

The Injustice of Underpolicing in America¹

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Introduction

Since the protests of summer 2020, there has been renewed attention paid to the injustices of American policing. Many people have marched and written to demand change, and the arguments they have made have ranged widely. Some have called for better and smarter policing. Prominent activists and academics have demanded defunding the police and re-allocating the funds to substitutes or alternatives. And others have called for abolishing the police altogether. For all of these reformers, the problems are similar: the police do not solve serious crime, they focus far too much on petty offenses, and they are far too heavy-handed and brutal in their treatment of Americans, and especially poor, Black Americans. This is the so-called paradox of under-protection and over-policing that has characterized American policing for a long time.

These reformers are right to think that policing is broken. Levels of violence in America are intolerably high, and the costs of policing and imprisonment are unjustifiable. Yet we will argue that reformers have the diagnosis and thus the solution backwards. The injustices of American policing are not a consequence of the fact that we have too many police who are trained and socialized to be brutal. Rather, we will argue, they are a result of the fact that we have too few police, who are brutal precisely because they are so few. The solution, we will argue, is to organize penal policies to look more like penal policies in the rest of the developed world: to lean more heavily on policing and much less heavily on incarceration.

We cannot defend every premise of the argument we make in what follows. It is developed in more detail in a forthcoming book, titled *What's Wrong With Mass Incarceration*. In this essay, we err deliberately on the side of comprehensiveness rather than tightness. That is, we present everything that is relevant rather than only those things we can defend. Our goal is not to convince readers that we are right, but to demand of readers and reformers in general a more explicit discussion of the empirical and normative basis of our thinking about criminal justice.

Five Comparative Facts

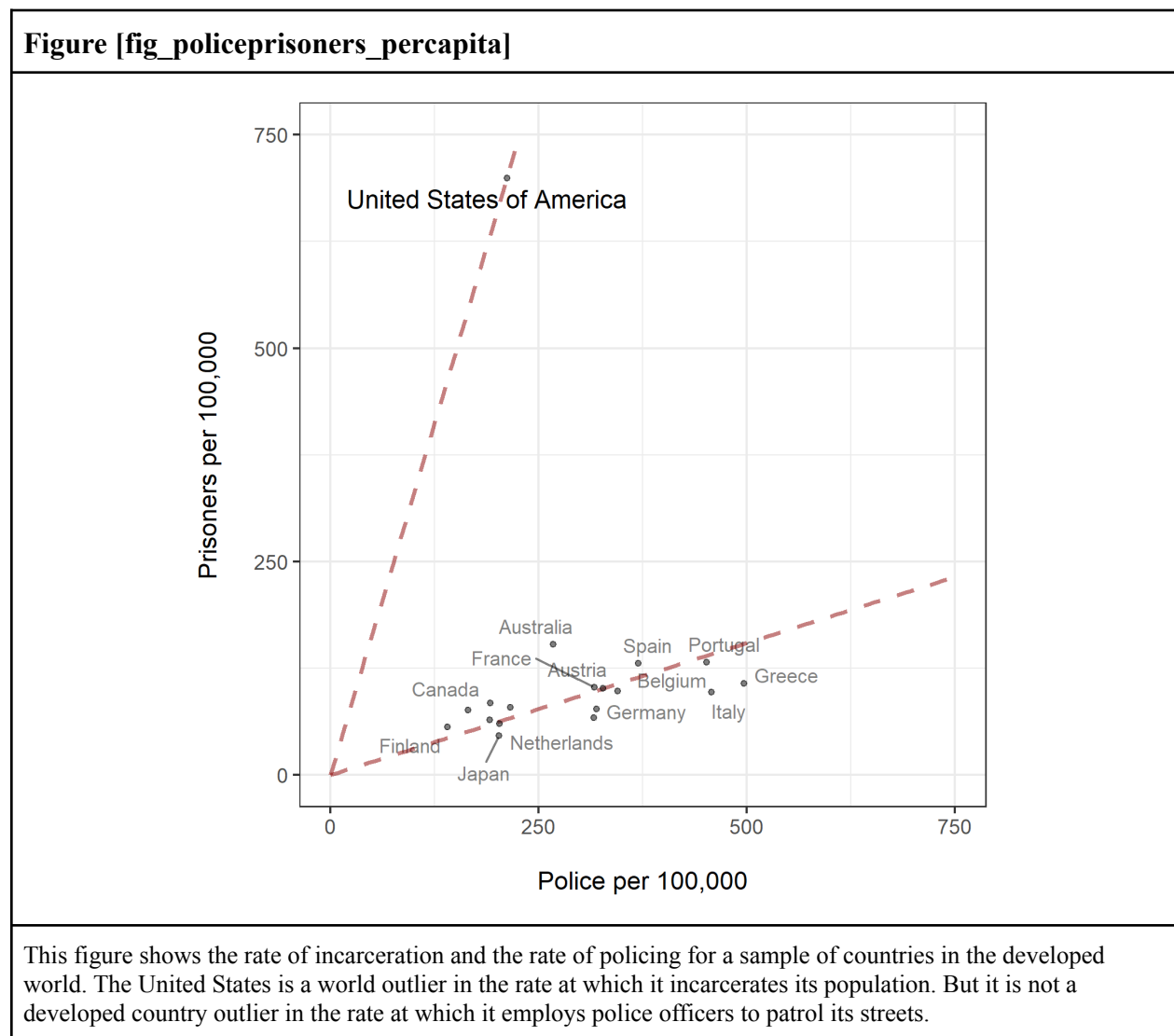
i. Mass Incarceration is not a world of mass policing

In one sense, prisons and police are complements. It would be impossible to have many people in prison without the police, since, to put people in prison, the police usually have to apprehend and arrest them first. It would also be difficult to have police without prisons, since the threat of

¹ Last updated February 13, 2022. We thank Tara Menon for incisive comments.

imprisonment is one of the typical sanctions wielded by police around the world. Given this, and given the exceptionally high incarceration rate in the United States, many people assume that the U.S. must also have an exceptionally large number of police officers.

But that is not in fact the case. Figure [fig_policeprisoners_percapita] plots the average police and incarceration rates of a sample of developed countries.² The graph illustrates the chief fact that has animated the literature on mass incarceration: America is a developed-world outlier in its use of incarceration. Yet it also illustrates the much less well-known fact that America is not at all an outlier in its rate of policing. The US has around 212 police officers for every 100,000 total residents, which ranks it, roughly, in the 4Xth percentile of today's developed world.



² [[Notes on data, sources go here.]]

ii. Given its level of serious crime, America has ordinary levels of incarceration but extraordinary levels of underpolicing.

Yet this way of putting things in fact understates the magnitude of what has been misunderstood. Figure [fig_policeprisoners_percapita] denominates the scope of incarceration and policing by population. By that metric, the U.S. has an exceptionally high incarceration rate, but a relatively normal number of police officers given the total size of its population. But we think it is more informative to denominate punishment and policing by the level of serious crime in a country. By doing so, it is possible to make inferences about cross-national differences in how countries manage serious crime.

Here one runs into difficulties. As an empirical matter, it is difficult to compare levels of serious crime across countries. Some countries criminalize acts that are perfectly legal in others. Countries define many criminal acts, such as “assault,” very differently from one another. And countries vary widely in their ability to measure the incidence of criminal acts. International police data suggests that the rate of assault in France is higher than the rate in El Salvador, and that Sweden and Norway have higher rates of sexual violence than India. Our solution to this problem is thus to measure the rate of serious crime by the rate of homicide.

For the comparisons that anchor this piece -- the US to the developed world -- this immediately raises a problem. What if, as some criminologists insist, the relatively high homicide rate in the United States is a biased estimate of the rate of serious crime? Zimring and Hawkins famously argued that America has more lethal violence than Europe, but not more crime.

We have two kinds of reasons for thinking that they are wrong. First, because of the reliability issues that bedevil the kind of police and victim survey data on which Zimring and Hawkins and others reply, this is an area in which one has to take some cues from theory and other data. Consider the following trilemma.

1. Concentrated disadvantage causes serious crime.
2. America has significantly more concentrated disadvantage than European countries
3. America has the same amount of serious crime as other developed countries

One of these three statements must be false. We think all contemporary theories of crime and existing social science evidence support (1).³ And there is good evidence to support (2).⁴ Given

³ See Robert Lilly et al, *Criminological Theory: Context and Consequences* (7th ed, 2019) for a comprehensive survey. See also Sampson, Robert J., and William Julius Wilson. “Toward a Theory of Race, Crime, and Urban Inequality.” In *Crime and Inequality*, edited by John Hagan and Ruth D. Peterson, 37–56. Stanford, CA: Stanford University Press, 1995.

⁴ See Freemark, Yonah, Justin Steil, and Kathleen Thelen. “Varieties of Urbanism: A Comparative View of Inequality and the Dual Dimensions of Metropolitan Fragmentation.” *Politics & Society* 48, no. 2 (June 1, 2020):

what we know about patterns of homicide and the questionable quality of the data on which Zimring and Hawkins have based their conclusion, we think it is most likely that (3) is false.⁵

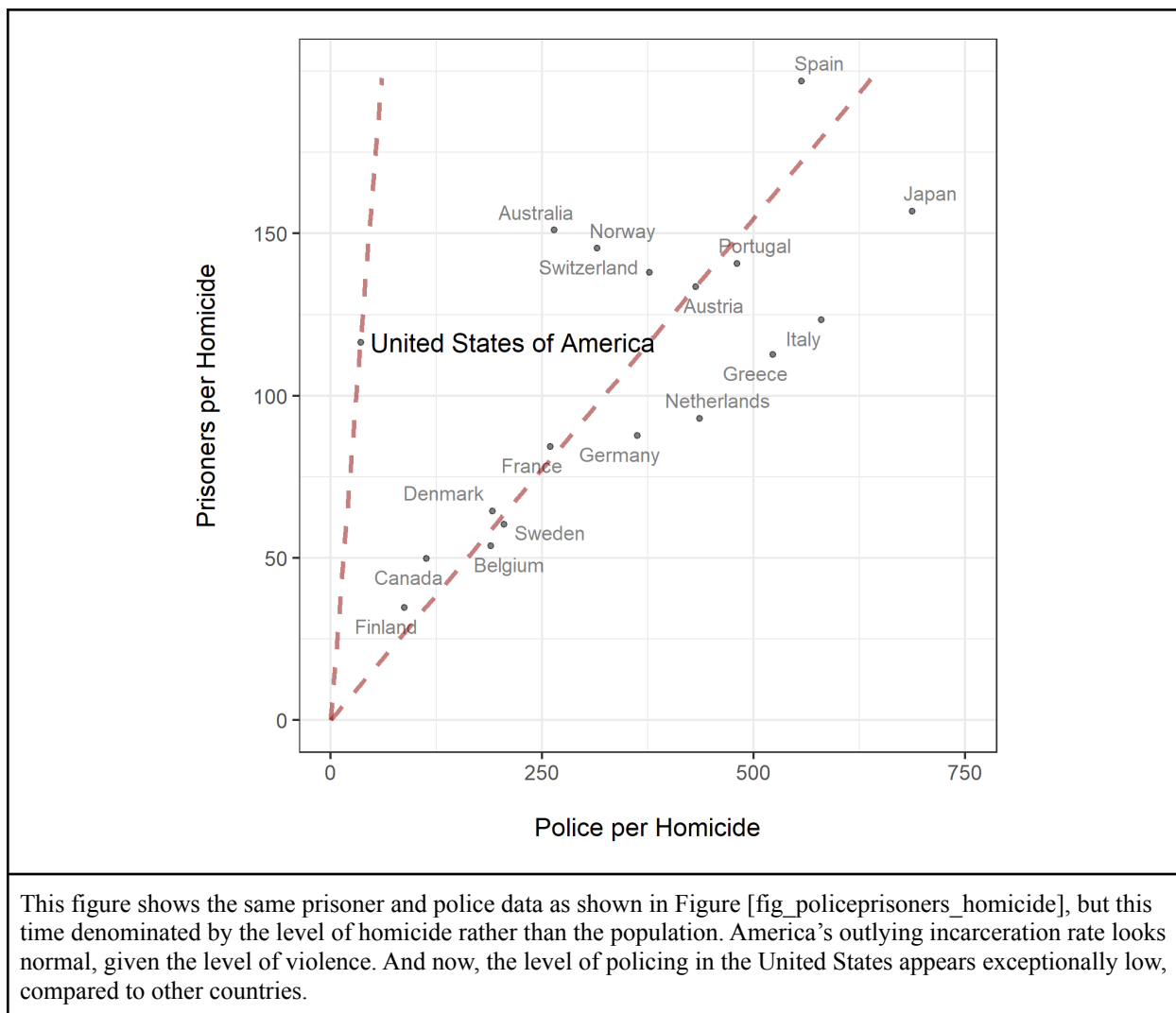
The second reason -- which does not depend on the first -- is that homicide accounts for a large proportion of the total harm caused by crime. It is difficult to measure how harmful different kinds of crime are with any precision, but the “cost of crime” literature provides a rough approximation. Economists estimate the social costs of different kinds of crime by asking people how much they would be willing to pay to reduce their odds of being a victim of various offenses. Using this method, Chalfin and McCrary, for example, estimate the cost of a murder at around \$7,000,000, the cost of an assault at less than \$40,000, the cost of a robbery at around \$13,000, and motor vehicle theft around \$6,000. Even though homicide is much more infrequent than other crimes, it is judged so much more severe that it accounts for about 70% of the total costs of crime (compared to about 15% from assault). This means that it is a much better estimate of rate of serious harm than unweighted measures of the rate of crime.

Thus, Figure [fig_policeprisoners_homicide] shows the same data, but this time denominated by homicide rather than by population.

Figure [fig_policeprisoners_homicide]

235–74. <https://doi.org/10.1177/0032329220908966>. See also Lacey, Nicola, and David Soskice. “Crime, Punishment and Segregation in the United States: The Paradox of Local Democracy.” *Punishment & Society* 17, no. 4 (October 1, 2015): 454–81. <https://doi.org/10.1177/1462474515604042>.

⁵ A further reason is that the leading explanation of why America has more homicide but not more crime -- the availability of guns -- is not easy to square with what we know about historical, cross-national and intra-national patterns of crime and violence within the United States.



One immediately sees something different. Now, America's outlying level of incarceration looks relatively ordinary. Its prisoner/homicide ratio is a little higher than the developed world median, but not by much. No less stark is the fact that its police/homicide ratio now appears exceedingly low. That is, if denominated by the level of serious crime, America is not normally policed, but *underpoliced*. America has about 1/9th the number of police officers, per homicide, than does the median developed country.

iii. America's low clearance rate is not due to police inefficiency, but to underpolicing.

One of the refrains of police reformers has been that American police are uniquely inefficient. Typically, when people argue that American people -- and black people, especially -- have been under-protected and over-policed, they mean by this that the priorities of American police are skewed. Police focus too much on petty offenses and too little on serious crimes. This is the

purpose of dwelling, for example, on the fact that only 4 percent of a typical police department's time is devoted to handling violent crime.⁶

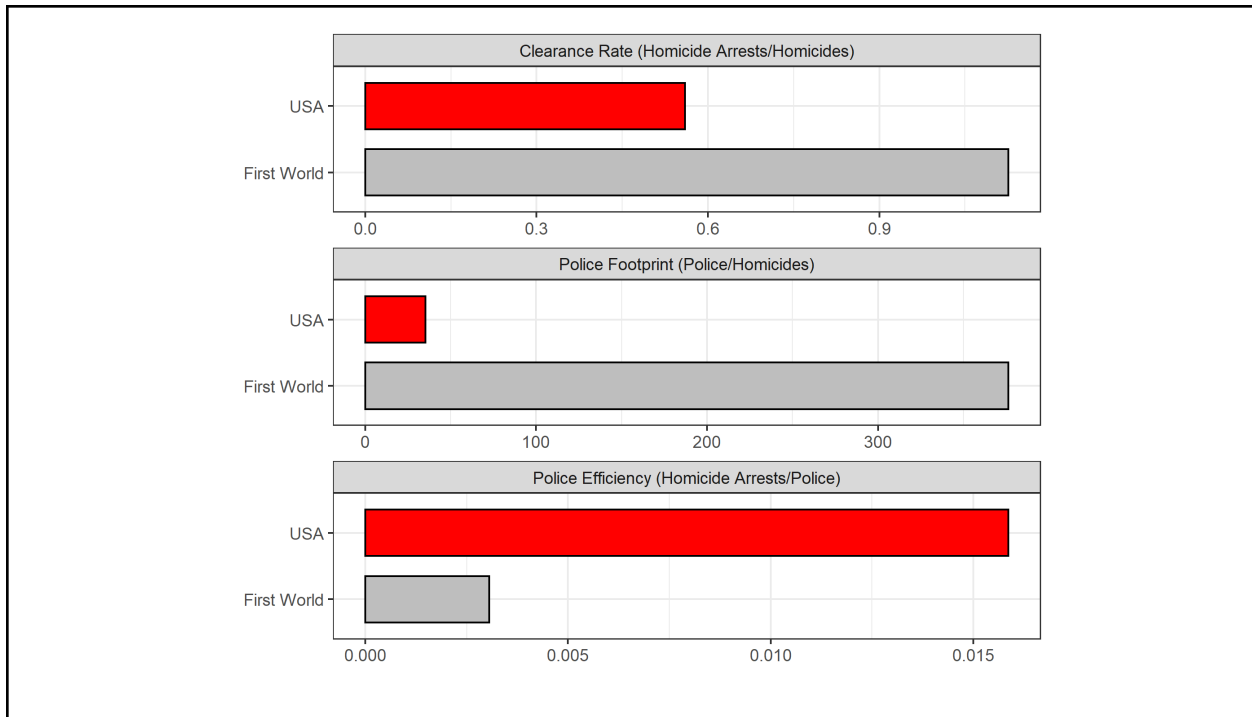
And indeed, it is true that in comparative context the police in the United States do not solve many serious crimes. America's clearance rate is the lowest of all comparable countries, as Figure [fig_clearancerate] shows.⁷ The median developed country records around one homicide-related arrest per homicide that occurs. In the United States, however, the figure is 0.56.

Yet, as Figure [fig_clearancerate] also suggests, this is not because police in the United States are exceptionally focused on non-serious offenses. Consider one measure of police focus -- the number of homicide arrests made per police officer. By this measure, American police are in fact far more focused than officers in the median developed country. The problem, quite simply, is that there are not enough of them. The clearance rate, as measured above, is the product of police focus (homicide arrests/police) and the police footprint (police/homicide). To demand that the rate be as high as it is in countries with much higher police/homicide ratios is to make unrealistic demands of American police officers. Given reformers' general pessimism about policing, this is a particularly strange expectation. Why should we think American police officers would be able to do something that no other police force in the developed world has accomplished?

Figure [fig_clearancerate]

⁶ Asher, Jeff, and Ben Horwitz. "How Do the Police Actually Spend Their Time?" *The New York Times*, June 19, 2020, sec. The Upshot. </interactive/2020/06/19/upshot/19up-asher1.html>, </interactive/2020/06/19/upshot/19up-asher1.html>.

⁷ Here we measure the clearance rate by the proportion of homicides which result in an arrest, but one could also measure this by the proportion that result in a conviction. We do not do this here because the probability of a conviction is a function not just of the nature of policing but also the court system. But even if measured by convictions per homicide, the US is among the countries with the lowest clearance rate in the developed world (X% the rate of clearance in the median developed country).



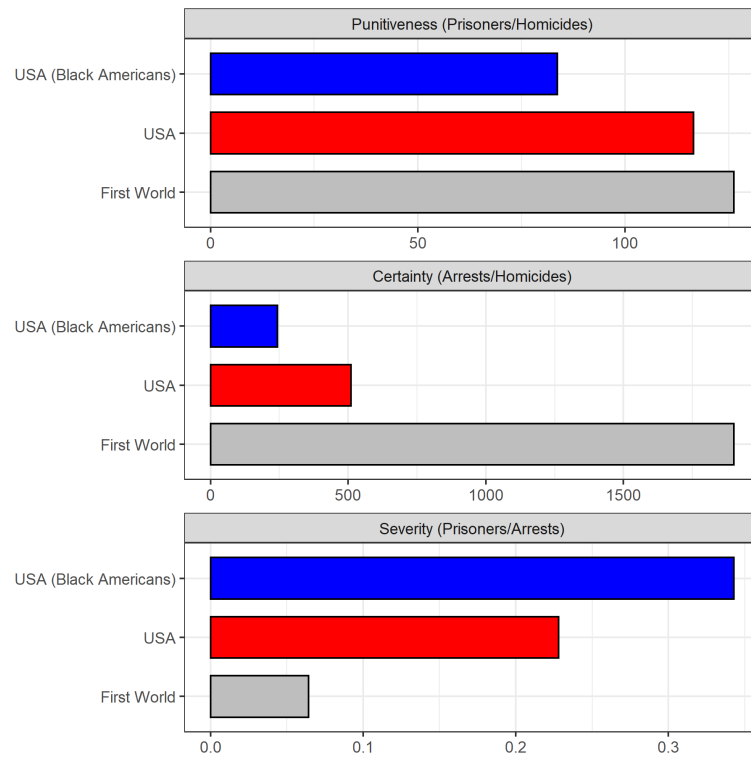
This graph plots one measure of the clearance rate (homicide arrests/homicides) and two quantities into which it can be decomposed: the footprint of the police (police/homicides) and the rate at which any given police officer makes homicide arrests (homicide arrests/police). It shows that the clearance rate in the United States is substantially lower than the clearance rate in the median developed country, and that this is a product of its exceptionally low police footprint and not the rate at which American police make homicide arrests (which is much higher in the US than in the median developed country).

iv. America combines low levels of certainty with high levels of severity, especially in its most disadvantaged communities.

One way of summarizing much of what we have shown so far is to observe that the United States emphasizes the *severity* of punishment over the *certainty* of sanction. The exceedingly high prison/police ratio and the low level of police per homicide together imply that the US relies on long sentence lengths rather than the sanction of arrest to control crime. One way to estimate certainty and severity more directly is to decompose the prisoner/homicide ratio into the ratio of arrests to homicide (certainty) and the ratio of prisoners to arrests (severity). Figure [fig_certaintyseverity] plots these two ratios across the developed world. This figure supports our inference: the US has relatively low levels of certainty but relatively high levels of severity.

One advantage of using homicides, arrests and prisoners to measure these two concepts is that we can say something about how certainty and severity are distributed *within* the United States. As Figure [fig_certainty] shows, while all Americans suffer from an exceptional balance of certainty and severity, it is Black people in the U.S. who are especially subject to it.

Figure [fig_certaintyseverity]



This graph plots measures of certainty (arrests/homicides), severity (prisoners/arrests) and their product (prisoners/homicides, or punitiveness) in the United States and the developed world, as well as for black Americans specifically. It shows that the USA's relatively ordinary levels of punitiveness reflect low levels of certainty and high levels of severity, and that this combination is especially true for black Americans.

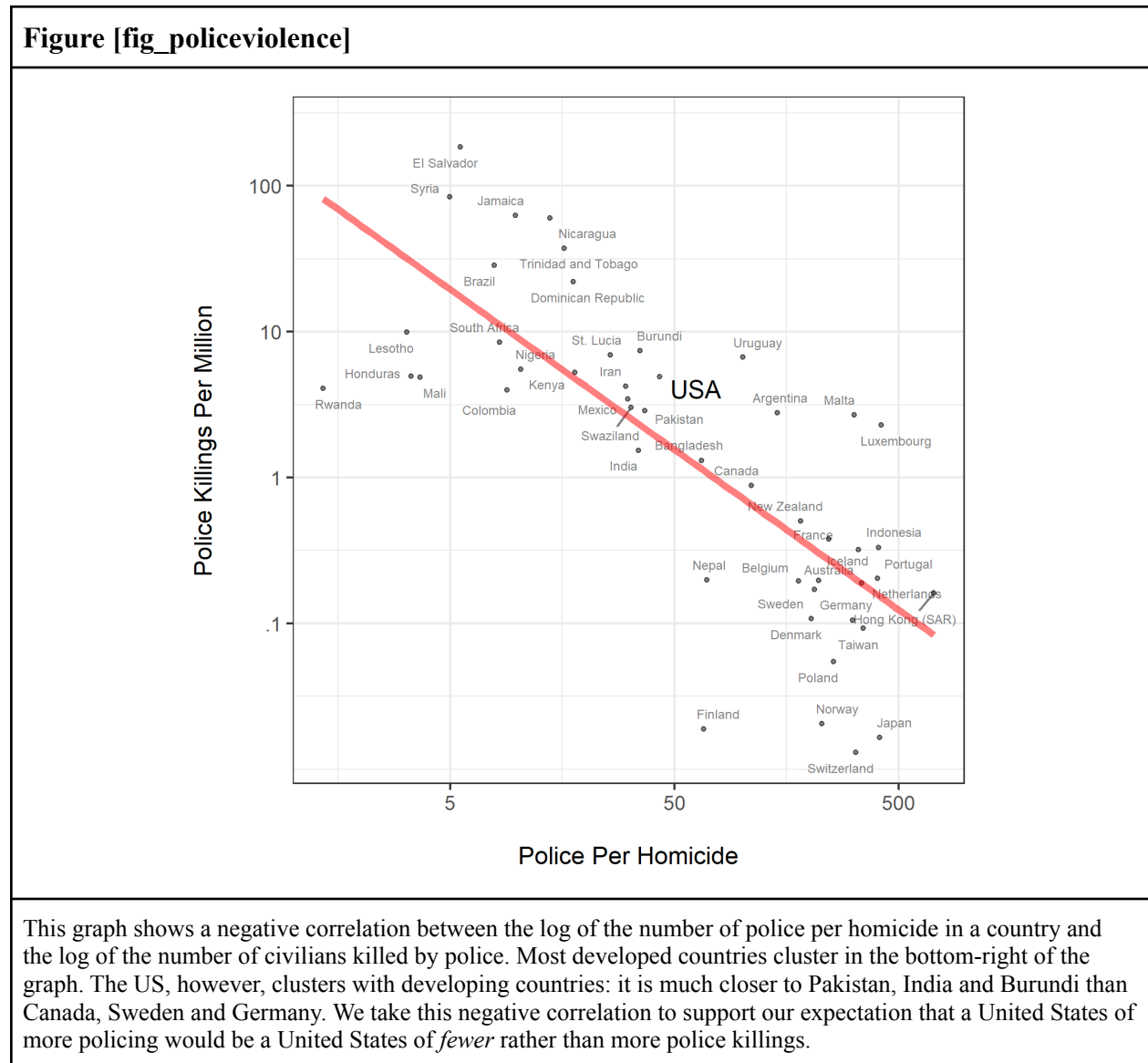
v. Police violence is not a symptom of overpolicing, but underpolicing.

Since the birth of the Black Lives Matter 5 to 10 years ago, there has, rightly and admirably, been a lot of attention paid to the outrageous rate at which American police kill American civilians. American police regularly kill 1,000 to 2,000 civilians a year. In the rest of the developed world, the average is around 5 (the median is just 2).

At least among activists and some academics, much of this outrage has been channeled into arguments to defund the police. This demand draws an intuitive conclusion about police violence: namely, that to reduce it, we must reduce the footprint of the police. The problem of police violence is a consequence of the fact that we have too *many* police.

Yet cross-country comparisons suggest the opposite conclusion. As Figure [fig_policeviolence] shows, there is a striking and *negative* cross-national correlation between the rate at which police

kill civilians and the number of police officers per homicide. Countries with large numbers of police, per homicide, are countries in which police are much *less* likely to kill civilians than countries with fewer police, per homicide. The countries of the developed world cluster on the bottom-right of this graph (high police/homicide, low levels of police violence), while the countries of the developing world cluster towards the top left. The exception is the United States.



Certainly, a negative correlation is not proof that lower levels of police/homicide *cause* the police to be more violent.⁸ But consider the theoretical reasons to believe that they do.

⁸The same negative correlation exists across counties in the United States. It is also visible in a city like New York, where the increase in the size of the NYPD has been accompanied by a decline in the rate at which police have been

When violence overwhelms police resources, police make contact with only a small fraction of those who commit it. In these circumstances, a police officer will probably find it more rational to behave brutally in those rare encounters than to behave with civility. Civil treatment of a small fraction of offenders will have a negligible deterrent effect. This is not unlike the behavior of the early modern state. As the opening pages of Foucault's *Discipline and Punish* describe, in a world of low state capacity, the rational way to keep the peace was via exemplary but rare shows of spectacular force.

Further, under a severe sentencing regime, there are stronger incentives for suspects to take extreme measures in order to evade apprehension and arrest. In *Commonwealth v. Jordan*, for example, a uniformed officer, Charles Cassidy, walked into a Dunkin' Donuts store that the defendant, Jordan, was in the act of robbing at gunpoint.⁹ At the time of the offense (2007), Jordan could have been sentenced to as much as 30 years in prison for the robbery. Instead, "As the officer was about to enter the shop, [Jordan] turned toward the officer, took two steps in his direction, pointed a gun at him, and shot him in the forehead at close range." Relying on severe and lengthy sentencing to deter crime, rather than policing, may make the job of policing more dangerous.

Reformers often argue that police officers should be trained as "guardians," rather than "warriors."¹⁰ But this kind of shift is likely to be difficult under a system that emphasizes sentencing severity so heavily compared to police force size. The warrior mindset, and police training protocols that reinforce it, are in our view just symptoms of the problem, not the disease.

What should be done?

The United States is much more violent and crime-ridden than other comparably wealthy societies. It responds to this level of crime with an exceptional combination of relatively small police forces and comparatively long sentences. And, tellingly, this regime reaches its apogee in the way it treats most disadvantaged people. What is to be done?

Well, these comparative observations raise an obvious hypothesis. Perhaps the US, like the rest of the developed world, ought to emphasize policing and penal *certainty* rather than incarceration and penal *severity*.¹¹ Perhaps the US ought to shift resources from incarceration to policing until the balance between the two looks more like the balance in the rest of the developed world. The

killing civilians. But it is still possible that a third factor could explain both high levels of police killing and homicide (e.g., inequality). Or, it could be that the causal relationship is the reverse of what we hypothesize. Perhaps, for example, countries with high levels of police killing are countries in which fewer people trust the police, which leads people to demand fewer police.

⁹ A.3d 318 (Pa. 2013).

¹⁰ Stoughton, Seth. "LAW ENFORCEMENT'S 'WARRIOR' PROBLEM" 128 (n.d.): 10.

¹¹ Others have proposed something like this, before (Stuntz, Ludwig and XXXX, Kleiman), but we are not aware of anyone who has put the proposal in comparative terms.

implications of such a move -- which we call The First World Balance -- would be dramatic. The US currently has 3.X times as many prisoners as police officers. If it raised no revenue but simply used the money saved by cutting prison populations to hire police officers until the ratio was the same as the ratio in the developed world (about 3.X times as many police officers as prisoners), the new United States would have only have about 300,000 prisoners and 1.X million police officers. That is, The First World Balance, if implemented in the US, would be a world of two million fewer prisoners and half a million *more* police officers.¹²

Of course, to note that this would align the US with other countries is not to have shown that this would be a good thing. One cannot reason to normative policy conclusions from comparative empirical observations alone. To make these arguments, one has to connect fact to value. Would The First World Balance be justified?

To understand our answer, it will be helpful to note three points about our approach.

First, it was due to our shared interest in answering questions like this one that the two of us began to work together. Sociologists write about normatively-laden questions, but are taught to refrain from considering the normative implications of their arguments. It is no surprise that many of them do anyway, since it is those implications that give their vocation meaning. But social scientists' lack of training in moral and political philosophy means that these conclusions are founded on ideology rather than rigorous normative argument. Some philosophers are interested in applying moral and political theory to puzzles that bear on real-world problems. But a lack of social scientific training leads many of them to seek answers to these questions (or, at worse, versions of those questions) that don't require empirical inputs. Thus, our aim is to combine empirical evidence and social theory with explicit normative argument.

Second, where possible, we strive to be as ecumenical as possible. In general, we do not attempt to defend the correct theory of interpersonal morality or political justice (or the correct theory of "what causes crime"), and draw out their specific implications, only. Instead, we consider the implications of a wide range of frameworks. In general, we find that these first-order disagreements do not typically have dramatic implications for nth-order policy disagreements (which suggests that wringing our hands about these first-order disagreements may not be worth the energy it consumes). In fact, as we show, the combination of empirical and normative claims one would have to endorse in order to reject our argument are incongruent. They represent various mixtures of ideas that effectively nobody accepts.

¹² This calculation is based on the number of prisoners and police officers in the US in 2019, which is the latest date for which we have data on all the relevant variables in this paper (arrests, homicides, prisoners, police). Since the number of prisoners has declined considerably between 2019 and the date of writing (as of Spring 2021, the prison population in the US was around 1.7 million), the specifics are today a little different today, though the principle is the same.

Finally, our case for The First World Balance should be understood as our answer to a narrowly-specified question about how the United States ought to apportion a fixed pool of penal spending. Many readers will wonder, understandably, whether we stack the deck in our favor by posing the question this narrowly. Why a fixed pool of resources? And why force a choice between prisons and police, when various kinds of social or non-penal alternatives are so in vogue?

We say much more about why we specify the question in this way in our forthcoming book *What's Wrong With Mass Incarceration*. We agree with many reformers that, in the long-run, a significant expansion of social policy would address the root causes of serious crime. But a significant expansion of social policy requires significant redistribution from rich to poor. This significant redistribution would require the poor to wield some kind of leverage over the rich. Given the collapse of the American labor movement and the electoral fracturing of the American working-class, we doubt that we will see anything like this soon. And so our hope is to say something about what should be done in the non-ideal (revenue-neutral) world in which we live, not just in the ideal world in which we would like to live.

This answers why we want to know what should be done given the constraint of a fixed pool of resources. But why only consider prisons and police? Why couldn't the government redistribute the existing pool of money from prisons and police to social policy, just as many reformers have demanded?¹³ As we argue in *What's Wrong With Mass Incarceration*, this is because social policy is bedeviled by what we call The Efficiency-Feasibility Paradox. To address the root causes of crime would be to meaningfully change the opportunity structure for the most disadvantaged people in America. To do this via universal social policy would require significant resources, since most of the beneficiaries of these kinds of policies never commit crime. This is why it costs about \$300 billion dollars a year to run the developed world's most extensive penal state, but \$3 trillion dollars to run its most anemic welfare state. There is evidence that social policy targeted just at the truly disadvantaged is efficient at reducing crime. But the same thing that makes it efficient also makes it politically infeasible. The more targeted the beneficiaries, the more certain it is to provoke the resentment of the near-poor and middle-class. Hence, the Efficiency-Feasibility Paradox: traditional social policy is feasible but inefficient, while hyper-targeted social policy is efficient but infeasible.

Thus, we think the challenge can be posed as a question of the right penal balance. What ought to be done about the level of incarceration and the level of policing in today's United States? Where, in the 2x2 space plotted above, should the US lie?

¹³ E.g., Gomez, Felicia, Thea Sebastian, and Sam Washington. "A Roadmap to Community Safety: A Guide for Local Lawmakers," October 2021. <https://civilrightscorps.org/wp-content/uploads/2021/10/Local-Policy-Guide.pdf>.

Welfare

Consider, first, how a consequentialist might approach this question. On that view, the state should decide how to strike the balance between incarceration and policing by choosing that point in the 2x2 space that maximizes aggregate welfare. Let us propose that the first-order welfare consequences of moving to any point in this space are what it would imply for the level of homicide and crime, the number of people in prison, and the number of people killed and arrested by the police (We say more about the nth-order consequences below). What would happen to each of these if the US were to implement The First World Balance?

First, crime and homicide would decline. As behavioral psychologists and economists have shown, certainty deters more effectively than severity. People tend to weigh the immediate consequences of their actions much more heavily than consequences in the distant future. Arrests tend to occur in the immediate aftermath of most crimes, while the costs of incarceration happen much later in the process, after conviction and sentencing. And it is by definition only possible to add to the length of a prison sentence on the back end. So theory also inclines us to believe that increasing the probability of apprehension would do more to deter crime than increasing sentence lengths. This view receives strong support in the empirical literature on prisons and policing, which suggests that increasing the size of police forces is a much more efficient way to prevent crime than increasing the length of prison sentences for those who are apprehended and convicted. Today in the United States, a single dollar spent on policing is around XX times more effective at deterring crime than a dollar spent on incarcerating additional prisoners. Our best guess is that The First World Balance would be a world of a little more than 4,000 fewer homicides (and substantially less crime).¹⁴

Second, the welfare costs imposed by incarceration would be substantially less. Whatever its general consequences, prison is extremely detrimental to the well-being of prisoners. It is difficult to put a precise number on this suffering. But suppose one thinks that a year in prison is even one-half as good as a year spent outside (which seems extremely generous). On this view, a reduction of two million in the prison population would be the equivalent of saving 1,000,000 years of life (roughly, 15,000 lives, assuming a life expectancy of about 65). The smaller the exchange rate (e.g., if living for a year in prison generates only 1/10th of the utility of living for a year outside of prison, rather than 1/2), the larger the welfare consequences of decarceration.

¹⁴ We base this calculation on the elasticities reported in Chalfin and McCary 2017 (who report the elasticity of homicide with respect to policing at -0.67) and Donohue 2009 (who reports an elasticity of homicide with respect to incarceration of -0.05 to -0.15). Full calculations and code to replicate our results are available at <https://github.com/ausmani23/miwhatswrong>. In *What's Wrong With Mass Incarceration*, we show the robustness of our proposal to a range of alternative assumptions. The only assumption that yields a different verdict requires an unjustified, extreme pessimism about the effect of expanding police on the level of crime, arrests and police violence.

Finally, consider the costs of policing. On the one hand, a world of more policing would, perhaps unsurprisingly, be a world of more arrests. Based on recent work by Chalfin, our best guess is that The First World Balance would be a world of almost eight million more arrests.¹⁵ Yet, for reasons we gave earlier, it would also be a world of fewer police killings. Our best guess is that moving to The First World Balance would cut the number of people killed by the police in half (about 900 fewer people killed by the police).

Consequentialists have to propose some way to weigh these consequences against each other. This is not straightforward, but however one chooses to do it, the deck seems stacked against the status quo. For the additional arrests to be reason to rule against our proposal, the welfare costs of these arrests must outweigh the sum of the benefits of less crime, less incarceration and fewer police killings. We think this is implausible on almost any accounting. In fact, the first-order welfare costs of increased arrest are probably smaller (in absolute value) than *any one* of the benefits of The First World Balance considered in isolation. Suppose, for instance, that the average arrest is about as bad as a few days in prison. On this assumption, eight million arrests in a year is the equivalent of roughly 150,000 prisoner-years ($150,000 \text{ prisoner-years} = 8,000,000 \text{ arrests} * 3/365$). This is not even 10% of the benefits of decarceration. Further, if we convert prisoner-years to lives at the rate given above, this eight million arrests would be the equivalent of about 500 lives ($150,000 * 0.5 * 1/65$). This is about half the number of lives that would be saved by the reduction in police killings, and it is substantially less than the 4,000 lives we estimate would be saved by the resulting reduction in homicide.¹⁶

One might object that the nth-order costs of this large increase in arrests would outweigh the primary welfare benefits of The First World Balance. Perhaps the psychic and social costs of these ~8,000,000 additional arrests are too large to justify the reduction in serious crime, incarceration and police violence? We cannot settle the issue here. But consider the fact that, even under The First World Balance, there would only be about 80 police officers per homicide in the United States. This would still be the lowest police/homicide ratio in the developed world (almost 1/5th the median value). The arrest/homicide ratio would be around 1,150, about 60% of the median value in the developed world. Even the police per capita ratio in this counterfactual United States would still be roughly equivalent to the police per capita ratio in today's Spain. The First World Balance could not, at least by international standards, be considered a police state.

Extreme Civil Libertarianism

¹⁵ Chalfin, Aaron, Benjamin Hansen, Emily Weisburst, and Morgan Williams. "Police Force Size and Civilian Race." Cambridge, MA: National Bureau of Economic Research, December 2020. <http://www.nber.org/papers/w28202.pdf>. Our calculation is based on the reported estimate that an additional police officer adds about 9.6 arrests.

¹⁶ In our forthcoming book, we show that The First World Balance is more efficient on a range of plausible empirical and normative assumptions. We show that to reject it one has to be extremely (and unjustifiably, we think) pessimistic about the relationship between policing and crime, arrests and police killing.

Now, even if The First World Balance is justified on efficiency grounds, this is not the same thing as having shown that it is what justice demands. As we argued earlier, we prefer to be ecumenical about philosophical first principles. We would like to know that there are no compelling deontological reasons to reject The First World Balance.

We do think that an extreme kind of civil libertarianism probably does rule out our proposal. That is, if someone believes that no amount of interpersonal violence could ever justify the use of coercive force by the state, then the only solution to the problems of American criminal justice would probably be to eliminate the coercive power of the state altogether.

But a state completely lacking in coercive power would be unable to enforce tax law and policy, and thus unable to collect revenue. Without revenue, governments could not provide public goods or a social safety net. So we doubt that those on the academic left would truly commit to such an extreme view. Rather, here we consider two more plausible but still deontological reasons to be concerned about our proposal: the first that it would be distributively unjust, even if inefficient; the second that it would unduly punish the undeserving, and let those deserving of punishment off the hook.

Prioritizing The Disadvantaged

Many argue that public policy should not aim simply to maximize aggregate wellbeing; it must also be sensitive to how the benefits and burdens of society are *distributed*. Consider, for example, what Parfit calls “The Priority View.”¹⁷

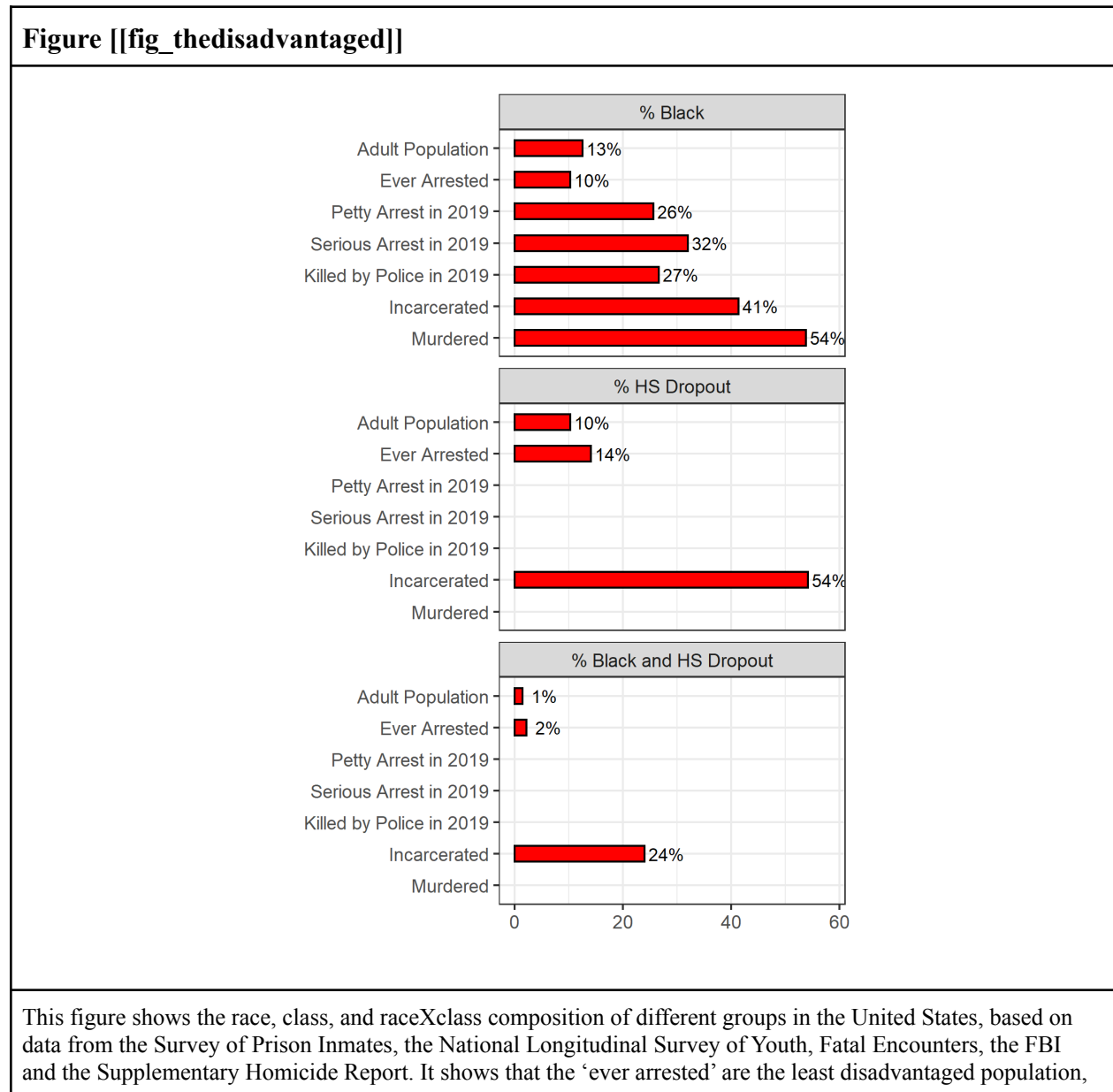
The Priority View: Benefitting people matters more the worse off these people are.

One corollary of The Priority View (or “Prioritarianism”) is that *burdening* people matters less, the better off those people are.

The burdens of how governments choose to strike the balance between policing and incarceration—no matter how they choose to do so—will be disproportionately borne by the disadvantaged. Victims of crime; victims of police abuse and brutality; and those behind bars all tend to be drawn disproportionately from the ranks of the least well-off. They are disproportionately Black and disproportionately poor. Those who are most likely to be victims of the worst kinds of crime—in particular, homicide—are the same people who are most likely to be abused, brutalized, or killed by the police. And they are also those who are at the highest risk of serving time in prison.

¹⁷ Derek Parfit, *Equality or Priority* (The Lindley Lectures, University of Kansas, 1995).

But these groups are not identical. As Figure [\[\[fig_the disadvantaged\]\]](#) shows, Black people are more disproportionately overrepresented among murder victims, the incarcerated and those arrested for serious offenses than they are in the ranks of those who have been arrested for petty offenses in any given year. In fact, Black people are *underrepresented* among those who report ever having been arrested in their lifetimes.¹⁸ High school dropouts are far more disproportionately overrepresented in the incarcerated population than they are among those who have been arrested in their lifetimes. They make up 54% of the former group, but only 14% of the latter (and 10% of the total adult population).



¹⁸ [\[\[Say more about the source, here.\]\]](#)

out of the different subgroups that figure in The First World Balance.

The Priority View thus lends further support to the case for The First World Balance. The burdens of the status quo—under which the U.S. leans so heavily on long prison sentences relative to policing—fall more disproportionately on Black people and the poor, and especially the Black poor, than do the benefits. Shifting to The First World Balance would seem not only to reduce the burdens associated with the penal system overall, and increase the benefits. Because it would reduce the number of prisoners, victims of crime and homicide, those arrested for serious offenses, and those killed by the police, it would also shift the burdens from a more disproportionately disadvantaged population to the somewhat better off.

We can thus summarize the prioritarian argument for the First World Balance as follows.

Prioritarian Argument

AP. Burdening people matters less the better off those people are.

1. The burdens of incarceration and homicide are more disproportionately borne by the disadvantaged than the burdens of arrest.
2. The burdens of police violence are born at least as disproportionately by the disadvantaged as the burdens of arrest.
3. Therefore, we should weigh the burdens of incarceration, homicide more heavily than the burdens of arrest, and the burdens of police violence at least as heavily as the burdens of arrest.
4. The First World Balance lightens the burdens of incarceration, homicide and police violence, while increasing the burdens of arrest.

∴ The Priority View strengthens the case for The First World Balance

Responsibility and Retribution

Most people in US prisons are incarcerated for offenses that are universally criminalized. Violent offenses like murder, robbery, rape and assault together account for almost half of the prison population. Thus, some retributivists might think that these people deserve to be in prison, and that, thus, the status quo is preferable to The First World Balance. The suffering of prisoners is not, on this view, a cost to aggregate wellbeing, or an especially regrettable burden we impose on the disadvantaged. Furthermore, if the distribution of burdens and benefits of society ought to be sensitive to people's choices, then one might think that it would be unfair to shift those burdens from people who have chosen to commit uncontroversially criminalized offenses to that broader

group of citizens who have done nothing to warrant the additional harassment or scrutiny of the police.

Yet our view is that retributivist considerations in fact *support* our hypothesis that the US ought to shift to The First World Balance. Consider the following formulation of a retributive ideal:

Proportionality Principle: The state is obligated to punish criminal wrongdoing proportionately to the moral gravity of the offense.

But what does it mean for the severity of punishment to be proportionate to the gravity of an offense? Under a system of corporal punishment, it is possible to respond by demanding an “eye for an eye”. For example, consider the criminal code Thomas Jefferson proposed in Virginia a few months after the American Revolution. Under his crimes bill, “Those who committed murder by poison were to be punished with death by poison,” and “...maiming and disfiguring (‘by cutting out or disabling the tongue, slitting or cutting off a nose, lip or ear, branding or otherwise’) was to be punished by retaliation in kind—‘or if that cannot be for want of the same part, then as nearly as may be in some other part of at least equal value and estimation in the opinion of a jury.’”¹⁹

When incarceration is the primary form of criminal sanction used in a legal system, however, satisfying the Proportionality Principle requires a difficult “moral currency exchange.” How much time in prison is proportionate to a robbery, carjacking, or assault? It is hard to give anything but an arbitrary answer to these questions. Further, it is equally difficult to know exactly how much harm or suffering a given length of time in prison might impose in any particular case, or how much that amount of time in prison might tend to impose on average, given that prison facilities themselves vary, and people’s individual experiences in prison vary even more. This is often referred to as the “anchoring problem” for retributive sentencing theory.²⁰

One way out of this problem is to anchor the sentencing scale from the top down. The most severe forms of punishment permitted under the 8th Amendment are the death penalty, and life in prison without the possibility of parole (LWOP). These penalties could intuitively be thought of as proportionate to murder—if they are proportionate to anything. After all, murder involves the taking of the life. The death penalty is thus the closest that we have to an eye-for-an-eye response. The imposition of capital punishment, even for murder, is rare in the United States, but LWOP entails the deprivation of one’s liberty for life, which is the closest equivalent in the 23 states that have abolished capital punishment.

¹⁹ Kathryn Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 *Law and History Review* 53, 58-9 (1983).

²⁰ See, e.g., Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 *Crime & Just.* 55, 83 (1992).

These extreme sanctions could serve as the upper “anchoring points” of a retributive sentencing scale. We could then use that anchoring point to derive proportionate penalties for non-capital offenses by estimating the harm of those non-capital offenses relative to murder. The “cost of crime” literature, once again, provides a rough and ready (if imperfect) way of doing so.

Now, incarcerated people tend to have shorter lifespans than free people, so very few will ever live long enough to serve more than 40 years in prison. If we take the cost of crime literature as a proxy for the relative moral gravity of various offense-types, and we take LWOP as the upper anchoring point of the sentencing scale, then it follows that most non-capital offenses should not warrant nearly so long in prison as they do under current state and federal sentencing regimes. For example, on the premise that assault is around 200 times less severe than murder ($\$40,000/\$7,000,000 \cong 0.006$), then it should be punishable by about 11 weeks in prison ($0.006 \times 40 \text{ years} = 11 \text{ weeks}$). Robbery, under the same reasoning, should be punishable by no more than three or four weeks; motor vehicle theft by about twelve days.

While these estimates may seem radically counterintuitive, they are in fact quite conservative in two respects.

For one, these estimates assume that each day in prison is equal in its effect on people’s suffering. But the empirical literature on hedonic adaptation suggests that the first days, weeks, and months of life in prison are much harder than the last.²¹ If we were to map these estimates onto the declining marginal effect of prison time on suffering, using murder as the anchoring point at the top of the sentencing scale, then the proportionate penalties for these non-capital offenses would be even shorter.

Second, these estimates do not take account of the possibility that many or most people who commit the kinds of offenses that people in the United States are incarcerated for are at least partly justified or excused in breaking the law, or that their culpability may be mitigated in light of their circumstances or capacities.²² If the top of the sentencing scale is anchored to murder where there is no justification or excuse of any kind, but many or most crimes are committed under circumstances that at least partially justify or excuse the offense, then sentencing length in practice should be scaled back even further than these estimates suggest.

Conclusion

Consider what we have argued in this essay. We have noted that the United States, uniquely amongst developed countries, leans especially heavily on penal severity to the neglect of penal

²¹ [[cite source]]

²² Lewis, Christopher. “Inequality, Incentives, Criminality and Blame.” *Legal Theory* 22, no. 2 (June 2016): 153–80. <https://doi.org/10.1017/S1352325217000052>.

certainty. This is reflected in the fact that it has roughly 3 prisoners for every police officer, while every other developed country has about 3 police officers for every prisoner. The United States would have to reduce the incarcerated population by around 2 million people, and hire half a million more police officers, to bring its prisoner to police officer ratio in line with the rest of the world—what we called The First World Balance.

We first defended The First World Balance on consequentialist grounds. We suggested that it would be a substantially more efficient way to use the pool of resources America currently devotes to penal spending. The human, social, and economic costs of incarceration would be reduced immensely; homicide and other serious crime would decline; and police violence would also likely drop. The main downside of our proposal would be the costs associated with the significantly larger number of arrests that the police would likely make. But these costs pale in comparison to the benefits.

We then argued that The First World Balance would also be more distributively just than the status quo, given that arrests affect a more advantaged group of people than crime, incarceration or police violence. The radically shorter sentences it entails would also be justified on retributivist grounds, since the only plausible forms of sentence anchoring entail radically shorter sentences than sentences at present

Many questions linger, but one of the important questions is whether this world, even if justified, is feasible. The First World Balance would be a world of about 300,000 prisoners and roughly 15,000 homicides. The prisoner/homicide ratio in this world would thus be about 20, which, as Figure [ref_prisonerspolice_homicide] shows, would be the lowest in the developed world. Put another way, our proposed United States would be the least punitive society in the developed world. We earlier dismissed the possibility of expanding the welfare state and developing hyper-targeted social policies on the grounds that they were infeasible. But is it feasible to think that the U.S. could ever implement The First World Balance?

The strongest response to this objection would be to give reasons that it is. But this is not what we think. There are reasons America has developed the penal balance it presently has. These reasons are certain to be significant obstacles to changing it. Rather, our view is just that The First World Balance is substantially *more* feasible than the kinds of things that reformers tend to demand today, like the call to retrain police to be better at their jobs, or the demand to expand the welfare state to tackle the root causes of crime. We support the latter demand (and defend the idea that it would be justified even on right-wing principles that are typically taken to defeat it, in other work). But in the highly unequal, oligarchic America in which we live at present, calls to re-allocate a fixed pool of revenue will meet with less powerful opposition than calls to tax the rich. Nor should readers anyway think of The First World Balance as an alternative to the

expansion of social policy. Even in a world in which America did social policy differently, it ought also to do penal policy differently. Or so we have argued.