## Uniqueness

Prison overcrowding is on the rise now due to an excess of federal criminal laws.

**Jessup 12**[[1]](#footnote-1)

**Capitol Hill is** probably **the best place to start** if you want more information **on overcriminalization** -- the United States Code -- Title 18, Crimes and Criminal Procedure. There are about a thousand different pages that cover material considered to be a federal crime. The problem is not all of the estimated 4,500 federal crimes are listed in the code. There are **about** 50 volumes that cover all the different federal agencies that have the jurisdiction to enforce and interpret rules and regulations. When you add all of that up you're somewhere in the neighborhood of 300,000 to **400,000 rules** that **could be considered a federal offense.** "Most people have probably heard of the FBI, the Secret Service, and the DEA. But the truth is many regulatory agencies have some law enforcement power," Larkin revealed. Experts like Timothy O'Toole, an attorney with Miller & Chevalier, argue that authority often leads to problems. "Once you have law enforcement people on staff, and you have these laws that are very broad, you almost consider yourself to have a mandate to go and find crime, even if no one's really seen it before then," O'Toole said. That mentality has led to more and more people getting entangled with these laws. According to inTime magazine writer Fareed Zakaria, **America**, by far,**leads the world** by far **in putting people in prison.** The United States has 760 prisoners per 100,000 people. Compare that number to Britain with 153, Germany with 90 and Japan with 63 and it becomes evident the U.S. is truly becoming a nation of criminals. One reason why is the explosion in the number of federal laws and regulations. A Wall Street Journal bar graph shows a steady increase in the number of federal sentences in the last two decades. **Whether they're crimes concerning drugs, immigration, or fraud,** the **rising convictions** continue to **put more people into** already **overcrowded prisons.**

## Link

Retribution is key to reversing the growth of unnecessary criminal laws, solving overcrowding. **Bradley 12**[[2]](#footnote-2)

From the ever-expanding number of federal criminal laws to prison sentences that are too numerous or too long, there are many promising bases for criticizing overcriminalization. One such basis, however, has yet to be fully exploited for its potential to limit overcriminalization: the fact that **too many** criminal **offenses** today **are** malum prohibitum offenses—that is, they criminalize conduct that is **morally innocuous—and do not contain** an adequate mens rea (**criminal**-**intent**) element. **These offenses often** capture conduct that would otherwise be natural and even desirable in business, commerce, accounting, or everyday life. The primary instances discussed throughout this paper **are strict liability regulatory offenses** (referred to as the “central case”).[[1]](http://www.heritage.org/research/reports/2012/03/retribution-and-overcriminalization" \l "_ftn1) In order to limit the growth of laws criminalizing morally innocuous conduct—a development which, in turn, would curb overcriminalization—the U.S. legal community would be well-served to explore the concept of retribution and the manner in which it provides an account of how punishing those convicted of criminal offenses is morally justified. Indeed, punishment without a firm basis in retribution is unjust and therefore should be avoided. Using the principle of retribution to critique overcriminalization may seem paradoxical for two separate reasons. The first arises from widespread and sometimes grotesque misunderstandings of retribution, such that it is often caricatured to mean lock up as many people as possible for very long times. In truth, however, retribution has no built-in tendency toward severity. The second criticism arises from the fact that retribution is a justification for punishment and not a theory about substantive criminal law. But what justifies also limits. **Retribution offers solid** moral **bases for opposing overcriminalization.**

**[…]**

The first way arises from the fact that, for the foreseeable future, a **criminal conviction will** continue to **stigmatize the offender** as morally deficient: as the possessor of tainted, if not just plain bad, character. **But someone convicted in our central case** (like others whose punishment cannot be justified on retributive grounds) **does not deserve this** obloquy. Nor is he rightly made to suffer the many collateral consequences that come with a criminal conviction—being labeled as a criminal offender, being deprived of his right to vote, and many other legal and informal social disabilities and handicaps. The second distortion stems from the first. Precisely because the central-case defendant is not a moral reprobate, the moral obloquy of criminal conviction is likely to be watered down by its improvident extension to him. This sullying effect is not limited to the precise regulatory offense at issue or to a class of similar offenses. The point is that the social identification of criminal conviction with moral fault will be watered down across the board. **The classic example is overtime parking, a** trivial **violation of the motor vehicle code** that probably everyone who has ever driven has committed at some time. **Because everyone has committed that** offense, **no one treats the matter as** evidence of a character flaw. The result is that, for such infractions, society has severed the connection between **a moral defect** and a criminal offense. Because there are very good reasons to retain and preserve this connection and to preserve it as a common good, overcriminalization portends a potentially serious social loss.

Rehab doesn’t solve overcrowding. Overcrowding persists, which kills rehab, turns the case. **Reynolds 12**[[3]](#footnote-3)

**As Monterey County struggles to provide** more **rehab**ilitation **programs, its jail has become** so **packed** that inmates will soon be shipped off to the San Francisco Bay Area. Starting next month, jail Chief Jeff Budd said, about 50 to 60 inmates will be sent to available jail beds in Alameda County. The cost to Monterey County will be about $84 per inmate per day, compared with the $129 it costs to house inmates locally, Budd said. The number of inmates sent away to state prison from Monterey County has dropped 35 percent since realignment took effect Oct. 1, 2011, according to a report released Thursday by the nonprofit Center on Juvenile and Criminal Justice on the early effects of realignment. Budd said the prison bus that leaves the jail each week once carried 22 inmates, but "now it's eight or nine." That means **the county's jail population is expected to** continue **grow**ing **as more "low level" sentences are served** in the county jail instead of state prisons. Last week, the jail's count reached 1,122, a 10 percent increase since realignment took effect 8½ months ago. The **overcrowding leaves little space** for classrooms, **making it hard** for the county **to provide** the kinds of **re-entry programs** once available in the state prison system. "For us to expand, the problem is finding the space to do it," said Jim Guy, director of a nonprofit group called Introspect Services that contracts with the jail. "We use just about all the space we have for existing programs." Among those currently offered by Introspect are an "employability" class, anger management, GED preparation and chemical dependency awareness.

## Alternate Link

Rehab promotes negative public perception of prisons and demoralizes prison officers. **Logan and Gaes 93** write[[4]](#footnote-4)

As agents of governmental authority, prison officers must understand that they are obliged to operate within rigid constraints. They ensure that justice is done, first and foremost, by following the rules that define the parametars of justice, the rules that determine what is too permissive and what is too harsh. If inmates are treated unfairly inside prison, they will find it hard to appreciate that it is fair for them to be in prison in the first place. To accept the justice of their punishment, inmates must understand that it is principled, not malicious. Prison officers, as representatives of society, must convey that message to them through their demeanor. First, however, prison officials, and officers must accept without apology the fact that they are among society's "ministers of justice." Think about it: isn't that a more admirable mission than being a "correctional officer?" **Prison officers deserve a more favorable image as agents of punishment.** The most negative result of emphasizing **rehab**ilitation is that almost **inevitably** it **demoralizes** security and custody **staff members** who are **portrayed** (if only by implication) **as less professional and** less **humane than** the treatment and **program staff. It** also **impugns** the most important **purposes of imprisonment–**justice, **punishment, and security–by portraying them as uninspiring**, if not morally inferior. Prison professionals need to understand, to be reminded often, and to help the public appreciate that the job of confining and controlling an unwilling population without violating rights, the job of treating inmates "firmly but fairly," is every bit as praiseworthy as the pursuit of rehabilitation, if not more so.

Demoralization and negative public perception is the root cause of prison understaffing.

**Pearson 10**[[5]](#footnote-5)

When the topic of public safety and law enforcement careers is mentioned and initiated for discussion, why is it that **becoming a correction officer is never mentioned as a sought-after career**? Why is that? Is the media to blame or are we, as professionals, causing our own negative culture? The job of a correctional officer is a thankless job not everyone can handle. Mainstream **media** often **portray correction officers as** brutal, corrupt, ignorant **bullies who take advantage of** unfortunate **inmates with no** civil **rights. Anyone** who has worked **in corrections knows this to be far from the truth** and the daily reality is nowhere near the image portrayed by the media and the film industry. Hollywood is usually the first to be singled out because it’s an industry that reaps impressive profits from prison movies that present distorted views of correctional reality by focusing on sensationalism. The most powerful images promoting a negative stereotype are presented in classic prison movies such as The Longest Yard, Cool Hand Luke, Escape from Alcatraz, and The Shawshank Redemption. These films evoke audience sympathy for inmates and contempt for prison staff while inflaming a negative stereotype of correctional professionals. **The majority of the general public** has no personal knowledge of modern correctional reality, so they **easily accept** the **rhetoric of politicians and** the **distorted imagery** of Hollywood, especially when a corrections horror story ("Prison Guards Indicted in Inmate Beating Death") is being aired on the nightly news. This enduring fallacy is initially created by stereotypical Hollywood accounts of correctional life being reinforced by news media coverage of employee misconduct and scandals.**Even though many** jails and **prisons suffer from** overcrowding, **understaffing and overworked officers, these** are the realities that don’t have entertainment value and, therefore, **are never detailed in** movies and **media coverage.** Everyone likes to root for the underdog and the media loves to portray inmates as the unfortunate, neglected, mistreated and misunderstood victims of correctional monsters carrying guns, nightsticks and mace who happily practice sadism as an art form. This is an insult to the correctional men and women of today who are skilled, highly trained professionals with a majority holding college degrees. A **negative public perception** of a correctional organization **has serious consequences, including damaging** the community relations of **prison systems and** jeopardizing **their legislative support.** The failure of public officials and others to fully understand the issues confuses the public **and demoralizes corrections staff** who feel as if their contributions to public safety are being minimized in the public eye. Unfortunately, employee misconduct also reinforces negative stereotypes. Although it is only a minority of correctional employees who engage in destructive behavior at any given time, all employees are tarred with the same brush. The only antidote to this negative correctional stereotyping is community education and organizational professionalism. Both methodologies serve to enhance our image and restore credit to an honorable profession.  Hopefully by educating the public, our elected officials, and the media about the challenges corrections professionals face everyday, a greater respect for our profession and an appreciation of the unwavering dedication delivered daily by the forgotten branch of public safety will be achieved.

Understaffing increases prison overcrowding. Former prisoner agrees.

**BBC News 12**[[6]](#footnote-6)

**A former prisoner**, who wanted to remain anonymous, **said** he spent one year in HMP Liverpool from 2002. "I know **they used to put six men in a four-man dorm** or three in a two-man cell. It was like being put in a cage made for one animal and then getting two or three other people in. "There was a lot of stress, anxiety and violence. It was one big stress pit, is the only way I can describe it. **"I used to spend 23 hours in my cell** and I was allowed two hours a week on association, which means watching TV. **We were told the reason** we spent so many hours in our cells **was because they were understaffed.** "I signed a petition, intended for our local MP, to complain about the overcrowding and shortly after I got moved to Risley Prison (in Warrington, Cheshire). Risley wasn't overcrowded, it was so much better, the inmates were more relaxed. I was allowed out of my cell."

## Impacts

### ILaw Impact

Prison overcrowding violates the ICCPR. The US has a binding obligation to adhere to the ICCPR.

**Chung 2k**[[7]](#footnote-7)

Because the ICCPR does not itself define nor explain the provisions "cruel, inhuman, or degrading treatment," or "respect for the inherent dignity of the human person," their meanings are derived from the decisions of **the ICCPR's interpreting** body-the Human Rights **Committee** ("Committee").264 Pursuant to the enforcement provisions of the ICCPR, the Committee was established in 1976 to monitor states' compliance.2 ' The Committee's purpose is to examine reports from and complaints against the states, and to issue comments and opinions.2 " All state parties are required to submit reports to the Committee on the measures they have adopted to implement the ICCPR.-6 Moreover, under the First Optional Protocol of the ICCPR ("Optional Protocol"), individual citizens may petition against the state for violations of rights, provided that the country has ratified the Protocol."6 If the country has not ratified the Optional Protocol, then the state is not subject to individual petitions, but only to inter-state petitions.269 In determining whether prison conditions violate the ICCPR provisions, the Committee has used the per se test270 or a totality analysis.271 For example, in Mukong v. Cameroon,27 2 the Committee primarily employed a totality analysis. The complainant, a journalist detained in a Cameroon jail, argued that his incarceration violated Article 7 of the ICCPR due to overcrowding, insalubrious conditions, and deprivation of food and clothing.273 The complainant had been held in a cell measuring approximately twenty-five square meters,274 together with twenty-five to thirty other detainees, and was deprived of food for several days.275 Authorities then transferred him to another cell in which he was forced to sleep on a concrete floor.276 As to the general conditions of detention, the Committee **held that certain** minimum **standards regarding prison conditions must be observed** by all state parties, even if economic considerations make such compliance difficult. 7 7 **These** standards **include**, according to the United Nations Standard Minimum Rules for the Treatment of Prisoners ("Minimum Rules"): **"minimum floor space and cubic** content of **air for each prisoner**, adequate sanitary facilities, clothing... , provision of a separate bed, and provision of food of nutritional value adequate for health and strength. 278 Although the requirement of minimum floor space is consistent with the per se approach to analyzing cruel and unusual overcrowding conditions, the inclusion of other prison condition requirements in addition to overcrowding reflects a totality analysis in identifying ICCPR violations.279 In this case, the Committee noted that the minimum requirements had not been met. Based on the facts revealed, the Committee found that the prison conditions and the treatment of the complainant violated Article 7 of the ICCPR. In Massiotti v. Uruguay, 1 the complainant, an inmate in an Uruguayan prison, also contended that the conditions of her imprisonment amounted to a violation of the ICCPR. The complainant claimed that officials housed thirty-five inmates in one cell measuring four-by-five meters, and that during the rainy season, water flooded the cell by up to ten centimeters.' Also, because the jail had no open courtyard, prisoners were forced to remain indoors under artificial light throughout the entire day.2 When officials transferred the complainant to a second prison, they placed her in a hut measuring five-by-ten meters, along with 100 other prisoners. In addition, the complainant was provided with very poor food and subjected to hard labor.' In light of these facts, the Committee ruled that the prison conditions in the Uruguayan prisons constituted inhuman treatment, in violation of Articles 7 and 10 of the ICCPR. In reaching its decision, the Committee enumerated each of the various factors of the confinement and stated that "because the[se] conditions of her imprisonment amounted to inhuman treatment," they violated the ICCPR.20 Although the Committee did not expressly indicate that it employed the totality-of-circumstances test, by listing the separate conditions and by using the plural form of the word "condition," it can be inferred that the Committee considered not just one of these factors, but the various conditions together in its analysis. The Committee thus effectively applied a totality analysis in assessing the alleged prison conditions. The Committee has also used both the totality and per se approaches to prison overcrowding in its specific country reports. For example, in its report on Nigeria, **the Committee noted** its disturbance at the inadequate prison conditions, including "**severe overcrowding**, lack of sanitation, lack of adequate food, clear water and health care, all of which contribute to a high level of death in custody.''29 ' It held that these conditions **did not meet** the basic guarantees as provided by **Article 10 of the ICCPR**, and thus were incompatible with the ICCPR.292 In making this assessment, the Committee considered all of the factors noted above, including overcrowding and other core conditions. By doing so, it employed the totality analysis in making its determination about conditions of confinement in Nigeria. In its report on Brazil, however, the Committee appeared to use the per se approach in assessing prison overcrowding. Here, the Committee also expressed its deep concern at intolerable prison conditions.293 These conditions included "first and foremost, overcrowding. '294 The Committee stressed the state's duty to comply with Article 10 of the ICCPR, particularly as it pertains to prison conditions.95 It recommended that the state take steps to alleviate jail overcrowding, such as adopting alternative sentencing measures that would enable some prisoners to serve their sentences in the community.296 In this manner, the Committee applied the per se method of analyzing jail overcrowding and found a violation of Article 10 of the ICCPR. Similarly, in its comment on Colombia, the Committee indicated its concern at "appalling prison conditions, including first and foremost the serious problem of overcrowding.., as well as the lack of measures taken to date to address this problem.' '29 The Committee also urged the state to adhere to the standards set forth in Article 10 and to take measures to reduce the overcrowding problem.2 98 It suggested that the state commit greater resources to expand prison capacity and to improve confinement conditions.- Similar to the report on Brazil, the Committee used the per se approach in determining whether prison overcrowding violated the ICCPR provision by focusing "first and foremost" on the problem of overcrowding.3 ' Thus, in its various cases and reports, the Committee has employed either the per se or the totality approach in determining whether the conditions of confinement violated Articles 7 and 10 of the ICCPR. Because **the U**nited **S**tates **has ratified the ICCPR**, it, too, is bound to those standards?" Although the treaty has not been implemented by Congressional legislation in the United States, the government is nevertheless under a duty to take measures to comply with the ICCPR provisions because treaties-both self-executing and non-selfexecuting-are considered to be the supreme law of the land. Moreover, even though the United States has entered a reservation on Article 7 of the ICCPR, this reservation may not apply to prison overcrowding because there is no uniform, definitive Constitutional interpretation of confinement overcrowding.' Also, even if the reservation does apply to prison overcrowding, the United States has not entered a reservation on Article 10 of the ICCPR. As such, the United States is arguably bound to the per se or the totality-ofconditions analyses in examining prison overcrowding claims.

Every violation of I-Law matters. It sets a precedent for future decisions.

**Calabresi 05** writes[[8]](#footnote-8)

Six Justices on the Rehnquist Court signed on to the conclusion in Roper that the Court may, at least on some occasions, rely upon foreign sources of law. We submit, therefore, that such reliance is not likely to wane anytime soon, even with two new appointments, and that the real question for the future is not whether but when the Court will cite foreign sources of law. This is especially true since **reliance upon** such **[foreign] sources of law has a self-validating and snowballing aspect to it, wherein the more significant and widespread the Court's use of foreign sources now, the greater the body of precedent the Court will have to cite for using foreign sources of law in the future.**

I-Law solves multiple scenarios for extinction but US commitment is key.

**IEER 02**[[9]](#footnote-9)

The evolution of international law since World War II is largely a response to the demands of states and individuals living with**in a global society with a deeply integrated world economy.** In this global society, **the repercussions of** the **actions** of states, non-state actors, and individuals **are not confined within borders, whether we look to greenhouse gas** accumulations, **nuclear testing,** the danger of **accidental nuclear war, or the** vast **massacre**s **of civilians** that have taken place over the course of the last hundred years and still continue. **Multilateral agreements** increasingly have been a primary instrument employed by states to meet extremely serious challenges of this kind, for several reasons. They clearly and publicly embody a set of universally applicable expectations, including prohibited and required practices and policies. In other words, they **articulate global norms, such as** the protection of human rights and **the prohibitions of genocide and use of** **w**eapons of **m**ass **d**estruction. **They establish predictability and accountability** in addressing a given issue. States are able to accumulate expertise and confidence by participating in the structured system offered by a treaty. However, influential U.S. policymakers are resistant to the idea of a treaty-based international legal system because they fear infringement on U.S. sovereignty and they claim to lack confidence in compliance and enforcement mechanisms. This approach has dangerous practical27 implications for international cooperation and compliance with norms. U.S. treaty partners do not enter into treaties expecting that they are only political commitments by the United States that can be overridden based on U.S. interests. **When a powerful** and influential **state like the U**nited **S**tates is seen to **treat[s] its legal obligations as a matter of convenience** or of national interest alone, **other states will see this as** a **justification to** relax or **withdraw from their** own **commitments.** If the United States wants to require another state to live up to its treaty obligations, it may find that the state has followed the U.S. example and opted out of compliance.

### AIDS Impact

Overcrowding increases AIDS spread. **UNAIDS 97**[[10]](#footnote-10)

**In** many **prisons** around the world **there are high rates of** infection with the human immunodeficiency virus (HIV), the virus that causes **AIDS.** At the same time, prisoners often also have tuberculosis (TB), syphilis and various strains of viral hepatitis. & For example, HIV prevalence in French prisons is about ten times that of the general population, while the prevalence of TB is three times the national average. In south-eastern France, 12.7% of prisoners tested HIV-positive in a 1994-95 survey. In Santa Fe province, Argentina, between 11.3% and 14% of prisoners tested HIV-positive in 1995. In the United States in 1994, there were 5.2 cases of AIDS per 1,000 prisoners, almost six times the rate in the general adult population. & **The prison population is not eternally sealed off, but** is **constantly changing, with people going in and out.** In some places, the average stay in prison is quite short. For example, Ireland has an average prison population of around 2,200, with an annual turnover of about 10,000 and an average prison sentence of 3-4 months. & **Several factors make prisons** an **ideal** breeding ground **for** onward transmission of **HIV infection. Overcrowding is one such factor.** In 1995, the prison population of the United States was 1.6 million, a doubling over ten years. In a major Eastern European prison, individual cells hold up to 35 prisoners each. Violence, often a feature of prison life, produces tensions, recriminations and an atmosphere of fear. & Many of those in prison are there because of drug use or trafficking, and they often find ways to continue drug use inside. Drug injecting with shared, non-sterile equipment is the factor probably accounting for the greatest number of new HIV cases in prisons worldwide.

AIDS spread risks extinction.

**Lederberg 91**[[11]](#footnote-11)

Will Aids mutate further ? Already known, **a** vexing **feature of AIDS is its** antigenic **variability,** further **complicating** the task of developing **a vaccine.** So we know that **HIV is still evolving.** Its global spread has meant there is far more HIV on earth today than ever before in history. **What are the odds of** its learning the tricks of **airborne transmission?** The short is, “**No one can be sure.**” But we could make the same attribution about any virus; alternatively the next influenza or chicken pox may mutate to an unprecedented lethality. As time passes, and HIV seems settled in a certain groove, that is momentary reassurance in itself. **However,** given its other ugly attributes, **it is hard to imagine a worse threat to humanity than** an **airborne** variant of **AIDS. No rule of nature contradicts such a possibility;** the **prolif**eration **of AIDS** cases with secondary pneumonia **multiplies the odds of such a mutant, as an analogue to** the emergence of **pneumonic plague.**

## AT Rehab k2 Lesser Sentences

Rehab leads to indefinite sentencing. **Manier 10**[[12]](#footnote-12)

The way we punish criminals and restore justice is very important to our overall crime prevention strategy. It is important to establish a punitive system that will exact the right amount of punishment while also bringing about justice and restitution to the victim of the crime. A **retributive punishment** system, where the maximum punishment **is proportional to the crime and the victim decides the final sentence** for the aggressor would bring the goal of criminal punishment back to its rightful focus… justice for the victims of crime. The “primacy of restitution to the victim” is an “ancient principle of law”, but “as the State monopolized the institution of punishment, so the rights of the injured were slowly separated from penal law.” (1)(2) This has led to the focus of “punishment” shifting from justice for the victims to the utilitarian purpose of deterrence or the “humanitarian” goal of “rehabilitation.” Both of these alternatives to justice are philosophically flawed if carried to their logical conclusions. The utilitarian goal of deterrence would justify “cruel and unusual” punishments, since it would be the most effective at deterring future criminals, as well as severely harsh punishments for minor crimes since justice or proportionality is not the goal. The humanitarian goal of **rehab**ilitation, on the other hand, **condemns the criminal to an “indeterminate” sentence**– “to be determined at the Psychologist’s pleasure”– **regardless of the crime** and all at the expense of the victim, who pays taxes to support these rehabilitation efforts, with no restitution repaid to the victim or justice achieved on their behalf. Also, if rehabilitation is the sole goal of criminal punishment than **a petty thief could theoretically be held much longer than a murderer if the thief is less willing to reform** or not as capable of feigning rehabilitation compared to the murderer. The way to truly pursue justice against the aggressor and on behalf of the victim would be to allow the victim to sentence the aggressor, up to a maximum punishment, once they have been found guilty. The punishment should be both proportionally retributive towards the criminal as well as include restitution for the victim, “two teeth for a tooth” concept of punishment. This is demonstrated most easily in the example of theft used by Murray Rothbard in his essay Punishment and Proportionality. Suppose a thief is found guilty of stealing $15,000 from Bob. We would hold that he must pay back the $15,000 he stole (restitution), but that is not punishment but simply restitution for the thief is no worse off than he was prior to the theft, so he should be forced to pay an additional $15,000 (plus police and court costs) to Bob so that he is deprived of the same liberty that he deprived Bob of (retribution). This is the concept that sets the proportional maximum that a victim may sentence a guilty criminal. However, the victim, since justice is theirs, should also be able to forgive the criminal in entirety or exercise partial forgiveness for whatever reason, philosophy, sympathy, monetary compensation, etc. This legitimate sense of justice and retributive system of punishment will distribute punishment appropriately according to the level of harm done to the victims of the crime and the “two teeth for a tooth” concept upheld up to the desire of the victim should also act as a deterrent to criminals, even though that is not the primary goal.

# Omitted Bradley Text

Criticisms and Confusion: Toward a Proper Understanding of Retribution

Confusion about retribution, and about the moral justification for punishment more generally, is rampant. Almost nothing in standard first-year criminal law casebooks gets it right.  Scholarly literature is scarcely more helpful. Legislative reformers rarely understand it and, by all accounts, never accord it the central place that it needs to occupy if the institution of punishment is to be adequately justified. High state court authority is just as confused. This widespread misunderstanding is one reason why retribution is so neglected today. Indeed, if retribution really did mean what people seem to think it means, then it ought to be neglected. But retribution is not *lex talionis*, the law of retaliation—“an eye for an eye”—as many think it is. To apply the “eye for an eye” norm non-metaphorically, a polity would have to be willing to do whatever its most depraved members might do. Probably no society has so abandoned moral constraint in the pursuit of criminal justice. It is true that “eye for an eye” is found in the Bible and was apparently meant to serve as a practical guide for the ancient Israelites, but biblical scholars have explained that the “eye for an eye” axiom was not an authorization of punishment or even a command to exact a like penalty. It was instead meant to limit retaliatory acts by kin and friends of the victim to no more than the loss incurred. The historical prevalence and perennial allure of retaliatory excess—vendettas, blood feuds, lynchings, and the like—no doubt had much to do with the emergence of public systems of criminal justice. According to Oxford legal philosopher John Gardner, it was “for the elimination of these modes of retaliation, more than anything else, the criminal law as we know it today came into existence.” Even so, society must distinguish between this—what Gardner calls the “displacement function” of criminal law and punishment—and its critical moral justification. For there is no necessary connection, either logically or practically, between a practice’s origins and its critical moral worth. It is easy to see, too, that the “displacement function” cannot morally justify defining some conduct as a crime or imposing criminal punishment on anyone. Notwithstanding some historical kinship with retaliation, retribution properly understood as a critical moral proposition is not about domesticating popular hatred for a known criminal. It is not about channeling repugnance toward a particularly heinous crime. It is not state-orchestrated revenge. Retribution is not driven by anger, hatred, or any other emotion; it is distinct from community outrage. It is perhaps admissible to hold that these pacific tendencies are one desired effect or function of punishment, but that is not to say that retribution’s tendency to pacify the passions of victims of crime and their communities constitutes a moral justification for punishment: It certainly does not. Mob-conducted lynchings and similar acts of cruelty and injustice are also capable of pacifying community outrage for (real or perceived) wrongdoing, but civilized society condemns such conduct. Against the Transfer Justification of Punishment H.L.A. Hart, one of the leading legal philosophers of the 20th century, famously argued that society may impose punishment on an offender only where society has been “harmed.” He identified two types of harms: where the authority of law is diminished and where a member of society is injured. Hart's first category could be mistaken for an awkward description of the retributive view described here, but his view of crime and punishment was very different from the one that is considered in this paper. Hart’s second harm—that a member of society is injured—points toward a deeper investigation of the moral relationship between the institution of punishment and private rights. Hart is scarcely alone in holding this view. Richard Swinburne has argued that the state enjoys authority to impose punishment for criminal harm only where it serves as a proxy for the individual victim, and he said that this was a retributive viewpoint. Swinburne and Hart apparently imagine a state of nature similar to that described by John Locke: a notional place where individuals hold a natural moral right to punish those who harm them. When these individuals band together to form a civil society, these thinkers (Swinburne, Hart, and perhaps Locke) suppose that they transfer their natural authority to punish to the emergent political authority, so the state punishes as agent or delegate of the community—conceived as an aggregate of individual rights-bearers, now standing down. This whole line of thought is mistaken. Civil society does not punish as transferee or delegate of the victim. Civil society punishes in its own name for its own sake because civil society itself is the victim of each and every crime. Indeed, central political authority and its authoritative directives for the common good—laws—are a necessary precondition to and are conceptually derived from the institution of punishment. There are two additional compelling arguments against the transfer justification of punishment theory. *First,* as a matter of contingent fact, criminal acts often do involve an injustice to one or more specific persons: the defrauded elderly lady, the black-eyed assault victim, the hapless pedestrian whose car was stolen. But many crimes lack any such unwilling, particularized victim. Among these offenses are many public morals laws (drug possession, gambling, and prostitution); offenses against the state (including treason, espionage, and lying to the grand jury); and “quality of life” crimes (littering and public intoxication). In these cases, it is often far from obvious which individuals, if any, have a natural right to punish those who did them harm. *Second,* there is good reason to doubt the premise of the transferor theory: namely, that there exists a natural right to punish those who do wrong to oneself or to one’s kin. People do have a natural right to defend themselves against attack and theft. People do have a natural right (within limits) to take back any goods that have been wrongfully taken from them. People do have a natural right to demand some remedy for vandalism or other wrongful deprivation of property. And people have a natural right to use force that is reasonable in amount and kind in order to accomplish those goals. But all these rights bundled together do not yield, imply, or entail a natural right to punish, because the nature of punishment differs from the nature of self-defense, replevin, or restitution. Nor do these rights promise moral justification of criminal punishment (even if they perhaps do provide justification for an inchoate tort system and an embryonic joint protective or police association). Wicked deeds are a necessary but not a sufficient condition for morally justified punishment. Individuals regularly witness acts of injustice by others—lying spouses, cruel parents, disrespectful children, cheating colleagues—but it scarcely occurs to those witnessing these acts that they, as individuals, are authorized to punish those bad actions. Moreover, even if it is presumed that person *A* misbehaves and that his misbehavior warrants the judgment “*A* deserves to be punished,” it does not follow that *B*, *C*, *D*, or anyone else has the moral authority to punish *A*. Even in advanced legal systems, violations of law do not automatically authorize anyone to punish the violator; only certain officials wielding designated powers according to the relevant positive law are designated competent to punish others. Civil Authorities and the Imposition of Punishment Punishing a criminal involves the deliberate imposition by the political community’s administrative arm—the state—of some privation or harm upon an unwilling member of society. Whether punishment takes the form of a fine, incarceration, or (historically) the rack, the question arises: How is such a grave imposition upon someone morally justified? The question of why civil authorities are entitled to punish is usually treated in law school as the “point” or “purpose” or “rationale” of punishment and not often as a question about its “moral justification”—a sign of the confusion that usually follows. The question is typically the first topic in criminal law class. The laundry list of punishment’s purposes in criminal law casebooks includes deterrence, rehabilitation, and incapacitation. These purposes refer to, respectively, sanctioning a convicted criminal with a view to providing a disincentive to him or others to commit similar crimes, making the criminal well psychologically and socially, and isolating the criminal from law-abiding people. The problem is that none of these “rationales” provides an adequate moral justification for punishing anyone. Retribution does. But retribution is usually mangled in the teaching materials. The Purposes of Law in Political Society Understanding retribution depends upon a prior understanding of the purposes of law and the nature of cooperation in political society. In the absence of any established political order, people would be free from authoritative constraint to do as they pleased. Their choices would not necessarily render society an uncontrollably selfish state of nature, as Thomas Hobbes anticipated. Absent political order, some people would act reasonably—maybe even altruistically—and seek to cooperate with other people to achieve common benefits. (Call this the possibility of private ordering.) But such a state of nature would, by definition, lack the means to structure the sort of cooperation that a large and heterogeneous society sometimes requires. Even custom could not provide this structure, at least for any large or complex society. States of nature lack altogether a common or effective authority by which to bring recalcitrants and free riders into line and by which to respond coercively to those who acted unfairly outside of the common pattern. Without some such central authority, the weaker members of society would be prey for the stronger, save where the former allied themselves into protective associations with the latter—in which case the excesses of vendettas and retaliatory raids might call forth a central authority: a proto-state. Political society provides just such an authoritative scheme for structuring cooperation. Once this authority is up and running and providing direction (usually through law), justice requires individuals to accept the pattern of liberty and restraint specified by political authorities. Indeed, it is everyone’s acceptance of the established apparatus of political society for the purposes of cooperation for common good that makes civil liberty possible. One crucial meaning of equality and liberty within political society is precisely that everyone observes the pattern of freedom, restraint, and forbearance set up by these authorities. Criminal acts often—but far from always (e.g., so-called victimless crimes)—involve injustice to one or more specific individuals, such as the battered spouse. What always occurs in crime is this: The criminal unjustifiably usurps liberty to pursue his own plans and projects in his own way, notwithstanding the law’s pattern of restraint. Thus far considered, the entire community remains within the law, each member denying to himself the liberty to do as he pleases except for the criminal. The criminal acts outside the pattern of common restraint and thus of mutual forbearance and cooperation. The central wrong in crime, therefore, is not that a criminal causes harm to a specific individual. Rather, it is that the criminal claims the right to pursue his own interests and plans in a manner contrary to the common boundaries delineated by the law. From this perspective, the entire community—with the exception of the criminal—is victimized by crime. The criminal’s act of usurpation is unfair to everyone else; he has gained an undue advantage over those who remain inside the legally required pattern of restraint. In this view, punishing criminals is necessary to “avoid injustice, to maintain a rational order of proportionate equality, or fairness, as between all members of society.” Punishment restores the fundamental fairness and equality of mutual restraint disturbed by the criminal’s act. A criminal is punished in order to efface (as it were) his prior extravagance. By and through his punishment, society is restored to the *status quo ante*: The equality of mutual restraint within law is—morally speaking—re-established. The criminal’s debt to society is paid. Again, depriving the criminal of this ill-gotten advantage is the central aim of punishment. Since that advantage consists primarily of a wrongful exercise of freedom of choice and action, the most appropriate means to restore order is to deprive the criminal of that freedom. Punishment sometimes includes sensory deprivation and even limited and transient pain, such as the pain of being shackled or of not being able to satisfy one’s hunger, and these will likely be experienced by the criminal as “suffering.” The essence of punishment, however, is to restrict a criminal’s will by depriving him of the right to be the sole author of his own actions. Retribution: Moral Explanations and Justifications for Punishment Arguing that retribution should be (at least) the primary driver of the moral justification of punishment is not like advocating that society dust off an impractical moralism, as if retribution were somehow a “justification in exile.” Retribution not only performs the invaluable service of justifying an essential but morally confounding social practice; it also provides morally adequate explanations for some anchor commitments within that social practice. Take, for example, the ubiquitous styling of criminal prosecutions as a lawsuit to which the entire community is party, as in *People v. Smith*. Why are the “People” (or the “State” or the “Commonwealth”) the complaining party in every criminal case? Perhaps because retribution shows why and how by showing how society as a whole is victimized by every criminal act. Retribution also underwrites the whole moralistic framework and language of criminal justice in a way that no other account of punishment can do. “Praise and blame,” “freedom and responsibility,” “guilt and innocence,” “crime and punishment”: This whole panoply of concepts and terms is part and parcel of America’s criminal justice experience, and it is supported well by retributive theory. So, too, is the act-specific and choice-specific focus of the criminal law. From a retributive view, no one’s uncharitable attitudes, character defects, or personality disorders (all of which might trigger intervention in a rehabilitative or reformative regime of punishment) are fit grounds for punishment. The reason that they are not predicates for punishment owes to the fact that they are not acts of usurping liberty. The mere possession of these traits or beliefs is not, moreover, unfair to others. Proponents of rehabilitation and paternalistic moral reformers, by contrast, are hardly able to explain why their particular ministrations must always await (by dint of moral imperative) the performance of some prohibited act. Another indication of how retribution explains and justifies punishment involves a perennial chestnut of first-year criminal law classes: What if a public authority could stave off riots and mayhem only by hanging an innocent person popularly believed to be guilty? The commonplace statement of moral priorities in society has long been “better that a hundred guilty persons go free than that one innocent suffer.” Perhaps a hundred is hyperbole; Blackstone put the number at 10. No matter, though, because both numbers express an important truth: A just society never wittingly convicts an innocent and stops at almost nothing to avoid negligently doing so. Why? What are the moral underpinnings of this commitment, which is deeply embedded in this nation’s law and institutions? Where retribution forms the moral justification for punishment, the problem of punishing the innocent can be solved. The aim of retribution is always frustrated—and is never served—by punishing the innocent. Punishing someone who has committed no offense is counterproductive. If someone has not distorted society’s equilibrium by committing a criminal act, harming him cannot restore that equilibrium, especially while the truly deserving party escapes retribution. Making an innocent disgorge his bold act of will is impossible, for there is nothing to be disgorged. Inflicting “punishment” on the innocent is instead simple scapegoating, which, even if it could somehow be morally justified, is surely not punishment at all. Additionally, retribution promises cogent instruction on some controversial issues of the day. Retribution points straightaway, for example, in favor of determinate sentencing. The harm of any crime is cabined within a defined act performed on a particular occasion, and the measure of punishment required to redress it is tied tightly around that discrete act and its particular harm, both conceptually and morally. Retribution also points, however, to a negative judgment on the broad movement in favor of “victims’ rights.” The specific victims of a criminal act deserve to be taken seriously and treated reasonably by all actors in the criminal justice system, from their first police encounter all the way through trial and sentencing. But it is dubious policy to make dispositive victims’ opinions about the disposition of what some call “their” cases and about appropriate penalties for offenders. Reconciling victims with their victimizers is not a bad idea, but in most cases, it may be quixotic, and in no case should it be the only goal of those public officials who are in charge of criminal justice matters. Retribution and Overcriminalization The foregoing slog through retribution and its virtues and alleged vices lays the foundation from which this paper may now take aim at overcriminalization. Below are five distinct criticisms of this phenomenon. Each is based upon moral principle. Each cuts deeply. The five are mutually reinforcing in very interesting ways, and the whole may be greater than the sum of its parts. Taken together, these five criticisms support the conclusion that the central case of overcriminalization—viz., a strict liability regulatory offense—is a case of unjust punishment, which is to say that it should not be done. The following considerations do not address whether any one of the criticisms or some combination of them short of five supports the same conclusion. The effective force of these five criticisms upon secondary and peripheral cases of overcriminalization is also left aside, save to say that these criticisms have considerable extended force. Criticism #1: Overcriminalization is driven by a desire to deter and is therefore unable to morally justify criminal sanctions. As the Manhattan Institute’s Marie Gryphon writes: *[O]ften the overriding reason for enacting a piece of legislation is to produce an overall social benefit, and the criminal sanctions attached to certain forms of conduct…are chiefly aimed at conducing to that benefit by deterring that conduct rather than stigmatizing it and punishing the person who carried it out….*Because it is impossible to fit the central case into the retributive framework—and because rehabilitation and moral reform are inapposite too—deterrence is left haplessly to shoulder the whole moral justificatory burden. It is not altogether misleading to say that the goal of any criminal justice system is that certain conduct become rarer than it otherwise would be, and it is often said that retribution looks backward while deterrence looks forward and anticipates a beneficial societal result (more specifically, less crime). In this formulation of punishment theory, retribution is sometimes said to inflict socially useless suffering upon people and thus to be beyond the pale of worthy social policy. So far considered, it seems that deterrence and not retribution ought to be driving things. The sole goal of deterrence is to reduce the future incidence of crime. Deterrence thinking is suffused with utilitarian theories of value, which tend toward social engineering in their social analyses. Retribution aims to restore a lost balance of fairness and equality for its own sake and not (as utilitarians would insist) because it is an overall state of affairs which includes proportionally more of goods or values or preferences than it does of corresponding negations, however these matters are determined. The goal of retribution, though, is to re-establish the balance of fairness in political society. Both theories of punishment thus attempt to have a positive effect on society *after* the incidence of criminal activity, albeit in different ways. Retribution has the considerable further advantage of being capable of morally justifying criminal sanctions, which deterrence by itself lacks. And deterrent aims may be integrated (up to a point) with retributive moral underpinnings in a functioning criminal justice system, such as our own.

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