

The Public Health-Quarantine Model

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One of the most frequently voiced criticisms of free will skepticism is that it is unable to adequately deal with criminal behavior and that the responses it would permit as justified are insufficient for acceptable social policy. This concern is fueled by two factors. The first is that one of the most prominent justifications for punishing criminals, retributivism, is incompatible with free will skepticism. The second concern is that alternative justifications that are not ruled out by the skeptical view per se face significant independent moral objections (Pereboom 2014: 153). Despite these concerns, I maintain that free will skepticism leaves intact other ways to respond to criminal behavior—in particular incapacitation, rehabilitation, and alteration of relevant social conditions—and that these methods are both morally justifiable and sufficient for good social policy. The position I defend is similar to Derk Pereboom's (2001, 2013, 2014), taking as its starting point his quarantine analogy, but it sets out to develop the quarantine model within a broader justificatory framework drawn from public health ethics. The resulting model—which I call the *public health-quarantine model* (Caruso 2016, 2017a)—provides a framework for justifying quarantine and criminal sanctions that is more humane than retributivism and preferable to other non-retributive alternatives. It also provides a broader approach to criminal behavior than Pereboom's quarantine analogy does on its own since it prioritizes prevention and social justice.¹

In Section 1, I begin by (very) briefly summarizing my arguments against free will and basic desert moral responsibility. In Section 2, I then introduce and defend my public health-quarantine model, which is a non-retributive alternative to criminal punishment that prioritizes prevention and social justice. In Sections 3 and 4, I take up and respond to two general objections to the public health-quarantine model. Since objections by Michael Corrado (2016), John Lemos (2016), Saul Smilansky (2011, 2017), and Victor Tadros (2017) have been addressed in detail elsewhere (see Pereboom 2017a; Pereboom and Caruso 2018), I will here focus on objections that have not yet been addressed. In particular, I will respond to concerns about proportionality, human dignity, and victims' rights. I will argue that each of these concerns can be met and that in the end the public health-quarantine model offers a superior alternative to retributive punishment and other non-retributive accounts.

1. Free Will Skepticism

To begin, it is important to first get clear on what type of moral responsibility is being doubted or denied by free will skeptics. Most skeptics maintain that our best philosophical and scientific theories about the world indicate that what we do and the way we are is ultimately the result of factors beyond our control, whether that be determinism, chance, or luck, and that because of this

¹ This chapter includes some passages from Caruso (2016, 2017a).

agents are never morally responsible in the sense needed to justify certain kinds of *desert-based* judgments, attitudes, or treatments—such as resentment, indignation, moral anger, backward-looking blame, and retributive punishment. This is not to say that there are no other conceptions of responsibility that can be reconciled with determinism, chance, or luck. Nor is it to deny that there may be good reasons to maintain certain systems of punishment and reward. Rather, it is to insist that to hold people *truly deserving* of blame and praise, punishment and reward, would be to hold them responsible for the results of the morally arbitrary or for what is ultimately beyond their control, which is fundamentally unfair and unjust.

Derk Pereboom provides a very helpful definition of the kind of moral responsibility being doubted by skeptics, which he calls *basic desert* moral responsibility and defines as follows:

For an agent to be morally responsible for an action in this sense is for it to be hers in such a way that she would deserve to be blamed if she understood that it was morally wrong, and she would deserve to be praised if she understood that it was morally exemplary. The desert at issue here is basic in the sense that the agent would deserve to be blamed or praised just because she has performed the action, given an understanding of its moral status, and not, for example, merely by virtue of consequentialist or contractualist considerations. (2014: 2)

Consistent with this definition, I have elsewhere argued that we should understand basic desert moral responsibility in terms of whether it would ever be appropriate for a hypothetical divine all-knowing judge (who didn't necessarily create the agents in question) to administer differing kinds of treatment (i.e., greater or lesser rewards or punishments) to human agents on the basis of actions that these agents performed during their lifetime (see Caruso and Morris 2017). The purpose of invoking the notion of a divine judge in the afterlife is to instill the idea that any rewards or punishments issued after death will have no further utility—be it positive or negative. Any differences in treatment to agents (however slight) would therefore seem warranted only from a *basic desert* sense, and not a consequentialist perspective.

In the past, the standard argument for free will skepticism was based on the notion of *determinism*—the thesis that every event or action, including human action, is the inevitable result of preceding events and actions and the laws of nature. *Hard determinists* argued that determinism is true and incompatible with free will and moral responsibility—either because it precludes the *ability to do otherwise* (leeway incompatibilism) or because it is inconsistent with one's being the “ultimate source” of action (source incompatibilism). Hard determinism had its classic statement in the time when Newtonian physics reigned but it has very few defenders today. Most contemporary skeptics instead defend positions that are agnostic about determinism—e.g., Derk Pereboom (2001, 2014), Galen Strawson (1986, 1994), Saul Smilansky (2000), Neil Levy (2011), Richard Double (1991), Bruce Waller (2011, 2015), and myself (2012). Most maintain that while determinism is incompatible with free will and basic desert moral responsibility, so too is *indeterminism*, especially the variety posited by quantum mechanics. Others argue that regardless of the causal structure of the universe, we lack free will and moral responsibility because free will is incompatible with the pervasiveness of *luck* (Levy 2011). Others (still) argue that free will and ultimate moral responsibility are incoherent

concepts, since to be free in the sense required for ultimate moral responsibility we would have to be *causa sui* (or “cause of oneself) and this is impossible (Strawson 1994).

My own reasons for adopting free will skepticism amount to a rejection of both compatibilism and libertarianism. I maintain that the sort of free will required for basic desert moral responsibility is incompatible with causal determination by factors beyond the agent’s control and also with the kind of indeterminacy in action required by the most plausible versions of libertarianism. For this reason, I follow Pereboom in labeling my view *hard incompatibilism* (Pereboom 2001, 2014; Pereboom and Caruso 2018). Against the view that free will is compatible with the causal determination of our actions by natural factors beyond our control, I argue that there is no relevant difference between this prospect and our actions being causally determined by manipulators (see Pereboom 2001, 2014; Mele 2008; Todd 2011, 2013). I further argue that it is incompatible with an agent’s *ability to do otherwise*, a necessary condition for free will (Caruso 2012). Against event causal libertarianism, I advance the “luck” or “disappearing agent” objection, according to which agents are left unable to *settle* whether a decision/action occurs and hence cannot have the control in action required for moral responsibility (see Caruso 2012, 2015; Pereboom 2001, 2014; 2017b; Waller 1990, 2011; Levy 2008, 2011; for non-skeptics who advance similar objections see Ekstrom 2000; Mele 1999, 2017; Haji 2001). The same problem, I contend, arises for *non-causal libertarian accounts* since these too fail to provide agents with the control in action needed for basic desert (see Pereboom 2014). While agent-causal libertarianism could, in theory, supply this sort of control, I argue that it cannot be reconciled with our best physical theories and faces additional problems accounting for mental causation (Caruso 2012). Since this exhausts the options for views on which we have the sort of free will at issue, I conclude that free will skepticism is the only remaining position.

Since the arguments for hard incompatibilism have been spelled out and defended at great length elsewhere (see, e.g., Pereboom 2001, 2014; Caruso 2012, 2013; Levy 2011; Pereboom and Caruso 2018), and no solid refutation of them have yet been offered, I will not elaborate on them further here. Instead, my goal in this chapter is to explore the practical implications of free will skepticism. For many, it is not the philosophical arguments for free will skepticism that are the problem, it is the existential angst they create and the fear that relinquishing belief in free will and basic desert moral responsibility would undermine morality, negatively affect our interpersonal relationships, destroy meaning in life, and leave us unable to adequately deal with criminal behavior. *Optimistic skeptics*, however, respond by arguing that life without free will and basic desert moral responsibility would not be as destructive as these critics maintain, and, in fact, may be preferable in a number of important ways (see Pereboom 1995, 2001, 2014; Waller 2011, 2015; Caruso 2016, 2017a, 2017b, forthcoming; Pereboom and Caruso 2018). These optimistic skeptics argue that prospects of finding meaning in life or of sustaining good interpersonal relationships, for instance, would not be threatened. They further maintain that morality and moral judgments would remain intact. And although retributivism and severe punishment, such as the death penalty, would be ruled out, they argue that the imposition of sanctions could serve purposes other than the punishment of the guilty—e.g., it can also be justified by its role in incapacitating, rehabilitating, and deterring offenders. In this chapter, I attempt to extend this general optimism about the practical implications of free will skepticism to the practices and policies surrounding criminal behavior.

2. The Public Health-Quarantine Model

It is important to begin by recognizing that retributive punishment is incompatible with free will skepticism because it maintains that punishment of a wrongdoer is justified for the reason that he *deserves* something bad to happen to him just because he has knowingly done wrong—this could include pain, deprivation, or death. As Douglas Husak puts it, “Punishment is justified only when and to the extent it is deserved” (2000: 82). And Mitchell Berman writes, “A person who unjustifiably and inexcusably causes or risks harm to others or to significant social interests deserves to suffer for that choice, and he deserves to suffer in proportion to the extent to which his regard or concern for others falls short of what is properly demanded of him” (2008: 269). Furthermore, for the retributivist, it is the *basic* desert attached to the criminal’s immoral action alone that provides the justification for punishment. The desert the retributivist invokes is basic in the sense that justifications for punishment that appeal to it are not reducible to consequentialist considerations nor to goods such as the safety of society or the moral improvement of the criminal.

Free will skepticism undermines this justification for punishment because it does away with the idea of *basic desert*. If agents do not deserve blame just because they have knowingly done wrong, neither do they deserve punishment just because they have knowingly done wrong. The challenge facing free will skepticism, then, is to explain how we can adequately deal with criminal behavior without the justification provided by retributivism and basic desert moral responsibility. While some critics contend this cannot be done, free will skeptics point out that there are several alternative ways of justifying criminal punishment (and dealing with criminal behavior more generally) that do not appeal to the notion of basic desert and are thus not threatened by free will skepticism. These include moral education theories, deterrence theories, punishment justified by the right to harm in self-defense, and incapacitation theories. While I have elsewhere argued that the first two approaches face independent moral objections—objections that, though perhaps not devastating, make them less desirable than their alternative (see Pereboom 2001, 2014; Caruso 2016; Pereboom and Caruso 2018)—I maintain that an incapacitation account built on the right to harm in self-defense provides the best option for justifying a policy for treatment of criminals consistent with free will skepticism (Caruso 2016, 2017a; Pereboom and Caruso 2018).

The public health-quarantine model is based on an analogy with quarantine and draws on a comparison between treatment of dangerous criminals and treatment of carriers of dangerous diseases. It takes as its starting point Derk Pereboom’s famous account (2001, 2013, 2014). In its simplest form, it can be stated as follows: (1) Free will skepticism maintains that criminals are not morally responsible for their actions in the basic desert sense; (2) plainly, many carriers of dangerous diseases are not responsible in this or in any other sense for having contracted these diseases; (3) yet, we generally agree that it is sometimes permissible to quarantine them, and the justification for doing so is the right to self-protection and the prevention of harm to others; (4) for similar reasons, even if a dangerous criminal is not morally responsible for his crimes in the basic desert sense (perhaps because no one is ever in this way morally responsible) it could be *as* legitimate to preventatively detain him as to quarantine the non-responsible carrier of a serious communicable disease (Pereboom 2014: 156).

The first thing to note about the theory is that although one might justify quarantine (in the case of disease) and incapacitation (in the case of dangerous criminals) on purely utilitarian or consequentialist grounds, both Pereboom and I want to resist this strategy (see Pereboom and Caruso 2018). Instead, on our view incapacitation of the dangerous is justified on the ground of the right to harm in self defense and defense of others. That we have this right has broad appeal, much broader than utilitarianism or consequentialism has. In addition, this makes the view more resilient to a number of objections (see Pereboom 2017a; Pereboom and Caruso 2018).

Second, the quarantine model places several constraints on the treatment of criminals (see Pereboom 2001, 2014; Pereboom and Caruso 2018). First, as less dangerous diseases justify only preventative measures less restrictive than quarantine, so less dangerous criminal tendencies justify only more moderate restraints (Pereboom 2014: 156). In fact, for certain minor crimes perhaps only some degree of monitoring could be defended. Secondly, the incapacitation account that results from this analogy demands a degree of concern for the rehabilitation and well-being of the criminal that would alter much of current practice. Just as fairness recommends that we seek to cure the diseased we quarantine, so fairness would counsel that we attempt to rehabilitate the criminals we detain (Pereboom 2014: 156). If a criminal cannot be rehabilitated, however, and our safety requires his indefinite confinement, this account provides no justification for making his life more miserable than would be required to guard against the danger he poses (Pereboom 2014: 156).

Third, this account also provides a more resilient proposal for justifying criminal sanctions than other non-retributive options. One advantage it has, say, over consequentialist deterrence theories is that it has more restrictions placed on it with regard to using people merely as a means. For instance, as it is illegitimate to treat carriers of a disease more harmfully than is necessary to neutralize the danger they pose, treating those with violent criminal tendencies more harshly than is required to protect society will be illegitimate as well. In fact, in all our writings on the subject, Pereboom and I have always maintained the *principle of least infringement*, which holds that the least restrictive measures should be taken to protect public health and safety (Caruso 2016, 2017a; Pereboom and Caruso 2018). This ensures that criminal sanctions will be proportionate to the danger posed by an individual, and any sanctions that exceed this upper bound will be unjustified.

In addition to these restrictions on harsh and unnecessary treatment, the model also advocates for a broader approach to criminal behavior that moves beyond the narrow focus on sanctions. On the model I have developed, the quarantine analogy is placed within the broader justificatory framework of *public health ethics* (Caruso 2016, 2017a). Public health ethics not only justifies quarantining carriers of infectious diseases on the grounds that it is necessary to protect public health, it also requires that we take active steps to *prevent* such outbreaks from occurring in the first place. Quarantine is only needed when the public health system fails in its primary function. Since no system is perfect, quarantine will likely be needed for the foreseeable future, but it should *not* be the primary means of dealing with public health. The analogous claim holds for incapacitation. Taking a public health approach to criminal behavior would allow us to justify the incapacitation of dangerous criminals when needed, but it would also make prevention a *primary function* of the criminal justice system. So instead of myopically focusing on punishment, the public health-quarantine model shifts the focus to identifying and addressing the

systemic causes of crime, such as poverty, low social economic status, systematic disadvantage, mental illness, homelessness, educational inequity, abuse, and addiction (see Caruso 2017a).

In my recent *Public Health and Safety: The Social Determinants of Health and Criminal Behavior* (2017a), I argue that the social determinants of health (SDH) and the social determinants of criminal behavior (SDCB) are broadly similar, and that we should adopt a broad public health approach for identifying and taking action on these shared social determinants. I focus on how social inequities and systemic injustices affect health outcomes and criminal behavior, how poverty affects brain development, how offenders often have pre-existing medical conditions (especially mental health issues), how homelessness and education affects health and safety outcomes, how environmental health is important to both public health and safety, how involvement in the criminal justice system itself can lead to or worsen health and cognitive problems, and how a public health approach can be successfully applied within the criminal justice system. I argue that, just as it is important to identify and take action on the SDH if we want to improve health outcomes, it is equally important to identify and address the SDCB. And I conclude by offering eight broad public policy proposals for implementing a public health approach aimed at addressing the SDH and SDCB (see Caruso 2017a for details).

Furthermore, the public health framework I adopt sees *social justice* as a foundational cornerstone to public health and safety (Caruso 2016, 2017a). In public health ethics, a failure on the part of public health institutions to ensure the social conditions necessary to achieve a sufficient level of health is considered a grave injustice. An important task of public health ethics, then, is to identify which inequalities in health are the most egregious and thus which should be given the highest priority in public health policy and practice. The public health approach to criminal behavior likewise maintains that a core moral function of the criminal justice system is to identify and remedy social and economic inequalities responsible for crime. Just as public health is negatively affected by poverty, racism, and systematic inequality, so too is public safety. This broader approach to criminal justice therefore places issues of social justice at the forefront. It sees racism, sexism, poverty, and systemic disadvantage as serious threats to public safety and it prioritizes the reduction of such inequalities (see Caruso 2017a).

While there are different ways of understanding *social justice* and different philosophical accounts of what a theory of justice aims to achieve, I favor a *capability approach* according to which the development of capabilities—what each individual is able to do or be—is essential to human well-being (e.g., Sen 1985, 1999; Nussbaum 2011; Power and Faden 2006). For capability theorists, human well-being is the proper end of a theory of justice. And on the particular capability approach I favor, social justice is grounded in six key features of human well-being: *health, reasoning, self-determination, attachment, personal security, and respect* (see Powers and Faden 2006; Caruso 2017a).² Following Powers and Faden (2006), I maintain that each of these six dimensions is an essential feature of well-being such that “a life substantially lacking in any one is a life seriously deficient in what it is reasonable for anyone to want, whatever else they want” (Powers and Faden 2006: 8). The job of justice is therefore to achieve a sufficiency of these six essential dimensions of human well-being, since each is a separate indicator of a decent life.

² Note that this is a pared down list from the ones offered by Martha Nussbaum and other capability theorists (see Nussbaum 2011).

The key idea of capability approaches is that social arrangements should aim to expand people's capabilities—their freedom to promote or achieve *functionings* that are important to them.

Functionings are defined as the valuable activities and states that make up human well-being, such as having a healthy body, being safe, or having a job. While they are related to goods and income, they are instead described in terms of what a person is able to do or be as a result. For example, when a person's need for food (a commodity) is met, they enjoy the functioning of being well-nourished. Examples of functionings include being mobile, being healthy, being adequately nourished, and being educated. The genuine opportunity to achieve a particular functioning is called a *capability*. *Capabilities* are “the alternative combination of functionings that are feasible for [a person] to achieve”—they are “the substantive freedom” a person has “to lead the kind of life he or she has reason to value” (Sen 1999: 87).

As Tabandeh, Gardoni, and Murphy describe:

Genuine opportunities and actual achievements are influenced by what individuals have and what they can do with what they have. What they can do with what they have is a function of the structure of social, legal, economic, and political institutions and of the characteristics of the built-environment (i.e., infrastructure). For example, consider the functioning of being mobile. The number of times an individual travels per week can be an indicator of mobility achievement. When explaining a given individual's achievement or lack of achievement, a capability approach takes into consideration the conditions that must be in place for an individual to be mobile. For instance, the possession of certain resources, like a bike, may influence mobility. However, possessing a bike may not be sufficient to guarantee mobility. If the individual has physical disabilities, then the bike will be of no help to travel. Similarly, if there are no paved roads or if societal culture imposes a norm that women are not allowed to ride a bike, then it will become difficult or even impossible to travel by means of a bike. As this example makes clear, different factors will influence the number of times the individual travels. (Tabandeh, Gardoni, and Murphy 2017)

Thinking in terms of capabilities raises a wider range of issues than simply looking at the amount of resources or commodities people have, because people have different needs. In the example given above, just providing bicycles to people will not be enough to increase the functioning of being mobile if you are disabled or prohibited from riding because of sexist social norms. A capabilities approach to social justice therefore requires that we consider and address a larger set of social issues.

Bringing everything together, my public health-quarantine model characterizes the moral foundation of public health as social justice, not just the advancement of good health outcomes. That is, while promoting social goods (like health) is one area of concern, public health ethics as I conceive it is embedded within a broader commitment to secure a sufficient level of health and safety for all and to narrow unjust inequalities (see Powers and Faden 2006). More specifically, I see the capability approach to social justice as the proper moral foundation of public health ethics. This means that the broader commitment of public health should be the achievement of those capabilities needed to secure a sufficient level of human well-being—including, but not

limited to, health, reasoning, self-determination, attachment, personal security, and respect. By placing social justice at the foundation of the public health approach, the realms of criminal justice and social justice are brought closer together. I see this as a virtue of the theory since it is hard to see how we can adequately deal with criminal justice without simultaneously addressing issues of social justice. Retributivists tend to disagree since they approach criminal justice as an issue of individual responsibility and desert, not as an issue of prevention and public safety. I believe it is a mistake to hold that the criteria of individual accountability can be settled apart from considerations of social justice and the social determinants of criminal behavior. Making social justice foundational, as my public health-quarantine model does, places on us a collective responsibility—which is forward-looking and perfectly consistent with free will skepticism—to redress unjust inequalities and to advance collective aims and priorities such as public health and safety. The capability approach and the public health approach therefore fit nicely together. Both maintain that poor health and safety are often the byproducts of social inequities, and both attempt to identify and address these social inequities in order to achieve a sufficient level of health and safety.

Summarizing the public health-quarantine model, then, the core idea is that the right to harm in self-defense and defense of others justifies incapacitating the criminally dangerous with the minimum harm required for adequate protection. The resulting account would not justify the sort of criminal punishment whose legitimacy is most dubious, such as death or confinement in the most common kinds of prisons in our society. The model also specifies attention to the well-being of criminals, which would change much of current policy. Furthermore, the public health component of the theory prioritizes prevention and social justice and aims at identifying and taking action on the social determinants of health and criminal behavior. This combined approach to dealing with criminal behavior, I maintain, is sufficient for dealing with dangerous criminals, leads to a more humane and effective social policy, and is actually preferable to the harsh and often excessive forms of punishment that typically come with retributivism.

3. Proportionality and Human Dignity

One concern critics have with my approach to criminal behavior is that they fear it will not protect human dignity and respect for persons in the same way that retributivism does. Retributivists adopt something called the *principle of proportionality*. As Alec Walen describes: “Retributive justice holds that it would be bad to punish a wrongdoer *more* than she deserves, where what she deserves must be in some way proportional to the gravity of her crime. Inflicting disproportionate punishment wrongs her just as, even if not quite as much as, punishing an innocent person wrongs her...” (Walen 2014). For retributivists, the principle of proportionality is needed to guarantee respect for persons since it treats them as autonomous, morally responsible agents and not just objects to be “fixed” or used as a means to an end. Hence, punishment administered because one is a morally responsible autonomous person who *justly deserves* punishment due to his or her own choices, preserves one’s status as a person and a member of the human community of responsible agents as long as it is not disproportionate (see Lewis 1971; Oldenquist 1988; and Morris 1968). Critics contend that without this principle in place, there will be no limit to the harshness of punishment meted out and no way to block treating individuals as a mere means to an end.

Immanuel Kant, for example, famously argued that human beings possess a special dignity and worth which demands that they be treated as ends in themselves and never as mere means. According to Kant, imprisonment could only be justified on the grounds that the criminal conduct was a product of the free willed choices of the criminal making him/her *deserving* of a punitive response. Kant, however, also believed that the death penalty was deserved, in fact obligatory, in cases of murder:

But whoever has committed murder, must die. There is, in this case, no juridical substitute or surrogate that can be given or taken for the satisfaction of justice. There is no likeness or proportion between life, however painful, and death; and therefore there is no equality between the crime of murder and the retaliation of it but what is judicially accomplished by the execution of the criminal. His death, however, must be kept free from all maltreatment that would make the humanity suffering in his person loathsome or abominable. Even if a civil society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last murderer lying in prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice. (Kant 1790, Part II: 6)

While many retributivists disagree with Kant regarding the death penalty, they share his belief that punishment should not exceed what is *deserved* and that free will and basic desert moral responsibility are needed to maintain respect for persons. John Lemos, for example, has argued, “the human capacity for moral responsibility gives human beings a special dignity and worth that is fundamental to a proper system of morality grounded on the concept of respect for persons” (2013: 78), and theories of punishment that reject basic desert moral responsibility are incapable of protecting this special dignity and worth (see Lemos 2013, 2016).

In response, I would argue three things: (1) it is unclear that the principle of proportionality *in actual practice* protects respect for persons any better than the alternatives; (2) what counts as proportional punishment is unclear and as a result several important questions remain—e.g., how should we measure the gravity of a wrong, and how can punishment be “proportional” to it?; and (3) the public health-quarantine model has a non-desert-based principle of proportionality of its own—one which I maintain *is* capable of securing respect for persons and protecting innocent people from being used as a means to an end. Let me take each of these in turn.

First, while concerns over proportionality are important ones, the worry that relinquishing the concept of just deserts will lead to harsh and inhumane treatment of persons is overblown. Before getting to the more philosophical responses to this objection, I would first like to examine the question empirically and ask whether belief in just deserts and retributive justice *ensure* punishment is proportional any better than the alternatives. Since the *real-life effects* of free will skepticism is what is being questioned here, I think the empirical question is an important one. If the critics are wrong about the protective power of desert-based moral responsibility and the constraints it places on proportional punishment, then this concern loses much of its force.

Empirically speaking, then, does belief in just deserts and retributive justice ensure punishment is proportional? I contend that it does not. Of course, there are many reasonable retributivists who acknowledge that we imprison far too many people, in far too harsh conditions, but the problem is that retributivism remains committed to the core belief that criminals *deserve* to be punished and suffer for the harms they have caused. Recall Kant's claim that we should execute the last prisoner on the island before we abandon it in order that everyone "realize the desert of his deeds." This retributive impulse in *actual practice*—despite theoretical appeals to proportionality by its proponents—often leads to practices and policies that try to make life in prison as unpleasant as possible.

Bruce Waller has done an excellent job examining this question empirically and he sets up the cultural expectations as follows:

Belief in individual moral responsibility is deep and broad in both the United States and England; in fact, the belief seems to be more deeply entrenched in those cultures than anywhere else—certainly deeper there than in Europe. That powerful belief in moral responsibility is not an isolated belief, existing independently of other cultural factors; rather, it is held in place—and in turn, helps anchor—a neo-liberal cultural *system* of beliefs and values. At the opposite end of the scale are social democratic corporatist cultures like Sweden that have taken significant steps beyond the narrow focus on individual moral responsibility. With that picture in view, consider the basic protections which philosophers have claimed that the moral responsibility system afford: first, protection against extreme punitive measures; second, protection of the dignity and rights of those who are held morally responsible and subject to punishment; and third, a special protection of the innocent against unjust punishment. According to the claim that strong belief in individual moral responsibility protects against abuses, we would expect the United States and Great Britain (the neo-liberal cultures with the strongest commitment to individual moral responsibility) to score best in providing such protections; and we would predict that Norway, Sweden, and Denmark (the social democratic corporatist cultures, with much more qualified belief in individual moral responsibility) would be the worst abusers. (2014: 6; see also 2015)

What happens when we actually make the comparison, however, is that we find the exact opposite. That is, we find that the stronger the belief in basic desert moral responsibility (as in the United States) the harsher the punishment, the greater the skepticism of moral responsibility (as in Norway) the weaker the inclination toward punishment. A few cross-cultural statistics should help make this point salient.

In 2014, the Pew Research Center asked people whether they agreed or disagreed with the notion that personal success is determined by factors outside of oneself. While not exactly measuring belief in free will and moral responsibility, the survey was able to confirm that Americans are much more likely to see success or failure in personal terms. This is in line with the systems of thinking Waller describes and is unsurprising given the U.S. emphasis on rugged individualism and individual responsibility—which, of course, is closely aligned with attitudes about just deserts, praise and blame, punishment and reward. For example, 57% of Americans disagreed with the statement "Success in life is determined by forces outside our control," which was the

highest percentage among advanced countries. The U.K. was immediately behind the U.S. with 55% disagreeing. Unfortunately Scandinavian countries were not included in the survey but European nations Germany and Italy came in at 31% and 32% respectively.

Now, retributivists would have us believe that given its strong commitment to individual moral responsibility, the United States can be expected to provide better protections against harsh and excessively punitive forms of punishment than countries with a weaker commitment to individual moral responsibility. The reality, however, is quite the opposite. Consider the problem of mass incarceration in the United States. While the United States makes up only 5% of the world's population, it houses 25% of the world's prisoners—that's one of the highest rates of incarceration known to mankind. Despite a steady decline in the crime rate over the past two decades, the United States imprisons more than 700 prisoners for every 100,000 of population, according to the International Centre for Prison Studies (ICPS).³ Compare that to the social democratic countries with a much weaker commitment to individual moral responsibility, such as Norway, Sweden, and Finland, where the imprisonment rate hovers around 70 per 100,000. As a proportion of the population, then, the United States has 10 times as many prisoners as these other countries. Furthermore, the U.S. not only imprisons at a much higher rate, it also imprisons in notoriously harsh conditions.

American supermax prisons are often cruel places, using a number of harsh forms of punishment including extended solitary confinement. Prisoners are isolated in windowless, soundproof cubicles for 23 to 24 hours each day, sometimes for decades. Under such conditions, prisoners experience severe suffering, often resulting in serious psychological problems. Supreme court Justice Anthony Kennedy, for instance, recently stated that, "solitary confinement literally drives men mad."⁴ Looked at empirically, then, it's nigh impossible to defend the claim that commitment to just deserts and retributivism *ensures* proportional and humane punishment. In fact, the opposite seems to be the case—the problem of disproportionate punishment seems to grow more out of a desire for retribution and the belief that people justly deserve what they get than from free will skepticism. This claim is further supported by the fact that individual states *within* the United States with stronger belief in individual moral responsibility tend to have harsher forms of punishment (see Waller 2014, 2015). Given these cross-cultural and inter-state comparisons, I cannot help but conclude along with Waller that, "commitment to moral responsibility exacerbates rather than prevents excessively harsh punitive policies" (2014: 7).

Recent work in experimental philosophy further reveals that where belief in free will is strongest we tend to find increased punitiveness (see Shariff et al. 2014; Carey and Paulhus 2013). Perhaps the strongest evidence for this linking comes from a set of recent studies by Shariff et al. (2014). Shariff and his colleagues hypothesized that if free will beliefs support attributions of moral responsibility, then reducing these beliefs should make people less punitive in their attitudes about punishment. In a series of four studies they tested this prediction. In Study 1 they found that people with weaker free will beliefs endorsed less retributive attitudes regarding punishment

³ International Centre for Prison Studies, "World Prison Brief," accessed November 5, 2013, www.prisonstudies.org/highest-lowest.

⁴ He made this statement before the House Appropriations Subcommittee on Financial Services and Federal Government, as reported on in the Huffington Post on 3/24/2015: http://www.huffingtonpost.com/2015/03/24/anthony-kennedy-solitary-confinement_n_6934550.html

of criminals, yet their consequentialist attitudes were unaffected. In the study, two hundred and forty-four American participants completed the seven-item Free Will subscale of the Free Will and Determinism Plus scale (FAD+) (Paulhus and Carey 2011), which measures belief in free will. In order to further measure attitudes toward retributivist and consequentialist motivations for punishment, Shariff and his colleagues had participants read descriptions of retributivism and consequentialism as motivations for punishment and then indicate on two separate Likert scales (1 = *strongly disagree*, 7 = *strongly agree*) how important retributivism and consequentialism should be in determining motivation for criminal punishments. As predicted, Shariff et al. found that stronger belief in free will predicted greater support for retributive punishment, but was not predictive of support for consequentialist punishment. The effects remained significant when statistically controlled for age, gender, education, religiosity, and economic and social political ideology. Study 1 therefore supports the hypothesis that free will beliefs positively predict retributive attitudes, yet it also suggests that “the motivation to punish in order to benefit society (consequentialist punishment) may remain intact, even while the need for blame and desire for retribution are forgone” (Shariff et al. 2014: 7).

It is Study 2, however, that really highlights how stronger belief in free will and moral responsibility can lead to increased punitiveness. In the study, participants were randomly assigned to one of two groups. In the anti-free will condition, participants were given a passage from Francis Crick’s (1994) *The Astonishing Hypothesis* which rejected free will and advocated for a mechanistic view of human behavior. In the neutral condition, the passage was unrelated to free will. Next, participants read a fictional vignette involving an offender who beat a man to death. Acting as hypothetical jurors, participants recommended the length of the prison sentence (if any) that this offender should serve following a 2-year, nearly 100%-effective, rehabilitation treatment. As Shariff et al. describe:

The notion that the offender had been rehabilitated was used in order to isolate participants’ desire for punishment as retribution. The passage further focused participants on retributive, rather than consequentialist, punishment by noting that the prosecution and defense had agreed that the rehabilitation would prevent recidivism and that any further detention after rehabilitation would offer no additional deterrence of other potential criminals. (Shariff et al. 2014: 4)

As predicted, participants who read the anti-free passage recommended significantly lighter prison sentences than participants who read the neutral passage. In particular, participants whose free-will beliefs had been experimentally diminished recommended roughly half the length of imprisonment (~5 years) compared with participants who read the neutral passage (~10 years). This study helps further confirm that it is actually commitment to retributivism that increases punitiveness, contrary to what its proponent’s claim.⁵

⁵ Carey and Paulhus (2013) also found a relationship between beliefs about free will and punishment. In particular, they found that believing more strongly in free will was correlated with increased punitiveness—i.e., free will believers were more likely to call for harsher criminal punishment in a number of hypothetical scenarios. In the third of their studies, for instance, Carey and Paulhus presented two scenarios portraying serious crimes (child molestation and the rape of an adult woman) and tested the degree to which subjects’ attitudes towards punishment of the criminals would be impacted by factors including the criminal having been abused as a child and assurance that a medical procedure would prevent the criminal from ever perpetrating similar crimes again. The fact that subjects who expressed the strongest belief in free will were essentially the only group of subjects whose attitudes

Moving on to my second reply, the principle of proportionality does not provide us with any clear and unambiguous way of measuring the gravity of a wrong. Nor does it tell us how we should determine which punishment is “proportional” to the wrong done. There is no magic ledger we can look to that spells out the gravity of a wrong in one column and the punishment that is deserved in another. This is obvious from the fact that retributivists often disagree with one another about how to measure the gravity of a wrong—consider, for instance, H.L.A. Hart’s question: “Is negligently causing the destruction of a city worse than the intentional wounding of a single policeman?” (1968: 162). And even when there is wide agreement on the gravity of a wrong, there is still often disagreement about what kind of punishment is deserved. For instance, all retributivists can agree that murdering an innocent person is a grievous wrong, but they can, and often do, disagree on what count as “proportional” punishment. Kant proposes death. Others propose life in prison. Others still think life in prison is too harsh. How do we decide questions like these on the principle of proportionality?

The problem of measuring *gravity*, for instance, is an important one for retributivists since what punishment is deserved is going to be determined by this. Yet the proportionality principle leaves unanswered several important questions. The first is “does it matter if harm is caused, or is the gravity of the wrong set fully by the wrong risked or intended” (Walen 2014). (For the position that harm does not matter, see Feinberg 1995; Alexander, Ferzan, and Morse 2009; for a criticism of that view, see Levy 2005; Walen 2010.) Second, what significance, if any, should be given to the difference between being punished for the first time, and having been punished before and then having committed the same or a similar wrong again (see Walen 2014)? Until retributivists can agree on how to resolve these problems it remains unclear how gravity should be measured, which needs to be settled if we are to know how to apply the proportionality principle in practice.

Assuming for the moment, however, that a rank order of gravity is possible, there still remains the problem of determining what counts as *proportional* punishment. There are two basic senses of proportionality that can be found in the literature: cardinal and ordinal. Cardinal proportionality sets absolute measures for punishment that is proportional to a given crime; ordinal proportionality requires only that more serious crimes should be punished more severely (Walen 2014). There are, however, problems with both approaches. Cardinal proportionality, for instance, tends to lead to unacceptable extremes. For example:

Lex Talionis... offers a theory of cardinal proportionality. In its traditional form—an eye for an eye, a tooth for a tooth—it seems implausible, both for being too lenient in some cases (take \$10 from a thief who stole \$10), and too extreme in others (repeatedly torture and rape someone who had committed many such acts himself). Kant proposed what might be thought a better version, saying that the thief should lose not just the value of what he stole, but instead all rights to property (1797: 142), and prohibiting those forms of “mistreatment that could make the humanity in the person suffering it into something abominable” (ibid.). Nonetheless, his measure for theft swings to the overly punitive side, leaving the convicted thief a dependent on the state, and thereby “reduced to the status of

towards punishment were not mitigated by environmental or consequentialist considerations led the researchers to conclude that “free will belief is related to retributivist punishment” (2013: 138).

a slave for a certain time, or permanently if the state sees fit” (ibid.). Others have tried to rehabilitate *lex talionis*, arguing, for example, that it can be rendered plausible if interpreted to call for punishment that “possess[es] some or all of the characteristics that made the offense wrong” (Waldron 1992: 35). But however one spells out the wrong-making characteristics, it seems likely that *lex talionis* will provide a measure either too vague to be of much help (see Shafer-Landau 1996: 299–302; 2000: 197–198), or too specific to be plausible (at least in some cases). (Walen 2014)

Ordinal proportionality, on the other hand, faces a different problem:

If all that were required to do justice is to rank order wrongs by their gravity and then provide a mapping onto a range of punishments that likewise went from lighter to more serious—respecting the norms of rank-ordering and parity—then neither the range of punishments from a fine of \$1 up to a fine of \$100, nor from 40 years to 60 years in prison, would provide disproportionate punishment, no matter what the crimes. This seems wrong. Murder should not be punished with a \$100 fine, and littering should not be punished with 40 years in prison. Some vague degree of cardinality therefore seems to be called for, punishing grave wrongs with heavy penalties and minor wrongs with light penalties. (Walen 2014)

Such problems reveal that the principle of proportionality is too ambiguous to guarantee respect for persons since it is unable to draw a clear line in the sand between deserved punishments on the one hand and cruel and inhumane punishment on the other. As a result, cultural and societal pressure can easily affect how gravity and proportional punishment are measured, and this can easily lead (as highlighted above) to excessively punitive forms of punishment.

Lastly, while rejecting the retributivist principle of proportionality, the public health-quarantine model has a proportionality principle of its own. It maintains that criminal sanctions should be proportionate to the danger posed by an individual, and any sanctions that exceed this upper bound will be unjustified. This is coupled with the principle of least infringement, which holds that the least restrictive measures should be taken to protect public health and safety. Together these two principles set strict limits on how individuals can and should be treated. Consider again the hypothetical scenario used in the Shariff et al. study. The fictional case involved an offender who beat a man to death but after serving two years in prison was nearly 100% effectively rehabilitated. The case further stipulated that “the prosecution and defense had agreed that the rehabilitation would prevent recidivism and that any further detention after rehabilitation would offer no additional deterrence of other potential criminals” (Shariff et al. 2014: 4). On my model, it would be unjust to continue to incapacitate this individual. Retributivists, on the other hand, will generally feel that this person *deserves* to be punished further since two years in prison is not proportional punishment—although, as my comments on the proportionality principle above indicate, they will likely disagree on exactly what this additional punishment should amount to.

Which of these views better respects human dignity? I have a hard time seeing how punishing someone who is no longer a threat to society, and in a way that exceeds effectiveness, respects human dignity. Instead, I maintain that the public health-quarantine model actually respects human dignity more since it specifies that (a) individuals who are not a serious threat to society

should not be incapacitated, (b) no one should be incapacitated longer than is absolutely necessary (where this is determined by the continued threat the individual poses to society), and (c) when it is necessary to incapacitate an individual, we must do so in a way that treats them humanely, with respect and dignity, and with rehabilitation as our goal. There is more to human dignity than the retributivist obsession with giving individuals their just deserts. Human dignity also demands that we *not* dehumanize, disenfranchise, and treat cruelly those we imprison. The public health-quarantine model, I contend, does a better job as respecting human dignity since it prioritizes prevention, rehabilitation, and reintegration, and demands a level of concern for the well-being of prisoners.

Furthermore, the public health-quarantine model can also respect human dignity by prohibiting the incapacitation of innocent people (see Pereboom and Caruso 2018). Neither Pereboom nor I set out our position in a strict consequentialist theoretical context. Rather, we justify incapacitation on the ground of the right to self-defense and defense of others. That right does not extend to people who are non-threats. It would therefore be wrong to incapacitate someone who is innocent since they are not a serious threat to society. The aim of protection is justified by a right with clear bounds, and not by a consequentialist theory on which the bounds are unclear (see Pereboom and Caruso 2018). For this reason, the public health-quarantine model provides a distinct advantage over consequentialist deterrence theories since it has more restrictions placed on it with regard to using people merely as a means. Concerns over the “use” objection, for example, count more heavily against punishment policy justified simply on consequentialist grounds than they do against incapacitation based on the quarantine analogy (see also Pereboom 2014, 2017a).

4. Victims’ Rights

A second objection is that victims of violent crime will never receive proper justice or satisfaction on my account since it rejects harsh punishment in favor of rehabilitating dangerous criminals and implementing the least restrictive forms of sanctions needed to secure public safety. Democratic Senator Dianne Feinstein and Republican Senator Jon Kyl have argued, for instance, that “for too long, our court system has tilted in favor of accused criminals and has proven appallingly indifferent to the suffering of crime victims.”⁶ I think this is a gross misrepresentation of the U.S. criminal justice system over the last few decades—evidenced by our current mass incarceration crisis, the heavy-handedness of mandatory minimums, the increased use of plea bargains, and the three-strikes-you-are-out laws that have swept the nation—but I mention it because it captures a common concern critics have with reformist proposals like my own. The concern is that such models put the rights of criminals above the concerns of victims, and worse still advocate for reforms that run contrary to the concerns of victims. While I take this objection seriously, I do not think the public health-quarantine model is “indifferent to the suffering of crime victims.” Rather, I maintain that it better reflects the attitudes and preferences of most victims and does a better job preventing future victims.

First, I contend that this objection is predicated on a mistaken assumption. The underlying assumption seems to be that most victims of violent crime want revenge and retribution above all

⁶ As reported on in the *Washington Post* (2016): <https://www.washingtonpost.com/news/wonk/wp/2016/08/05/even-violent-crime-victims-say-our-prisons-are-making-crime-worse>

else and that to deny them the satisfaction of seeing their perpetrators suffer is an injustice. Proponents of the death penalty and other forms of excessively punitive forms of punishment typically argue, for instance, that whatever deterrence factor such punishment may or may not have, such punishment provides justice for the victims and their families since it satisfies their desire for revenge and proportional punishment. Kant, for example, famously argued that if a people do not insist on the execution of murders, “blood guilt” would “cling” to them “as collaborators in this public violation of justice” (1797: 142). Setting aside the issue of what counts as proportional punishment raised above, it is an empirical question what victims *actually* want, what their preferences and attitudes are, and what kind of justice they would like to see from the criminal justice system.

Fortunately, the Alliance for Safety and Justice has recently investigated exactly these questions. In its first-of-its-kind national survey, they found that victims of violent crime say they want to see *shorter* prison sentences, *less* spending on prisons, and a *greater* focus on the rehabilitation of criminals (2016). The survey polled the attitudes and beliefs of more than 800 crime victims pooled from a nationally representative sample of over 3,000 respondents. According to the report:

Perhaps to the surprise of some, victims overwhelmingly prefer criminal justice approaches that prioritize rehabilitation over punishment and strongly prefer investments in crime prevention and treatment to more spending on prisons and jails. These views are not always accurately reflected in the media or in state capitols and should be considered in policy debates. (2016: 4)

An examination of the data reveals that victims prefer an approach much closer to the public health-quarantine model, with its focus on prevention, social justice, and rehabilitation, than retributivism. For instance, the survey found that:

- By a 2 to 1 margin, victims prefer that the criminal justice system focus more on rehabilitating people who commit crimes than punishing them.
- By a margin of 15 to 1, victims prefer increased investments in schools and education over more investments in prisons and jails.
- By a margin of 10 to 1, victims prefer increased investments in job creation over more investments in prisons and jails.
- By a margin of 7 to 1, victims prefer increased investments in mental health treatment over investments in prisons and jails.
- By a margin of nearly 3 to 1, victims believe prison makes people more likely to commit crimes than to rehabilitate them.
- By a margin of 7 to 1, victims prefer increased investments in crime prevention and programs for at-risk youth over more investments in prisons and jails.
- 6 in 10 victims prefer shorter prison sentences and more spending on prevention and rehabilitation to prison sentences that keep people incarcerated for as long as possible.
- By a margin of 4 to 1, victims prefer increased investments in drug treatment over more investment in prisons and jails.
- By a margin of 2 to 1, victims prefer increased investments in community supervision, such as probation and parole, over more investments in prisons and jails.

- 7 in 10 victims prefer that prosecutors focus on solving neighborhood problems and stopping repeat crime through rehabilitation, even if it means fewer convictions and prison sentences.
- 6 in 10 victims prefer that prosecutors consider victims' opinions on what would help them recover from the crime, even when victims do not want long prison sentences.

The report also found that victims' views remained consistent across demographics—that is, for each of the questions above, they found majority or plurality support across demographic groups, including age, gender, race, ethnicity, and political party affiliation. This skepticism of prisons is in line with most social science research, which has generally shown that mass incarceration causes more crime than it prevents, that institutionalizing young offenders makes them more likely to commit crime as adults, and that spending time in prison teaches people how to be better criminals (see, e.g., Weatherburn 2010).

It would seem, then, that those tough-on-crime proponents who invoke the names of victims of violent crime and claim to speak for them, such as Feinstein and Kyl, often misrepresent their actual preferences, attitudes, and desires. To say that approaches like the public health-quarantine model are “appallingly indifferent to the suffering of crime victims” is to discount what victims say they actually want. It also overlooks the fact that the best way to reduce crime and the suffering caused by it is to (a) prevent the crime from occurring in the first place by addressing the causal determinates of crime, and (b) to rehabilitate criminals so as to reduce the likelihood of recidivism. The public health-quarantine model attempts to do both, retributivism by its very nature does neither. Since retributivism myopically focuses on justifying backward-looking blame and punishment, it does not have the resources needed to address rehabilitation or preventative measures. I question, then, the claim that retributivism reflects a deeper concern for victims and their families. If one really cares about victims and their suffering, the best way to honor this concern is to reject retributivism and adopt a more holistic approach to criminal behavior that focuses on preventing crime, rehabilitating criminals, and reducing the number of people who become victims of violent crime.

Second, *even if* victims of violent crime wanted to see criminals suffer and were on the whole indifferent to concerns about safety and rehabilitation—contrary to what appears to be the case—it does not follow that we should inflict such harm and suffering nor does it follow that denying victims the satisfaction of seeing their perpetrators suffer would be a violation of their rights. As Walen accurately points out, “the view that it wrongs victims not to punish wrongdoers confuses vengeance, which is victim-centered, with retributivism, which is agent-centered: concerned with giving the wrongdoer the punishment *he* deserves” (2014). Paul Robinson (2008), for instance, has argued that retributivists must distinguish between vengeful and deontological conceptions of deserved punishment. The former urges punishing an offender in a way that mirrors the harm or suffering he/she has caused:

Because of this focus on the harm done, the vengeful conception of desert is commonly associated with the victim's perspective. Retributive justice “consists in seeking equality between offender and victim by subjecting the offender to punishment and communicating to the victim a concern for his or her antecedent suffering” [(Fletcher 1999: 58).]...And the association with the victim's suffering, in turn, associates vengeful

desert with the feelings of revenge and hatred that we commonly see in victims. Thus, punishment under this conception of desert is sometimes seen as essentially an institutionalization of victim revenge; it is “injury inflicted on a wrongdoer that satisfies the retributive hatred felt by the wrongdoer’s victim and that is justified because of that satisfaction” [(Feinberg and Coleman 2000: 793)]. (Robinson 2008: 147-48)

The problem, however, is that justifying punishment on the grounds of vengefulness or the satisfaction of retributive hatred fails to take into account the blameworthiness of the offender. The deontological conception of desert, on the other hand, focuses at least not on the harm of the offense but on the blameworthiness of the offender, as drawn from the arguments and analysis of moral philosophy (Robinson 2008: 148).

Thus, the criterion for assessing punishment is broader and richer than that for vengeful desert: Anything that affects an offender’s moral blameworthiness is taken into account in judging the punishment he deserves. The extent of the harm caused or the seriousness of the evil done will be part of that calculation but so too will be a wide variety of other factors, such as the offender’s culpable state of mind or lack thereof and the existing conditions at the time of offence, including those that might give rise to claims of justification, excuse, or mitigation. (Robinson 2008: 148)

To the extent, then, that retributivists want to appeal to moral blameworthiness rather than vengeful desires in justifying punishment, denying victims the vengeful satisfaction they seek would not be a violation of their rights.

This brings me to my next reply. Punishment inflicts harm on individuals and the justification for such harm must meet a high epistemic standard. If it is significantly probable that one’s justification for harming another is unsound, then, *prima facie*, that behavior is seriously wrong (Pereboom 2017a). But if free will skeptics are right, neither libertarians nor compatibilists satisfy this epistemic standard and hence individuals do not justly deserve to be punished. And if individuals do not justly deserve to be punished, there is no violation of the rights of victims to deny them the revenge they seek. Even retributivists would acknowledge that the desire for revenge and retribution has its limits. The principle of proportionality, despite its weaknesses, dictates that punishments that are disproportionate to the wrong done (whatever that ultimately amounts to) would be unjustified. Hence, if the victim of an armed robbery wanted to see their perpetrator executed, and this was deemed disproportionate punishment by the standards of retributivism, it would not be a violation of the victim’s rights on that theory to prohibit said execution. By extension, if free will skeptics are right, and retributive punishment itself is unjustified, then to deny victims their desire for revenge (conceived here in a purely backward-looking, non-consequentialist sense) would likewise not be a violation of their rights. For victims to have the right to see suffering and harm imposed on their perpetrators, it would have to be the case that such harm was justified. According to free will skeptics, however, neither victims of violent crime nor the state acting on their behalf are justified in causing more harm than is minimally required for adequate protection.

Lastly, the public health-quarantine model is able, I contend, to deal with the concerns of victims, acknowledge the wrongs done them, and help aid in recovery. First, recall that the

Alliance for Safety and Justice Survey (2016) found that six in ten victims preferred that prosecutors consider victims' opinion on what would help them recover from the crime, even when victims do not want long prison sentences. Too often tough on crime advocates and overzealous prosecutors speak for victims without listening to what they really want or considering what would help them recover. As the survey indicates, many victims prefer that the criminal justice system focus more on preventing crime by investing in job creation, education, and mental health services, as well as rehabilitating criminals rather than punishing them. Since the public health approach to criminal behavior similarly advocates for these reforms, it has the virtue of being sensitive to the concerns of victims. Many victims of violent crime want above all else to know that meaningful efforts are being made to guarantee that others do not suffer in the same way they have. Retributive punishment is unable to provide this, and in many cases simply obfuscates the need to do so. The public health-quarantine model, on the other hand, is perfectly designed to address the forward-looking concerns of victims and it is able to do so a manner that is acutely sensitive to the harms done them.

Contrary to what some critics have argued, free will skepticism is consistent with acknowledging the moral wrongs done to victims. As Pereboom and I have argued:

Accepting free will skepticism requires rejecting our ordinary view of ourselves as blameworthy or praiseworthy in the basic desert sense. A critic might first object that if we gave up this belief, we could no longer count actions as morally bad or good. In response, even if we came to hold that a serial killer was not blameworthy due to a degenerative brain disease, we could still justifiably agree that his actions are morally bad. Still, secondly, the critic might ask, if determinism precluded basic desert blameworthiness, would it not also undercut judgments of moral obligation? If "ought" implies "can," and if because determinism is true an agent could not have avoided acting badly, it would be false that she ought to have acted otherwise. Furthermore, if an action is wrong for an agent just in case she is morally obligated not to perform it, determinism would also undermine judgements of moral wrongness (Haji 1998). In response, we contend that even if the skeptic were to accept all of this (and she might resist at various points; cf. Pereboom 2014: ch.6; Waller 2011), axiological judgments of moral goodness and badness would not be affected (Haji 1998; Pereboom 2001). So, in general, free will skepticism can accommodate judgments of moral goodness and badness, which are arguably sufficient for moral practice. (Pereboom and Caruso 2018: 200)

There is nothing preventing free will skeptics, then, from acknowledging the moral wrongness of criminal acts. There is also nothing preventing them from acknowledging the harm done to victims by these morally bad acts. Given that free will skeptics can retain axiological judgments of moral goodness and badness, the public health-quarantine model can recommend that one way to help aid victims in recovery is to have the wrong done them acknowledged and a commitment made to rehabilitate the offender and protect others from similar crimes.

This brings me to my final point. On the forward-looking account of moral responsibility developed by Pereboom (2013, 2014), non-desert-based blame and the acknowledgement of wrong can be used for the purposes of protection, moral formation, and reconciliation. This forward-looking approach to moral responsibility can be used to aid victims in their recovery and

perhaps even achieve some form of reconciliation. *Restorative justice* models, for example, have been employed around the country over the last few decades with great success (see, e.g., Camp et al. 2013; Walgrave 2002). Restorative justice is an approach that emphasizes repairing the harm caused by criminal behavior by bringing together members of the community, victims, and offenders. As the Centre for Justice and Reconciliation describe it:

Restorative justice views crime as more than breaking the law—it also causes harm to people, relationships, and the community. So a just response must address those harms as well as the wrongdoing. If the parties are willing, the best way to do this is to help them meet to discuss those harms and how to bring about resolution. Other approaches are available if they are unable or unwilling to meet. Sometimes those meetings lead to transformational changes in their lives.⁷

The restorative approach maintains that the best way to repair the harms caused by criminal behavior is to bring together all stakeholders for the purpose of making amends and reintegration. It focuses on repairing the harm caused by crime and reducing future harm through crime prevention.

Now it is true that most restorative justice methods require offenders to take responsibility for their actions and for the harm they have caused, but such responsibility *need not* be conceived in terms of basic desert. Most current restorative justice models probably do assume backward-looking blame and basic desert moral responsibility (e.g., Sommers 2016), but these are not essential components of the restorative approach. The same ends, I contend, can be achieved on a model that does not appeal to basic desert moral responsibility. A conversational model of forward-looking moral responsibility like that proposed by Pereboom (2013, 2014) could, for example, serve as a basis for an exchange between victim and offender in a way that does not invoke backward-looking blame or basic desert. Such an exchange could aid both in the rehabilitation of offenders and in the recovery of victims. To use slightly different lingo, we can say that a restorative justice model consistent with free will skepticism could appeal to *answerability* and *attributability* conceptions of moral responsibility rather than *accountability*.

5. Conclusion

In this chapter I have argued that the public health-quarantine model not only justifies the incapacitation of dangerous criminals, it also demands that we identify and take action on the social determinants of criminal behavior—such as poverty, socioeconomic status, abuse and violence in the home, housing, mental health, access to healthcare, education, environmental health, and nutrition. I argued that the right to self-protection and prevention of harm to others justifies incapacitating the criminally dangerous with the minimum harm required for adequate protection. But I also argued that a more comprehensive approach to criminal justice, one which views public safety as akin to public health, demands that we reject retributivism and purely punitive approaches to criminal justice and shift the focus to prevention, rehabilitation, and reintegration. The public health-quarantine model prioritizes prevention and social justice and maintains that the goal of the criminal justice system should be the rehabilitation and

⁷ <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-1-what-is-restorative-justice/>

reintegration of offenders back into society. Along the way, I also responded to several concerns about proportionality, human dignity, victims' rights, and the incapacitation of innocent people. I argued that each of these concerns can be met and that the public health-quarantine model is consistent with free will skepticism, morally justifiable, and sufficient for good social policy. If what I've argued is correct, the public health-quarantine model offers free will skeptics a way forward and a suitable conception of justice without retribution.

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