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Peter Ramsay

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Imprisonment and Political Equality

Peter Ramsay*

Abstract: In this paper I outline the logical relations between political equality and the practice of imprisonment by the state. I identify the very limited conditions in which the citizen-rulers of a democratic state give it the authority to imprison them, and the still more limited conditions in which a democratic state has good reason to imprison its citizen-rulers. I further argue that this reason to imprison becomes less significant the more that formal political equality leads to substantive equality of political influence among citizens. The more democratic is the state, the more it will substitute restorative justice methods for imprisonment. I demonstrate that this democratic theory of punishment can explain recent huge rises in imprisonment rates in the US and the UK as one consequence of the retreat of political equality in those countries over the same period. I conclude by considering in turn the position of non-citizens in a penal regime of political equality; the persistent social injustice of democratic state punishment; and the inherent abolitionism of a penal theory based on a serious commitment to political equality.

* Associate Professor of Law, London School of Economics. Different versions of this paper have been presented in various seminars. I am grateful to Alan Brudner, Henrique Carvalho, Antony Duff, Roberto Gargarella, Sandra Marshall, Alan Norrie, Mike Redmayne, Craig Reeves and Charlie Webb for their comments and criticisms of the argument. I am especially in debt to Zelia Gallo, Jeremy Horder, Nicola Lacey and Jo Murkens for their detailed comments on and criticisms of an earlier draft. The usual disclaimer definitely applies.

INTRODUCTION

There are many normative theories of state punishment. However, theories of state punishment that seek to derive a justification of the practice from specifically democratic premises are very rare.¹ The need for a democratic theory of punishment is pressing because electoral politics has, in recent times, involved a race to the bottom in criminal justice policy resulting in more punitive penal rhetoric, more criminal laws, and more severe penalties for breaking them. It appears that democratic politics has resulted in true mass incarceration in the USA, and to unprecedentedly high levels of imprisonment in the UK.²

The association between rising penal severity, populism and democracy is misleading. The phenomena of penal populism have occurred at a time of falling political participation both in elections and more generally.³ It is, therefore, an oversimplification to understand contemporary criminal justice policy as being politically popular with the electorate. It is better understood as one among many symptoms of the unpopularity of politics and a decline in participation in public life.⁴ Since penal populism is one aspect of the decline of ordinary citizens' participation in the life of the state, its baleful effects are unlikely to be improved by further excluding citizens from political decision-making.⁵ On the contrary, as others have persuasively argued, there is every reason to think that penal severity will be moderated in practice by encouraging greater citizen participation both in the criminal process,⁶ and in the broader political deliberation about crime and punishment.⁷

The potential of greater popular participation in criminal justice to lessen penal severity in practice is a very important subject, but it is not my direct concern here. Nor am I concerned with the influence of institutional structures of democratic decision-making on imprisonment.⁸ I want instead to explore the

¹ See N Lacey, *The Prisoner's Dilemma* (CUP, 2008) 6-7. What I mean by this claim is that those penal theorists who are sympathetic to democracy have generally relied on existing liberal moral philosophies of punishment. Good examples are the consequentialist Nicola Lacey, and the retributivist RA Duff whose expressive theory of punishment has, as Roberto Gargarella puts it, both a liberal and democratic 'soul' (R Gargarella, 'The Place of the People in the Criminal Law', paper given to Democracy and the Modes of Punishment Workshop, Edinburgh University, March 2015). One recent attempt to provide a purely democratic theory is C Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton UP, 2007) Ch 5.

² After huge increases in previous decades there has been a slight fall off in numbers in the last few years. For summaries see, The Sentencing Project, 'Trends in US Corrections' (2012) available at http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf; Ministry of Justice, *The Story of the Prison Population: 1993-2012, England and Wales* (MoJ, 2013).

³ For a summary of the UK experience, see C Hay, *Why We Hate Politics* (Polity, 2007) 11-39.

⁴ I Loader, 'The Anti-Politics of Crime' (2008) 12(3) *Theoretical Criminology* 405; A Dzur, *Punishment, Participatory Democracy and the Jury* (OUP, 2012) 33.

⁵ Dzur, *ibid*, 32.

⁶ See Dzur, n 4 above; and V Barker, *The Politics of Imprisonment* (OUP, 2009), esp 181-82.

⁷ I Loader, 'For Penal Moderation: Notes Towards a Public Philosophy of Punishment' (2010) 14(3) *Theoretical Criminology* 349, 363.

⁸ See Lacey n 1 above; Barker n 6 above.

relation of democratic government and imprisonment *in principle*. I offer a sketch of a theory of justifiable punishment that adopts some of the insights of liberal penal theory, but democratizes them by putting political equality at the heart of its penal rationale. It is only a sketch. It will need much more work to secure its claims. However, I think it is worth sketching this democratic theory because its implication is that the more seriously a society takes the idea of political equality as its guiding principle, the more limited will be its use of imprisonment, and the more it will move to eliminate imprisonment entirely. By the same token, the weakening of political equality, such as we have experienced in recent times, will tend to increase penal severity. The strengthening of political equality is, therefore, the key to reducing imprisonment.

In Section 1, I indicate the core proposition of what I take to be the dominant school of *liberal* penal theory, and I identify the key problem it has in setting limits to the severity and extent of punishment. In Section 2, I argue that all imprisonment constitutes an interference with political equality, an interference that amounts to a suspension of the political citizenship of the prisoner. In Section 3, I outline the very limited conditions in which such a suspension of political citizenship is nevertheless consistent with political equality. I provisionally call this theory of punishment 'democratic retributivism'. In Section 4, I argue that democratic retributivism contains an inherent tendency to reduce and even to eliminate the need for imprisonment that is lacking in liberal theory. The argument up to this point will be abstract and will seem merely idealistic. In Section 5, therefore, I seek to show that, appearances notwithstanding, democratic retributivism offers a realistic explanation of our recent experience of rapidly rising incarceration. The democratic theory only appears unrealistic in so far as we take for granted the recent de-democratisation of our societies. In Section 6, I outline the implications of the argument for the punishment of non-citizens. In Section 7, I respond to a key normative criticism of retributive theory in general, specifically the proposition that retributivism is unjust because it judges concrete particular individuals by the standards of abstract universal citizens. I will argue that democratic retributivism, precisely because it is a theory of criminal justice, cannot escape this criticism entirely, but that the theory does radically mitigate its force. In the final section, I suggest that 'democratic retributive abolitionism' is a more precise name for this theory, and outline the significant obstacles to realising democracy's logical tendency to bring the practice of incarceration by the state to an end.

1 LIBERALISM AND PENAL MINIMALISM

Liberal penal theories set out from the fundamental proposition that individuals enjoy an equal dignity as moral agents which constitutes them as ends in themselves, as persons who cannot rightly be used or coerced as a mere means to

collective social ends. Since the 1960s, liberal penal theory has moved sharply away from utilitarian justifications of punishment. Utilitarian justifications claimed to be committed to the principle of parsimony – that there should be no more punishment than necessary to maximize social welfare. However, utilitarian justifications encompassed the possibility that the status of individual persons as ends in themselves could be overridden for the greater good of society as a whole. The liberal commitment to respect the individual’s dignity has led moral philosophers to seek to ensure that the distribution of punishment is not unfair to the individual.⁹ The dominant trend in recent liberal penal theory has, therefore, been to limit punishment to only that which is proportionate to the seriousness of the offence,¹⁰ or at least to punishment that is not disproportionate.¹¹ In this way, it is thought, the state respects the rights of the offender as a person enjoying the status of an end in themselves by giving them no more nor less than what they, as a result of their own conduct, deserve.¹² By doing this, the law addresses the offender as a rational moral agent capable of conforming his conduct to the law. Most retributive theorists see the idea of proportional punishment as a constraint on the pursuit of the consequential justifications of punishment such as deterrence, rehabilitation or incapacitation.¹³ The precise shape of the combined theories varies but the idea that punishment should be proportional to what the offender deserves remains at the core of the attempt by liberal theorists to respect the dignity and rights of the individual person in the practice of state coercion.

The key problem with the idea of proportional punishment is that, even if it is respectful of the rights of the offender in the abstract, in itself it is too indeterminate to limit the severity of punishment. The proportionality of punishment consists of two different aspects: ordinal proportionality and cardinal proportionality. Ordinal proportionality means that offences of similar seriousness receive punishments of similar severity and that the punishments increase in severity as offence seriousness increases. Cardinal proportionality concerns the severity of the entire scale of ordinally proportionate punishments. The problem for penal theorists is that while it is possible to devise ordinally proportionate sentencing regimes, there is no obvious answer to the question of how severe the punishments in that regime should be overall. The cardinal severity of the scale of ordinally proportionate punishment appears to be a contingent question. As John Braithwaite and Phillip Pettit put it:

⁹ See HLA Hart, *Punishment and Responsibility* (Clarendon Press, 1968).

¹⁰ A von Hirsch, *Censure and Sanctions* (OUP, 1996).

¹¹ R Frase, *Just Sentencing: Principles and Procedures for a Workable System* (OUP, 2013).

¹² Although the idea of desert continues to be criticized by both consequentialist and non-consequentialist theorists. See for example, N Lacey, *State Punishment* (OUP, 1988) and V Tadros, *The Ends of Harm* (OUP, 2011).

¹³ There are retributivists who eschew any role for consequential justifications, see M Moore, *Placing Blame* (OUP, 1997) and RA Duff, *Punishment, Communication and Community* (OUP, 2001).

The eighteenth century judge who sentences the burglar to torture followed by death, the judge from Alabama who sentences him to ten years, and the judge from Amsterdam who sentences him to victim compensation all pronounce that they are giving the offender what he deserves. There is no retributivist answer as to which judge is right. On the retributivist's view, so long as they are all handing down sentences for burglary that are proportionately more than those for less-serious crimes and proportionality less than those for more-serious crimes, they could all be right.¹⁴

The indeterminacy of the idea of proportionality leaves the scale of proportional punishment open to the possibility of relatively severe sentencing scales where, for example, the death sentence or multiple life without parole sentences are possible for murder, permitting mandatory incarceration for minor crimes, all the while maintaining ordinal proportionality. The idea of proportionality in itself does not contain any inherent restraint on the cardinal scale of proportionate punishment,¹⁵ which appears to be a contingent question of social convention.¹⁶ Should social convention, for whatever reason, come to regard the actions of offenders in general as constituting a more serious wrongdoing than was previously thought, then the retributive idea of proportionality seems to have in itself no capacity to resist that. Although liberals generally claim to prefer state coercion to be minimal, their penal theory lacks an inherent restraining mechanism on the severity of punishment.

This problem is not necessarily fatal to liberal penal minimalism. Liberal theorists have responded to the problem of cardinal proportionality with various proposals as to how the overall scale of proportional punishments could be restrained.¹⁷ The point being made here is simply that the liberal idea of just punishment is not immune to tendencies towards penal severity. Moreover, as I shall argue below, the understanding of crime as a relation between an offender and a victim, an understanding that is dominant in both the moral philosophical theory of punishment and contemporary political discourse, will tend to construct any particular offence as a *more serious* wrongdoing than the political understanding of crime that is maintained by the democratic theory, to which we now turn.

¹⁴ J Braithwaite and P Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (OUP, 1990) 178.

¹⁵ N Lacey and H Pickard, 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems' (2015) 78(2) *Modern Law Review* 216.

¹⁶ A Von Hirsch, 'Proportionate Sentences: A Desert Perspective' in A von Hirsch, A Ashworth and J Roberts (eds), *Principled Sentencing* (Hart, 2009) 120-21; RA Duff, *Punishment, Communication, and Community*, (OUP, 2001) 133-34.

¹⁷ See for example A von Hirsch, n 10 above, Ch 5; R Lippke, 'Anchoring the Sentencing Scale: A Modest Proposal' (2012) 16(4) *Theoretical Criminology* 463-80.

2 IMPRISONMENT AND POLITICAL EQUALITY

The democratic theory I will set out has much in common with the liberal retributive theory both in its sensitivity to individual rights and its commitment to the proportionality of punishment. I will argue, however, that democracy contains an inherent tendency to reduce the cardinal scale. The stronger a democracy is, the less imprisonment it will impose and vice versa.

Unlike liberal penal theory, which has been predominantly understood as a question of moral philosophy, a democratic theory of punishment is necessarily a political theory of punishment. As Corey Brettschneider observes, the problem for democratic theory is not what the offender morally deserves, but what the state can legitimately do to its citizens.¹⁸ Numerous writers from various traditions have sought to address criminal law as a question of citizenship using both political and moral theory.¹⁹ Here I will develop a specifically democratic theory by reformulating Alan Brudner's detailed elaboration of Georg Hegel's penal theory.²⁰ I have argued elsewhere that, in its own avowedly liberal terms, Brudner's account ultimately fails to explain or to resist the expansive penal regime that we have.²¹ However, I think a more promising democratic theory can be developed by grounding the elements of Brudner's Hegelian penal theory not, as he does, in the movement of reason through history, but from what is practically necessary for the achievement of political equality.

Brudner sets out from the proposition that criminal law is coercion by a sovereign with a monopoly on legitimate coercion.²² He argues that coercion is only legitimately *sovereign* coercion if the state coerces in the public interest, which is to say in the pursuit of interests that are *necessarily* shared by all the law's subjects. For Brudner, the public interest, or 'public reason', in a liberal state is individual freedom, since individual freedom is the interest that *is necessarily* shared by the citizens of a liberal state. The penal law of a liberal state and the limits on its use of coercion are therefore set by the public reason of individual freedom.²³

Following the same logic, a democratic criminal law is coercion by a democratic sovereign. The interest that is *necessarily* shared by all the subjects of a democratic sovereignty is political equality. The *raison d'être* of democracy is the

¹⁸ See Brettschneider, n 2 above 102. Compare M Dubber, 'Criminal Police and Criminal Law in the Rechtsstaat' in M Dubber and M Valverde (eds), *Police and the Liberal State* (Stanford UP, 2008) 95-6.

¹⁹ In addition to Brettschneider and Dubber *ibid*, see, for example, N Lacey, *State Punishment* (Routledge, 1988); Braithwaite and Pettit, n 14 above; RA Duff, 'A Criminal Law for Citizens' (2010) 14 (3) *Theoretical Criminology* 293; RA Duff, 'Responsibility, Citizenship and Criminal Law' in RA Green and SP Green (eds), *Philosophical Foundations of Criminal Law* (OUP, 2011). For Rawlsian accounts see M Matravers, 'Political Theory and the Criminal Law' in Duff and Green, *ibid*; E Melissaris 'Toward a Political Theory of Criminal Law' (2012) 15(1) *New Criminal Law Review* 122.

²⁰ A Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (OUP, 2009); GWF Hegel, *Elements of the Philosophy of Right* (CUP, 1991).

²¹ P Ramsay, 'The Dialogic Community at Dusk' (2014) 1(2) *Critical Analysis of Law* 316.

²² Brudner n 20 above, 21.

²³ *Ibid*, 22-23.

rule of the people and this entails the equal right of all citizens to participate in and to influence both the making of laws and the exercise of executive power. Political equality might, therefore, be called democracy's public reason, since political equality is the interest necessarily shared by the citizens of a society that defines itself as democratic.

Liberalism has good reasons to limit to the use of imprisonment because imprisonment entails a deprivation of individual liberty. However, the deprivation of liberty entailed by imprisonment also supplies democracy with good reason to limit its use. Every official deprivation of a citizen's liberty represents a loss to a democracy since depriving a citizen of civil liberty is also a denial of political equality. To understand why this is so, it is necessary to spell out two particularly significant normative commitments entailed by political equality.

The first implication of political equality is that to be committed to it requires making the assumption that ordinary citizens are normally competent to participate in the life of the state; that they are competent to rule themselves collectively.²⁴ Political equality is a rational way to go about political decision-making only if citizens are ordinarily competent to rule themselves collectively. What this means is that to be genuinely committed to political equality is to have no objection to collective self-government in so far as the citizenry has the will to govern itself. In a democracy, therefore, citizens have the formal status of rulers, and the law must address the citizens as the rulers that they are taken to be: the law must be consistent with its subjects also being its authors.²⁵ And political equality implies more than just formal recognition of the citizen's status as ruler. It is also a substantive condition in which upholding those formally equal rights to participate makes possible an actual equality of influence over law and policy.²⁶

Political equality does not guarantee collective self-government,²⁷ but collective self-government is both the ultimate normative ground of formal political equality and its immanent potential. The rights that formally guarantee the political equality of citizens as rulers are the form taken by the political activity of collective self-rule. Political equality can, therefore, be more or less realized. The formal rights of political equality can be respected in practice to a greater or lesser degree by executive agents and other citizens. The citizenry that enjoys formal political equality can exert more or less influence over the making of law and the execution of policy. In any state of formal political equality, the degree to which

²⁴ R Dahl, *On Democracy* (Yale UP, 1998) 74-76. Of course this assumption precisely assumes away the fact that individuals will in fact vary substantially in their competence in this respect. It is likely those who are particularly disadvantaged in this respect will make up a substantial proportion of the prison population. I return to this problem in Section 7 below.

²⁵ See Brettschneider, n 1 above, 33.

²⁶ Political equality is therefore a means to realizing Rousseau's idea of freedom as obedience to laws one has given to oneself. See JJ Rousseau, *The Social Contract*, Book 1 Chapter 8 (Penguin, 1968) 65.

²⁷ To approach substantive political equality, actual collective self-government, citizens will need to exercise their political and civil rights and to develop sufficient knowledge of their circumstances to deliberate effectively – see discussion below and P Ramsay, 'The Democratic Limits to Preventive Criminal Law' in A Ashworth and L Zedner (eds), *Prevention and the Limits of the Criminal Law* (OUP, 2013) 229-31.

substantive political equality is realized will therefore be subject to constant change.

The second implication of political equality is that to have an equal influence over public policy and the making of the laws that we will obey, citizens need more than equal *political* rights. We must have not only an equal right to offer ourselves as political representatives, and an equal say in the choice of political representatives at elections.²⁸ We also need very extensive freedom to discuss with prospective representatives what they should do; to express our opinions; to try to change the opinions of others and to have our opinions changed by the arguments of others; to associate with others for this purpose; and to assemble with others to debate and promote our political ideas. Without these civil liberties, actual legislative and policy proposals, and their promotion, will depend on more or less shadowy networks of citizens whose influence comes from private connections with existing legislators or the executive branch. Even if citizens outside those networks get to express a preference in a vote at the end of the process, much of the political deliberation will have taken place in the absence of most citizens who will be rendered dependent on the laws authored by others rather than the independent authors of the law. Such a regime could be more oligarchy than democracy precisely because it would frustrate political equality. True political equality therefore requires that the entire political process is open to all citizens on an equal basis and this entails civil liberties in addition to narrowly political rights.²⁹

Civil liberty is then an essential characteristic of political equality, and this explains why each and every act of imprisoning a citizen is a denial of political equality. It strips the citizen of the right to move, speak freely, assemble, associate and enjoy a private life. While imprisonment does not deprive a citizen of their nationality, or necessarily prevent them from exercising a right to vote or stand in elections, it does entail executive coercion that prevents a prisoner from participating in the political process on equal terms with other citizens. Imprisonment deprives a citizen of an essential aspect of democratic citizenship - formal political equality. The dependence on executive discretion that is entailed in imprisonment is simply inconsistent with participating in collective self-government on an equal basis. Imprisonment is not inconsistent with participating in political life as such. Prisoners may be politically active and wield considerable political influence. But imprisonment is inconsistent with formal political equality. As a consequence, in a regime of political equality, prisoners have their political citizenship suspended for the duration of their imprisonment.³⁰

²⁸ On political representation as a means to collective self-government, rather than an obstacle, see D Plotke, 'Representation is Democracy' (1997) 4(1) *Constellations* 27; and N Urbinati, *Representative Democracy: Principles and Genealogy* (University of Chicago Press, 2006).

²⁹ R Dahl, *On Political Equality* (Yale UP, 2006) 12-18.

³⁰ Note that it is their political citizenship, not their nationality that is suspended on this account. Moreover political citizenship is suspended for the duration of imprisonment only. Political equality

This conclusion runs against the grain of an influential view among penal reformers that the rights of prisoners should be recognized *because* prisoners are citizens too.³¹ Whatever the motivation for this argument, its logic is subversive of democracy. Since prisoners lack civil liberties, to insist on their citizenship is to discount the civil liberties as an essential component of democratic citizenship.³² From the point of view of penal reform, the argument that prisoners are citizens is perverse because it constructs imprisonment as consistent with a person's continuing citizenship. It therefore implicitly normalizes imprisonment and undermines arguments against mass incarceration.³³ From the democratic standpoint, by contrast, imprisonment can only be an exceptional condition precisely because imprisonment entails loss of political equality to a citizen, and so suspends their citizenship. It does not follow from this that prisoners have no rights in a democracy, only that their rights do not arise from their suspended political citizenship but from other duties owed to them by a democratic state.³⁴ However the fact that imprisonment suspends the political equality, and therefore the citizenship, of a ruler constitutes a problem for a democracy. Imprisonment represents such a fundamental infringement of the rights of democratic citizenship that we need to ask how a democracy can imprison its citizens at all.

3 DEMOCRATIC RETRIBUTIVISM

There are some limited circumstances in which upholding the norm of political equality allows for the possibility of denying political equality to particular citizens. As we have seen, political equality presupposes the equal right of all to influence the making of the laws, which is to say that in a democracy citizens enjoy the formal status of rulers. The ultimate political authority, therefore, lies with the citizens themselves. It follows that the only source of the political authority that would permit a citizen to be deprived of their share in ruling, and to have their citizenship suspended, is that citizen herself. Without the citizen's permission, political equality would be violated. In what circumstances does a citizen provide the state with the authority to imprison her?

provides no rationale for the practice of 'felon disenfranchisement' after release from prison, See P Ramsay, 'Voters Should Not Be in Prison! The Rights of Prisoners in a Democracy' (2013) 16(3) *Critical Review of International Social and Political Philosophy* 421, 431.

³¹ See, for example, C Behan, *Citizen Convicts: Prisoners, politics and the vote* (Manchester UP, 2014); V Stern, 'Prisoners as Citizens: A Comparative View' (2002) *Probation Journal*, 49; the contributions of Liberty, The Prison Reform Trust, the AIRE Centre and Caritas to the joint select committee on Draft Voting Eligibility (Prisoners) Bill, form (HL Paper 103, December 2013).

³² P Ramsay, 'Letting prisoners vote would undermine the idea that civil liberties are fundamental to democratic citizenship' (2013) Democratic Audit UK (available at <http://www.democraticaudit.com/?p=1765>).

³³ *Ibid.*

³⁴ See Section 7 below and P Ramsay, 'Voters Should not Be in Prison: The Rights of Prisoners in a Democracy' (2013) 16(3) *Critical Review of International Social and Political Philosophy* 421, 431-33.

We have seen that certain rights are essential to democratic self-government: the rights that we commonly refer to as civil liberties. However, these civil liberties are in turn dependent on the existence of certain rights of personhood, rights to control of one's own body and personal property, without which the civil liberties would be nugatory. These rights of personhood are the rights that are upheld by the ordinary criminal law. They are not unique to democratic societies but they are nevertheless a necessary component of them. There would be no civil liberty to speak one's mind and assemble with others in order to hear such speech if others could attack, kill or imprison the speaker or her audience with impunity. Speakers and audience would have to assert their rights to speak and assemble as natural rights in the Hobbesian sense or as revolutionary acts. They would have to enter the debate armed and ready for action. The underlying legal rights of personhood are, therefore, essential to the protection of political deliberation *as a civil liberty*. They are such a fundamental aspect of the existence of a state that we rarely think about them in the context of a democracy.³⁵ It is here that democracy recognizes the insight of Hegelian political theory that a citizen may violate one of these rights in such a way as practically to deny the existence of such rights, and it is in such circumstances that a citizen can provide the authority for her own detention.

When a person commits a criminal offence against the personhood of another, then, providing that conviction for the particular offence requires proof that its commission was *deliberate*, the citizen does something that constitutes a practical denial of the existence of the rights of personhood.³⁶ Deliberate attacks on another's person or deliberate interferences with another person's property are the classic form taken by such rights denials. For example, if a person deliberately assaults another, she acts in a way that implicitly claims that her actions are not limited by the other's rights.³⁷ The attacker's action in such a case is, therefore, not only a violation of the particular victim's rights; it is also necessarily a denial of the existence of rights as such.³⁸ This claim is not affected by the fact that much violent offending is a consequence of a failure to resist momentary impulses towards a particular other person. In so far as the act of violence is nevertheless conscious and deliberate, it constitutes a denial *in practice* of the existence of rights.³⁹ It is important to keep in mind that this denial is not a matter of the particular citizen's subjective opinions or motives in violating the rights of another; it is an assessment of the citizen's action from the objective standpoint of

³⁵ In a different register, see L Miller, 'Power to the People: Violent Victimization, Inequality and Democratic Politics' (2013) 17(3) *Theoretical Criminology* 283, 285.

³⁶ Here 'deliberate' implies intentionally or recklessly in the sense that the offender knew that there was a risk that they might violate rights (for a full account, see Brudner, n 20 above, Ch 2, esp 38-41.

³⁷ Unless of course they can claim that one of the general defences recognized by the criminal law applies to justify or exculpate their action.

³⁸ Brudner n 20 above, Ch2, esp 76-81.

³⁹ There is nevertheless the possibly intractable problem posed to 'subjectivist' legal doctrine by offenders who lose control of their emotions and act in blind rage. For a discussion, see A Norrie, *Crime, Reason and History* (CUP, 2014) 82-83.

her political equality with others. Since these rights are rights essential to the exercise of democratic citizenship, the attacker is denying the existence of rights essential to citizenship. When a citizen practically denies the existence of the rights of democratic citizenship in this way, she denies them to herself also, and effectively licenses the state to deny her rights and to infringe her political equality. If the state does imprison her, it will only be acting on the principle underlying her own actions: the principle that our actions are not limited by others' rights.⁴⁰ In other words, the state would be taking its authority to deny citizenship rights only from the citizen whose rights are to be denied.

As I have argued elsewhere, this relationship between democratic rights and the need for proof of deliberation in criminal offences explains why the modern doctrines of *mens rea*, that require proof that a defendant intended or at least knew there was a risk that they would commit such an offence, came to prominence in criminal law doctrine as formal political equality advanced over the course of the 19th and especially 20th centuries.⁴¹ Although these doctrines were promoted by law reformers who were inspired by utilitarian or broadly humanitarian aims, they gained traction with the criminal courts only as those whom the criminal courts condemned acquired the status of citizens, requiring the courts to show them the respect due to citizens at least in the law's formal and recorded terms.⁴² Without proof of *mens rea*, there is no proof of deliberation, and therefore no proof that a citizen has by her actions denied the existence of rights and so given the state a license to imprison her and suspend her citizenship.

This theory of punishment only justifies imprisonment for offences that involve proof of subjective *mens rea*. This would include all the so-called 'true crimes' (such as homicides, assaults, sexual assaults, thefts, robberies, criminal damage to property), but also public welfare offences, where these are committed intentionally or recklessly. The deliberate commission of public welfare offences also constitutes a denial of the authority of the democratic community to determine the scope of individual rights and duties, in this case with respect to upholding the social rights of citizenship rather than the civil rights.⁴³ In so far as public welfare offences are legitimately used by a democracy to deter activity that creates an excessive risk of harm, negligence or strict liability may also be legitimately used as part that aim. However, the penalties that can be legitimately attached where these offences are committed negligently or without fault are limited to interferences with property rights – fines – because the merely negligent offender has given the state no permission to deny her political equality.⁴⁴

The licence to imprison, that the citizen grants when she commits a deliberate rights denial, is generally implicit. Many offenders would not recognize that they

⁴⁰ Democratizing Brudner, n 20 above, 41.

⁴¹ See P Ramsay, 'The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State' (2006) 69(1) *Modern Law Review* 29.

⁴² *Ibid*, 41-45.

⁴³ For the basic connection between democracy and public welfare offences see *ibid*, 48-52.

⁴⁴ See Brudner, n 20 above, 177-78. It is not the case that existing formal democracies abide by this limitation.

had granted it (an issue I will return to in Section 7 below). The license is nevertheless real, in the sense that it is an objective implication of the offender's own action, assuming that the offender is a political equal with all other citizens. The granting of this licence by the offender is a necessary condition of imprisonment in a society where all citizens are equal in their formal status as rulers.⁴⁵

Like any retributive justification of punishment, democratic retributivism is limited to punishments that are proportional to the rights violation committed by the offender. Any particular offender's criminal denial of rights is specific; it only goes so far. A particular offence will involve a different degree of denial according to whether the offender intended or merely risked the particular rights violation. Moreover, the extent of any particular rights violation also varies according to the amount of harm done to the victim. The reason for the importance of harm is that the personhood of persons exists in embodied creatures that have needs and desires. Participation in self-government depends upon various agency goods (such as life and limb, health, personal property and so on) that are necessary to the satisfaction of these needs and desires. Coercion of others' personhood can and often does involve harm to these essential agency goods and the extent of this harm affects the extent to which the offender acted without regard to the rights of others.⁴⁶ In other words, a murder is a more serious and determined denial of rights than non-intentional homicide; homicide is more serious than causing minor bodily harms; and they are in turn more serious than thefts and so on. Since the offender's specific practical denial of rights only goes so far, it only permits a proportional response. A disproportionate deprivation would be in excess of the authority granted to the state by the citizen-ruler and, therefore, a violation of political equality.

Although this argument explains why a democracy can punish and imprison some of its citizens, it leaves this democratic account with the same problem faced by liberal justifications of punishment: the contingency of the cardinal scale of proportional punishment.⁴⁷ What is to stop democratic punishments being harsh and extensive while maintaining ordinal proportionality?

⁴⁵ See also Brettschneider, n 1 above, 104.

⁴⁶ Brudner, n 20 above, 138-39.

⁴⁷ It also endures the difficulties associated with establishing an acceptable ordinal scale of proportionality. But unlike some moral desert theories, this difficulty is ameliorated by legal retributivism's commitment only to not imposing disproportionate punishment, to a 'limiting retributivism' (see Brudner n 20 above, 55; and also Frase, n 11 above).

4 DEMOCRATIC DECREMENTALISM

The first part of the democrats' answer is that, so far, we have only established that in certain circumstances a citizen-offender gives implicit permission to the democratic state to impose a proportional deprivation of her rights. This identifies the source of the democratic state's *authority to punish*, but it does not tell us what reason a democratic state would have to act on that authority or how severe any punishment should be, other than it must be ordinally proportionate. Even where imprisonment has been permitted by a citizen, the citizen's equal status will be suspended by imprisonment and she will be excluded from equal participation in the process of collective self-government. A state that is committed to political equality will therefore need good reason to maintain a cardinal scale of punishment that includes deprivations of liberty as a penal response to criminal rights-denials, reasons going beyond the mere fact that the citizen-offender has licensed such a response.

The one compelling reason for a democratic state to act on the citizen-offender's authorization to interfere with her rights is that such a punishment would serve to uphold political equality in general, even as it interferes with it in the particular case. Imprisonment and other forms of penal hard treatment can do this in so far as they are necessary in order to realize the rights of citizenship. Here too we can democratize Brudner's theory. The offender has denied the existence of rights not by merely expressing an opinion that people have no rights (permissible from the point of view of political equality), but in practice, by *acting* on the principle that she is not limited by others' rights. Punishment, by turning the offender's own principle back upon herself, 'acts out' the self-contradictory character of this 'criminal principle' and, in so doing, it restores the rule of law.⁴⁸ In this way, state punishment realizes (gives reality to) the authority of democratic rights. When a democratic state removes the offender's rights, it demonstrates in practice that the offender's denial of democratic rights was a nullity. Or, to put the point the other way around, punishment (and imprisonment as a punishment) will be necessary in a democracy only in so far as the failure by the state to punish a criminal rights-denial would, by leaving the offender's rights denials unchallenged in practice, tend to undermine the reality of citizens' rights.

This political theory of punishment does not deny (the familiar idea) that crimes are often also moral wrongs perpetrated by the offender against a victim. It does deny that the moral aspect of a crime is the business of the state. Rather a moral wrong only becomes a truly *criminal* wrong when it amounts to a denial of the existence of rights, because the business of the state in wrongdoing is the realization of rights.⁴⁹

⁴⁸ See Brudner, n 20 above, 45-48.

⁴⁹ Although in its regulatory function the state also has a role in deterring excessive risk creation. But as we noted above, where causing or increasing the risk of harm involves no denial of rights, imprisonment is ruled out as a penal response to violations of the law.

In a democratic regime, the cardinal scale of punishment is, therefore, set by whatever is necessary to realize those rights that protect citizens' political equality, which is to say their equal status as rulers. How much punishment will that be? The answer to that question will depend on how potent the challenge of any criminal act is to the reality of democratic rights. The critical point here is that citizens' rights, and citizens' status as rulers, are not realized only, or even primarily, by negating criminal challenges to them by means of state punishment. In a democracy, citizens' status as rulers will be realized to the extent that practical respect for their rights is at the core of the everyday practice of both state agents and citizens. The more that state officials and other citizens are respectful of each others' status as co-rulers, and the more that state officials are practically dependent on the citizenry for their day-to-day power and authority, the more fully realized will be the rights of democratic citizenship and the stronger the authority of the democratic legal regime. And the stronger is the authority of these rights of democratic citizenship, the less significant any particular criminal denial of their authority will be. The less potent the offender's rights denial, the less necessity for the state to negate it in the form of punishment. In other words, the more that the state is characterized by the political equality of its citizens, which is to say, the more democratic is the state, the less the challenge that any particular offence will represent to the rights of citizenship. As a consequence, the better realized are democratic rights and the stronger the democracy, the lower will be the cardinal scale of penal proportionality, and the more room there will be for leniency, since not every criminal rights denial will require a penal response for the regime of democratic rights to enjoy effectively unchallenged supremacy.⁵⁰

This is a radically decrementalist theory of the cardinal scale of proportional punishments. To understand the decrementalism of this penal rationale, it is necessary fully to grasp the potential that dwells within the concept of political equality. The democratic rationale for political equality is the shared capacity for self-government. Realising that potential so that citizens actually become self-governing by rendering the state dependent on those citizens' vigilant exercise of their rights, which is to say democratizing the state, tends to diminish the potency of the specifically *criminal* aspect of criminal acts – their denial of the rights of persons. As rights are strengthened in every other aspect of the relation of state and citizens, the specifically criminal aspect of criminal acts diminishes in relative significance, and so too does the need for severe punishments such as imprisonment. Should criminal denials of rights persist in a democratic regime that had become so strong that those offences no longer present a significant challenge to the reality of democratic rights, then restorative methods involving interested

⁵⁰ Again democratizing Brudner and Hegel, see A Brudner, 'The Contraction of Crime in Hegel's *Rechtsphilosophie*', in Markus D. Dubber (ed), *Foundational Texts in Modern Criminal Law* (OUP, 2014) 160-61.

parties can be substituted for incarceration.⁵¹ Such a wholesale substitution of restorative methods for state punishment would be mediated by something like what Albert Dzur calls ‘thick populism’: the development of a political way of life in which the citizenry organizes itself, through the exercise of its political rights, to carry out the process of government in collaboration with experts.⁵²

There are numerous potential objections to this democratic theory. The first and most important is that the argument made so far is obviously very abstract, and deliberately so. It is trying to establish some logical relations between the normative ground of political equality, the criminal laws of political equality and the practice of imprisonment by the state. As a logical argument, it might appear to be unrealistic. In the process of elaborating it, I have imagined a society in which serious crimes might acquire a significance that is so limited as to no longer make imprisonment a necessary response to them. This is, of course, the opposite of our recent experience, in which the state’s penal responses have become more severe. However, it is precisely this contemporary reality that indicates that the democratic theory is a realistic theory. The recent expansion of incarceration has occurred over the same period in which Western societies have retreated away from the conditions of political equality towards a condition increasingly referred to as ‘post-democracy’.⁵³ There is reason to believe that the relationship between the two trends is not accidental but causal.

5 ‘POST-DEMOCRATIC’ PUNISHMENT

The period since the 1970s, the period in which incarceration rates have risen, has also been a period in which the ideas of popular sovereignty and collective self-government have been eliminated from the content of electoral politics. The decisive shift occurred when left-of-centre political parties retreated from longstanding commitments to intervene in the market economy to guarantee full employment and to negotiate deals between employers and trades unions. The acceptance that ‘there is no alternative’ to the market removed basic economic and social questions, questions about the organization of the production and distribution of goods and services, from political contestation. In so doing, the underlying normative proposition of political equality, that is, the idea that the political sphere was one through which the citizenry as a whole could gain collective control of their circumstances and approach collective self-government,

⁵¹ See Brudner, *ibid*, 161. However, note that restorative justice methods may gain traction wherever the state tends to lose its ideological significance as a protagonist in the wrongs that concern criminal justice. This can occur not only from the realization of rights but also from the redefinition of crime as a relation of perpetrator and victim, as in the present. See also text and note at n 63 below.

⁵² See Dzur, n 4 above, 36.

⁵³ J Ranciere, *Disagreement* (University of Minnesota Press, 1995); C Crouch, *Post-Democracy* (Polity 2004); J Habermas, *Guardian* 10 November 2011.

was marginalized.⁵⁴ Electoral politics was eviscerated. The parties of the left abandoned their traditional constituencies, and, without the threat of socialism and social democracy, the political mobilization of traditional conservatives also lost its rationale. Participation in electoral and representative politics has since suffered very significant decline, with electoral turnouts falling and party membership falling further. Politics has become a spectator sport: ‘a tightly controlled spectacle managed by rival teams of professionals expert in the techniques of persuasion, and considering a small range of issues selected by those teams’ in which ‘the mass of citizens plays a passive, quiescent, even apathetic part’.⁵⁵

In other words, the emergence of populist penal policy at the same time only tells us that the popularity of punishment is more or less proportional to the unpopularity of politics. As Ian Loader puts it, crime is ‘the preoccupation of a world no longer enchanted and animated by political vision(s)’.⁵⁶ The dismal contemporary politics of crime and punishment have emerged as democracy has declined. Moreover, the rising severity of punishment, and of prisoner numbers, is a function of the qualitative decline in political equality. These two processes, declining political participation and rising imprisonment, are mediated by a transformation in the meaning of citizenship over the same period. Citizens of contemporary Western democracies are no longer integrated into the political community by virtue of their political role as co-rulers, even in theory. Citizens have been redefined as consumers: consumers in highly regulated markets for privately provided goods and services, consumers of public services, and indeed consumers of politics.⁵⁷

Crucially, for our purposes, this transformation of the meaning of citizenship has transformed the relation of citizens to the particular ‘public service’ that is the criminal justice system. For the consumer-citizen, autonomy lies in being able to realize her identity from the plurality of available lifestyles in the consumer society.⁵⁸ The consumer process of personal differentiation is quite different from, and in some respects opposed to, the process of ideological contestation that characterizes political citizenship, the political process through which shared and conflicting interests are identified and disputed or reconciled.⁵⁹ Where political citizenship aspires to self-rule, the individual consumer-citizen’s autonomy appears to be intrinsically vulnerable to forces beyond her control, as I have argued

⁵⁴ ‘Government by the people for the people becomes meaningless unless it includes major economic decision-making by the people for the people.’ J Reid, Rector’s Inaugural Address Glasgow University 1972, reprinted in *The Independent*, 13 August 2010.

⁵⁵ Crouch, n 53 above, 4.

⁵⁶ Loader, n 3 above, 405.

⁵⁷ C Crouch, n 53 above, Ch5; W Streeck, ‘Citizens as Customers: Considerations on the New Politics of Consumption’ (2012)76 *New Left Review* 27; K Faulks, *Citizenship in Modern Britain* 134 (1998); P Ramsay, *The Insecurity State* (OUP, 2012), 102-05.

⁵⁸ A Giddens, *The Third Way* (Polity, 1998) 37; A Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (1991).

⁵⁹ Streeck, n 57 above.

elsewhere in detail.⁶⁰ This intrinsic vulnerability of the consumer-citizen to harm is particularly sharply focused in criminal justice. As consumers of criminal justice services, citizens have been redefined as potential victims of crime.⁶¹ Jonathan Simon points out that because the *representative* subject of law is conceived as a victim in this way, the vulnerability of the victim to criminal harm comes to ‘define the appropriate conditions for government intervention’.⁶²

Reimagining criminal justice as a question of a service to the vulnerable potential victims of crime reconceives crime itself as a moral relation between victim and offender rather than a political-constitutional relation of sovereign and subject. This tendency of the official mind to construct crime as a moral relation between victim and offender is, as we have seen above, the opposite of the democratic conception of crime as the denial of the existence of rights. It has an inflationary tendency on penal severity for at least three reasons.⁶³

In general terms, any particular offence, when it is viewed in the abstract *from the standpoint of a victim*, as a moral wrong that has been done to that victim, necessarily appears to be more potent than it appears from the standpoint of the state, as a practical denial of the existence of rights.⁶⁴ The more that criminal offences are understood and constructed as wrongs to victims, as opposed to denials of rights in general, the more that the cardinal scale will tend to rise. It is striking that the major cause of the rising prison population in England, at a time when crime rates have been declining, is increasing sentence severity with a higher proportion of convicted offenders receiving custodial sentences and the average length of those sentences increasing.⁶⁵

A further tendency to penal escalation arises from the way that reconstructing the justification of punishment as a service to potential victims tends to reorder the relationship of retribution and incapacitation. When citizens are defined by their vulnerability to crime, their perception of their security becomes a vital interest because their freedom will be limited in so far as they are not secure from potential victimisation. As a result of this, the criminal law of consumer-citizenship increasingly protects a right to security by constructing *dangerousness* as a moral and penal wrong.⁶⁶ Simply being dangerous is a violation of the right to

⁶⁰ Ramsay, n 57 above, Ch 5. See also J Simon, *Governing Through Crime: (2007)* 86-89, although Jonathan Simon having identified the vulnerability of the consumer-citizen also suggests that the citizen-as-victim is a substitute for the citizen-as-consumer (ibid, 89), rather than a particular expression of the citizen-as-consumer, as I argue.

⁶¹ Ramsay, n 57 above, 103-04.

⁶² Simon, n 60 above, 76.

⁶³ This is only one tendency in the current order. The official reconceiving of crime as a relation of perpetrator and victim independent of the state creates other tendencies such as the attempts to institutionalize restorative justice.

⁶⁴ Bear in mind that we are speaking here of an official construction of the citizen as victim, just as democratic political communities construct citizens as persons. Actual victims may be very robust in their response to an offence and/or very forgiving towards the offender. However, even from the standpoint of such concrete victims, an offender’s wrongdoing is going to be more potent as a moral wrongdoing *against them* than it will be to the state as a denial of rights as such.

⁶⁵ See Ministry of Justice, n 2 above.

⁶⁶ For a detailed discussion, see Ramsay, n 57 above.

security, and once dangerousness itself is considered a wrong deserving of punishment, then incapacitation becomes a proportionate response to the wrong of dangerousness.⁶⁷ In this precautionary understanding of criminal justice not only does preventive incarceration acquire a new retributive rationale, but the scope of the criminal law will also tend to expand to cover ‘pre-inchoate’ conduct that involves no practical denial of rights but rather attracts liability to imprisonment because it provides evidence of criminal intentions or at least of a willingness to increase the risk of future criminal wrongdoings.⁶⁸ More prisoners and longer sentences are the result.

Thirdly, as a precautionary construction of criminal justice has established itself, the regulatory public welfare offences acquire a new significance. Although they involve no violation of a particular victim’s rights, and no immediate harm caused, commission of these offences will typically increase downstream risks of harm (the supply of drugs or possession offences, for example). From the precautionary standpoint, failing to cooperate with harm prevention policy in the form of committing these offences is a more serious wrong than it is in from the democratic standpoint.

In other words, the populist tough-on-crime policies and the penal severity of the period in which prison populations have risen, have proved electorally necessary in societies in which citizens have come to vote as individuated and vulnerable political consumers rather than as politically organized aspirant co-rulers. Instead of being addressed by the penal law as rational persons capable of self-rule, they are addressed as victims and dangerous offenders instead.⁶⁹ Markus Dubber points out that as a way of defining the law’s subjects, the ‘victim’ and the ‘offender’ have something in common. Both are formally stripped of their personhood. This transformation of the meaning of citizenship subverts the legal recognition of personhood that democracy presupposes. In the same moment, it occludes the normative basis of political equality in the potential for collective self-government and creates a powerful tendency to penal severity.

Political equality has been denuded of its ideological content and lost the force that animated it – the popular engagement of a wide spectrum of citizens in the task of collective self-government through mass political parties. As the form of political equality has been emptied of life, so the form itself is proving vulnerable to decay. In recent years, the protection of civil liberty that we saw was essential to

⁶⁷ That incapacitation could be a proportionate retributive response to the wrong of dangerousness should not surprise us since proportionality as such ‘is virtually indeterminate in its substantive implications’, see Lacey and Pickard, n 15 above. On incapacitation as a retributive response, see J Floud and W Young, *Dangerousness and Criminal Justice* (Heinemann, 1981) 46; D Husak, ‘Lifting the Cloak: Preventive Detention as Punishment’ (2011) 48 *San Diego Law Review* 1173; P Ramsay, ‘Imprisonment Under the Precautionary Principle’ in GR Sullivan and I Dennis (eds), *Seeking Security: Pre-empting the Commission of Criminal Harms* (Hart, 2012).

⁶⁸ See P Ramsay, *Pashukanis and Public Protection* in M Dubber (ed), *Foundational Texts in Criminal Law* (OUP, 2014) 201-04; or Ramsay, *Insecurity State*, n 57 above, esp Ch 7.

⁶⁹ See MD Dubber, *Victims in the War on Crime* (NYU Press, 2002) 154-55.

political equality has slowly given way to ever-wider restrictions on freedoms of expression, association and assembly and very extensive state surveillance of private communications.⁷⁰

The tendency towards penal severity and mass incarceration is the inverse of the tendency towards political equality. Logically, mass incarceration is a sign that political equality is poorly realized; practically, the rise in imprisonment in recent years is a symptom of the retreat of political equality in our public life. The only sense in which mass incarceration in the present could be laid at the door of democracy is the sense in which it arises from the failure of the citizenry to achieve democracy's end, to realize political equality in full. Though my emphasis here is more on ideological change and the historical decline of the old representative politics, the conclusions of this argument closely parallel the observations of Vanessa Barker's detailed comparative political sociology of American jurisdictions. As she puts it: 'at the aggregate level, depressed civic engagement, withdrawal from public life, and lack of public participation in the political process may underpin mass incarceration in the United States'.⁷¹ They also support Barker's 'counterintuitive claim' that 'increased democratization can support and sustain less coercive penal regimes'.⁷²

Even if this democratic theory offers a realistic account of the present experience, there are other potential objections to it. Here I will briefly consider the implications of this account for the punishment of non-citizens and then outline a response to what I take to be an important normative doubt about retributivism as a democratic penal theory.

6 THE IMPRISONMENT OF NON-CITIZENS

The theory of democratic retributivism that I have outlined here seeks to limit penal coercion to that which is consistent with the political equality of citizens. Its normative assumption is that human individuals are together capable of achieving collective self-government. The democratic theory is not based on any particularistic notion of the moral unity of a particular ethnic group or nationality. Once personhood is recognized as the basis of democratic citizenship, then all persons become potential citizens. A democracy that takes its virtues of political freedom and collective self-determination seriously will therefore protect and coerce both citizens and non-citizens with penal law on an equal basis.

⁷⁰ For a summary, see KD Ewing, *Bonfire of the Liberties* (OUP, 2010) Chs 2-7.

⁷¹ Barker, n 6 above, 12.

⁷² *Ibid.*

7 DEMOCRATIC RETRIBUTIVISM AND SOCIAL INJUSTICE

The democratic theory of punishment presented here is a retributive theory. It is not a theory of moral retributivism, but of what Brudner calls legal retributivism. The legal structure of criminal offences, with clearly specified conduct elements and proof of *mens rea*, is intended to ensure not that punishment by the state is morally deserved, but that it has the offender's authority behind it so as to be consistent with political equality. However, it is true that this authorization is in a large majority of cases implicit. If asked about this, a particular offender who is convicted and punished is unlikely to agree that she has given permission for her own punishment. These legal forms of punishment treat concrete particular individuals as if they had the abstract and universal characteristics of democratic citizens; in other words, they hold offenders to a standard of conduct that takes little or no account of their concrete personalities or the broader social circumstances in which their choices to violate others' rights are made.⁷³ The very idea of personhood, of individuals as rational agents, on which the democratic theory relies, is an abstraction. Rational agency is an emergent property of embodied creatures with needs as well as the capacity to reason.⁷⁴ There are many ways in which a human's needs may not be met, and this failure can inhibit the development of the self-control that characterizes the abstract rational person. Rational agency is, therefore, a property that is more or less fully realized in concrete human individuals.

The consequence of this abstraction lying at the heart of criminal justice is that the burden of the enforcement of formal equal rights by legal retributivism will fall most heavily on the most disadvantaged, those who for one reason or another are least able to conform their behaviour to the requirements of equal rights. This means that doing criminal justice may continue to be an aspect of a broader injustice.⁷⁵ It will be those who most lack the economic, social and psychological resources conducive to participation in self-government who will in practice be more likely to go to prison, and democratic punishment will be one more mechanism for the political and social exclusion of those who have the least control as individuals over their lives. To put it mildly, that seems to be in tension with democratic aspirations. Democratic legal retributivism is in principle open to this criticism just as is the retributive theory that it democratizes.

Democratic legal retributivism does not achieve social justice. It does not achieve it because ultimately justice is not its purpose or rationale. The rationale of democratic legal retributivism is to realize more basic conditions of political

⁷³ See Alan Norrie's critique of Hegel on this point in *Law, Ideology and Punishment*, (Kluwer, 1991) 83-85.

⁷⁴ C Reeves, 'Retribution and the Metaphysics of Agency', Unpublished paper. It is not necessary to adopt all the detail of any particular psychoanalytic theory to agree that individual rational agency is not something that we are born with.

⁷⁵ See A Norrie, *Punishment Responsibility and Justice* (OUP, 2000) Ch 9; B Hudson, 'Beyond Proportionate Punishment' (1995) 22 *Crime, Law and Social Change* 59.

equality – the formal rights essential to political equality. However, as we have already seen, political equality is, like individual agency, an emergent property. The emergence of a real substantive equality of influence over the state and society is the normative ground and immanent potential of equal political rights and civil liberties. Democracy upholds the formal rights of political equality in advance of the achievement of the collective self-government that is its rationale and its potential, and it does so in order to achieve that potential. By the same token, democracy upholds the rights of persons in advance of the full achievement of the rational agency among concrete agents that these rights formally declare, and it does so in order to foster that agency. As a consequence, democratic legal retributivism radically mitigates the force of the social justice criticism of retributivism in three ways.

Realising political equality is among other things a mechanism for eliminating criminogenic social and economic conditions. In realizing political equality, the majority of citizens gain access to the state's wider powers to reorganize, regulate and coerce, allowing them to democratize society's system for meeting human needs. It is well known that the burden of crime and punishment falls overwhelmingly on the most economically disadvantaged sections of the population, the sections of society least likely to be engaged in the political life of the state. However, the more that a society seeks to realize political equality's normative content, the more it will seek to universalize the exercise of democratic rights. Citizens who respect themselves and each other on the grounds of their political equality, who respect each other's status as co-rulers, will seek to use their political influence over the state to eliminate the relatively poor social conditions that both contribute to criminal wrongdoing and make it less likely that individuals will contribute to collective self-government. The more that citizens are moved by their formal rights to achieve the content of political equality, to make themselves, and all of themselves, the source of the state's authority, the less interest they will have in denying the conditions of their collective self-government, either by engaging in crime or by tolerating the persistence of the relative deprivation and inequality in which ordinary crime flourishes.

This argument too will appear idealistic but only for as long as we take our present circumstance of de-democratization for granted. At the sharp end of the process of democratization being described here is the political equality of the relatively disadvantaged sections of society, those that have a much greater interest in preventing crime by improving their economic lot than they do in punishing the offenders among them. As Lisa Miller puts it: 'When lawmakers are made to answer to people who are likely to experience violence and the collateral consequences of a wide range of social and economic insecurities, there are fewer political incentives to rely on imprisonment as the sole or primary policy response.'⁷⁶ Moreover, this tendency of political equality to eliminate criminogenic conditions will also tend to reduce the incidence of criminal rights denials, and in

⁷⁶ L. Miller, n 35 above, 285.

this way reduce the challenge to the authority of rights that crime represents, and so decrease the scale and extent of imprisonment.

Secondly, since democratic legal retributivism in theory eliminates moral blame from criminal justice, it is open to a much more constructive penal regime than that maintained in most Western prison systems. To a democracy, criminal punishment consists in a loss of civil liberties because it is an official response that denies the criminal denial of rights. It requires no hard treatment in any other way. Moreover, in so far as society considers the question of moral blame for criminal offending, and to whom blame should be attributed, a democracy cannot pretend that the conditions in which citizens are socialized do not contribute to crime, or that all the responsibility can be laid at the offender's door. As a regime that lays claim to the tasks of collective self-government, a democratic sovereignty cannot deny responsibility for the social condition of the population.⁷⁷ In general, the moral blame for offending must be shared between offenders and society as a whole.⁷⁸ As a consequence, society as a whole acquires responsibilities to the offender. Within the constraints of proportionality and respect for the personhood of the offender, it is open to a vigorous rehabilitative approach, one that implies that prison conditions should be better than merely decent, and much better than they are now.⁷⁹

Finally, the radical decrementalism of a penal system grounded in political equality opens a road towards the abolition of imprisonment as a response to the violation of others' rights.

8 DEMOCRATIC RETRIBUTIVE ABOLITIONISM

A democratic state may continue to require imprisonment, but only for so long as it is weak because actual involvement of citizens in their own self-government remains limited, and their political equality little more than a formality. As we saw above, the more that the relation of state and citizens is one practically governed and organized by citizens' extensive democratic rights, the less imprisonment will be needed, and vice versa. Democracy contains an inherent tendency to the abolition of state punishment. The realization of political equality is a process that engages people in their own collective life in a way that reduces the necessity for imprisonment. Individual rights in a state that was in reality nothing other than the

⁷⁷ 'We who believe in democratic goals are obliged to search for ways by which citizens can acquire the competence they need.' Dahl, n 24 above, 80.

⁷⁸ Compare Norrie, n 75 above, 220-21.

⁷⁹ On the relation of rehabilitation and responsibility without 'affective blame', see also N Lacey and H Pickard, 'From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm' (2012) 33 (1) *Oxford Journal of Legal Studies* 1.

collective political action of its citizens would need no imprisonment to realize them.⁸⁰

The virtue of democratic retributivism is that although it tends towards abolition, it does not pretend that imprisonment can simply be abolished. Nor is it content with a simple antithesis between retributive criminal justice and restorative justice. Rather it identifies the specific weakness of a democratic society that necessitates the persistence of criminal justice and state punishment. That weakness is our failure fully to recognize ourselves, and each other, as the rulers of our collective life, and the related inability to know how to act like rulers. This failure deprives democratic societies of their essential moral force: us.⁸¹ In the same moment, it identifies political equality as a basis on which restorative and rehabilitative methods can be progressively substituted for state punishment, and especially for imprisonment.

Democrats have no reason, therefore, to be defensive about the relation of democratic politics and state punishment. Democracy and imprisonment are antithetical. The increasing imprisonment of recent decades is a result of democracy's retreat over the same period. The democratic penal theory *seems* unrealistic because democracy has been in retreat for decades, and the politics of popular sovereignty have been marginalized. Nonetheless, underlying this very appearance is the proof of the democratic theory: the increase in imprisonment has arisen from democracy's retreat. What this negative proof means, however, is that even though democrats have no cause to be defensive about imprisonment, we nevertheless confront an enormous intellectual and political challenge.

We have become accustomed to very low horizons with respect to the possibility of true democratic self-government. Even the language used to describe the contemporary process of de-democratization constructs democracy as a thing of the past. Although the Western democracies that developed in the twentieth century never fully achieved even formal political equality, the subsequent retreat from the limited degree of political participation achieved then has come to be described as 'post-democracy'. The citizenry of these countries is marked by depoliticization and its accompanying outlook of generalised distrust, anxiety and vulnerability. Reversing the depoliticizing trends of recent decades by inspiring citizens to take responsibility for our collective social life and to realize political equality is not going to be easy. Nevertheless, one among many reasons to try is that democracy provides a way out of the carceral state.

⁸⁰ In other words, the radical democratization of the penal state entails its withering away, see B Fine, *Democracy and the Rule of Law* (The Blackburn Press, 2002) 169.

⁸¹ See A Dzur, 'Repellent Institutions and the Absentee Public: Grounding Opinion in Responsibility for Punishment', in J Ryberg and JV Roberts (eds), *Popular Punishment: On the Normative Significance of Public Opinion* (OUP, 2014) 207-08.