

RETHINKING IMPRISONMENT

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RICHARD L. LIPPKE

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To Aidan and Emil

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General Editor's Preface

In this work Professor Lippke sets out to construct a normative theory of imprisonment, and its emphasis is therefore on the justificatory reasons for certain practices. While the book deals in detail with prison conditions and the reasons for providing certain facilities and respecting certain rights, it also examines the justifications for criminalizing conduct in the first place, and for punishing people for committing those offences. From these foundations the author moves on to consider the types of crime for which imprisonment may be justified, all the while contrasting the justifications in an ideal society with those that might realistically be maintained in societies riven with social inequality. Having discussed the justifications for using the sanction of imprisonment, Professor Lippke then considers the extent to which normal civil rights should be forfeited in prison, and whether the answer should be affected by the seriousness of the offence committed. The analysis of prisoners' rights and prison conditions, supported by references to several penal systems, keeps faith with the concept of autonomy implied in the justification for criminalization and for punishment. The result is a carefully argued challenge to many assumptions about prisons and their use for punishment, a challenge that does not espouse abolitionism but which advances reasons for using imprisonment of a certain kind and duration for offences and offenders of a certain kind. In this way the monograph establishes a new benchmark in integrated thought about criminal justice.

Andrew Ashworth

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Many of the formative ideas for this book stem from a series of previously published articles. Those who read and offered helpful comments on these articles prior to their publication include Thom Brooks, Michael Davis, and Walt Schaller. Numerous anonymous reviewers also prodded me to craft more persuasive arguments and to pay attention to the empirical literature on prisons and punishment. The book incorporates material from these articles, though many of the arguments and points made in them have been recast as my thinking about the topics under discussion evolved. I wish to thank the following for permission to use previously published material: 'Victim-Centered Retributivism,' [2003] 84 *Pacific Philosophical Quarterly* 127; 'Retribution and Incarceration,' [2003] 17 *Public Affairs Quarterly* 29; 'Diminished Opportunities, Diminished Capacities: Social Deprivation and Punishment,' [2003] 29 *Social Theory and Practice* 459; 'Criminal Offenders and Right Forfeiture,' [2001] 32 *Journal of Social Philosophy* 78; 'Imprisonable Offenses,' [2006] 3 *Journal of Moral Philosophy* 265–287; 'The Disenfranchisement of Felons,' [2001] 20 *Law and Philosophy* 553; 'Prison Labor: Its Control, Terms, Conditions,' [1998] 17 *Law and Philosophy* 533; and 'Prisoner Access to Recreation, Entertainment, and Diversion,' [2003] 5 *Punishment & Society* 33.

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Introduction

When people are imprisoned for their crimes, a powerful message is sent to them and their fellow citizens: those who transgress the criminal law are unfit to continue living among us.¹ Although fines or other non-custodial sanctions set back offenders' interests, imprisonment imposes deprivations and restrictions on them that are much greater in degree and different in kind. Yet when the plight of prison inmates is considered at all, it is not uncommon for them to be portrayed as deserving of whatever abuses or indignities befall them during their confinement. The reason for this is not hard to discern: unlike other human beings who are socially marginalized for reasons of race, gender, or ethnicity, prisoners are presumed to have done things that make them loathsome. This presumption is occasionally challenged, but usually only by those who worry that some prisoners may be innocent of the crimes for which they are imprisoned or have committed crimes that were not grave enough to warrant confinement. Once the merits of these challenges are conceded, however, few seem inclined to question further the conditions under which serious offenders are confined.

There is a voluminous philosophical literature on the general justification of legal punishment. The question of what, if anything, justifies the state in depriving individuals of their freedom, property, or lives in response to their criminal wrongdoing has long occupied moral and political theorists and continues to do so. There is also an extensive philosophical literature on the acts that should be made criminal, and a modest one on the determinants of criminal sentences. Yet once we have decided to punish offenders with imprisonment, numerous important questions remain about the restrictions and deprivations that may legitimately be imposed on them. Should their basic physical and psychological welfare be assured? Should prisoners be denied access to paid labor or, alternatively, forced to work? To what extent should they be granted autonomy over their lives? Should they enjoy any privacy? Should they be kept isolated from family and loved ones, or their fellow prisoners? Should they have access to recreation and entertainment, or is imprisonment supposed to make their lives unpleasant? Should they be permitted to vote or exercise other civil rights such as freedom of speech or conscience? These and other questions have received scant attention from philosophers concerned with the justification of legal punishment.

¹ Imprisonment's communicative meaning is emphasized by RA Duff in *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001) 148–149.

Other scholars, whose work tends to be more empirical or comparative in nature, have studied the character of imprisonment. Criminologists and legal scholars have made invaluable contributions to our understanding of prisons and the treatment of their inhabitants. Their research demonstrates the considerable variation in penal practices that exists throughout the world. It also offers important insights into the kinds of penal practice that reduce the degradation and suffering of prisoners; and those that improve their chances of resuming normal lives once they are released from confinement. I draw extensively on the findings of those who study and compare prisons in my own analysis. But their work does not provide us with a normative theory of imprisonment—that is, a theory about justified prison conditions. Indeed, the dominant characteristics of contemporary imprisonment—loss of liberty, privacy, amenity and work, along with social and political isolation—are too often assumed to be its inherent features by most everyone who writes about legal punishment.

The aim of this book, as the title suggests, is to encourage a normative rethinking of imprisonment as a criminal sanction. The book's main focus is an examination of the restrictions and deprivations imprisonment legitimately imposes on serious offenders. In considering how we structure imprisonment, however, other questions about it inevitably arise. For what crimes is imprisonment an appropriate sanction? For how long should different types of offender be imprisoned for their crimes? What wrongful acts should be treated as crimes, or as serious crimes? We are forced to confront these questions because we cannot address those concerning the restrictions and deprivations imprisonment may legitimately impose without a theory of legal punishment's justifying aims. That such a theory is needed should come as no surprise. Without an account of what we hope to accomplish in punishing offenders we cannot determine what to do with or to them. And no account of legal punishment's justifying aims will be tolerably complete if it does not provide us with some recommendations concerning which offenders to punish most severely and for how long.

The conclusions I reach are not entirely original. I contend that many countries imprison too many offenders, for too long, under conditions that cannot morally be justified.² Many of those imprisoned are themselves victims of severe social deprivation; or they are not quite fit subjects for legal punishment in other respects. I urge less use of imprisonment generally, and less harsh and restrictive forms of it when it is employed. Not only have conclusions similar to these been reached by others, but there are countries in the world where some or all of them have been translated into penal practice. As James Whitman shows in his illuminating comparative study of criminal justice practices in Europe and the United States, some European countries, in particular Germany and France, have evolved penal systems

² Others who have reached similar conclusions, albeit on broadly consequentialist grounds, include E Currie, *Crime and Punishment in America* (New York: Henry Holt, 1998); M Tonry, 'Has the Prison a Future?' in M Tonry (ed), *The Future of Imprisonment* (New York: Oxford University Press, 2004) 3–24; and A O'Hear, 'Imprisonment', [1984 Supplement] 18 *Philosophy* 203.

that place a premium on more humane and respectful treatment of prisoners.³ The notion that prisoners should be deprived of no more than the freedom that their confinement, of necessity, takes from them is one that has considerable currency throughout Europe, as does the notion that concrete steps should be taken to prepare prisoners for their post-prison lives. What I hope to provide in this book is a firm philosophical grounding for prison confinement that respects and sustains the capacities of prisoners for responsible citizenship.

Imprisonment need not have a single or simple social meaning. What it communicates about offenders depends on how it is structured and the ways in which inmates are treated. Harsh and restrictive prison conditions, combined with disrespectful or abusive treatment of inmates, sends the message that offenders are contemptible, little more than dangerous wild animals to be severely chastised and restrained. This way of regarding offenders makes sense, if it makes sense at all, only on certain assumptions about them—that they are capable moral agents who have deliberately chosen to inflict grave wrongs on others though they had sufficient opportunities to behave in less destructive ways. Even if such assumptions are warranted, and one suspects that in such unqualified terms they rarely are, it is hard to see how such an approach to punishing people is anything but short-sighted. The vast majority of prison inmates will eventually be released back into society. Not only will they carry with them the heavy social stigma of having been imprisoned, the isolation, idleness, and brutality of harsh imprisonment seems unlikely to affect them in helpful ways.

Less restrictive and degrading forms of confinement, by contrast, convey very different messages to and about offenders. True, any confinement says that the past behavior of individuals has been such that, for some period of time, they cannot be permitted to live freely in civil society. But if prisoners are allowed to work, exercise responsibility, and maintain social ties, and if they are treated with respect and fairness, then they (and their fellow citizens) will find it harder to conclude that they are beyond hope. Individuals properly imprisoned for their crimes will always be problematic citizens. Yet problematic citizens need not be unsalvageable ones, and imprisonment can and should be structured to acknowledge and affirm this crucial distinction.

Structure of the Book

Some who write about prisons believe that an elaborate defense of humane and minimally restrictive confinement is not needed.⁴ Their view is that deprivation of liberty is the *sine qua non* of legal punishment, in the sense that it and it alone

³ JQ Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford: Oxford University Press, 2003). More details about the German approach to imprisonment are provided by L Lazarus, *Contrasting Prisoners' Rights: A Comparative Examination of Germany and England* (Oxford: Oxford University Press, 2004).

⁴ Tonry (n 2 above) 20, and E Rotman, 'Do Criminal Offenders Have a Constitutional Right to Rehabilitation?' [1986] 77 *Journal of Criminal Law & Criminology* 1023, 1032–1033.

comprises defensible legal punishment for serious offenders. Any further losses or restrictions are ruled out by definition, as it were. I am deeply sympathetic with this conclusion, yet it is one that, in my view, must be earned through careful argument. It is not obvious that all we can do to serious offenders is to deprive them of their liberty. The practices of many countries do not support or reflect such a view. We need a normative theory of imprisonment if we are to criticize those practices in systematic fashion. More importantly, many who think and write about punishment dispute the contention that deprivation of liberty is the essence of imprisonment, and we can certainly conceive of arguments in favor of harsher or more restrictive prison conditions. Hence, I believe that we must take the longer way round to reach the conclusion that less restrictive and more humane prison conditions are sufficient to achieve the aims of legal punishment.

In developing a normative theory of imprisonment, I employ both familiar and novel arguments. In the first two chapters, I sketch a theory of legal punishment and criminal sentencing which combines retributive and crime reduction elements, with the former having priority. This approach to justifying legal punishment builds upon the notion that the role of the state is to ensure a limited equality of condition among all citizens. Criminal offenses upset that equality of condition. Legal punishment aims at restoring it by imposing sanctions that censure the conduct of offenders and disrupt their lives in ways proportional to the seriousness of their offenses. For complicated reasons, I argue that this essentially retributive account must be supplemented by a crime reduction aim. Though I concede that we punish offenders, in part, to reduce crime, I argue that this abstract aim is not terribly useful in helping us construct a theory of sentencing. First, there are the standard retributive concerns about how firmly the crime reduction approach can justify proportional sentences. Then, beyond this, we simply may not know enough about which sentences or prison conditions reduce crime to make much use of the crime reduction component in determining such matters; nor do we have the ability to weigh the many factors needed to determine optimum sentences and prison conditions. We are thus largely thrown back on retributive considerations in these areas.

Still, the idea that a theory shaped by a retributive aim might be the basis for urging substantial reforms in imprisonment will seem counter-intuitive to many. Critics of retributivism sometimes portray it as justifying unforgiving if not vindictive attitudes towards criminal offenders.⁵ True, retributivism does justify us in stoutly punishing those who have committed serious crimes. Yet because imprisonment inflicts severe losses and restrictions on individuals, I contend in Chapter 3 that its use can only be justified in relation to crimes which likewise cause or threaten significant harms to victims. Its use is not appropriate to express moral outrage toward acts that democratic majorities disapprove of or to deter citizens

⁵ For instance, D Dolinko, 'Some Thoughts about Retributivism', [1991] 101 *Ethics* 537, 559.

from committing what amount to relatively harmless offenses. Retributivism also sets demanding requirements for liability to punishment that are not always satisfied in the real world. The only fit subjects of retributive legal punishment are rational moral agents who have genuine options for attaining their ends other than offending, but who nonetheless elect to commit crimes. To the extent that these assumptions about offenders are not satisfied in the real world, the legitimacy of their legal punishment is undermined.

One neglected area of retributive penal theory is the limits that it entails on the duration and structure of imprisonment. On the retributive account I defend, penal sanctions should be keyed to the ways in and extent to which crimes interfere with the abilities of victims to live decent lives shaped by their autonomous choices. More serious crimes interfere with victims' lives in profound ways, and the state is therefore justified in imposing comparable penal losses on those who commit them (taking offender culpability into account, as shown in Chapter 1). But retributivism's assumptions about liability to legal punishment yield various constraints on the structure of imprisonment, which are detailed in Chapter 5. These constraints are born of the retributive commitment to imposing proportional criminal sanctions on convicted offenders in ways that do not destroy or erode their capacities for autonomy and responsible citizenship. When employed to analyze and evaluate prison conditions, these constraints yield some surprising conclusions—ones that are bolstered by the best evidence, patchy as it may be, about what treatment of prisoners is likely to reduce crime.

Nonetheless, some readers will be tempted to reject out of hand the equalizing version of retributivism I defend, and others may not be persuaded by the arguments I muster on its behalf. It is thus important to note that most of my arguments for less harsh and restrictive prison conditions do not depend on the specific form of retributive theory I advance. What they do depend upon are two retributive assumptions that are likely to attract a wide following—that legal punishment must be proportional to the seriousness of offenses and understood as an institutionalized way of holding offenders morally accountable for their acts. The latter claim, in particular, yields the rich set of retributive constraints that I rely upon to build the case for reforming prisons.

Utilizing these retributive constraints, and the available evidence about the kinds of sanctions most likely to reduce crime, I urge the adoption of prison regimes 'at or near' what I term the 'minimum conditions of confinement'. I say 'at or near' because I believe that abstract philosophical argument can do no more than specify a set of prison conditions toward the less restrictive and harsh end of a continuum of possible prison regimes. I shall be content if it can do this much. The minimum conditions of confinement (hereafter, MCC) are discussed at length in Chapter 5, and initially contrasted with what I term 'extreme conditions of confinement' (hereafter, ECC). The former impose the least restrictions and deprivations on offenders consistent with their confinement. The latter impose many

more restrictions and deprivations, resembling those found in many supermax prisons. The ECC are shown to violate retributive constraints on legal punishment and impose costs and burdens on offenders and the public that greatly exceed their crime reduction benefits.

There is, obviously, a range of prison regime options between the ECC and the MCC. In Chapters 7 through 10, I discuss in more detail the kinds of prison conditions that can be justified, attempting to demonstrate that those at or near the MCC are sufficient, in most cases, to achieve the retributive and crime reduction aims of legal punishment in relation to serious offenders. More specifically, I argue that prisoners should be regarded as rightfully controlling their own labor and the state should take steps to facilitate their employment. I contend that prisons should be made more permeable, so that inmates can sustain meaningful social relationships with spouses, children, other family members and friends. I also maintain that prisoners should be permitted to vote, exercise free speech and freedom of conscience, and that they should also have access to moderate levels of entertainment and recreation. In these and other ways, prison life should be structured so that it more closely resembles ordinary life in civil society, where individuals work, exercise responsibility, and enjoy meaningful social relations with others.

It is natural to object that serious offenders have done things to severely compromise their claims to humane and less restrictive conditions of confinement. Different ways in which this diminution of moral status might be construed are discussed in Chapter 6. The most extreme form of such diminution says that offenders have, through their criminal acts, forfeited their moral rights. Though few theorists support this extreme view, there are some defenders of the more moderate view, which says that offenders forfeit some of their moral rights. I reject the moderate view as well, contending that it is more plausible to regard serious offenders' moral rights as legitimately curtailed by legal punishment. I also argue that offenders' retained rights remain in full force, as against those who maintain that they are weaker, and thus more easily overridden by the state.

In developing an account of the normative character of imprisonment, I rely on a distinction between what I term A- and B-level analysis. At the A-level of analysis, discussed in Chapter 1, it is assumed that we inhabit a reasonably just society, one that secures for all its citizens what I term the 'social conditions of responsible citizenship'. Such a society criminalizes all and only those acts that may defensibly be defined as criminal, attaches sanctions to their violation that are proportional, and ensures that all citizens have both the capacities and opportunities to live decent lives shaped by their autonomous choices. Such a society also apprehends offenders, then prosecutes and punishes them in ways that strictly reflect their criminal acts, rather than their race, sex, socio-economic status, or other (arguably irrelevant) characteristics. In such a society, resentment toward offenders and their acts is appropriate, and the censure punishment conveys is fully justified, especially where those who break the law are adults whose capacity for responsible action is not impaired.

Unfortunately, we often inhabit less than reasonably just societies, ones that criminalize many actions inappropriately, impose disproportionate sanctions on offenders, tolerate severe social deprivation, and are characterized by various forms of injustice when it comes to the policing, apprehension, trial, and conviction of citizens. Hence, there is a need for B-level analysis, which I develop in Chapter 4. The distinction between A- and B-level analysis is vital for anyone defending a retributive aim to legal punishment, especially given the theory's emphasis on justice. There is some tendency for critics of retributivism to point triumphantly to the many injustices in most societies as a definitive refutation of the approach. How can legal punishment restore justice, they ask, if most offenders have had to endure grave social injustices in their own lives, ones that figure prominently in the etiology of criminal offending? Here I am inclined to believe that Jeffrie Murphy's categorization 'theoretically ideal, though practically inapplicable' remains viable, though too sharply drawn.⁶ Social injustices of various kinds do render retributive legal punishment problematic, though not, I argue, entirely unjustified. The ways in which social deprivation and other social inequities operate to complicate the justification of legal punishment are surveyed in Chapter 4, as are the options we are left with if little is done to address them. On retributive grounds it is harder, not easier, to justify lengthy criminal sentences, and harsh and restrictive prison conditions, at the B-level of analysis. Still, less than reasonably just societies will likely produce more offenders (including more serious ones) and ones who are less reliably attached to defensible moral norms. The latter offenders, in particular, present prison officials with difficult challenges that may require them to impose deprivations and restrictions that exceed the MCC in certain limited respects.

Many existing prisons have distressingly poor track records at reducing crime and producing more responsible citizens. Some have also questioned whether there is any discernible way in which they give offenders what they deserve. It is hardly surprising, therefore, that alternatives to public prisons as we know them are sometimes proposed. Two such alternatives are discussed in the concluding chapter. One of them is private prisons, the turning over of prison administration to private agencies, most of which seek to earn a profit by providing the government with a much-needed service. Though I believe that there are worrisome features of privatization, I urge a mostly benign view of the phenomenon. Granted, it is unlikely that privatization will spur prison reforms of the sort I advocate. Yet I see little reason for believing privatization inherently inhospitable to such reforms. A more formidable challenge is presented by those who urge partial or complete abolition of all prisons. Most who do so assume that prisons must take their current, squalid forms. Also, they do not always clearly separate the critique of prisons from a broader critique of current criminal justice policies. I concur with much of the broader critique, and I concede that defending most existing

⁶ JG Murphy, 'Marxism and Retribution', [1973] 2 *Philosophy and Public Affairs* 217, 241.

prisons may be a hopeless task. However, I am more optimistic about defending reformed ones. I believe that imprisonment at or near the MCC can be shown to be a defensible legal sanction, especially for certain types of serious offenders.

Though I ultimately defend imprisonment of a certain kind, this does not make me an avid supporter of it. I offer a narrow and carefully qualified justification of its use. Imprisonment of even the most humane sort strikes me as a poor substitute for the kind of concerted social action that seeks to decriminalize many acts, sanction acts that should be illegal less harshly, and establish the social conditions of responsible citizenry. It is distressing that, in lieu of such concerted social action, many countries increasingly resort to imprisonment as a response to what their leaders and citizens perceive (rightly or wrongly) as a crime crisis. They also continue to ratchet up the hard treatment imprisonment inflicts on offenders. The United States, for instance, currently imprisons more than 2.2 million of its citizens.⁷ This represents a quadrupling of the prison population since 1980. The United States is also the world leader in the development of so-called supermax confinement—prisons that subject inmates to levels of social isolation, restriction of autonomy, and sensory deprivation heretofore unthinkable (in the USA, at least) for months or years at a time.⁸ The argument of this book is that these trends are curiously divorced from both retributive logic and the best empirical evidence we have about what reduces crime. I do not defend legal punishment and imprisonment as they are currently structured and employed, only as they might be.

In certain respect, the reforms I urge would make prison life easier for inmates. Yet in other respects, such reforms would make it possible to expect and demand more of them. Reformed prisons would provide inmates with opportunities to earn income to support themselves, their families, and to pay the victims of their crimes restitution. Reformed prisons would also enable inmates to remain engaged with their spouses, children, and the broader communities of which they are a part. Ironically, many current prisons, by imposing idleness, isolation, and passivity on inmates, demand little of them beyond conformity with the rules of the institution. Also, as Alison Liebling has noted, it is important not to confuse liberalized prison regimes with lax ones that are so poorly run or overseen that they encourage inmates to escape or behave irresponsibly while confined.⁹ It is one thing to argue that prisoners should have fewer overall deprivations and restrictions of certain kinds imposed on them, but quite another to say that prisons should not have rules that are strictly enforced. Prisons by their nature subject their inhabitants to a substantial measure of oversight and control. I say relatively

⁷ 'Prison Statistics', U.S. Department of Justice, at <<http://www.ojp.usdoj.gov/bjs/prisons.htm>>.

⁸ A description of typical supermax conditions is provided by L Kurki and N Morris, 'The Purposes, Practices and Problems of Supermax Prisons', [2001] 28 *Crime and Justice: A Review of Research* 385–424. I analyze supermax confinement in 'Against Supermax', [2004] 21 *Journal of Applied Philosophy* 109–124.

⁹ A Liebling, assisted by H Arnold, *Prisons and their Moral Performance: A Study of Values, Quality, and Prison Life* (Oxford: Oxford University Press, 2004) 36–37.

little about the optimum ways of attempting to maintain order and security in prisons.¹⁰ Such details about prison management are probably best left for those who have greater experience with or knowledge about prisons. But I shall assume that the reforms I urge are not inimical to the proper management of prisons.

A Note on Method

Many of the philosophical claims on which my normative conception of the prison rests are deeply contested. These include claims about the justification of legal punishment, the moral rights of individuals, and the nature of the just society. I defend some of the claims I rely upon more than others, but those familiar with the complexity of the underlying issues will recognize that there is much more about them that would need to be said. Those who do applied philosophy must find some reasonable balance between the development of abstract theories and their use for analyzing institutions and practices in ways that offer critical perspectives on them. Allow me to say a little about how I attempt to strike this balance.

My approach might best be characterized as one of 'mid-level theory'. I employ accounts of the justification of legal punishment, the constraints on it, and the moral rights of individuals that should have fairly wide appeal. The aims of retribution and crime reduction are each likely to play crucial roles in any plausible version of legal punishment's justification. Granted, how these are interpreted, what their respective roles and weights are in a comprehensive theory, and what such a theory implies about the sentencing of offenders, are all matters about which there will be disagreement. My own views about these matters are explained in the first two chapters. The important point here is that disagreements at the theoretical level may yield comprehensive theories that do not vary widely in their practical implications for the treatment of criminal offenders. Most penal theorists agree, for instance, that criminal sanctions should be proportional to the seriousness of offenses. Also, many of them will concur with the retributive constraints on legal punishment that I rely extensively upon in developing a normative theory of imprisonment. Penal theorists might dispute the deeper philosophical grounds for ensuring the basic welfare, respecting the autonomy, and fostering the moral personalities of offenders, but they are unlikely to reject the need to do so.

Though the interest conception of moral rights employed throughout the book is not uncontroversial, many of the more substantive claims that I make about prisoners' rights would likely be unaffected were a different analytical conception of rights used. There are conceptions of rights according to which these can be traded off against mere considerations of utility, but few any longer regard

¹⁰ For further discussion of such matters, see Liebling (n 9 above) 431–492.

such accounts as plausible. So long as rights are conceived as entities that cannot be eroded or abridged unless their exercise threatens the equally important (or almost equally important) interests or abilities of other persons, most of the claims I make about them should not provoke strong resistance from those favoring somewhat different analytical conceptions.

Similarly, many of the substantive moral rights discussed in the book are ones concerning which there is likely to be widespread agreement. Few theorists deny that ordinary citizens have moral rights to control their labor, freely associate with others, engage in free speech, exercise freedom of conscience, participate in democratic political processes, and entertain or amuse themselves as they see fit. Most theorists also regard these as fairly weighty rights. If prisoners can be shown to retain many of these moral rights, we may be able to confine the well-known disagreements among rights theorists about the content, scope, and weight of rights to the margins of the debate about prisoners' rights. This is not to say that such disagreements can always be kept at the periphery. Disagreements about the extent to which the state should help individuals secure certain right-designated interests, especially when they are imprisoned, will be a recurring theme throughout the book's later chapters. My strategy when I encounter such disagreements is twofold: try to resolve them to the extent that I can do so; make explicit the assumptions with which I operate when I cannot.

Importantly, most rights theorists will agree that if prisoners retain fundamental moral rights, those rights cannot reasonably be abridged by the authorities based solely on speculation that their exercise will increase the probability that other people's substantially less weighty interests might be set back in various ways. Yet such justifications for limiting prisoners' rights are, as we shall see, quite common in practice. The more difficult cases, which also occur with some frequency, are ones where the exercise of prisoners' rights would, with a higher degree of probability, jeopardize the rights of other individuals. A framework for thinking about these harder cases is developed in Chapter 6. I believe that its employment in Chapters 7 through 10 shows that considerable headway can be made in addressing the problems posed by such cases.

In short, though most of the theoretical claims I rely upon in developing my account of justified prison conditions are not neutral in any significant sense, I avoid using strongly controversial ones that would undercut the broad appeal of my account. Still, no philosopher can avoid controversy altogether, and I am quite certain and indeed hopeful that what I say will spark some.

Things Left Unaddressed

The Introduction seems as good a place as any to note some of the issues that are not discussed in subsequent chapters. My focus in the book is on sentenced prisoners. There are important questions about how individuals held on remand

while awaiting trial should be treated. It should not be assumed that remand prisoners are justifiably subjected to the same losses and deprivations as sentenced ones. Indeed, it seems obvious that prisoners awaiting trial should be treated differently from those convicted of serious offenses. However, since my aim is to urge much less restrictive and harsh treatment of sentenced prisoners than is the norm in many countries, it may not be apparent in what ways the conditions of confinement for remand prisoners could be made less harsh or restrictive. Certainly they should not be made more so, but whether remand prisoners should be extended rights and privileges sentenced prisoners are not is a question beyond the scope of my inquiry.

I shall also have comparatively little to say about the treatment of former prisoners who have been released from confinement. It is apparent that ex-prisoners are desperately in need of assistance—in finding housing and jobs, in particular. Again, some of the problems ex-prisoners confront are artifacts of the current forms of imprisonment in many countries. If prison conditions are reformed in the ways I recommend, ex-prisoners will presumably have fewer adjustment and reintegration problems. This is not to say that they will not have any or that steps should not be taken to address these.

Finally, I do not discuss in any systematic way whether the death penalty is a justified sanction for certain crimes. For one thing, I have little to add to the existing literature on the topic, which is vast. For another, death is a penalty that is likely to fall on only a very small percentage of serious offenders. Indeed, I would suggest that the death penalty receives a disproportionate share of attention from penal scholars, especially in the United States. Slightly more than one thousand offenders have been executed in the United States since the death penalty was reinstated by the Supreme Court in 1976.¹¹ More than two thousand times as many offenders are currently imprisoned there in a given year. Most serious offenders in the United States and elsewhere will be imprisoned instead of executed. We therefore need to think more carefully about what it is we aim to accomplish by confinement, and how we might best go about doing so. My hope is that this book will start us down that path.

¹¹ Amnesty International provides an up to date tally of executions in the United States at <http://www.amnestyusa.org>.