

# THE INHERENT PROBLEM WITH MASS INCARCERATION

RAFF DONELSON\*

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## *Introduction*

Imagine a country where the vast majority of its citizens are incarcerated. They are incarcerated for violating substantive criminal laws that are both legitimate and just. By *legitimate*, I mean that those governed by the laws, by and large, affirm these laws as good ones to bind them and to safeguard their communities against what community members find problematic.<sup>1</sup> By *just*, I mean that the criminal laws actually are good ones, judged by the perspective of the best theory of justice. The sentencing laws are also legitimate and just in this hypothetical society.

Before developing more about this society, it is important to respond to an early worry. It may seem odd that a populace would find the criminal laws legitimate but still violate them, but this is not odd after all. In the hypothetical, people commit the kinds of crimes that many Americans do all the time—they have stolen property, driven recklessly, driven drunk, covered for friends’ misdeeds thereby obstructing justice, lied to police officers, battered people, engaged in public intoxication, abused animals, urinated in

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1. See Joachim Blatter, *Legitimacy*, ENCYC. BRITANNICA (Dec. 17, 2018), <https://www.britannica.com/topic/legitimacy> (“If people believe that existing political orders or laws are appropriate and worthy of obedience, then those orders and laws are legitimate.”).

public, used and sold illicit drugs, fudged the numbers on their taxes, violated copyright law, and so on. All of these offenses are jailable in some parts of America, and arguably, rightly so. Many Americans violate these criminal laws, even though we appreciate such laws and wish to keep them. In the hypothetical country, people behave like that.

In the hypothetical, the vast majority of folks subject to the jurisdiction of the polity are incarcerated at any given time. Some are held for a relatively short time for the aforementioned crimes. Some small percentage of the populace also commits weightier crimes like murder, rape, kidnapping, and robbery. Accordingly, they are given lengthier sentences. In sum, then, having committed crimes both mundane and notorious, the vast majority of folks in the hypothetical society are caught, convicted, and incarcerated.

Unlike in the United States, the criminal laws in the hypothetical society are enforced in an equitable manner. No unpopular group bears the brunt of criminal penalties. Not only are people policed, prosecuted, and convicted fairly, but let us also imagine a society in which criminogenic forces do not disproportionately work on one subset of the population. There is no underclass more given to property crimes or drug offenses, for instance.

We should also imagine that the jails and prisons themselves are run in a respectable manner. These facilities are safe and clean, not pits of disease and despair, not havens for rape and violence. There is no solitary confinement, no subpar medical treatment, no abuse from corrections officers.

In most societies, should the vast majority of people end up in jail, incarceration costs would be high, and it would be hard to make the society economically efficient. In our hypothetical society, let us imagine that way. One can envision a society in which the lost labor is not a great hamper on the economy, because technology has advanced to such a point that workers are not much needed due to robots and other artificial intelligence (“AI”). Less fancifully,<sup>2</sup> one could also imagine a criminal justice system with a generous work release program.

Finally, when most people are imprisoned in contemporary America, the youth are left unattended.<sup>3</sup> Let us also imagine that this problem can be

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2. *But see* Jack Kelly, *U.S. Lost Over 60 Million Jobs—Now Robots, Tech and Artificial Intelligence Will Take Millions More*, FORBES (Oct. 27, 2020, 11:09 AM EDT), <https://www.forbes.com/sites/jackkelly/2020/10/27/us-lost-over-60-million-jobs-now-robots-tech-and-artificial-intelligence-will-take-millions-more/?sh=2eeb0bb71a52>.

3. *See generally* Nora Wikoff, *Abstract: Reconsidering Poverty and Race as Criminogenic Influences Among American Youth*, SOC’Y FOR SOC. WORK & RSCH. (Jan. 14, 2011), <https://sswr.convex.com/sswr/2011/webprogram/Paper15438.html> (finding that family and peer dynamics significantly predict the level of criminal activity among youth).

remedied. Perhaps, in the distant future, super-intelligent AI can satisfactorily raise children.

I sketch this hypothetical society to raise an important question, the guiding question of this Essay: Is anything wrong with a legal system like this, that is, a system that happens to incarcerate a large portion of its citizenry? This Essay argues that there is something wrong, for mass incarceration itself is inherently wrong. Even if the criminal laws are just and legitimate, even if the criminal justice system is equitable, even if the jails are well kept, even if the economy continues to function, even if the youth continue to be educated, there is something deeply wrong with a society where the vast majority of people are incarcerated. The problem with such a society is its lack of freedom. That answer, which might seem obvious, is developed in more detail below.

The Essay is organized as follows. First, I review the most familiar criticisms of mass incarceration and show that these focus on *contingent* features of the phenomenon. Though these critics point to terrible problems, as critiques of mass incarceration, they fail to strike at the heart of the problem. Second, I consider commentators who point to non-contingent problems, but the problems identified are not *specific* to mass incarceration. If one were looking for a reason to specifically reject locking up millions of people, these criticisms still leave something to be desired. Third, I develop an argument about what is inherently and specifically wrong with mass incarceration. The argument, inspired by Thomas Hobbes, contends that mass incarceration is inconsistent with freedom. In the fourth section, I conclude.

### *I. The Contingent Critique*

Commentators have sharply criticized mass incarceration in the United States,<sup>4</sup> but the vast majority of commentary has focused on *contingent* features of mass incarceration. When I say that something is a *contingent* or *non-essential* feature of mass incarceration, I mean that the feature could, in principle, be removed while mass incarceration remains. For instance, *in principle*, one could have a system of mass incarceration that is not racist. The “in-principle” proviso is necessary, for it may well be true that one cannot *in fact* have mass incarceration that is not racist. It is possible that, in

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4. See, e.g., *Mass Incarceration and Criminalization*, DRUG POL’Y ALL., <https://drugpolicy.org/issues/mass-criminalization> (last visited Aug. 5, 2022); Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL’Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html>.

America, mass incarceration would disappear, were its racist features scrubbed away, because the populace would never tolerate a system of mass incarceration that equally burdened Whites and racial minorities.<sup>5</sup>

With this clarification borne in mind, my contention is that many critics have only found fault with contingent features of mass incarceration. For all the critics have said, there does not appear to be any problem with mass incarceration *itself*. There is only a problem with a racist system of mass incarceration, a classist system of mass incarceration, an expensive system of mass incarceration, and so on.

Critics of American mass incarceration have focused on a cluster of problems that are very serious but ultimately not essential to mass incarceration. To organize the various criticisms, I have divided them into three kinds of concerns. First are concerns about certain problematic background conditions that occur before anyone is ever incarcerated. Second are concerns about what happens while people are incarcerated. Third and finally are concerns about what happens after some people are incarcerated.

In the first set of concerns, concerns about problematic background conditions, we find the most familiar worries about mass incarceration. The foremost worry about mass incarceration, as it exists in the United States, is its racially disparate nature.<sup>6</sup> It may seem strange to think of this objection to mass incarceration as objecting to a background condition, but closer investigation reveals as much. As I interpret most writers on this issue, the problem for them is *not* the mere fact that, say, Blacks are incarcerated at higher rates than, say, Whites. The problem is a set of background conditions that make this possible and even likely. Maybe society is unfairly structured

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5. Yankah claims, plausibly, that we would have very different criminal laws “if they affected all races equally.” Ekow N. Yankah, *Punishing Them All: How Criminal Justice Should Account for Mass Incarceration*, 97 RES PHILOSOPHICA 185, 198 (2020).

6. See, e.g., *Racial Justice*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/racialjustice.html> (last visited Aug. 14, 2022) (“From arrest to sentencing, racial and ethnic disparities are a defining characteristic of our criminal justice system.”); *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> (last visited Aug. 5, 2022) (defining “What’s at Stake,” first by stating the high percentage of imprisoned people located in the United States and then immediately talking about racial disparities); ASHLEY NELLIS, SENT’G PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* (2021), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

such that criminogenic forces act on Blacks more than on Whites.<sup>7</sup> Maybe police unfairly arrest Blacks at higher levels than others, even after controlling for disparate levels of offending.<sup>8</sup> Maybe prosecutors charge Blacks at higher rates and with more severe crimes than others, even after controlling for different rap sheets.<sup>9</sup> Maybe courts give lengthier sentences to Blacks for the same crimes, after controlling for disparate criminal histories.<sup>10</sup>

All of these conditions, if they are so, reveal horrible things that happen *prior to* a person's incarceration. For that reason, I consider these background conditions. As an aside, these same worries can be raised about the poor.<sup>11</sup> Beyond these identitarian concerns, critics worry that the substantive criminal laws or sentencing laws are unjust or illegitimate. As a paradigmatic example, some claim that recreational drug use and sale should not be

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7. See, e.g., ELIZABETH HINTON & CINDY REED, VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM (2018).

8. See Cydney Schleiden et al., *Racial Disparities in Arrests: A Race Specific Model Explaining Arrest Rates Across Black and White Young Adults*, 37 CHILD & ADOLESCENT SOC. WORK J. 1, 10 (2019) (reporting the results of a longitudinal study which casts doubt on “[t]he Differential Involvement Hypothesis [which] suggests that Black individuals are engaging in more delinquent behavior, therefore causing them to be arrested more than White individuals”); see also Brendan Lantz & Marin R. Wenger, *The Co-Offender as Counterfactual: A Quasi-Experimental Within-Partnership Approach to the Examination of the Relationship Between Race and Arrest*, 16 J. EXPERIMENTAL CRIMINOLOGY 183 (2019).

9. See SENT’G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 7–8 (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf> (“Prosecutors are more likely to charge people of color with crimes that carry heavier sentences than whites. Federal prosecutors, for example, are twice as likely to charge African Americans with offenses that carry a mandatory minimum sentence than similarly situated whites. State prosecutors are also more likely to charge black rather than similar white defendants under habitual offender laws.” (footnote omitted)).

10. See U.S. SENT’G COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 2 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114\\_Demographics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf).

11. See Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL’Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>.

illegal,<sup>12</sup> or if it is to remain illegal, incarceration is an improper penalty.<sup>13</sup> To the extent that such laws contribute to mass incarceration, mass incarceration is problematic. Tying all of these concerns together is the thought that certain background conditions should not be so. Because mass incarceration results from these background conditions, it should not be so either. Of course, none of these background conditions are essential to mass incarceration. It is conceptually possible to have a system where a great many people are locked up, yet the pool of incarcerated reflects the racial and wealth demographics of the populace as a whole, and the laws that put them there are just and legitimate. This is, at least, what the opening hypothetical teaches.

The second set of worries concerns what happens while people are incarcerated. Obviously, many critics point out terrible conditions that plague many corrections facilities. There is overcrowding,<sup>14</sup> violence,<sup>15</sup> and some corrections tactics which are instances of torture, such as solitary confinement.<sup>16</sup> Incarcerated also experience more subtle harms that seem to serve no legitimate penological purpose: disenfranchisement,<sup>17</sup> increased health risks,<sup>18</sup> and brutalization.<sup>19</sup> There are also costs that society incurs while people are incarcerated. There are both direct costs and opportunity costs. Direct costs include housing, feeding, and generally managing millions

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12. See DOUGLAS N. HUSAK, *DRUGS AND RIGHTS* 209–56 (1992) (chapter 4, “Restrictions on Drug Use”).

13. See generally JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUST., *HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED?* 7 (2016), <https://www.brennancenter.org/media/362/download> (“Of the 1.46 million state and federal prisoners, an estimated 39 percent (approximately 576,000 people) are incarcerated with little public safety rationale. They could be more appropriately sentenced to an alternative to prison . . . with limited impact on public safety.”).

14. See Ryan Spohn & Melanie Kiper, *State Prison Overcrowding and Capacity Data*, UNIV. OF NEB. OMAHA (May 3, 2020), <https://www.unomaha.edu/college-of-public-affairs-and-community-service/governing/stories/state-prison-overcrowding-and-capacity-data.php>.

15. See WHO, *PRISONS AND HEALTH* 19–24 (Stefan Enggist et al. eds., 2014).

16. See Ariel A. Simms, *Solitary Confinement in America: Time for Change and a Proposed Model of Reform*, 19 U. PA. J.L. & SOC. CHANGE 239, 245–46 (2016).

17. See NICOLE D. PORTER, SENT’G PROJECT, *VOTING IN JAILS* (2020), <https://www.sentencingproject.org/wp-content/uploads/2020/05/Voting-in-Jails.pdf>.

18. See generally WHO, *supra* note 15.

19. See Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, OFF. ASSISTANT SEC’Y FOR PLAN. & EVALUATION (Nov. 30, 2001), <https://aspe.hhs.gov/reports/psychological-impact-incarceration-implications-post-prison-adjustment-0#II>.

of incarcerated people.<sup>20</sup> There are opportunity costs; those who are incarcerated may not contribute as much to the economy and to the world as they would if they were free. Particularly worrisome on this front is what happens to inmates' children and communities while they are gone.<sup>21</sup> Tying all of these concerns together is the thought that certain bad things happen while people are subject to certain systems of mass incarceration, and these things must end. Of course, for each of these things, one could, in principle, have mass incarceration without them. There need not to be any overcrowding or violence. Inmates might have voting rights<sup>22</sup> and might work.<sup>23</sup> We could end solitary confinement.<sup>24</sup> We might one day drive down the high costs of incarceration. If all of this were to be achieved, it would be wonderful, but it would not necessarily end mass incarceration.

The third set of worries concerns what happens after people leave prison. In America, incarceration carries collateral legal consequences. One can be barred from taking certain jobs;<sup>25</sup> one can be barred from receiving certain social benefits,<sup>26</sup> including loans for tertiary education;<sup>27</sup> one can face legally

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20. See Casey Kuhn, *The U.S. Spends Billions to Lock People Up, but Very Little to Help Them Once They're Released*, PBS NEWS HOUR (Apr. 7, 2021, 5:18 PM EDT), <https://www.pbs.org/newshour/economy/the-u-s-spends-billions-to-lock-people-up-but-very-little-to-help-them-once-theyre-released> (reporting estimates for the costs of incarceration); CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUST., *THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010-2015* (2017), <https://www.vera.org/downloads/publications/the-price-of-prisons-2015-state-spending-trends.pdf>; Shayda A. Collins & Sharon H. Thompson, *What Are We Feeding Our Inmates?*, 18 J. CORR. HEALTH CARE 210 (2012).

21. See RYAN LUGALIA-HOLLON & DANIEL COOPER, *THE WAR ON NEIGHBORHOODS: POLICING, PRISON, AND PUNISHMENT IN A DIVIDED CITY* 93–108 (2018).

22. This already happens in certain enlightened jurisdictions. See *Felon Voting Rights*, NCSL (June 28, 2021), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (“In the District of Columbia, Maine and Vermont, felons never lose their right to vote, even while they are incarcerated.”).

23. See 2 MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS* § 8:29 (5th ed. 2021).

24. See Amy Fettig, *2019 Was a Watershed Year in the Movement to Stop Solitary Confinement*, ACLU (Dec. 16, 2019), <https://www.aclu.org/news/prisoners-rights/2019-was-a-watershed-year-in-the-movement-to-stop-solitary-confinement> (reporting a decline in the “abusive use of solitary confinement” in some U.S. jurisdictions).

25. See Joshua Kaiser, *We Know It When We See It: The Tenuous Line Between “Direct Punishment” and “Collateral Consequences,”* 59 HOW. L.J. 341, 345–46 (2016).

26. See *id.* at 352 (discussing the permissibility of depriving one of welfare benefits).

27. See *Students with Criminal Convictions Have Limited Eligibility for Federal Student Aid*, FED. STUDENT AID, <https://studentaid.gov/understand-aid/eligibility/requirements/criminal-convictions> (last visited Aug. 6, 2022).

sanctioned discrimination in housing,<sup>28</sup> employment,<sup>29</sup> access to credit,<sup>30</sup> one can forever lose the right to vote,<sup>31</sup> stand for election to public office,<sup>32</sup> or serve on a jury.<sup>33</sup> In addition to obstacles formally imposed by the law on formerly incarcerated people, there are other obstacles that follow incarceration. For instance, even without legally sanctioned discrimination, one might face ongoing stigma, and incarceration may destroy relationships<sup>34</sup>

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28. Recent guidance from the U.S. Department of Housing and Urban Development interprets the Federal Housing Act as prohibiting discrimination on the basis of criminal record. *Federal Law Bars Housing Discrimination Against People with Criminal Records*, EQUAL JUST. INITIATIVE (June 16, 2016), <https://eji.org/news/federal-law-bars-housing-discrimination-against-people-with-criminal-records/>. Nonetheless, certain criminals are exempt from this protection. *Id.* (“Federal law still allows landlords to deny housing to anyone convicted of drug manufacturing or distribution . . .”). Also, some counties, while instituting similar bans on housing discrimination, have similar carveouts for undesirable criminals. *See, e.g.*, Gregory Pratt, *Cook County Makes It Illegal to Refuse to Show or Rent Property to People with Certain Criminal Records*, CHI. TRIB. (Apr. 25, 2019, 3:10 PM), <https://www.chicagotribune.com/politics/ct-met-housing-ordinance-arrest-record-20190425-story.html> (detailing the “Just Housing” ordinance in Cook County, Illinois, which “makes it illegal to refuse to show property or rent housing to people with certain criminal records. It doesn’t apply to sex offenders or people who have a criminal conviction that, after an ‘individualized assessment,’ shows that denial based on the conviction ‘is necessary to protect against a demonstrable risk to personal safety and/or property of others . . .”).

29. *See* Scott H. Decker et al., *Criminal Stigma, Race, and Ethnicity: The Consequences of Imprisonment for Employment*, 43 J. CRIM. JUST. 108 (2015).

30. *See* Kelly Elizabeth Orians, “I’ll Say I’m Home, I Won’t Say I’m Free”: Persistent Barriers to Housing, Employment, and Financial Security for Formerly Incarcerated People in Low-Income Communities of Color, 25 NAT’L BLACK L.J. 23, 51–54 (2016); *see also* Taja-Nia Y. Henderson, *New Frontiers in Fair Lending: Confronting Lending Discrimination Against Ex-Offenders*, 80 N.Y.U. L. REV. 1237 (2005).

31. *See* PORTER, *supra* note 17, at 5 (“Among those excluded [from voting] are persons in prison, those serving felony probation or parole, and, in 11 states, some or all persons who have completed their sentence.”).

32. Pennsylvania is one of many states that denies ex-felons the right to hold public office. PA. CONST. art. II, § 7 (“No person hereafter convicted of embezzlement of public moneys, bribery, perjury or other infamous crime, shall be . . . capable of holding any office of trust or profit in this Commonwealth.”). For a story on the effects of this draconian measure, *see* Beau Berman, “93 Drug Conviction Blocks McKeesport Man from City Council Despite Election”, WTAE (Jan. 5, 2016, 11:51 PM EST), <https://www.wtae.com/article/93-drug-conviction-blocks-mckeesport-man-from-city-council-despite-election/7476684>.

33. *See* Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 (2003).

34. William Tank Black, *I Went to Prison, and It Nearly Destroyed My Family*, WASH. POST (June 19, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/06/19/i-went-to-prison-and-it-nearly-destroyed-my-family/> (“One recent study found that each year



or a career.<sup>35</sup> Perhaps all of these effects of incarceration are unwarranted evils. If so, it is surely a tragedy that these evils affect many millions of people where there is mass incarceration. This all might be true, and yet, one can envision a system of mass incarceration without these wretched effects. As such, this critique too is merely contingent.

## *II. The Broader Critique*

While most critics find fault with contingent features of mass incarceration, a few have pointed out problems that necessarily accompany mass incarceration. These critics fall into three camps. There are those who call for the abolition of all punishment, those who call for the abolition of incarceration, and finally, those who find fault with mass punishment. As demonstrated below, even if these critiques succeed in telling us something wrong about every instance of mass incarceration, the breadth of the critique causes one to lose sight of what is specifically worrisome about mass incarceration.

Several scholars call for an end to punishment generally.<sup>36</sup> Some of these critiques focus on contingent problems with contemporary systems of punishment, but some center on essential problems with punishing other human beings. I highlight two of these efforts below.

Deirdre Golash offers a negative argument against punishment: for her, there is no good argument *for* punishment.<sup>37</sup> According to Golash, punishment must be justified, but the main justificatory theories of punishment—retributive theories, deterrence theories, and rehabilitation theories—are all flawed, so punishment is unjustified.<sup>38</sup> Retributive theories are flawed because punishment cannot, as some maintain, annul a crime, and it does not, as others maintain, restore balance to the moral order.<sup>39</sup> Deterrence theories are wrongheaded because (a) punishment probably harms society more than it helps, (b) even if punishment did help more than

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of incarceration increases the odds that the inmate's marriage will end in divorce (before or after the inmate gets out of prison) by an average of 32 percent.”).

35. Elena Holodny, *'It Still Haunts Me': What It's Like to Get a Job After Prison in America*, INSIDER (July 30, 2017, 8:03 AM), <https://www.businessinsider.com/finding-job-after-prison-2017-7>.

36. See, e.g., Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977).

37. See DEIRDRE GOLASH, *THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW* 5 (2005).

38. *Id.* at 23.

39. *Id.* at 49–51.

harm, its net benefits are smaller than other responses to crime, and (c) even if there were great net benefits, punishing to yield those benefits treats wrongdoers as a mere means to those ends.<sup>40</sup> Finally, about rehabilitation theories, Golash claims that they are unjustifiably paternalistic.<sup>41</sup> There are many possible responses to these critiques, but it is most important to note that these criticisms really do strike at something inherent to mass incarceration. While the first two points about deterrence theories are contingent, the third point, if it is right, marks an inherent problem. Also, the points about retributivism and rehabilitation are also about inherent features of all punishments.

Gregg Caruso offers a more positive argument against punishment.<sup>42</sup> While he has many things to say about punishment, the most striking of his points is the free will argument against punishment. In short, Caruso argues that human beings lack free will of the kind that would justify imposing punishment.<sup>43</sup> He also argues that, even if one is unsure whether human beings possess free will, one should still abstain from punishment because it is wrong to impose significant harms without a high degree of justification that one is correct in bestowing the harms.<sup>44</sup> Again, there are plenty of places to disagree, but the point is that Caruso critiques something inherent to mass incarceration. All punishment, for him, involves something wrong, namely behaving as if human beings have free will and can deserve poor treatment; since mass incarceration necessarily involves punishment, all instances of mass incarceration involve something wrong.

The issue with Golash and Caruso, from the perspective of this Essay, is that their projects do not identify anything specifically wrong with mass incarceration. For them, the wrong of mass incarceration is just additive. All punishment is wrong; lots of punishment is wrong; therefore, mass incarceration, which is lots of punishment, is wrong. I suspect, though, many of us think that there is something especially amiss about mass incarceration, and whatever that might be, folks like Golash and Caruso cannot capture it.

A similar story might be told about those who oppose all instances of incarceration. While most prison abolitionists worry about various

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40. *Id.* at 24–29.

41. *See id.* at 125–26.

42. *See* GREGG D. CARUSO, REJECTING RETRIBUTIVISM: FREE WILL, PUNISHMENT, AND CRIMINAL JUSTICE 1 (2021).

43. *Id.* at 14.

44. *See id.* at 8–9.

*contingent* features of incarceration<sup>45</sup> and thus only worry about contingent features of mass incarceration too, some do raise problems that are inherent to incarceration. For instance, as Allegra McLeod writes, “Abolition . . . entails . . . an ethic that recognizes the violence, dehumanization, and moral wrong inherent in any act of caging or chaining—or otherwise confining and controlling by penal force—human beings.”<sup>46</sup> If caging people is inherently wrong, mass incarceration, which involves caging many people, is also inherently wrong. But notice, that this too sees the inherent wrong of mass incarceration as merely additive.

Recently, two scholars have suggested that there is an inherent problem with mass punishment. These two separate critiques—one from Hamish Stewart, the other from Chad Flanders—are worth exploring for our own sakes and for better understanding how a critique of mass punishment is not quite a critique of mass incarceration.

I begin with considering the account from Stewart since his account explicitly concerns mass punishment.<sup>47</sup> Stewart’s project is to explain how someone who accepts retributivism as the correct justification of punishment could come to condemn mass punishment, and in particular, mass incarceration.<sup>48</sup> He then turns to the work of Immanuel Kant, which embraces retributivism and which, according to Stewart, has the theoretical resources to find fault with mass punishment.<sup>49</sup> As I read him, Stewart’s Kantian argument has three main steps. First, grant that the state derives its authority to punish at all from fulfilling its duty to establish and maintain a rightful condition, which is a system of extensive equal freedom for all within the state’s jurisdiction.<sup>50</sup> Second, note that in a jurisdiction where most people are excessively threatened with punishment, there is no rightful condition.<sup>51</sup>

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45. See, e.g., ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 37–39 (2003) (mentioning that the American prison is racist and sexist and that it leads to democracy failures which, in turn, catalyze other horrors, like environmental devastation and war); Robert Scott, *Using Critical Pedagogy to Connect Prison Education and Prison Abolitionism*, 33 ST. LOUIS U. PUB. L. REV. 401, 403 (2014) (“The phrase ‘prison abolitionism’ refers to a movement to eliminate the use of prisons as a form of legal punishment. Its rationale hinges on a critique of race, class, and gender oppressions found inside and outside of the criminal justice system.”).

46. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1172 (2015).

47. See Hamish Stewart, *The Wrong of Mass Punishment*, 12 CRIM. L. & PHIL. 45, 46 (2018).

48. *Id.*

49. See *id.* at 47, 47 n.7.

50. See *id.* at 50–52.

51. *Id.* at 52–53.

Third, we can conclude that, in such a jurisdiction, the state loses its authority to punish.<sup>52</sup> In a quip, a state that threatens mass punishment has no authority to punish anymore. A polity characterized by mass incarceration not only threatens mass punishment but makes good on those threats; thus, it is behaving wrongly.

Stewart's argument is interesting to consider both as an apology for retributivism and for someone drawn to other justifications for punishment, but the important thing for present purposes is not the soundness or validity of his arguments, but rather their scope. As the title of his article indicates, Stewart aims to find fault with mass punishment, not with mass *incarceration* specifically. This is not a problem; mass punishment does seem troubling, but if one shares the intuition that there is something particularly appalling about mass incarceration—a specific means of carrying out mass punishment—his account does not vindicate that intuition.

Having discussed Stewart, now I turn to the account of Flanders. He develops a Rawlsian argument against mass incarceration. Following John Rawls, Flanders thinks that a political order can go awry insofar as the order lacks stability or has stability but for the wrong reasons.<sup>53</sup> A society featuring mass incarceration is one that has stability, but for the wrong reasons.<sup>54</sup> Moreover, in having stability for the wrong reasons, the society is in danger of losing its stability.<sup>55</sup> A society has stability for the right reasons when it “win[s] compliance through winning the voluntary compliance of its citizens.”<sup>56</sup> There is stability for the wrong reasons when compliance is instead bought “through coercion.”<sup>57</sup>

For Flanders, there is a limited role for some buying of compliance through coercion, but when a state does this too much, it has gained stability for the wrong reasons, which is a bad condition.<sup>58</sup> Because mass incarceration, when it occurs, will always be connected with this bad condition, mass incarceration is inherently wrong, according to Flanders.<sup>59</sup> Instead of living in a polity with mass incarceration and its attendant ill-

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52. *See id.* at 53.

53. *See* Chad Flanders, *What Is Wrong with Mass Incarceration?*, in *THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY AND SCIENCE OF PUNISHMENT* 161, 170 (Farah Focquaert et al. eds., 2022).

54. *Id.*

55. *Id.*

56. *See id.*

57. *Id.*

58. *Id.* at 170–71.

59. *Id.* at 171.

gotten stability, it would be better for the state to demand less compliance in the first place.

While Flanders envisions his argument as attacking mass *incarceration*, it seems that the argument has little to do with incarceration as the specific punitive measure that the state employs. If I read him rightly, Flanders finds fault with any polity that excessively uses coercive measures, rather than mostly relying on legal subjects' own uncoerced volition. If so, a society with no incarceration but with mass fines would also be troubling on this account. To be clear, this is not a problem with Flanders's account, but like Stewart before him, Flanders does not focus on a problem specific to mass incarceration.

### *III. The Inherent Problem: The Freedom Critique*

In Parts I and II, I point out that most discussion of mass incarceration either focuses on problems that are contingent features of the practice or focuses on broader problems with punishment in general, incarceration in general, or mass punishment in general. Here, I introduce a framework for diagnosing an inherent problem for mass incarceration, specifically.

Thomas Hobbes is famous for introducing the world to the idea of a state of nature, or a state without government. Famously, or perhaps infamously, Hobbes claims that the state of nature would be violent—life in such a state would be “nasty, brutish, and short.”<sup>60</sup> Hobbes introduces the idea in order to offer a justification for the state and the range of powers that a state exercises. For Hobbes, we agree, or would agree, to live under a government, even an absolutist government, because the alternative—life in the state of nature—is so much worse. Closer consideration of this argument reveals how Hobbes could disagree with mass incarceration.

First, I explain how the state arises for Hobbes, which is just the same as a justification for the state. As Hobbes argues, the state of nature is characterized by war, a war “of every man against every man.”<sup>61</sup> With that said, “War consists not in battle only or the act of fighting, but in a tract of time, wherein the will to contend by battle is sufficiently known . . . .”<sup>62</sup> Because war does not just include the actual fighting, the badness of war cannot be reduced to being maimed or killed. War is bad also because “there

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60. THOMAS HOBBS, *LEVIATHAN* pt. 1, ch. 13, para. 9 (Project Gutenberg 2021) (1651), <https://www.gutenberg.org/files/3207/3207-h/3207-h.htm>. The archaic spellings and capitalizations of this source have been modified where deemed necessary.

61. *Id.* at pt. I, ch. 13, para. 8.

62. *Id.*

is no place for Industry, because the fruit thereof is uncertain, and consequently, no Culture of the Earth, no Navigation . . . no Knowledge of the face of the Earth; no account of Time; no Arts, no Letters, no Society.”<sup>63</sup> While one could think of the absence of these things as merely a deficit of welfare or utility, I think these absences also signal a lack of freedom. A free society is one characterized by industry, discovery, and creation, and these are precisely the things that are missing in the Hobbesian state of nature. To avoid this wretched life, devoid of welfare and freedom, “every man . . . ought to endeavour Peace, as [far] as he has hope of obtaining it.”<sup>64</sup> This is why each person must forswear their limitless power to govern themselves individually and transfer that power to “one man, or assembly of men,”<sup>65</sup> the sovereign, who will “use the strength and means of them, as he shall think expedient, for their Peace and Common Defence.”<sup>66</sup>

Having explained the origin and justification for the state, now we can understand how a Hobbesian would find fault with mass incarceration. For Hobbes, the people in the state of nature form a covenant with one another to institute a state in order to have safety and a free society where people can engage in industry, discovery, and creation. A polity characterized by mass incarceration is not a free society. If the state arises because, and is justified to the extent that, it fulfills our desire to live in a free society, a state with mass incarceration is problematic. To be clear, the complaint is not a material one about a lack of the *fruits* of industry, discovery, etc. That is a contingent consequence of modern mass incarceration, which could be remedied by advanced AI or something in the future. *We* want to discover, create, and do. It is not enough that there are things for our use. Even in the state of nature, there are things for our use; our planet has supplied all sorts of things that do not require much industry: there are things to eat, caves to sleep in, lakes and rivers from which to drink. This is not enough, for each person wants to “live contentedly,” as Hobbes says, “by *their own* industry, and by the fruits of the earth.”<sup>67</sup> This is what another writer meant by saying that it was our birthright to engage in “the pursuit of happiness.”<sup>68</sup>

This Hobbesian critique of mass incarceration is a slight departure from what Hobbes himself would say in two major respects. The first concerns

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63. *Id.* at pt. I, ch. 13, para. 9.

64. *Id.* at pt. I, ch. 14, para. 4.

65. *Id.* at pt. II, ch. 17, para. 13.

66. *Id.* (emphasis omitted).

67. *Id.* (emphasis added).

68. See THOMAS JEFFERSON, THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

what valid objection one can make to others' punishment. The second concerns the consequences of a valid objection to punishment.

The Hobbesian critique advanced against mass incarceration essentially claims that each of us has a valid objection to the level of incarceration when that level is such that each of us no longer receives something they have contracted for, namely a free society.<sup>69</sup> It is not clear that Hobbes himself would recognize this as a valid objection. Hobbes himself allows each person only to object to their own punishment. The incarcerated person, for Hobbes, never has any duty to comply with punishment. As Hobbes explicitly says, "no man is supposed bound by covenant, not to resist violence; and consequently it cannot be intended, that he gave any right to another to lay violent hands upon his person."<sup>70</sup> For Hobbes, though we each can validly object to our own punishment, no one has a valid complaint against the punishment of others because one's own self-preservation and peace—the reasons for contracting in the first place—are not endangered by some other person's punishment.<sup>71</sup> Nonetheless, each of us *has* contracted to have a free society, and this is endangered by the incarceration of many other people. This is a conclusion Hobbes could reach, but he does not explicitly draw that conclusion. This is the first reason why the critique is Hobbesian, rather than Hobbes's.

The second departure is a bigger departure. For Hobbes, even where one has a valid complaint against punishment, that does not negate the fact that "to the sovereign is committed the power . . . of punishing with corporal, or pecuniary punishment."<sup>72</sup> To put it in Hohfeldian language,<sup>73</sup> a convicted individual has no *duty* to acquiesce to punishment, so the sovereign has no

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69. Avlana Eisenberg raised a fantastic and tough question about determining that level. Essentially, she asked, "How much incarceration is mass incarceration?" Avlana Eisenberg, Professor, Remarks at the Oklahoma Law Review Symposium: Ending Mass Incarceration: Philosophy, Practice, and Policy (Feb. 4, 2022). Not enough attention is paid to this. People decry current levels of incarceration in America, but I am not aware of any literature on what an acceptable level of incarceration would look like, besides, of course, true abolitionists who think there should be no incarceration at all. See, e.g., McLeod, *supra* note 46. On the approach advocated in this Essay, once one further develops the normative notion of a *free society*, one could work backwards to think empirically about levels of incarceration are consistent with that ideal. That is, unfortunately, a task deferred.

70. HOBBS, *supra* note 60, at pt. II, ch. 28, para. 2.

71. *Id.* at pt. I, ch. 14, para. 8.

72. *Id.* at pt. II, ch. 18, para. 14.

73. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32–34 (1913) (defining the relationship between "duty" and a "right or claim").

*claim-right* to that individual's acquiescence; however, the sovereign still possesses a *liberty* to punish. On the Hobbesian story, the sovereign possesses a liberty to punish because the sovereign, *qua* sovereign, is not party to the social contract and still possesses their original limitless right from the state of nature to do whatever they wish. With this in mind, if Hobbes were to accept my first point—that mass incarceration means that the sovereign has failed to deliver something we contracted for—he would still say that a sovereign remains at liberty to incarcerate more and more people. For me, this goes too far. The sovereign's normative authority, in my view, is limited by its ability or willingness to fulfill the people's underlying desires for contracting in the first place. Drawing out this view, sovereigns cannot justifiably act in ways to frustrate everyone's reasons for joining the contract. That is what is a step too far. I can agree with Hobbes that, in the ordinary case of a single person's punishment, the sovereign still has authority to punish, as most people have no valid objection.

Speaking of objections, there is a potential objection to my account that a critic might offer from a Hobbesian perspective. My account has suggested that mass incarceration frustrates any hope to have the kind of free society for the sake of which individuals join the social contract. However, a Hobbesian critic might point out that crime may do that too. Crime may be antithetical to the industry, discovery, and creation to which we aspire, and mass incarceration may be the only tool a sovereign has to combat this scourge. This is an important worry, one that invites a clarification. A society where mass incarceration is the lesser evil is still one in which it is an evil. Cold war is still bad even if a hot war is worse. To put this another way, I claim to offer a *pro tanto* reason against mass incarceration, not an *ultima facie* reason against it.

#### *IV. Upshots and Conclusions*

The Hobbesian account developed in this Essay offers a reason why mass incarceration is inherently wrong, and this reason is specific to mass incarceration. On this Hobbesian account, every instance of mass incarceration, no matter how otherwise ideal that world may be, is problematic because the society is not free. It is not one where we can enjoy the free pursuit of happiness. Being within a state typically safeguards that freedom, but a state that takes the path of mass incarceration infringes on that freedom. This Hobbesian freedom critique is not a critique of punishment in general. There can be instances of punishment that do not endanger the prospect of a free society. My critique is also not a critique of incarceration. One person's incarceration does not entail the absence of a free society.



Finally, the critique is not even a critique of mass punishment. It is actually having lots of people confined that interferes with the operation of free society marked by industry, discovery, and creation. Levying fines and shaming people, while genuinely punitive and of constitutional concern, do not rise to the level of making the whole society unfree.

I began this Essay sketching a society where mass incarceration does not have the ills commonly associated with it in contemporary America. Even with all of these modifications, I suspected that one might still find fault with a society like that. I hope, with the Hobbesian account, to have put my finger on the troubling remainder. That was all I set out to do. I do not claim to have found the single most important problem with mass incarceration. My claim was to uncover the inherent problem with this practice. Because there is an inherent problem, we now know that reform must take the form of decarceration. We can tidy up the prisons, purge ourselves of racism, treat inmates humanely, and we would still fail to do what is fully right, for we would still maintain an unfree society.