different Kmart and was again caught by a security guard. Andrade was arrested for both thefts. Andrade had been a heroin addict since leaving

the Army twenty years earlier and was in and out of jail, but his most serious offense was burgling three houses when no one was home. Both Kmart thefts were charged as "petty theft with a prior," which is punishable by a maximum of three years and eight months in prison. This may seem like a harsh sentence, but unfortunately for Andrade, his burglaries counted as a "serious or violent" felony for the purpose of California's three-strikes law. Just as unfortunately, in California petty theft with a prior is a "wobbler" offense, which can be charged as a misdemeanor or as a felony. The prosecutor chose to charge Andrade with two felonies. A jury convicted Andrade on both counts, and in accordance with the three-strikes schedule, he was sentenced to two consecutive terms of twenty-five years to life, a sentence in excess of those imposed on rapists and many murderers. Andrade appealed his case to the Supreme Court, which declined to vacate his sentence, holding that a fifty-years-to-life sentence was not cruel and unusual punishment for a $150 theft.[3]

Another important factor in U.S. incarceration rates is the War on Drugs, which has supplied more than half of the increase.[4] Drug offenders now make up a quarter of the penal population and half of the federal prison population.[5] A quick bit of math shows that there were more people incarcerated for drug offenses in 2013 than there were people incarcerated for *all crimes combined* in 1970. The consequences for African Americans have been particularly devastating. The number of prison admissions for African Americans is twenty-six times higher than it was at the beginning of the War on Drugs.[6] More importantly, African Americans are disproportionately incarcerated for drug offenses, making up roughly half of those incarcerated for drug offenses at the state level and close to half of those at the federal level.[7] This disparity exists even though whites and African Americans use and sell drugs at the same rate. If there is any significant difference indicated in the relevant research, it is that whites are more likely to deal drugs than people of color.[8]

Even this quick sketch of the unequal treatment of white and black offenders suggests that our penal system is unjust, and sentencing reform is urgently needed. But while these normative claims have obvious intuitive appeal, they run up against what I call the "noncomparativist challenge." Some philosophers, using a "noncomparative" conception of justice, argue that the justice of a type of punishment is *independent* of the fairness of its distribution, and that the aforementioned facts do not, by themselves, impugn the justice of contemporary practices of punishment. If you do the crime, you deserve the time, and so unequal punishment does not unjustly burden those groups who are disproportionately punished. The noncomparativist challenge garners support from the priority of noncomparative justice over comparative justice in most thinking about penal justice, including contemporary Fourteenth Amendment jurisprudence. In what follows, I will offer philosophical support for sentencing reform by defending the claim that the disproportionate application of punishment to disadvantaged social groups is unjust. After describing the noncomparativist challenge in more detail, I will argue that Levinasian conceptions of desert and responsibility enable a theory of penal justice according to which comparative considerations have priority over noncomparative ones. In so doing, I will show that the noncomparativist challenge can be met.

In the second section of the chapter, I will discuss a slightly different type of injustice. At the time of this writing, no one responsible for the financial crisis of 2008 has been convicted of a crime, even though the ensuing events lowered Americans' household wealth by $19.2 trillion,[9] sapped retirement accounts of $3 trillion, put 12 million people out of work, and increased the number of Americans needing food stamps by 13 million.[10] (The S.E.C. has made one attempt at a conviction, charging a junior ex-Citigroup executive named Brian Stoker with fraud. Stoker was acquitted by a federal jury, who suggested in an unusual note to the judge that they were frustrated that they were not sitting in judgment of the senior executives responsible for the crisis.[11]) This should be no great surprise: white-collar crime is far more costly to society than all the FBI Index crimes combined, yet white-collar criminals are almost never arrested or charged, and when they are, they are treated far more leniently than poor offenders.[12] If we compare the good fortunes of financial executives to the tragedies that befall people like Andrade, who are routinely subject to lengthy prison sentences for minor property crimes, we are confronted with an injustice that looks similar to the one discussed previously: the wealthy are underpunished, and the poor are overpunished.

These grim reminders of the plutocratic nature of American society and its effect on punishment set the stage for the actual point I want to make. When we assess the moral blameworthiness of the well-off compared to the disadvantaged, it can seem *more* blameworthy for the well-off to commit crimes (excluding violent crimes) than the disadvantaged, even when the harms caused by their wrongdoing is of similar magnitude. Put more prosaically, part of many people's anger at the instigators of the financial crisis stems from the fact that the malefactors are inordinately well-off. In some ill-defined way, this makes their actions seem worse. Yet it is very hard to specify what, exactly, is worse about them, and as a result, one might suspect that these judgments of blameworthiness are products of

ressentiment. But as I will argue, again on Levinasian grounds, these inchoate intuitions are correct, and the advantaged *are* more blameworthy for committing crimes that are equal in severity to crimes committed by the disadvantaged. (This claim is not aimed solely at the 1 percent, though I will refrain from defining what it means to be "advantaged.")

The Noncomparativist Challenge

To start, I want to explain the distinction between noncomparative and comparative justice. Very broadly, treating someone in accordance with comparative justice requires us to think about how we are treating other people; not surprisingly, comparative justice involves comparison. In contemporary political philosophy, comparative justice is at home in discussions of distributive justice, and it stands for a specific normative principle: like cases should be treated alike, and different cases should be treated differently. This principle regulates the distribution of benefits and burdens in two ways. On one hand, it tells us that we must make comparisons when we are gauging whether to give someone her due. On the other, it tells us that we must make comparisons when we are determining what is due to her. The first version of the like cases principle requires us to give everyone the same percentage of what they are due. (Ideally, we would give everyone everything they are due, but since this is impossible, we should give everyone the same percentage of what they are due.) The second requires us to look at relevant comparisons when determining what someone is due. An example of the latter application is grading: the like cases principle states that we ought to give shabby papers worse grades than excellent ones. In the second case especially, comparative justice stands in stark contrast with noncomparative justice. Noncomparative justice requires us to treat people in accordance with what they are due, the assessments of which are independent of comparative considerations.[13] In other words, noncomparative justice requires us to treat people in accordance with what they *deserve*. For example, imagine that you fail a student for plagiarizing, and he complains that his grade is unjust because his friend's equally egregious plagiarism went undetected. If you are unmoved by his plea, you are assessing him in terms of noncomparative justice.

There are unintuitive and intuitive aspects of noncomparative justice. Many find it extremely unjust that African Americans are far more frequently jailed for drug offenses than whites. Many also find it unjust that those who commit white-collar financial crimes are treated much more leniently than petty thieves. Yet if we *just* look at the individual offender, then

so long as he is guilty, and the punishment proportionate, punishment does seem "deserved" in some sense, even in contexts where punishments have a racially disparate impact. Much seems to depend on our perspective: as one philosopher of punishment puts it, "justice and injustice seem alternately to flit in and out of focus like the pictures in an optical illusion, depending on whether we consider comparative or noncomparative factors."[14]

But while both perspectives have intuitions on their side, the noncomparative perspective is more deeply rooted in contemporary penal thought and practice. Noncomparative justice is tied to penal justice—at least the retributivist variant I'll be discussing in this chapter—by means of the concept of desert. Both noncomparative justice and penal justice state that we ought to treat people in ways that accord with what they deserve. (By contrast, most philosophers deny that desert plays a role in distributive justice.[15]) The concept of desert plays two crucial roles in penal justice. First, it is often thought that someone is liable to be punished only insofar as she is a morally responsible being and her actions can be imputed to her; that is, she is liable to be punished only if she is capable of deserving punishment. Desert, then, is a necessary condition of morally permissible punishments. Second, and more importantly, desert is often cited as one of the reasons for punishing lawbreakers.[16] Desert, along with the illegality of the lawbreaker's act, are thought to form a set of jointly sufficient conditions of punishment. As such, desert, along with criminal conduct, constitutes a conclusive reason to punish, even in situations where other lawbreakers who have committed similar crimes are not so punished.

A point of clarification: for my purposes, desert is important because it helps answer the question of why a state should punish particular offenders, *not* because it helps answer the question of why a state should employ punishment as opposed to some other method of dealing with crime. Some philosophers have assigned the latter function to the concept of desert, and have justified the practice of punishment in retributivist terms, arguing that the *purpose* of legal punishment is to give people what they deserve. However, others believe that it is incoherent (or illiberal) to justify the practice of punishment in this way. These philosophers think that the practice of punishment should be justified in consequentialist terms, though they allow that the punishment of individual offenders is best justified in a retributivist fashion. I take no stand on this debate, as I am mainly concerned with the justification of the punishment of individuals, and on this point almost everyone is in agreement.

The noncomparativist challenge should now be clear. If desert is a jointly sufficient condition of legitimate punishment, this licenses the conclusion

that someone who commits a crime, and is subsequently punished for it, is treated justly *even though* someone else who commits the same crime is not punished. It licenses the conclusion that someone who commits a crime, and is subsequently punished for it, is treated justly *even though* someone else who commits the same crime is not charged with the crime, is charged with the crime but never convicted, or is convicted but punished less severely.[17] On the noncomparativist view, the fact that a legal institution overpunishes some people of color relative to whites (or the poor relative to the rich) does not imply that a person of color or a person of minimal means fails to *deserve* that punishment. And since desert functions as part of the jointly sufficient conditions of punishment, justice requires the punishment of the offender in question. Now, for the noncomparativist, there *is* a problem with unequal punishment, though it has no relation to those who are punished. The problem is that the wrongdoers who go unpunished do *not* get what they deserve.[18] But on this construal of the problem, overpunishment is not unjust.

At this point, I would note that the dispute between comparativists and noncomparativists is not a mere academic quibble. Noncomparativists have friends in high places. The Supreme Court holds that comparative considerations have no bearing on the constitutionality of an individual offender's punishment. In the landmark case *McCleskey v. Kemp*, the Court was presented with a study that concludes, on the basis of a rigorous analysis of over two thousand murder cases in Georgia, that the race of murder victims significantly influences sentencing decisions. The Baldus study shows that when victims are white, murderers are eleven times more likely to receive a death sentence than when victims are black.[19] The *McCleskey* dissent argues that such bias clearly violates African Americans' right to equal protection under the law, but this argument does not carry the day. While the majority disagrees neither with the Baldus study's methods nor with its conclusion that the victim's race is one of the most important factors determining a murderer's sentence, they deny that this is reason to give McCleskey relief under the Fourteenth Amendment. The Court believes that unless a petitioner can show evidence of *intentional* racism in his or her case, his desert is not in question, and there is no constitutional complaint. In short, the Court holds that penal justice prioritizes noncomparative over comparative justice.[20]

If the noncomparativist challenge is to be defeated, the conceptual privilege accorded to noncomparative justice must be revoked. In the following pages, I will argue that a Levinasian account of penal justice shows

comparative justice to have priority, thus defeating the noncomparativist challenge.

Justice and Equality

To begin, we need to get a handle on Levinas's multifaceted conception of justice. "Justice" has different meanings in different periods of his philosophical development, many having little to do with how justice is ordinarily conceived.[21] *Otherwise than Being* is his first major text containing a conception of justice that makes room for some of the term's ordinary meanings. In its broadest sense, which applies to both moral and political realms, justice refers to an ideal in which everyone possesses equal moral standing.[22] In a more specific sense, justice names a characteristic of societies in which equal rights are asserted, defended, and respected,[23] and it is here that Levinas's conception of justice overlaps with more traditional ones. To my mind, one of the most important developments of Levinas's work in the 1980s is to move beyond the extremely thin description of justice contained in *Otherwise than Being* to gesture toward what one might call a Levinasian theory of legal and political justice.

To understand this latter conception of justice, it is helpful to understand Levinas's critique of mainstream liberal justice. According to the latter, "justice" names the virtue belonging to institutions that respect, enable, and protect freedom and equality. In the liberal conception of justice—and I am painting with a very broad brush here—individual autonomy and fair treatment are basic values that legitimate political and legal institutions strive to exemplify. Liberal societies are ones in which legal and political institutions enable people to pursue their private conception of the good and run their lives effectively and efficiently. In addition, liberal societies arrange matters so that the burdens and benefits of social cooperation are distributed fairly, and no one gets the fruits of social cooperation without taking on social burdens proportional to their benefits, or vice versa.

Levinas often casts a critical eye on this conception of justice, as we see in passages where justice is described as "bookkeeping," "a balance of accounts in an order where responsibilities correspond exactly to liberties taken."[24] More fundamentally, Levinas rejects its metaphysical underpinnings, exemplified by Kant's claim that freedom is the essence of humanity, and his axiological claim that autonomy is the fundamental ethical and juridical value. In Levinas's view, liberal justice, with its emphasis on freedom and autonomy, is geared toward honoring an implicitly libertarian *conatus*

essendi; it delineates a sphere that surrounds each individual self, protecting their ability to reach their vision of the good life and minimizing all non-self-initiated claims on their time, money, and labor—in short, enhancing individuals' ability to persevere in their chosen way of being. For Levinas, of course, this way of thinking renders us incapable of understanding our fundamental ethical responsibilities.

But at the same time, Levinas states that "institutions and juridical proceedings are necessary," even ethically necessary.[25] In fact, Levinas explicitly endorses liberalism, claiming that it is the specific features of liberal justice that distinguish praiseworthy legal and political regimes from totalitarian or fascist ones.[26] He says that states *ought* to fairly apportion rights and responsibilities, to strive for equality in benefits and burdens.[27] At first glance, these claims might seem to be in tension with his critique, but they are not. They reflect a clear-eyed recognition of the ways in which liberal justice—or at least a Levinasian version of liberal justice where justice is conceived as subservient to ethics—furthers the aims of ethics. Again, Levinas's considered view is that liberal justice, properly understood, is ethically necessary. To see why this is the case, we need to take one more step back.

Levinas conceptualizes ethics on the basis of a fundamental normative relationship between the self and the other. For Levinas, responsibility for the other is the source of all normativity, be it political, legal, or ethical; it is in "responsibility for the other . . . ," he writes, "[that] the adjectives unconditional, undeclinable, [and] absolute take on meaning."[28] He contends there would be no normative orientation in a world without it. Levinas follows Kant in thinking that the very possibility of normativity depends on the existence of an unconditional moral authority. But Levinas puts responsibility where Kant—and the liberal tradition more generally—would put freedom: to be a moral agent is to be responsible. For Levinas, it is the other, not pure practical reason, that is the unconditional authority. The other's needs, not my freedom, constitute the fundamental normative fact that orients ethics. Likewise, moral requirements derive from the commands of the other, not from rational principles constitutive of free will.

Levinas's analysis of responsibility for the other is notoriously difficult to understand. Roughly speaking, my responsibility for the other is the fact that I am literally responsible for everything that happens to the other, responsible in the sense that I am answerable to the other for everything that happens to her. Being responsible for others is also about attending to the needs of the other without deliberating about what we "owe" to her. As a result, our responsibilities for others cannot be determined by,

or limited by, the responsibilities others bear for us. Moral duties are not cut from the cloth of reciprocity. This may seem outrageous, but Levinas's argument, which I will not be able to defend here, is that only by conceiving of responsibility in this way does it make sense to posit the existence of unconditionally binding moral duties. In his view, theories that privilege freedom put conditions on our duties to others that make a mockery of the notion of unconditional obligation.

To see how justice serves the aims of ethics so construed, we need to consider a problem that arises in virtue of the fact that there is more than one other in the world: the self is responsible for all others. Implicit in this responsibility for everyone is a deep normative tension, namely, every other's claim is *equally* valid. In rushing to someone's assistance, I turn my back on another who makes an equally valid claim on me. And what if I tried not to turn my back on anyone? I would be paralyzed, overcome by the impossibility of taking any specific course of action. I would be like Buridan's ass, which, confronted with equally attractive bales of hay, starves to death for want of an ability to decide between them.

Since our responsibility compels us to act, we must do something, but to do anything we must have some criteria for determining which responsibilities to act on. For Levinas, these criteria are provided by the fundamental principles of morality and by the basic principles of legal and political justice. So justice is *ethically* necessary because the requisite criteria for action are provided by principles of justice, or more specifically, by the catalogue of rights and duties generated by principles of justice. Furthermore, equality demands that I apply these criteria as impersonally as possible, so as not to favor those familiar to me. This necessity generates a need for *institutions* to make authoritative decisions in this arena. More specifically, institutions are needed to make impersonal judgments regarding the content of our more or less indeterminate rights (e.g., the right to life) and also to make decisions when our rights claims come into conflict (your right to life versus my right to self-defense). We also need institutions to determine procedures for the acquisition of rights (acquiring property, making contracts, passing laws, etc.). Finally, we need institutions to *enforce* our rights and duties, and to impose sanctions when they are violated. (Although Levinas says virtually nothing about punishment, I think this last point indicates how he would justify the practice of punishment. On his view, punishment is legitimate insofar as it serves justice by enforcing compliance with our duties.[29]) These needs make it ethically necessary to institute legal institutions. As Levinas puts it, "Institutions are necessary to carry out decisions. . . . Justice and the just State constitute the forum enabling

the existence of charity within the human multiplicity."[30] In our society, legal institutions just are the institutions in question. So while Levinas and liberal theorists agree on the necessity of legal institutions and, at a general level, would explain that necessity in similar ways, for Levinas the *purpose* of law is not primarily to protect our rights—though it must do that as well—but to equitably distribute responsibilities. Put differently, for Levinas law is a response not to the threat of Hobbesian violence or free-riding but to overwhelming responsibility.[31]

As a consequence of these considerations, legal justice must be understood as essentially comparative. The necessity of equal treatment flows from the purpose of law, which provides normative direction to every aspect of legal practice. Since the purpose of law is to equitably distribute responsibilities, each branch of the legal system is normatively governed by the principle of equality. In other words, equality is an *essential* feature of legal justice. And since legal justice is comparative all the way down, penal justice, as a type of legal justice, must also be comparative.

To better understand the novelty of Levinas's approach, it will help to draw a contrast with more traditional explanations of equality. Take, for example, a family of theories of equality that I will call "liberal" theories of equality. We can trace the importance of equal treatment in these theories to their conception of the purpose of law and their justification of legal coercion. On a liberal view (again, painting with a very broad brush), a legal institution is justified in exerting power over citizens insofar as it protects and enhances their freedom or autonomy. Here equal treatment is important because citizens have equal moral standing qua autonomous beings or rational agents, and equal treatment respects our equal standing. But this explanation of the importance of equality licenses the use of noncomparative practical judgments and establishes the permissibility of unequally applied punishments. If deliberations about who is to be punished and how much they are to be punished are guided (and constrained) by the value of autonomy, our decisions will privilege noncomparative justice, for the simple reason that autonomous beings can be said to *deserve* punishment. They deserve to be punished because they have chosen to break the law and to commit wrongful acts. Since respecting people's autonomy involves treating them as autonomous beings, respecting autonomy involves holding them morally and legally accountable for their wrongdoing, *regardless* of how others are treated.[32] Furthermore, nothing in the concept of autonomy precludes punishing members of an overpunished group for their wrongdoing; autonomy is violated only if there is no good reason

for the punishment. So insofar as fundamental norms of liberal justice are shaped by the value of autonomy, legal justice is not comparative all the way down, and noncomparative justice is not excluded from the ambit of penal justice.

We can now more clearly see what makes Levinasian justice distinctive and what enables it to repel the noncomparativist challenge. On Levinas's account, the justification of legal coercion, and the corresponding justification of punishment, is developed on the basis of a conception of the purpose of law that excludes a noncomparative conception of legal justice. The values central to this conception generate side constraints on the means states may use to control crime. Most importantly for our purposes, they prohibit unequal punishment. While liberal values also place side constraints on punishment, like the prohibition against dehumanizing punishments, the principle "no punishment without a crime," and so on, liberal values do not generate the prohibition in question.

It is important to note that establishing the priority of comparative justice does not mean that the Levinasian account must forgo the concept of desert altogether. Desert can still function as a necessary condition of legitimate punishment: we can still say that the state may punish only those who *deserve* to be punished. This makes room for the traditional requirement to assess a wrongdoer's state of mind and ensure that he is culpable for his actions. Furthermore, as I discuss later on, desert can still play a role in sentencing determinations. Desert, in its connection with blameworthiness, can help us determine how much to punish a lawbreaker by helping us pick out which crimes are the most severe and merit the most severe punishment. What desert *cannot* do is function as a sufficient condition of legitimate punishment.

Demonstrating the injustice of unequally applied punishment is an important step to reform, but it leaves a critical question unanswered. How should we remedy the injustices we find? As I mentioned earlier, the United States disproportionately punishes African American drug offenders; the ratio of drug convictions to drug offenses is higher for African Americans than it is for whites. Justice requires us to remedy this situation and pursue equality. But equality could be pursued in one of three ways. We could punish more white drug offenders, we could punish fewer African American drug offenders, or we could decriminalize drug possession and distribution. Of the first two options, the second is more attractive, at least if we accept the validity of the moral principle "first do no harm." Since unequal punishment is illegitimate, the state actively harms the African American

drug offenders it punishes. The state does not harm those it fails to punish. The "do no harm" principle would therefore direct sentencing authorities to reduce convictions of African Americans.

As for the final option, a good case can be made for decriminalizing possession and distribution of recreational drugs on both consequentialist and retributivist grounds. But to make this case, we need the sort of substantive moral argument that cannot be found in Levinas, and so Levinas will not help us settle this issue. (Obviously decriminalization would be a much more controversial way of solving the problem of unequal punishment of violent crimes such as first-degree murder.)

Unfortunately, things are not so simple with respect to crimes that involve severe moral wrongdoing. Imagine a world in which minority group M is overpunished for the crime of kidnapping. Would we want to refrain from punishing kidnappers who belong to group M? I am not sure that in this instance the "first do no harm" principle would carry the day; it may be preferable to focus efforts on ratcheting up punishment of nonminority offenders.[33] But for the purposes of this chapter, we need not settle this question.

Levinasian Desert

In this part of the chapter, I want to consider the consequences of Levinas's conception of justice for our understanding of what wrongdoers deserve, or what they are due. It is a commonplace of retributivist theories of punishment that a lawbreaker's punishment ought to be proportionate to the moral gravity of her offense. On the standard account, the moral gravity of an offense is a function of two variables: the culpability of the offender and the severity of her offence. Culpability refers to someone's responsibility for their act. For someone to be culpable at all, they must be reasonably mature and of sound mind. Once this threshold is passed, culpability admits of degrees. Someone who intentionally harms someone else is more blameworthy than someone who foreseeably but unintentionally harms his victim. The severity of an offense is typically based on the amount of harm caused by the wrongful act. To take an easy example, premeditated murder is one of the gravest offenses, because it intentionally causes an immense amount of harm. But in many cases, determining the precise amount of moral blameworthiness attached to an act of wrongdoing is a difficult task.

Legal institutions use various shortcuts to simplify assessments of desert. Culpability (*mens rea*) is differentiated into intentional, knowing, reckless, and negligent wrongdoing. (*Mens rea* need not be demonstrated for strict liability offenses.) The severity of the criminal act (*actus reus*), along with the elements of the act, are statutorily defined. While the Eighth Amendment gives sentencing bodies fairly wide latitude in determining punishment, most jurisdictions try to honor the principle that a lawbreaker's punishment should fit her crime. The basic idea of fittingness, or proportionality, is that crimes and punishments are ranked in severity (where severity includes the severity of the underlying offense, culpability, and sometimes criminal history), and punishments are attached to the crimes to which they are equal in severity. For example, if we ranked punishments and crimes on a scale of 1 to 10, a crime of severity 8 would merit punishment of severity 8.[34] Legal institutions that punish a crime of 8 with a punishment of 8 punish properly, and those that punish the same crime with a more or less severe punishment punish improperly. Since first-degree murder intentionally causes grievous harm, proportionality tells us that first-degree murderers will deserve some of our most severe punishments.[35] (For the purposes of this discussion, I want to focus on crimes that are *mala in se* rather than *mala prohibita*, i.e., wrong in themselves rather than wrong by legal fiat, as the latter involve complications that distract from the task at hand.[36]) In the United States, these considerations are distilled into federal and state sentencing guidelines.

On a *Levinasian* theory of desert or blameworthiness, we must add one more variable, which I will call "capacity," to the calculus. For the purposes of this chapter, capacity can be thought of as material resources and social capital, though this characterization is not exhaustive. In Levinas's view, or so I will argue, when we assess someone's blameworthiness for a particular wrongdoing, we must take into account her social and economic status. This addition captures the idea, presented earlier, that some crimes are more blameworthy when committed by a well-off offender than a disadvantaged one.

The scaffolding of this conception of blameworthiness begins with Levinas's claim that the other's need functions as a sufficient condition of my duty to meet that need. While the fact that I live in a world surrounded by many needy others absolves me from the requirements of the singular ethical relation (i.e., my "infinite responsibility"), the other's need does not cease to impose obligations. Now, if we convert this point about need into a determinate moral principle, it would look something like Peter Singer's famous claim that the better-off must donate their wealth until they reach the point of marginal utility. And this principle might seem so demanding as to be implausible. But I do not think that Levinas is arguing for such

a specific principle, though I cannot defend this interpretation here. (If there is a general principle to be extracted, it is that those of us who are decently provisioned are blameworthy for not sacrificing *any* of our comfort.) Rather, Levinas wants to show that a common moral intuition—I ought to assist someone in need, because they are in need—gets morality exactly right. If we privilege this intuition, as Levinas suggests we do, moral deliberation will *start* from the fact that other people's needs make a prima facie claim on us and only then ask whether there are reasons for believing that these needs fail to generate conclusive duties. Need is a sufficient condition of moral obligation, and so these needs impose duties, unless there are excusing conditions. By contrast, the standard mode of deliberation places the burden on the person with needs, demanding an argument showing that we really ought to give her what she needs.

To be sure, in Levinas's view considerations of justice *do* allow me to weigh my needs against the other's. This means that if I am in a situation of equal need, our needs cancel each other out, and I might not be obliged to renounce my right to the resources I possess. But these excusing conditions are limited; my only excuse is my own need. Since the well-off have no such needs, they possess no justification for failing to attend to the needs of others. For the well-off, the duty to assist others is almost always conclusive.

To my mind, the view just described is implied by the theory of responsibility developed in *Otherwise than Being*, though it is not made explicit. Levinas does, however, endorse something like the position I am attributing to him in one of his Talmudic readings, where he writes: "The problem of a hungry world can be resolved only if the food of the owners and those who are provided for ceases to appear to them as inalienable property, but is recognized as a gift they have received for which thanks must be given and to which others have a right. Scarcity is a social and moral problem and not exclusively an economic one. . . . A community must follow the individuals who take the initiative of renouncing their rights so that the hungry can eat."[37] There are a number of points to be noted here. First, this passage clearly expresses the idea that a good society must privilege the needs of the seriously disadvantaged over the rights of the advantaged. This indicates that a good society is an *egalitarian* one: social policies governing distributions of resources will favor the less well-off. Moving from the political to the moral themes of the passage, we see that it is the "owners" and "those who are provided for" who are first and foremost responsible for the feeding of the hungry and that the claims for assistance made in the name of those with less capacity primarily target those with abundant

capacity. This responsibility is incurred simply by means of being able to ameliorate the suffering. It has nothing to do with whether one has done anything to *cause* the suffering; as Levinas puts it, "To leave men without food is a fault that no circumstance attenuates; the distinction between voluntary and involuntary does not apply here."[38] Finally, desert does not lessen or attenuate these responsibilities. Those who are well-provided for do not deserve what they have, even if they have worked hard for it. Instead, they must recognize that their possessions are a "gift," presumably in the Rawlsian sense that the fundamental conditions of individual flourishing are distributed according to luck rather than desert.

But these points apply more broadly. Levinas is not simply talking about our responsibility to give food to those who are starving; he is talking about responsibility for the others' needs as such. So the well-off are more responsible than the disadvantaged for not meeting any of the needs of others: as Spider-Man's Uncle Ben intones, "With great power comes great responsibility."[39] And a well-off person is, *ceteris paribus*, more blameworthy than a disadvantaged person for not meeting the needs of others. The conclusion to draw from this is that for some types of actions and omissions, *blameworthiness is a function of capacity*. For our purposes, the act and omission types in question all have to do with the distribution of resources. Although I will not make this preliminary typology any more definite, one clarification is in order. The act and omission types in question do *not* include violent crimes. Nothing in Levinas suggests that the disadvantaged have fewer responsibilities with regard to respecting the other's physical and emotional integrity.

To see what difference Levinas's account makes, consider a competing theory of morality. For Kant, autonomy is the basic moral value. All moral duties are, in this sense, derived from the requirement that we respect the autonomy of ourselves and others. This theory of morality does *not* place higher demands on the well-off, because everyone, advantaged and disadvantaged alike, is equally capable of respecting themselves and others. (Kantian morality does require us to advance the happiness of others, but this is an indirect duty, and an easy one to discharge.[40]) So for Kant, blameworthiness is a function of culpability and harm, where harm is conceptualized in terms of infringements on autonomy.

But for Levinas, blameworthiness is not merely a function of culpability and harm; it is also a function of capacity. So when we deliberate about how we ought to treat others, we must take note of our capacities. And when we make moral assessments of other people, we must take their capacities into consideration, along with the harm done and their level of culpability.

There are two practical consequences of this view that need to be distinguished. First, the inclusion of capacity means that some act or omission types typically thought to be morally blameless will be considered blameworthy. It lengthens the list of moral offences. As I have already suggested, the inclusion of capacity would ground the claim that the wealthy are to be blamed for not helping those in need. Second, this inclusion modifies *existing* calculations of blameworthiness; it makes certain previously defined wrongful acts more blameworthy when committed by someone who is well-off.

The first consequence involves a special complication for a theory of punishment. Even if the well-off are *morally* blameworthy for not helping those in need, it is still an open question whether they should be *legally* blameworthy for failing to do so. And it is an open question whether any of the moral offenses on the newly lengthened list should be criminalized. So anyone who wants to defend the criminalization of such conduct would need to offer a separate argument defending their view. States do not criminalize all immoral conduct, nor do any philosophers of punishment or legal theorists think that criminalizing every moral offence is anywhere near a good idea. Furthermore, identifying the immoral conduct to be criminalized is an extremely difficult philosophical task. On the one hand, criminalizing immorality often curtails liberty; the more a state criminalizes immorality, the less freedom its citizens maintain to pursue their own conceptions of the good. On the other hand, morality is, in many cases, a matter of serious disagreement. And the dominant "positive morality" of a society is often deeply unjust and immoral.

I feel the force of these difficulties, but I will set them aside. This is partly because I am not sure how to address them. But mainly it is because the second consequence mentioned earlier is sufficient to support the argument I want to make, and it does not introduce such problems. Legal institutions can give effect to the Levinasian modification of blameworthiness by means of legal practices already in existence. In many jurisdictions, a sentencing body is allowed to consider aggravating and mitigating factors. If aggravating factors are demonstrated at trial, a sentencing body can impose a more severe punishment on the defendant; common aggravating factors include prior felony convictions, use of a deadly weapon, and excessive cruelty. The point of statutory aggravators is to enable criminal law to achieve proportionality in the following kind of case: offender is guilty of committing a criminal act A, which is an instance of criminal act-type T; the blameworthiness of T is codified in the jurisdiction's sentencing scheme, but A is clearly more blameworthy than T. To make the

punishment better fit the crime associated with A, statutory aggravators direct the sentencing body to impose a more severe punishment than is usually imposed for T.[41] (Mitigating factors are used in the opposite way.) Employing this model, the law could incorporate aggravators that capture variations in defendants' capacities. While there are some difficulties in specifying the type and level of capacity that would constitute the aggravator, they would be no more difficult to overcome than the ones inherent in identifying "especially cruel or heinous" circumstances, to take an infamous example.

To see how this works, consider a pair of malefactors. One, a wealthy CEO, cheats on his taxes. The other, an Army veteran living in a homeless shelter, steals some DVDs from Kmart. Let's stipulate that the harm involved in both cases is the same, and that both men were of sound mind. On the standard way of calculating desert and blameworthiness, both offenders would be equally morally blameworthy. But if we use the Levinasian way of calculating blameworthiness, we will include consideration of capacity, and the CEO turns out to be more blameworthy. As a result, there exist good reasons to sentence the CEO more severely than the veteran, and we need not worry that the intuitions motivating the present argument are products of *ressentiment*, or that they lack philosophical support.[42]

The conclusions reached previously might surprise those who possess prior acquaintance with Levinas. Levinas is often considered to be *the* proponent of ethical asymmetry, the champion of a relentless responsibility that singles us out and submits us to duty on top of duty, leaving no room for excuses. And while my analysis does not *excuse* the least well-off, it does show that they are less blameworthy for their wrongdoing. But I do not think that this result is in tension with Levinas's fundamental philosophical commitments. It is true that Levinas argues that the normativity, or binding force, of morality derives from the asymmetrical relationship of the one-for-the-other. However, as I have argued here, if we pay attention to Levinas's theory of justice, we find that his radical theory of responsibility grounds a liberal concern for equality as a legal and political principle. I have also shown why this admittedly cumbersome Levinasian baggage should appeal to those interested in punishment reform. The normative reach of the traditional liberal principle of equality, insofar as it is grounded in freedom and autonomy, does not extend so far as to properly regulate the institution of punishment. Only on Levinas's account is equality in punishment necessary.

8. Ibid, 218.
9. Hugo, *Écrits sur la peine de mort*, 118.
10. Ibid, 121.

PUNISHMENT, DESERT, AND EQUALITY: A LEVINASIAN ANALYSIS
Benjamin S. Yost

1. "US Rates of Incarceration: A Global Perspective." Retrieved January 18, 2013, from http://www.nccdglobal.org/sites/default/files/publication_pdf/factsheet-us-incarceration.pdf.

2. Over 3,200 Americans are currently serving life terms for nonviolent offences. "A Living Death: Life without Parole for Nonviolent Offences." Retrieved January 24, 2014, from https://www.aclu.org/criminal-law-reform/living-death-life-without-parole-nonviolent-offenses-0.

3. *Lockyer v. Andrade*. U.S. 538: 63. For further discussion of *Andrade*, as well as a detailed criticism of three-strikes laws, see Erwin Chemerinsky, "Cruel and Unusual: The Story of Leandro Andrade," *Drake Law Review* 52 (2003): 1–24. California voters recently passed Proposition 36, which requires that the third strike be a "serious or violent" felony for the mandatory life sentence to be applied. However, there is a loophole: some "non-serious, non-violent drug or sex offences" can still trigger a mandatory life sentence. See "California General Election Official Voter Information Guide." Retrieved January 18, 2013, from http://vig.cdn.sos.ca.gov/2012/general/pdf/complete-vig-v2.pdf.

4. Michelle Alexander, *The New Jim Crow: Mass Incarceration in an Age of Colorblindness* (New York: The New Press, 2010), 59.

5. Douglas A. McVay, "Prisons and Drug Offenders: Federal-Specific Data." Retrieved January 18, 2013, from http://www.drugwarfacts.org/cms/Prisons_and_Drugs#Federal-Data.

6. Alexander, *The New Jim Crow*, 96.

7. Marc Mauer, "The Changing Racial Dynamics of the War on Drugs." Retrieved January 18, 2013, from http://sentencingproject.org/doc/dp_raceanddrugs.pdf. Mauer shows that the situation is just as bad for Latinos.

8. Alexander, *The New Jim Crow*, 97.

9. "The Financial Crisis Response in Charts." Retrieved January 18, 2013 from http://www.treasury.gov/resource-center/data-chart-center/Documents/20120413_FinancialCrisisResponse.pdf.

10. "The Costs of the Financial Crisis." Retrieved January 18, 2013 from http://www.bettermarkets.com/sites/default/files/CBA%20Report%20CoC%205-31.pdf.

11. Peter Lattman, "Former Citigroup Manager Cleared in Mortgage Securities Case," *The New York Times*, July 31, 2012.

12. Jeffrey Reiman and Paul Leighton, *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice* (Boston: Pearson Higher Education, 2010), 110–171.

13. I take this way of putting the distinction from Owen McLeod, "On the Comparative Element of Justice," in *Desert and Justice*, ed. Serena Olsaretti (Oxford: Oxford University Press, 2003), 123–144.

14. Ibid.

15. The two principles of justice found in Rawls's *A Theory of Justice* contain no reference to desert; one of Rawls's main arguments is that desert should *not* figure into distributive justice. Desert is also absent from Nozick's conception of justice in *Anarchy, State, and Utopia*. To be sure, some theorists insist that desert plays a necessary role in distributive justice; for a discussion and criticism of this position, see Arneson, "Egalitarianism and the Undeserving Poor," *Journal of Political Philosophy* 5, no. 4 (1997): 327–350. But even friends of desert could agree that distributive justice is conceptually severable from the concept of desert, while it is difficult to say that penal justice is severable in that way.

16. It is important to note that retributivism need not be associated with the proposition "evil people deserve to suffer." Retributivism also has liberal variants. On the liberal view, legal and political institutions enable us to escape the state of nature in which violence threatens our natural rights. When the rule of law prevails, cooperative arrangements are secured, and massive social benefits result. Different versions of liberalism will emphasize different aspects of this story. Kant, for example, emphasizes the former, while contemporary liberals such as Rawls tend to emphasize the latter. But either way, the purpose of law is cashed out in terms of the protection of our rights. And if law is to protect our rights, it must ensure that rights are respected. This necessity justifies the state in coercing compliance with rights claims.

17. Ernest van den Haag famously depends on this claim to argue that capital punishment is just, even when it is imposed in a racially discriminatory fashion; see "The Ultimate Punishment: A Defense," *Harvard Law Review* 99, no. 7 (1986): 1662–1669.

18. Ibid.

19. David Baldus et al., "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," *Journal of Criminal Law and Criminology* 74 (1983): 661–753.

20. The Court is not completely immune to considerations of comparative justice. *Furman v. Georgia* deemed the death penalty unconstitutional pre-

cisely because its imposition was completely discretionary (i.e., states could provide no reason why they executed one person rather than another). Once states devised capital sentencing procedures that purported to guide juries' discretion and standardize the sentencing process, the Court found the death penalty constitutional. But requiring guided discretion does almost nothing to ensure comparative justice, and so the Court's interest in comparative justice is effectively nonexistent.

21. Elsewhere, I discuss the development of Levinas's concept of justice in detail; see Benjamin S. Yost, "Responsibility and Revision: A Levinasian Argument for the Abolition of Capital Punishment," *Continental Philosophy Review* 44 (2011): 41–64.

22. Emmanuel Levinas, *Otherwise than Being, or Beyond Essence* (The Hague: Marinus Nijhoff, 1980), 160.

23. Ibid., 160–161.

24. Ibid., 125. See also "The Rights of Man and the Rights of the Other," in *Outside the Subject* (Stanford, CA: Stanford University Press). It is important to note that Levinas never says much about law. He devotes a few pages of his major works to a consideration of legal and political institutions; he has two short essays on human rights; and he makes a number of brief claims in his interviews, the latter being the most important source for the present argument. The essays are "The Rights of Man and the Rights of the Other" and "The Rights of Man and Good Will." For our purposes, the most important interviews are contained in Jill Robbins, ed., *Is It Righteous to Be?: Interviews with Emmanuel Levinas* (Stanford, CA: Stanford University Press, 2001). Nevertheless, the scattered remarks found in these texts involve substantive conceptual commitments, the implications of which I discuss here.

25. Robbins, *Is it Righteous to Be?*, 67. This claim is repeated throughout the interviews contained in *Is it Righteous to Be?* One finds a more concrete discussion of this necessity in Levinas, "Ethics and Politics," in *The Levinas Reader*, ed. Sean Hand (Oxford: Blackwell, 1989).

26. Robbins, *Is it Righteous to Be?*, 51.

27. Levinas, "The Rights of Man and the Rights of the Other," 116.

28. Levinas, *Otherwise than Being, or Beyond Essence*, 124.

29. For the purposes of this chapter, I will assume that the institution of punishment is capable of legitimacy. This view has not gone unchallenged. David Boonin and Angela Davis provide two detailed arguments for the abolition of punishment and incarceration. See David Boonin, *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008), and Angela Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003). Although I am sympathetic to Boonin and Davis, I do not think that Levinas would side

with them, as he seems to endorse a roughly retributive justification of punishment in his cryptic essay "An Eye for an Eye," in *Difficult Freedom: Essays on Judaism* (Baltimore: Johns Hopkins University Press, 1990).

30. Robbins, *Is it Righteous to Be?*, 230.

31. Ibid., 167.

32. These considerations generate the surprising conclusion that Levinas is, in some sense, more concerned with equality than are mainstream liberals.

33. Debates about inequality in punishment of morally severe crimes are often centered on inequalities in capital sentencing, as that has been the focus of social science research. The proposed remedy to inequality in capital sentencing is to bar execution and replace it with a life sentence, with or without parole. While life in prison is quite clearly a severe punishment, this handy solution may not be available for other crimes. For example, reducing the sentence of a kidnapper belonging to an underpunished group does not seem to give the offender what she deserves in the same way.

34. Of course, it is not enough to attach two ordinal scales to each other. There must be some substantive correspondence (which philosophers of punishment call "commensurability") between the two scales of severity. If a jurisdiction's most severe punishment were ten days in prison, we would probably consider this an inappropriate punishment for the worst type of crime.

35. This does not mean that murderers merit the most severe punishments conceivable, or that they deserve to die. I develop a Levinasian argument against capital punishment in "Responsibility and Revision." I should also note that in jurisdictions with a felony-murder rule, the state can convict someone of first-degree murder when, in the process of committing certain classes of felonies, they do something that leads to someone else's death without intending to cause it. Felony murder is controversial because it violates proportionality, enabling the state to impose the most severe punishment on someone who lacks any intent to kill.

36. An example of the former is murder; an example of the latter is operating a hair salon without a permit.

37. Emmanuel Levinas, *Nine Talmudic Readings* (Bloomington: Indiana University Press, 1990), 133.

38. Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority* (Pittsburgh: Duquesne University Press, 1969), 201. I am here appealing to one of Levinas's metaethical statements. However, given the previous considerations, this statement can be read as a description of our normative situation.

39. Jill Stauffer drew my attention to the Levinasian overtones of Uncle Ben's saying in *Spider-Man*. Pursuing this, I discovered that the phrase is

traceable to Voltaire, and, even earlier, to the Gospel of Luke (12:48): "For unto whomsoever much is given, of him shall be much required."

40. Immanuel Kant, *Metaphysics of Morals, in Practical Philosophy*, ed. Mary Gregor (Cambridge: Cambridge University Press), 387–388.

41. I do not mean to suggest that as currently defined and employed, aggravators actually *do* capture blameworthiness. There is much to criticize about the way aggravators are employed; see Jonathan Simon and Christina Spaulding, "Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties," in *The Killing State: Capital Punishment in Law, Politics, and Culture*, ed. Austin Sarat (Oxford: Oxford University Press, 1999), 81–113. My point is just that there are mechanisms at law that could be used to capture the aspect of blameworthiness under discussion.

42. Of course, in the second essay of *On the Genealogy of Morals*, Nietzsche claims that a strong, vital society would not resort to punishment at all (§10). I want to reiterate that I am not convinced that punishment is ever justified. But if punishment in general is capable of justification, our current practices of punishment are not.

PRISONS AND PALLIATIVE POLITICS

Ami Harbin

I write this piece in memory of my dad, Walt Hovey, who worked for many years as a correctional officer and crisis negotiator in maximum- and medium-security prisons in Canada. Our conversations about the realities, constraints, and relationships he witnessed in prisons shaped my thinking. The care and support he received from prisoners and co-workers meant a great deal to him, and to me. For helpful feedback at multiple stages, I also thank Lisa Guenther, Scott Zeman, Geoffrey Adelsberg, Alexis Shotwell, Michael Doan, Phyllis Rooney, and Mark Navin.

1. See, for example, *Serving Life*, Dir. Lisa Cohen. Oprah Winfrey Network Documentary Club, 2011. Outside, filmmaker Edgar Barens has been working with the hospice volunteers at Iowa State Fort Madison to produce a documentary, "Prison Terminal," about their experiences and work there (due for release 2013, see http://www.prisonterminal.com).

2. See, for example, Lori Waselchuk and Lawrence N. Powell, *Grace Before Dying* (Brooklyn: Umbrage Editions, 2011).

3. See Felicia Cohn, "The Ethics of End-of-Life Care for Prison Inmates," *Journal of Law, Medicine and Ethics* 27 (1999): 252–259; E. Craig and M. Ratcliff, "Controversies in Correctional End-of-Life Care," *Journal of Correctional Health Care* 9 (2002): 149–157; N. N. Dubler, "The Collision of Confinement and Care: End-of-Life Care in Prisons and Jails," *Journal of Law, Medicine & Ethics* 26, no. 2 (1998): 149–156; Fleet Maull, "The Prison Hospice Movement," *Explore* 1, no. 6 (2005): 477–479; M. Ratcliff, "Dying Inside the Walls," *Journal of Palliative Medicine* 3, no. 4 (2000): 509–511; and A. Siobhan Thompson, "Caring for Prisoner Inmates the Hospice Way," *Illness, Crisis and Loss* 17, no. 4 (2009): 363–378.

4. To be clear, "palliative care" by definition is care aimed at reducing pain and suffering at any point in an illness (not only at end of life), and "hospice care" is one branch of palliative care, aiming to reduce pain and suffering at end of life specifically, after curative care is no longer being given. Throughout the chapter, I am referring to prison hospice programs that for the most part aim to relieve suffering at end of life (though given the limits of prison health care, there are cases where patients enter hospice well before end of life, or just when very ill or old). Although hospice is the main context I discuss here, the title reflects my interest in the broader politics of reducing pain and suffering in prison at all stages of life.

5. Angela Davis, *The Meaning of Freedom and Other Difficult Dialogues* (San Francisco: City Lights Books, 2012), 124–125, 47. Davis cites Ruth Gilmore's definition of racism as "the state-sanctioned and/or legal production and exploitation of group-differentiated vulnerabilities to premature death, in distinct yet densely interconnected political geographies." Ruth Wilson Gilmore, "Race and Globalization," in *Geographies of Global Change*, ed. P. J. Taylor, R. L. Johnston, and M. J. Watts, 2nd edition (Oxford: Basil Blackwell, 2002), 261.

6. As Angola hospice volunteer Justin Granier says: "Whether I'm in the dorm, or seeing dudes on the urinal, I'm watching dudes die here daily. Nobody is going home who has life sentences. This is death" (*Serving Life*). In another example from the film, as he is dying in prison hospice, Hollingsworth is permitted a visit from his brother, Roy, who is also a prisoner at Angola. Roy says to Kevin, "Me and you been together since you was born, so we both know we lived the life of a dead man. . . . When we hit the streets, we knew we was dead" (*Serving Life*).

7. I have in mind the work of many feminist bioethicists, including Susan Sherwin, Francoise Baylis, Hilde Lindemann, Rosemarie Tong, Anne Donchin, Margrit Shildrick, and many others.

8. Sadhbh Walshe, "When Prison Illness Becomes a Death Sentence," *The Guardian* February 16, 2012. http://www.guardian.co.uk/commentisfree/cifamerica/2012/feb/16/when-prison-illness-becomes-death-sentence (accessed January 29, 2013).

9. I am rephrasing Francoise Baylis here, as she has said in arguing for the importance of medical research involving pregnant women, who are