

Summer 2006

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Recommended Citation

Alice Ristroph, Desert, Democracy, and Sentencing Reform, 96 J. Crim. L. & Criminology 1293 (2005-2006)

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DESERT, DEMOCRACY, AND SENTENCING REFORM

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Exactly how much punishment an offender deserves is something of a metaphysical mystery, or so it has appeared to be in the past. A new discourse of desert seeks to close the gap between philosophical theories and everyday intuitions of deserved punishment, using the former to guide and the latter to legitimize sentencing policies that embrace “desert as a limiting principle.” This Article examines the operation of desert and finds that in practice, desert has proven more illimitable than limiting. Conceptions of desert are first, elastic: they easily stretch to accommodate and approve increasingly severe sentences. Desert judgments are also opaque: they appear to be influenced in some cases by racial bias or other extralegal considerations, but such bias is cloaked by the moral authority of desert claims. A better strategy for sentencing reform would be to scrutinize desert claims in the criminal law realm in the same way that post-Rawlsian discussions of distributive justice have scrutinized claims of deserved wealth. We will not and need not eliminate the rhetoric of desert, but we can and should treat it with greater skepticism.

I. INTRODUCTION

Exactly how much punishment an offender deserves is something of a metaphysical mystery, or so it has appeared to be in the past. Recently, a number of scholars and the American Law Institute (ALI) have advocated renewed attention to desert as a limiting principle for criminal sentencing.¹

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¹ The phrase is traced to Norval Morris, *Desert as a Limiting Principle*, in *PRINCIPLED SENTENCING* 201, 201-06 (Andrew von Hirsch & Andrew Ashworth eds., 1992). For recent

By insisting that criminal punishments be no more severe than what offenders deserve, scholars and practitioners hope to reverse the thirty-year trend of increasingly severe sentences. The new discourse of desert comes at a time when legal scholarship and law reform are increasingly attentive to empirical research and, perhaps, increasingly impatient with metaphysical mysteries. The arguments for desert as a limiting principle often point to empirical findings in social psychology or public opinion research that individual judgments about relative desert (who should be punished more severely: a car thief or a murderer?) are fairly consistent, even if judgments about absolute desert (does a car thief deserve one year in prison or ten?) fluctuate more widely. Moreover, proponents argue, desert is mysterious only if we demand precision. If instead we rely on the concept of desert to delineate a range of permissible punishments, we can then consult other sentencing purposes—such as deterrence or incapacitation—to determine the precise penalty.

Of course, the general claim that sentences should give offenders their just deserts—nothing more, nothing less—is hardly novel. It has long been a key tenet of retributive theories of punishment. But many of the current advocates of desert as a limiting principle disavow a full-fledged and exclusive commitment to retributive theory. The state may pursue many non-retributive goals in its sentencing policy; desert as a limiting principle simply prescribes upper (and perhaps lower) limits to the range of punishments that may be imposed in pursuit of these non-retributive goals.

The social science research on desert judgments appears to give desert some empirical basis, but this is not its only attraction. The reported consistency of judgments of relative desert helps establish the democratic legitimacy of sentencing policies based on desert. Given these findings, a sentencing commission or other body of experts could establish a scale that

endorsements of desert as a limiting principle, see MODEL PENAL CODE: SENTENCING (Discussion Draft 2006); THE CONSTITUTION PROJECT, PRINCIPLES FOR THE DESIGN AND REFORM OF SENTENCING SYSTEMS: A BACKGROUND REPORT vii (2006), available at http://www.constitutionproject.org/pdf/Sentencing_Principles_Background_Report.pdf; Richard Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571 (2005) [hereinafter Frase, "Proportionality" Relative to What?]; Richard Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 76-79 (2005) [hereinafter Frase, *Punishment Purposes*]; Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005). At this time, Professor Paul Robinson may be the legal academy's most ardent and prolific advocate for a reinvigoration of desert as the core focus of criminal sentencing, but he has expressed doubt about the distinction between desert as a determinative principle and desert as a limiting principle. See, e.g., Paul H. Robinson, *The A.L.I.'s Proposed Distributive Principle of "Limiting Retributivism": Does It Mean Anything in Practice Other than Pure Desert?*, 7 BUFF. CRIM. L. REV. 3 (2003).

ranks offenses in accordance with democratic judgments about their relative severity. Some further factor, such as available corrections resources, will be necessary to anchor the ends of the scale, but popular conceptions of desert can at least guide the internal ranking of offenses.

There is something at least superficially contradictory about invoking allegedly democratic conceptions of desert to challenge sentencing practices established by democratic legislatures. Given that empirical research shows consensus only on relative assessments of offense seriousness, not on non-relative judgments of desert, it seems particularly amiss to invoke that research to challenge the endpoints of the scale rather than its internal order. But perhaps current calls for attention to desert should be viewed simply as efforts to honor democratic judgments, even as we encourage more consistency, more fidelity to our professed political commitments, and more care in negotiating among those various commitments.

These efforts are surely worthwhile. Nevertheless, desert's current favor among academics and policymakers seems overly optimistic, especially given the ways in which conceptions of deserved punishment have functioned in political and legal discourse. The rush to codify desert as a limiting principle has not yet faced much skepticism or scrutiny.² In a skeptical spirit, this Article examines the operation of desert and finds that in legal and political practice, desert has proven more illimitable than limiting. Democratic conceptions of desert are first, *elastic*: desert is hard to quantify and easy to stretch. In practice, in the face of ever-increasing criminal sentences, many decision-makers and spectators of the criminal justice system have found it easy to conclude that offenders deserve just as much punishment as they get. Many of the sentencing policies alleged by academics to violate "desert as a limiting principle" were (and continue to be) popularly justified in the language of desert. Long prison sentences for repeat offenders, harsher punishments for juveniles, and more limited reprieves for allegedly mentally ill or mentally retarded offenders have all been criticized by some as undeserved, *and* defended by many more as the offenders' just deserts. Like the notion of harm, which was also once

² Three recent articles raise concerns about the proposed codification of retributivism in the Model Penal Code (MPC) sentencing provisions. See Michael H. Marcus, *Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1*, 30 AM. J. CRIM. L. 135, 140-49 (2003); Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17 (2003); James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85 (2003). Each of these pieces makes broad criticisms of retributivist theory in general. But defenders of the proposed MPC revisions have dismissed Rubin and Whitman as addressing a primitive, now-abandoned retributivism and leaving the ALI's more sophisticated retributivism unscathed. See, e.g., Robinson, *supra* note 1, at 13. This Article examines critically the specific claims of limiting retributivism.

invoked as a meaningful limitation on the penal power, the concept of desert has proven quite capacious.³

Moreover, desert is *opaque*: it is difficult to know or control which particular details of an offender or offense inform a decision-maker's assessment of desert. Racial bias, fear, disgust, and other arbitrary factors can shape desert assessments, but they do so under cover of a seemingly legitimate moral judgment. Evidence of such bias is particularly evident in capital sentencing, a process in which the sentencer is encouraged to assess directly the defendant's desert. Even beyond capital sentencing, there is reason to believe that the factors influencing desert assessments are not always ones that a liberal democratic state should endorse. Thus, in addition to the reasons to doubt desert's practical efficacy as a limitation on criminal sentences, there are also normative reasons to reconsider the appeal of, and the appeals to, desert.

To the extent that critics of retributive theory have previously expressed doubts about desert, they have focused on practical obstacles to the quantification of desert more often than the normative claim that if we know what people deserve, the state should seek to give it to them. The theorists' inattention to the general principle of punitive desert is particularly odd, for a great deal of contemporary political theory closely scrutinizes desert as a principle of distributive justice. John Rawls's influential *A Theory of Justice* famously rejected the notion that wealth should be distributed according to moral desert,⁴ and numerous theorists of distributive justice have debated the merits of Rawls's claim.⁵ But a fundamental distinction between distributive and retributive justice, declared by philosopher's fiat and rarely seriously questioned, has protected criminal desert from the critical scrutiny applied to desert as a principle of wealth distribution.⁶ These two opposing views of desert—skepticism or outright rejection of desert as a principle of distributive justice coupled with uncritical acceptance of desert in the criminal law—seems all the more remarkable given the close correlation between poverty and crime.

Or perhaps this is not so remarkable. As retributivists frequently emphasize, most poor people are not criminals even if most criminals are

³ See generally Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

⁴ JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

⁵ Cf. Samuel Scheffler, *Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics*, 21 PHIL. & PUB. AFF. 299, 301 (1992) (“[N]one of the most prominent contemporary versions of philosophical liberalism assigns a significant role to desert at the level of fundamental principle.”).

⁶ See *infra* Section IV for discussion of Rawls's cursory distinction between retributive and distributive justice.

poor. The link between poverty and crime is not absolute, so retributivists can argue that it does not implicate their basic premise that crime is a product of individual choice and a basis of moral desert. In fact, perhaps the concept of desert encourages us to ignore the relationship between poverty and crime altogether. The normative judgment that those who break the law are morally deserving of punishment renders irrelevant the more or less uncontroverted fact that the poor are much more likely to break the law. In an age in which empirical scholarship is increasingly prioritized, this effect of desert theory should not be minimized, for we should keep in mind the ways in which normative commitments make certain empirical information disappear from view.⁷

This Article seeks to evaluate critically the invocation of desert as a sentencing principle. It proceeds by exploring the interplay among the philosophy of desert, as articulated by legal theorists and philosophers; the psychology of desert judgments, as evidenced by social science research; and the political and legal operation of desert rhetoric, as evidenced by legal discourse and developments in sentencing policy. A study of the actual deployment and operation of the concept of desert suggests that, contrary to many theorists' hopes, democratic conceptions of desert are too malleable to serve as a meaningful limiting principle. There is more hope for desert as a limiting principle if we empower elites (such as sentencing commissions or academic criminal justice experts) to assess desert, but only if the elites are actually inclined to limit sentences and other political actors are willing to leave the elites' assessments undisturbed. And desert poses still other complications for sentencing policy: the opacity of desert claims may enable prejudice to take effect in sentencing practices even as the moralistic tenor of desert rhetoric shields sentencing practices from meaningful scrutiny.

Given the long history of debates among proponents of different sentencing purposes and punishment theories, a caveat is in order. I do not aim or expect to unsettle the core conviction of strong retributivists that wrongdoers deserve to be punished. For many, the commitment to retributive desert appears to be more a matter of intuitive and non-

⁷ Recent predictions that the increased focus on empirical scholarship will settle normative disputes seem to overemphasize the distinction between empirical and normative claims. Of course every normative theory is based on assumptions about the empirical world, but we should not expect "neutral" empirical research to show us which normative theories are right. Our underlying normative and non-falsifiable presuppositions (such as the intuition that people should get what they deserve) often determine which empirical claims will be viewed as relevant. For further discussion of these issues, see *infra* Section IV. For one recent optimistic endorsement of empirical scholarship, see John McGinnis, *Age of the Empirical*, 137 POL'Y REV. 46 (2006).

falsifiable moral conviction than of argument. I lack retributive intuitions, but I do not dispute their existence or force. But we should try to distinguish the matter of wrongdoers' metaphysical desert from the question whether and how the state should use desert as a political and legal basis for its sentencing practices. Especially to those who adopt desert only because it appears instrumentally valuable, I urge closer scrutiny of desert and attention to its pernicious effects. Even if desert is a permanent part of our moral discourse, it need not and should not be elevated to a central and independent sentencing principle.

II. THE PROMISE OF DESERT

In the middle of the twentieth century, the Supreme Court announced that "[r]etribution is no longer the dominant objective of the criminal law,"⁸ and some commentators went further and claimed that "retribution is obsolete."⁹ Today, a concept of deserved punishment closely related to retribution is endorsed by a number of leading scholars and practitioners, including the drafters of new sentencing provisions for the Model Penal Code. In this Section, I explain the current appeal of desert by noting three transformations in our discourse of retribution and desert. First, retribution had to be made safe for liberal democracy: this end was accomplished by ridding retribution of its vengeful overtones and recasting it in egalitarian terms. Second, retributive desert had to accommodate an enduring commitment to utilitarian aims: deontological critiques of utilitarianism and repeated warnings of innocent scapegoats simply failed to undermine the broadly held conviction that punishment should provide crime-control benefits such as deterrence or incapacitation. Third, and most recently, the metaphysical mysteries of desert had to be solved: the quantification of desert had to be made into an empirical (and therefore answerable) question.

⁸ *Williams v. New York*, 337 U.S. 241, 248 (1949).

⁹ Henry Weihofen, *Retribution Is Obsolete*, NAT'L PROBATION & PAROLE NEWS, Jan. 1960, at 1 (1960); see also Austin MacCormick, *The Prison's Role in Crime Prevention*, 41 J. CRIM. L. & CRIMINOLOGY 36, 40 (1951) ("Punishment as retribution belongs to a penal philosophy that is archaic and discredited by history. Our leading penologists, if prisons were to be operated as instruments of retributive punishment, would refuse to accept appointments to administer them."). Many scholars have chronicled the preference for rehabilitative rather than retributive approaches to punishment as a component of early twentieth-century progressive legal reform. See, e.g., JAMES D. CALDER, *THE ORIGINS AND DEVELOPMENT OF FEDERAL CRIME CONTROL POLICY: HERBERT HOOVER'S INITIATIVES* 59-75 (1993); MICHAEL SHERMAN & GORDON HAWKINS, *IMPRISONMENT IN AMERICA: CHOOSING THE FUTURE* 10-11, 124-26 (1981); Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 1-8 (2003).

Classic arguments against retributivism portray it as glorified vengeance, celebrating and codifying an essentially brutal and inhumane impulse to harm those who harm us. Against such critiques, contemporary punishment theorists have emphasized ways in which retributive punishment serves egalitarian values and respect for human dignity. In what may be the leading account of egalitarian retributivism, Herbert Morris has argued that all persons must bear an equal share of the burdens of the law.¹⁰ Wrongdoers should be understood as exempting themselves from the burdens of self-restraint imposed by the criminal law. Punishment must then be imposed to restore the equal distribution of the law's burdens.

[I]t is just to punish those who have violated the rules and caused the unfair distribution of benefits and burdens. A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage.¹¹

In this egalitarian model, retributive principles do not produce untrammelled, vengeful counterattacks, but instead limit punishment to the precise amount of suffering necessary to restore a just distribution of the burdens of the law.¹²

It is somewhat odd, and perhaps simply inaccurate, to conceive of criminal wrongdoers as gaining “unfair advantages” through their misconduct.¹³ Other modern retributivists have rejected Herbert Morris's argument on these grounds and have argued instead that the equality that punishment restores is really an equality of expressed dignities. In Jean Hampton's account, “inherent in a criminal's action is the message that the victim is not worth enough for him to treat her better.”¹⁴ Consequently, retributive punishment “uses the infliction of suffering to symbolize the

¹⁰ Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968), reprinted in *SENTENCING* 93-109 (Hyman Gross & Andrew von Hirsch eds., 1981).

¹¹ *Id.* at 95.

¹² Egalitarian retributivism thus views justice as “the proportional relations between inputs and outputs”—the inputs are crimes, the outputs are punishments. WOJCIECH SADURSKI, *GIVING DESERT ITS DUE: SOCIAL JUSTICE AND LEGAL THEORY* 221 (1985).

[C]riminal law reflects the hierarchy of protected values: the more precious the value, the bigger the benefit of non-self-restraint acquired by the criminal. The intuitively just principle that more serious crimes should be punished more heavily is not, therefore, violated by the proposition about punishment as a restoration of the balance of benefits and burdens.

Id. at 229.

¹³ “Do we really wish that we could murder, steal, rape, etc., and envy those criminals who perform these actions? . . . [A]re we really angry that they get to engage in these desirable activities and we don't?” Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS* 4 (Wesley Cragg ed., 1992).

¹⁴ *Id.* at 12.

subjugation of the subjugator, the domination of the one who dominated the victim. And the message carried in this subjugation is, ‘What you did to her, she can do to you. So you’re equal.’”¹⁵

Both versions of egalitarian retributivism recounted here emphasize respect for persons. Punishment must be imposed to respect the dignity of the victim as well as the dignity of the wrongdoer. This respect, on some accounts, is the distinction between retribution and revenge. “The vengeful hater does not respect but aims to diminish the worth of the offender . . . [T]he retributivist who accepts an egalitarian theory of worth has *no* interest in doing anything to *change* the value of either the wrongdoer or the victim.”¹⁶ Some egalitarian retributivists go so far as to claim that the wrongdoer’s dignity implies his “right to be punished.”¹⁷

These egalitarian arguments have won much support. Notably, they coincided with—and perhaps contributed to—a shift in terminology. Retributivists had long referred to offenders’ desert; indeed, retributivism is often described as the view that “punishment is justified because people deserve it.”¹⁸ But at some point in the mid-twentieth century scholars began using the terms *desert* and *justice* to the increasing exclusion of *retribution*.¹⁹ The emphasis on desert seems to have helped dissociate retribution from revenge, for it allows punishment theorists to draw on a concept that has a more neutral philosophical status. There is an expansive philosophical literature on the nature of desert and how to deserve things

¹⁵ *Id.* at 13.

¹⁶ Jean Hampton, *The Retributive Idea*, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 137 (1988).

¹⁷ Morris, *supra* note 10, at 93. But Herbert Morris’s alleged “right to be punished” is more accurately described as a right *not* to be “treated”: a criminal need not demand punishment, but if the only options are punishment and paternalistic, rehabilitative treatment, the criminal can demand to be punished and not treated. *See id.* at 100-01. Hegel does actually insist on a “right to be punished.” G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 123, § 97 (H.B. Nisbet trans., Cambridge University Press 1991) (1821). This right is based on Hegel’s peculiar metaphysics. Hegel argues that crime, or wrong, has a continuing presence (“a *positive* external existence”) even after the moment the wrong is committed. *Id.* Crime creates a metaphysical disruption that is as offensive to the criminal as it is to the state, and hence the criminal has a right to be punished. *Id.*

¹⁸ Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1981).

¹⁹ For example, Andrew von Hirsch has explicitly stated a preference for the term “desert” over “retribution.” ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 45-46 (1976). Paul Robinson also emphasizes “desert” and “justice” over retribution. *See, e.g.*, PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN’T GIVE PEOPLE WHAT THEY DESERVE 16-18 (2006) (arguing for a “justice”-based approach to the criminal law that does not depend on adherence to retributivism); PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995).

(especially things we want to deserve, like money, goods, or power).²⁰ For example, Joel Feinberg describes desert claims as having three elements: a person, a basis for deserving, and what the person deserves.²¹ Feinberg and others emphasize that desert is personal—characteristics, actions, or facts about a particular individual make him or her deserving.²² Further, by many accounts, desert seems to require agency, or the capacity to control one's own actions. Punishment theorists have borrowed this structure to explain punishment as a sort of reverse reward, an inverse of deserved wealth or assets. At the same time, the emphasis on desert as personal preserves the respect for individual rights present in classic retributive theory.

Thus, one transformation of desert theory was to make the notion of deserved punishment palatable to egalitarian liberals. A second transformation sought to reconcile desert with the utilitarian goals of the criminal justice system. The old retributivism had often insisted that utilitarian theories of punishment failed to respect individual rights and improperly treated individuals as means and not ends in themselves. The familiar example, of course, is the innocent scapegoat who is punished simply to provide general deterrence or to serve other broad social interests.²³ This argument did little to diminish the widespread support for crime control efforts among legal academics and in the general public. Perhaps the utilitarians argued convincingly that their theories did not in fact endorse punishment of the innocent, or perhaps the innocent scapegoat seemed too remote a possibility. In any event, sentencing theorists discovered (or rediscovered) that giving people what they deserve need not exclude the pursuit of other purposes of punishment.

One of the most widely followed reconciliations of desert with utilitarian aims also begins to address the problem of desert's seeming vagueness. The "limiting retributivism" model attributed to Norval Morris begins with the recognition that our intuitions about how much punishment

²⁰ Many of the general philosophical accounts of desert were responses to John Rawls's critique of desert as a principle of distributive justice. In Section IV, *infra*, I discuss the debate over desert as a principle of distributive justice and consider implications of that debate for desert as a principle of retributive justice.

²¹ See JOEL FEINBERG, *Justice and Personal Desert*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 61, 61 (1970).

²² "[T]o judge a person deserving is to respond to features of the person that we judge to be of value." David Schmidtz, *How to Deserve*, 30 *POL. THEORY* 774, 775 (2002) (citing GEORGE SHER, *DESERT* 195 (1987)).

²³ See, e.g., H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 *INQUIRY* 239, 255 (1965), *reprinted in* *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 119, 126-27 (Gertude Ezorsky ed., 1972) (imagining a sheriff framing an innocent black man in order to stop lynchings and satisfy the community's desire for justice).

a given offender deserves are often imprecise: we may be sure that one day in jail is too lenient and that fifty years in prison would be too severe, but whether the offender deserves ten years or fifteen we may be uncertain. Rather than bemoaning this uncertainty, limiting retributivists argue, we should simply refer to utilitarian goals to decide between ten and fifteen years. In Morris's view, desert or blameworthiness is neither a *defining* principle of punishment (one that specifies the "precisely appropriate" punishment) nor a *guiding* principle (a "general value" to be respected "unless other values . . . justify its rejection").²⁴ Instead, desert is a limiting principle: "a principle that, though it would rarely tell us the exact sanction to be imposed . . . would nevertheless give us the outer limits of leniency and severity which should not be exceeded."²⁵

On this account, desert permits the reasonable pursuit of utilitarian aims even as it forestalls the dangers of excessive utilitarianism. In fact, Morris advocated desert as a limiting principle in response to the perception that efforts to increase social utility by rehabilitating offenders were producing violations of individual rights. He worried that the popularity of rehabilitative sentences would lead to lengthy, indeterminate sentences that violated "fundamental views of human freedoms, rights, and dignities."²⁶ In Morris's view, "respect for the human condition requires drawing precise, justiciable restraints on powers assumed over other persons."²⁷ Morris argued that desert could provide such a "precise, justiciable" restraint. Today, limiting retributivism is very widely accepted and may be "the consensus model."²⁸

²⁴ Norval Morris, *Punishment, Desert and Rehabilitation*, in SENTENCING, *supra* note 10, at 257, 259.

²⁵ *Id.*; see also HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 66 (1968) ("I see an important limiting principle in the criminal law's traditional emphasis on blameworthiness But it is a *limiting* principle, not a justification for action.").

²⁶ NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 81 (1974). Morris had expressed a similar suspicion of non-retributive rationales for the expansion of punishment ten years earlier, arguing that "power over a criminal's life should not be taken in excess of that which would be taken were his reform not considered one of our purposes." NORVAL MORRIS & COLIN HOWARD, STUDIES IN CRIMINAL LAW 175 (1964) (emphasis omitted).

²⁷ MORRIS, *supra* note 26, at 81.

²⁸ Richard S. Frase, *Limiting Retributivism*, in THE FUTURE OF IMPRISONMENT 83, 84 (Michael Tonry ed., 2004). For endorsements of limiting retributivism, see sources cited *supra* note 1. Without using the phrase "limiting retributivism" or "desert as a limiting principle," Sharon Dolovich has advocated a similar role for desert in her Rawlsian account of punishment. See Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 321 (2004) ("[M]oral desert is . . . a necessary condition for legitimate punishment . . ."). But Dolovich also closely scrutinizes claims of deserved punishment, as I argue we should do more frequently. See *infra* Section IV.

Limiting retributivism finds a benefit in the imprecision of our judgments about the quantity of deserved punishment—the imprecision leaves flexibility for the pursuit of consequentialist goals. Still, for desert to limit these consequentialist pursuits at the extremes, it needs some specificity. Otherwise, what will stop the proponents of incapacitation from insisting that life prison terms for all offenders are both socially useful and deserved? Delineating specific limits to deserved punishments has proved one of the most challenging conceptual hurdles for desert theorists, but they have found some success through ranking offenses by seriousness. A basic approach to such a ranking can be found in the works of Andrew von Hirsch. Crime seriousness, von Hirsch has argued, “depends both on the harm done (or risked) by the act and on the degree of the actor’s culpability.”²⁹ With reference to these factors, we should assess the seriousness of crimes relative to each other to generate an ordinal ranking that tells us how each crime should be punished compared to others.³⁰ Assessing crime seriousness inevitably involves value judgments, but “[t]hose judgments can . . . be supported and guided through the giving of reasons and through debate.”³¹ To determine precise sentences, we merely determine the upper and lower limits of a penalty scale and place the ordinal rankings within that scale.³²

Ranking offenses by seriousness would seem to be an arbitrary solution to desert’s imprecision if such rankings were themselves deeply contested. In fact, many empirical studies have found a substantial degree of consensus about the *relative* severity of different offenses, even in the face of disagreement over “the absolute level of punishment” (the precise sentence that should be imposed for a given offense).³³ This empirical

²⁹ VON HIRSCH, *supra* note 19, at 69.

³⁰ ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 40-43 (1985).

³¹ *Id.* at 76.

³² *See id.* at 92-101. Available prison space and other resource considerations may influence the upper and lower limits of the penalty scale, but desert should serve as a limiting principle to keep the upper limit of the scale from climbing too high. *See id.* at 43-46, 96; *see also* J. KLEINIG, PUNISHMENT AND DESERT 117-24 (1973).

³³ *See, e.g.*, THORSTEN SELLIN & MARVIN E. WOLFGANG, THE MEASUREMENT OF DELINQUENCY 268 (1964) (describing results of survey in which subjects were asked to rank offenses by seriousness, and concluding “all the raters . . . tended to so assign the magnitude estimations [such] that the seriousness of the crimes is evaluated in a similar way . . . by all the groups.”); Joseph E. Jacoby & Francis T. Cullen, *The Structure of Punishment Norms: Applying the Rossi-Berk Model*, 89 J. CRIM. L. & CRIMINOLOGY 245 (1998); Peter H. Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224 (1974). *See generally* Francis T. Cullen, Bonnie S. Fisher & Brandon K. Applegate, *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 31

research has led to the third major transformation in desert discourse: we tend to focus on ordinal rather than cardinal desert (or relative rather than absolute desert), and we emphasize the empirical verification of ordinal, relative desert.³⁴

Given these transformations, the current appeal of desert as a sentencing principle is evident. Contemporary desert theories are based upon egalitarian claims rather than vengeful ones, and few persons wish to reject the pursuit of equality. Further, the contested language of retribution has been largely supplanted with references to desert and justice, and few persons would argue against “justice.” Still better, desert as a limiting principle seems to allow us to pursue both deontological and utilitarian aims, so we can have our cake and eat it too. Finally, ordinal desert rankings are firmly grounded in empirical measurements of democratic judgments, and again, there are few who would reject empirical facts or challenge democracy.

In a possible demonstration of the relevance of legal theory to practice (or simply a demonstration that sentencing theorists have finally found a way to endorse what the practitioners were going to do anyway), “hybrid” accounts of sentencing purposes that invoke desert as a limiting principle have been adopted by many American jurisdictions.³⁵ Furthermore, the egalitarian and democratic conception of desert seems poised to be codified in a revised Model Penal Code. Motivated in part by a desire to make the Code more relevant to actual sentencing law, the ALI has embarked on a project of revising the Code’s sentencing provisions.³⁶ These proposed

(2000).

³⁴ Paul Robinson, one of the most prolific contemporary advocates of desert-based sentencing, bases much of his work on empirical research in social psychology. See ROBINSON & CAHILL, *supra* note 19, at 14, 21-23; ROBINSON & DARLEY, *supra* note 19, at 1-11 (describing the importance and methodology of empirical research on community views of justice); Paul H. Robinson & John M. Darley, *Objectivist Versus Subjectivist Views of Criminality: A Study of the Role of Social Science in Criminal Law Theory*, 18 OXFORD J. LEG. STUD. 409 (1998) [hereinafter Robinson & Darley, *Objectivist*]; Paul H. Robinson & John M. Darley, *The Role of Deterrence in Criminal Law Rules: At its Worst when Doing its Best*, 91 GEO. L.J. 949 (2003) [hereinafter Robinson & Darley, *Role of Deterrence*]; Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997) [hereinafter Robinson & Darley, *Utility of Desert*]. Robinson has expressed skepticism about the weak version of retributivism that treats desert as merely a limiting principle, see Robinson, *supra* note 1, at 10-12, but he does invoke desert to criticize some sentences as excessive. See, e.g., ROBINSON & CAHILL, *supra* note 19, at 3-4, 31-32.

³⁵ See Frase, *Punishment Purposes*, *supra* note 1, at 76 (claiming that almost every United States jurisdiction has adopted some form of Norval Morris’s limiting retributivism); *id.* at 78-79 (providing specific examples).

³⁶ See, e.g., MODEL PENAL CODE: SENTENCING 3-5 (Report 2003). Although the Model Penal Code is not itself an enforceable criminal statute, many of its recommendations for the

revisions would adopt desert as an essential determinant of the upper and lower limits of criminal penalties.³⁷

According to a recent draft of proposed revisions, the sentencing articles of the original Code “were built on assumptions that have fallen into uncertainty or disfavor,” such as a commitment to rehabilitation as “the overarching purpose of criminal punishment.”³⁸ To remedy these weaknesses, the new sentencing provisions include a revised statement of sentencing purposes that directly embraces Norval Morris’s limiting retributivism.³⁹ The proposed revisions also endorse the ordinal ranking of offenses and the codification of community judgments about deserved punishment.⁴⁰ Beyond the ALI, other organizations have also embraced desert as a key component of sentencing reform. For example, the Constitution Project, a Washington, D.C.-based bipartisan nonprofit institution, established a sentencing initiative after the Supreme Court’s *Blakely v. Washington* decision raised questions about the constitutionality of sentencing guidelines.⁴¹ Like the ALI, the Constitution Project’s sentencing committee has endorsed limiting retributivism and adopted desert as a limiting principle that accommodates utilitarian aims: “Within the upper and lower bounds of a proportional sanction, crime control considerations such as incapacitation, deterrence, and rehabilitation should inform the sentencing decision.”⁴²

definitions of criminal offenses have been followed by individual states. As of 2003, forty states had adopted criminal codes based at least in part on the Model Penal Code. *See id.* at 15.

³⁷ *See id.* at 4, 35-36.

³⁸ MODEL PENAL CODE: SENTENCING 3 (Discussion Draft 2006).

³⁹ *See id.* at 4, 16-17. The Institute’s proposed revisions embrace not only limiting retributivism but at least two other hallmarks of Morris’s approach to sentencing: parsimony and “evidence-based treatment penology.” *See id.* at 7-8, 26. Parsimony is the principle that “[t]he least restrictive—least punitive—sanction necessary to achieve defined social purposes should be chosen.” MORRIS, *supra* note 26, at 60-61. The proposed revisions also echo Morris’s argument that we should base sentencing policy on more extensive empirical research about the consequences of rehabilitative sentencing options. *See, e.g.*, MODEL PENAL CODE: SENTENCING 33-34 (Discussion Draft 2006). Parsimony and the emphasis on gathering better empirical information are laudable goals, but they may be undermined by the endorsement of the non-falsifiable, non-measurable retributive principle of desert. *See infra* Section III.

⁴⁰ *See* MODEL PENAL CODE: SENTENCING 19 (Discussion Draft).

⁴¹ *See* THE CONSTITUTION PROJECT, *supra* note 1, at vii.

⁴² *Id.* Both the Constitution Project and the ALI, as well as many academic commentators, seem to assume that in order to have “proportionality” limitations on criminal sentences, one must necessarily adopt some form of retributivism. I have argued elsewhere that proportionality is not a necessarily retributive principle. *See* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005); *see also* Frase, “Proportionality” Relative to What?, *supra* note 1.

In short, support for desert is wide and hopes for it are high. Though Justice Thurgood Marshall wrote in 1972 that “no one has ever seriously advanced retribution as a legitimate goal of our society,”⁴³ this was probably not true then and it is certainly not true today.⁴⁴ Retribution—renamed as desert, softened to accommodate utilitarian concerns, and legitimized by empirical evidence of community preferences—is central to modern sentencing. The next Section explores the operation of desert in practice, both as a general sentencing principle and in its new role as a putative limiting principle.

III. DESERT IN OPERATION

As explained above, desert has come a long way in the academy, from wide condemnation to wide approval. In the thirty or forty years in which this occurred, the world beyond the academy saw both constancy and turmoil with respect to criminal sentencing. The constancy can be found in public conceptions of punishment purposes, which have consistently focused on “just deserts” in tandem with utilitarian goals.⁴⁵ Most people

⁴³ *Furman v. Georgia*, 408 U.S. 238, 363 (1972) (Marshall, J., concurring).

⁴⁴ Other opinions in *Furman* recognized or embraced popular support for retributive punishment. See, e.g., *Furman*, 408 U.S. at 308 (Stewart, J., concurring) (claiming that retributive punishment is psychologically necessary for social stability); see also Donald L. Beschle, *What's Guilt (or Deterrence) Got to Do with It?: The Death Penalty, Ritual, and Mimetic Violence*, 38 WM. & MARY L. REV. 487, 494 (1997) (noting that Justice Marshall was the only Justice in *Furman* to reject explicitly retribution as a legitimate goal).

⁴⁵ To the extent that empirical researchers have attempted to discover attitudes about the purposes of sentencing, they have found relatively unwavering support for both retribution and utilitarian crime control objectives. For an older but fairly comprehensive literature review, see Neil Vidmar & Dale T. Miller, *Socialpsychological Processes Underlying Attitudes Toward Legal Punishment*, 14 LAW & SOC'Y REV. 565 (1980). Vidmar and Miller observed that, at the time of their writing, there was relatively little empirical research that explored the complexities of public attitudes toward criminal sentences. *Id.* at 567. Notably, the sociological, psychological, and criminological studies that Vidmar and Miller reviewed emphasized “behavior control” and retribution as relatively equal motivations for criminal punishment, and those studies range from the early twentieth century to the late 1970s. *Id.* Several more recent studies report retribution, “just deserts,” or “just punishment” as the most frequently voiced explanation of criminal sentences. See, e.g., AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY 69 tbl.5.1 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996) (reporting that nationwide, 53% of Americans identified retribution as the most important purpose for sentencing, compared to 13% for deterrence, 13% for incapacitation, and 21% for rehabilitation); John Doble, *Attitudes to Punishment in the U.S.—Punitive and Liberal Options*, in CHANGING ATTITUDES: PUBLIC OPINION, CRIME AND JUSTICE 148, 150 (Julian V. Roberts & Mike Hough eds., 2002). “Although norms of just deserts may place limits on how little punishment people will find acceptable, research indicates that the public also supports utilitarian goals for imprisonment and for punishment in general.” Cullen, Fisher & Applegate, *supra* note 33, at 34.

seem to want a criminal justice system that gives offenders what they deserve, protects the public from crime through deterrence or incapacitation, and, if possible, reforms offenders. We want criminal sentences to do it all, and we have wanted that for a long time.

The turmoil is found in actual sentencing practices. Sentencing has been one of the most dynamic fields in American criminal law for some thirty years, and the changes have entailed, for the most part, expansions in the numbers of persons sentenced and in the length of sentences. As of June 2005, the United States had over 2.1 million inmates in its prisons and jails and the highest per capita rate of incarceration in the world—738 inmates per 100,000 residents.⁴⁶ The U.S. prison population has continued to rise even as crime rates have dropped.⁴⁷ The size of the inmate population is largely a result of much longer prison sentences than those imposed in other Western democracies, and these longer sentences can be traced to changes in sentencing policy (as opposed to increases in criminal behavior).⁴⁸ Specifically, longer prison sentences can be traced to mandatory sentences, increased penalties for drug crimes, the abolition of parole in many jurisdictions, and an increasing tendency to impose prison terms rather than non-carceral sentences.

The constancy of public understandings of punishment purposes in the face of radical changes in punishment practices could simply demonstrate that public views and actual policy have little to do with one another. Indeed, the relationship between public attitudes and sentencing policy is not simple cause and effect, as scholars seeking to explain the increases in sentence severity have found.⁴⁹ Still, public support for penal policies is

⁴⁶ PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISON AND JAIL INMATES AT MIDYEAR 2005 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim05.pdf>. In comparison, three-fifths of the world's countries incarcerate fewer than 150 inmates per 100,000 residents, and most western European countries incarcerate fewer than 100 persons per 100,000 residents. ROY WALMSLEY, U.K. HOME OFFICE, WORLD PRISON POPULATION LIST 1 (2003), available at <http://www.homeoffice.gov.uk/rds/pdfs2/r234.pdf>.

⁴⁷ THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: GROWTH IN POPULATION CONTINUES 1 (2005), available at www.sentencingproject.org/pdfs/1044.pdf.

⁴⁸ See, e.g., David Garland, *Introduction: The Meaning of Mass Imprisonment*, 3 PUNISHMENT & SOC'Y: INT'L J. PENOLOGY 5, 6 (2001); Franklin E. Zimring, *Imprisonment Rates and the New Politics of Criminal Punishment*, 3 PUNISHMENT & SOC'Y: INT'L J. PENOLOGY 161, 162 (2001).

⁴⁹ "[T]he pressure of public opinion by itself is not sufficient to explain the rise of punitive policies." JULIAN V. ROBERTS ET AL., PENAL POPULISM AND PUBLIC OPINION: LESSONS FROM FIVE COUNTRIES 61 (2003). Furthermore, "public punitiveness does not seem to fluctuate . . . as crime rates have risen, steadied, and fallen over the past two decades." Cullen, Fisher & Applegate, *supra* note 33, at 5. The public is underinformed and "receptive to direction" on punishment policy, and some scholars report that political leaders have

hardly irrelevant to those policies. Instead, the remarkable consistency with which people speak of punishments as deserved, even as those punishments expand in scope and severity, suggests that the concept of desert is quite elastic.

A. THE ELASTICITY OF DESERT

By the claim that desert is elastic, I mean that beliefs about the scope of morally appropriate punishments adjust to accommodate changes in sentencing policy, even when the policy changes are driven by non-retributive concerns.⁵⁰ As philosopher Julian Lamont has put it, desert is a highly indeterminate concept that “requires external values and goals to make it determinate.”⁵¹ If those external values change and produce revised sentencing policies—if we decide to emphasize incapacitation over rehabilitation, for example, and impose longer prison sentences and fewer early release options—the assessment of how much punishment is deserved is likely to change as well. To say that desert is indeterminate and elastic is not to deny that many people speak in terms of desert, but only to note that desert conceptions are strongly influenced by non-desert considerations.⁵²

My claim that desert is elastic refers more to popular conceptions of desert and less to high philosophy (Lamont notwithstanding). Although the evolution of punishment theory in the twentieth century may have closed some of the gaps between the philosophy of desert and the psychology of

pursued more severe sentences for independent reasons and then cited public opinion as a putative justification. ROBERTS ET AL., *supra*, at 61.

⁵⁰ To economists, the elasticity of demand is the degree to which demand for a product responds to a change in the product's price. If a small increase in price produces a significant decrease in demand, demand is said to be elastic. If a small increase in price produces relatively little change in demand, demand is said to be inelastic. I use the phrase “the elasticity of desert” primarily to establish that conceptions of desert do respond to social and political developments.

⁵¹ Julian Lamont, *The Concept of Desert in Distributive Justice*, 44 PHIL. Q. 45, 45 (1994).

⁵² As Lamont elaborates:

When people make desert-claims they are not simply telling us what desert itself requires. They unwittingly introduce external values, and make their desert-judgments in light of those values. The reason why so many writers have been able to affirm so confidently such a diverse and conflicting set of desert-claims in debates over distributive justice is not because the true conceptual and moral core of desert is so complex and difficult to discern. It is because the true conceptual and moral core of desert allows the introduction of external values and goals. It is the diversity and conflicting nature of these values which explains the diversity and conflicting nature of desert-claims. This is why differences of opinion over what should constitute the desert-basis are not going to be solved by examination of desert itself. The differences do not lie at that level, but rather at the level of values.

Id. at 49.

desert, the two remain distinct and even inconsistent in several respects. Philosophically, one could distinguish between the claim that a wrongdoer deserves punishment and the claim that the wrongdoer deserves *a specific* punishment. But as a matter of practical psychology, once someone is committed to the first claim, it is relatively easy to secure his approval of whatever punishment current policies impose. Thus the inherently “mushy” concept of desert preserves the popular legitimacy of penal practices, even as those practices change. J.L. Mackie noted:

[I]f we did not feel that there was . . . a positive retributivist reason for imposing a penalty, we should not feel that even sound arguments in terms of deterrence or reformation or any similar future benefit would make it morally right to inflict suffering or deprivation on the criminal.⁵³

At the same time, “what is ‘deserved’ rises with the tide of public resentment and anxiety”⁵⁴ and with our assessment of a range of other non-retributive considerations.

Recall that Joel Feinberg describes desert claims as having three elements: a person, a basis for deserving, and what the person deserves.⁵⁵ I deserve the trophy because I won the spelling bee; you deserve to lose your seat because you arrived late. With respect to criminal punishment, the deserving person is obviously the convicted defendant. But the relationship between the “desert basis” (presumably the criminal act, although Section III.C will show that other, extralegal factors may operate as bases for desert in some cases) and the penalty deserved is not fixed over time. In early America, horse thieves (and practically all felons) were adjudged deserving of death; today, few would assess death as the deserved punishment for any theft. And radical changes in desert judgments need not take two hundred years. For example, perceptions of the deserved penalty (not simply the optimal deterrent or necessary incapacitation, but the *deserved* penalty) for smuggling dangerous items onto airplanes or violating airport security regulations probably changed dramatically after September 11, 2001. Less traumatically, a little education or re-education can change desert judgments: first-year criminal law students may have one view of the deserved punishment for attempted crimes on the first day of class, and a very different view seven weeks later.⁵⁶

⁵³ J.L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3, 4 (1982).

⁵⁴ Sanford Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 981 (1999).

⁵⁵ See FEINBERG, *supra* note 21, at 61.

⁵⁶ Christopher Slobogin reports an unscientific study of his own students; perhaps other professors can replicate his results. See Christopher Slobogin, *Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law*, 87 J. CRIM. L. & CRIMINOLOGY 315, 324

Notably, empirical research that purports to demonstrate the stability of our desert judgments relies on one-shot cross-sectional studies rather than longitudinal studies. In a cross-sectional study, researchers identify some subset of the population (usually, volunteers or random households reached by telephone) and then take a one-time measurement of those subjects' desert assessments.⁵⁷ To demonstrate empirically the elasticity of desert, researchers would need to conduct a longitudinal study: they would need to identify individual subjects and then track their desert assessments over time. I am not aware of any such studies that focus on deserved punishment.⁵⁸ But the available psychological and public opinion research does seem to support the claim that desert conceptions are elastic in the face of changing utilitarian considerations. One review essay describes public punitiveness as "mushy," suggesting that people support retribution or "just deserts" in the abstract, but modify their assessments of appropriate penalties to accommodate non-retributive goals.⁵⁹ Individuals aware of only the basic facts of a crime tend to view a harsh, retributive punishment as appropriate, but those who are informed of more details about a particular crime will often revise their initial assessment and impose a different (and often less severe) sanction.⁶⁰ This research suggests that while desert justifies punishment in the abstract, other considerations might dictate the exact appropriate penalty in a particular case.

Of course, desert is not always elastic for particular individuals. Even aside from academic retributivists for whom desert is clearly inelastic, there are doubtless some persons who develop notions of appropriate

(1996) (reviewing ROBINSON & DARLEY, *supra* note 19) (reporting that "the vast majority" of his criminal law students said on the first day of class that attempts should be punished less severely than completed crimes, and that seven weeks later, "roughly 75% of the class now believed that the penalty for attempt should be identical to the penalty for the completed crime").

⁵⁷ All the major studies of punishment norms and offense seriousness assessments are cross-sectional studies. *See supra* note 33.

⁵⁸ Psychological research does suggest that children's perceptions of "badness" change over time, but this is an expected feature of child development and not proof of the elasticity of desert. *See, e.g.,* Marie S. Tisak & J.H. Block, *Children's Evolving Conceptions of Badness: A Longitudinal Study*, 1 EARLY EDUC. & DEV. 300 (1990).

⁵⁹ *See* Cullen, Fisher & Applegate, *supra* note 33, at 8, 34, 48; *see also* Franklin Zimring, *Principles of Criminal Sentencing, Plain and Fancy*, 82 NW. U. L. REV. 73, 77 (1987) (describing desert as "mushy").

⁶⁰ Anthony N. Doob & Julian V. Roberts, *Social Psychology, Social Attitudes, and Attitudes Toward Sentencing*, 16 CAN. J. BEHAV. SCI. 269, 275 (1984); *see also* Brandon K. Applegate et al., *Assessing Public Support for Three-Strikes-and-You're-Out Laws: Global Versus Specific Attitudes*, 42 CRIME & DELINQ. 517, 518 (1996) (noting that public responses to questions about crime policy depend on whether questions tap "global" or "specific" attitudes).

punishments and hold fast to these notions even as social conditions and sentencing policies change. Most obviously, judges and others in the legal profession develop strong views about which punishments are appropriate to particular crimes, and legislative changes in sentencing policy are unlikely to alter those views.⁶¹

But desert appears to be elastic for a sufficiently large number of individuals that aggregate conceptions of desert are also relatively elastic. In other words, wide variations in the severity of average sentences over time do not seem to disturb majoritarian judgments that criminals are punished no more than they deserve.⁶² Not only is desert subject to fluctuation, but the fluctuations are often closely linked to changes in institutional expectations.⁶³ So, for example, a legislature can calibrate criminal sentences based on a range of considerations, many of them utilitarian. Once those sentences are codified, popular notions of desert will

⁶¹ One may find some evidence of the inelasticity of judicial conceptions of desert by studying judicial sentencing before the enactment of the Federal Sentencing Guidelines, during the operation of those Guidelines as mandatory rules, and after the Guidelines were rendered advisory. Anecdotal evidence initially suggested that federal judges' notions of deserved punishment were not altered by the Guidelines, and consequently the Guidelines were decried as overly harsh and in some cases, artfully avoided. See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1719-22, 1725-27 (1992). But over the twenty years that the Guidelines were mandatory, federal judges learned to comply with them. Since the Guidelines were rendered advisory in *United States v. Booker*, 543 U.S. 220 (2005), judicial sentencing has continued to follow the Guidelines fairly closely, which may suggest that at least in the short term, judicial conceptions of desert are still inelastic. See U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING vi (2006), available at www.ussc.gov/booker_report/Booker_Report.pdf (noting that as of March 2006, "[t]he majority of federal cases continue to be sentenced in conformance with the sentencing guidelines").

⁶² There may, however, be a wide perception that criminals do not get as much punishment as they deserve. Since the 1970s, at least 65% and usually more than 80% of the American populace has said that criminals are not sentenced harshly enough. Cullen, Fisher & Applegate, *supra* note 33, at 27 fig.2; see also Paul Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1024 (2004) (discussing public concerns about lenient sentencing). But see Nora V. Demleitner, *Is There a Future for Leniency in the U.S. Criminal Justice System?*, 103 MICH. L. REV. 1231, 1254-55 (2005) (reviewing JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL JUSTICE AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003)) (discussing the "distortions of law and order politics" and notion that "detailed public opinion polls indicate that the public is less punitive than politicians appear to assume").

⁶³ Cf. PETER ROSSI & RICHARD BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED 160-61 (1991) (noting that individuals with prior knowledge of the legal system may be more likely to support the sentences mandated by the federal guidelines); UNITED NATIONS GLOBAL REPORT ON CRIME AND JUSTICE (Graeme Newman ed., 1999) ("Public attitudes about punishment generally conform to the actual sentencing options available.").

often adjust to match the legally mandated sentences. Philosophers distinguish between institutional and preinstitutional desert, and this distinction is useful to some degree.⁶⁴ Conceptions of moral or preinstitutional desert cannot be changed as quickly as institutional policy, so an abrupt policy change may be protested as inconsistent with just deserts. But over time, institutional policies certainly affect even “preinstitutional” (extra-institutional is probably a better term) conceptions of desert.

There are limits to desert’s elasticity, and it certainly appears to be easier to stretch desert than to shrink it. As described above, criminal sentences in the United States have been increasing in severity for some time now, and elected leaders have taken relatively few steps to scale back the growth.⁶⁵ Many scholars have noted that it is much more politically palatable to expand the penal power than it is to limit that power.⁶⁶ There is good reason to believe, then, that the elasticity of desert is not symmetrical. When utilitarian concerns prompt increases in criminal penalties, perceptions of desert seem to catch up quite quickly. But when empirical evidence suggests that penalties are not serving their utilitarian goals, we are nonetheless slow to abandon the harsh sentencing policies.⁶⁷ Put

⁶⁴ Speaking of desert’s role in social welfare policy, Samuel Scheffler describes “reactive attitudes” about desert as partially “plastic” and “flexible.” Samuel Scheffler, *Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics*, 21 PHIL. & PUB. AFF. 299, 314-15 (1992). Scheffler suggests that institutions can shape desert assessments to some degree, but “[t]o the extent that those attitudes are less than fully flexible, however, any purely institutional conception of desert runs the risk of conflicting with them, and hence of presenting itself as incompatible with a web of fundamental interpersonal responses.” *Id.* at 314. A central component of John Rawls’s *Theory of Justice* is a distinction between moral desert on one hand and legitimate expectations derived from institutional arrangements on the other. RAWLS, *supra* note 4, at 102-03, 310-15. Of course, Rawls recognized that these philosophically distinguishable concepts were often conflated. For a more detailed discussion of Rawls on desert, see *infra* Section IV.

⁶⁵ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (exploring the reasons that criminal law has become a “one-way ratchet” of ever-increasing severity).

⁶⁶ See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719 (2005) (“As a rule, lawmakers have a strong incentive to add new offenses and enhanced penalties . . . but face no countervailing political pressure to scale back the criminal justice system.”); Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 881 (2005) (“Congress and federal prosecutors have irresistibly strong political and institutional incentives to continue expanding the federal criminal code”); Stuntz, *supra* note 65, at 509-10, 529-34.

⁶⁷ For example, lengthy prison sentences are often defended with the claim that they incapacitate persons who would otherwise be on the street committing crime. In fact, empirical research suggests that “[l]ong sentences have little incapacitation effect on crime reduction because prisoners remain in jail at ages when they would have stopped offending.”

slightly differently, we seem to be much more concerned about the risks of under-punishing than we are about the risks of over-punishing. I suspect this asymmetric risk-aversion is, in part, a consequence of the elasticity of desert: as long as the offender did *something* wrong, it is easy to conclude that he deserves whatever punishment he gets.⁶⁸ Because desert is asymmetrically elastic, it may shield penal practices from rigorous empirical scrutiny.⁶⁹

B. THREE SETS OF DESERVING OFFENDERS

Three concrete examples illustrate the elasticity of desert assessments over time. The sentences imposed on repeat offenders or “career criminals,” offenders with diminished mental ability, and juvenile offenders have increased over the past twenty-five to thirty years. In each of these contexts, proponents of desert as a limiting principle have attributed the sentence increases to the misguided pursuit of other sentencing purposes—usually, incapacitation. In each context, sentencing reformers have urged renewed attention to desert in order to scale back the severe sentences. Each of these areas has also produced at least one noteworthy recent Supreme Court decision, and in the history and aftermath of each decision, one can see clear arguments about the scope of deserved punishment. While critics depict the sentences as abandonments of desert, the

Joanna M. Shepherd, *Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth About Truth-in-Sentencing Laws*, 45 J.L. & ECON. 509, 510 (2002) (citing Carl Schmertmann, Adansi Amankwaa, & Robert Long, *Three Strikes and You're Out: Demographic Analysis of Mandatory Prison Sentencing*, 35 DEMOGRAPHY 445, 459 (1998)).

⁶⁸ The politics of wrongful convictions suggest that most people are reluctant to punish a defendant who really has broken no law at all, but people are willing to let a defendant who did something wrong suffer whatever punishment is meted out to him. A claim of “actual innocence” is much more likely to win public support for the prisoner than a claim of “legal innocence” or a claim that the defendant is guilty only of a lesser included offense. See Daniel Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097, 1103-04 (2003) (“[B]y restricting our services to claims of actual innocence rather than the broader universe of wrongful convictions, we aimed to deploy our resources to what we perceived to be the most deserving cases and, not incidentally, make ourselves more attractive in grant proposals to prospective benefactors.”). As Medwed suggests, defendants who are wrongfully convicted (by procedural flaws, for example) but not “actually innocent” are viewed less sympathetically. See also Linda J. Skitka & David A. Houston, *When Due Process Is of No Consequence: Moral Mandates and Presumed Defendant Guilt or Innocence*, 14 SOC. JUST. RES. 305, 323 (2002) (describing results of empirical psychological studies that suggest that people tend to dismiss due process values when they believe they know the defendant to be guilty or innocent).

⁶⁹ Other characteristics of desert claims, specifically, their moral nature, also function to shield penal practices from rigorous scrutiny. See *infra* Section III.D.

proponents of the harsher sentences defend them as the offenders' just deserts.

I. Recidivists

About half the states have "three strikes" laws that impose a specified, and often severe, mandatory minimum penalty upon a third criminal conviction.⁷⁰ Although some jurisdictions have used penalty enhancements for repeat offenders for more than a century, the prevalence of these enhancements and their relative severity have increased considerably in the past few decades.⁷¹ Most observers of the laws agree on two things: first, there is very strong popular support for three strikes and other habitual offender laws; and second, the laws emphasize incapacitation as a response to this class of offenders.⁷² Support for habitual offender laws appears to be based on a judgment that the only way to stop some career criminals from doing more damage to society is to lock them up and throw away the key.

More contested is the question whether the incapacitative penalties are also deserved. A number of scholarly commentators have decried the laws as impositions of undeserved punishments.⁷³ Those who advocate desert as a limitation on sentence severity frequently refer to habitual offender laws as examples of the kind of misguided sentencing policy that would be remedied by renewed fidelity to desert.⁷⁴ But in public discourse, the laws

⁷⁰ See Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 463 app. A (1997).

⁷¹ See JOHN CLARK ET AL., "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION (1997); V.F. Nourse, *Rethinking Crime Legislation: History and Harshness*, 39 TULSA L. REV. 925, 928-33 (2004) (comparing the politics surrounding early habitual offender laws with the politics of recent three-strikes laws); Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 726-27 (2006).

⁷² See generally FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* (1995) (offering historical and theoretical analyses of the increased focus on incapacitation in American penal policy).

⁷³ See, e.g., FRANKLIN E. ZIMRING ET AL., *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA* 120-21 (2001); Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1071 (2004) ("Most recidivist statutes are not retributivist."); Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1029 n.35 (2004) (suggesting that three strikes laws are "premised on circumventing specific retributivist measurements").

⁷⁴ See, e.g., ROBINSON & CAHILL, *supra* note 19, at 3-4; Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L.J. 1059, 1097 (1992). But see Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1212 (2005) (discussing incapacitative punishments for repeat offenders as an unresolved problem for limiting retributivism, and noting that "[e]ven among retributivists

are frequently praised precisely for their retributive, or desert-based, qualities. To be sure, the public discourse lacks the conceptual nuances of academic philosophical theory. Nevertheless, if we are to embrace desert because it is in accord with community conceptions of justice, then we should pay attention to what ordinary members of American communities actually think. From prosecutors to lay citizens, many individuals embrace the habitual offender laws as “just deserts,” plain and simple.⁷⁵ Even courts engaged in more elaborate moral reasoning have often concluded that enhanced penalties for repeat offenders are appropriate retribution.⁷⁶

I do not suggest that conceptions of desert were the leading factor that caused the enactment of new and more severe penalties. The point is rather that conceptions of desert change over time. It does seem to have been a perceived need to incapacitate that prompted such laws—but once the

there is no agreement on the proper weight to give to repeat offending”). For opposing retributive accounts of whether repeat offenders deserve more punishment, compare GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 466 (1978) (“The contemporary pressure to consider prior convictions in setting the level of the offense and of punishment reflects a theory of social protection rather than a theory of deserved punishment.”), with VON HIRSCH, *DOING JUSTICE*, *supra* note 19, at 85-88 (arguing that repetitive criminal behavior makes an offender deserve more punishment).

⁷⁵ See, e.g., Vitiello, *supra* note 70, at 425-26 (noting that “[p]roponents sometimes speak as if Three Strikes is retributive” and quoting a prosecutor’s defense of the law as appropriate punishment “for being recidivists”); Stephanie Simon, *Three Strikes Advocates Passionately Defend Law*, L.A. TIMES, July 3, 1996, at A1, A16 (quoting a murder victim’s mother: “When TV gives us this 2½-minute sound bite about the poor soul who stole a piece of pizza, they ask if he deserves to spend 25 years to life in prison. Well, the truth of the matter is, he probably does.”); see also Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1303-04 (2001) (“[T]hree-strikes-and-you’re out’ policies . . . seem to be fueled by concerns about retribution, which are particularly sharp, many believe, because multiple recidivists have so clearly rejected society’s norms and institutions.”).

⁷⁶ One argument posits that more severe penalties are deserved by the “incorrigible” offender who, “after being reprov’d, ‘still hardeneth his neck.’” *Commonwealth v. Dickerson*, 621 A.2d 990, 992 (Pa. 1993) (quoting *Commonwealth v. Sutton*, 189 A. 556, 558 (Pa. Super. Ct. 1937)). To continue to break the law even after being caught and punished is to demonstrate recalcitrance that may itself be blameworthy. Alternatively, one could understand leniency for first offenders as a decision to give them the benefit of the doubt and assume some impediment to agency. For repeat offenders, such leniency is inappropriate. See also *United States v. De Luna-Trujillo*, 868 F.2d 122, 125 (5th Cir. 1989) (“The recidivist’s relapse into the same criminal behavior demonstrates his lack of recognition of the gravity of his original wrong [and] entails greater culpability for the offense with which he is currently charged”); *People v. Laino*, 87 P.3d 27, 39 (Cal. 2004) (“When the deterrent effect of the law fails and the defendant subsequently commits another felony, he or she becomes a repeat offender and deserves harsher punishment”); *Collins v. State*, 861 A.2d 727, 732 (Md. 2004) (“[R]epet offenders may be more morally blameworthy than first-time offenders, and hence deserve a stronger measure of retribution.”).

public perceived this need to incapacitate, notions of deserved punishment quickly adjusted to accommodate the utilitarian demands. Our desert conceptions are not independent of utilitarian considerations, and hence we should not expect desert conceptions to constrain the pursuit of utilitarian aims.⁷⁷

Critics of habitual offender laws sometimes acknowledge that the laws are frequently justified in the rhetoric of desert.⁷⁸ These acknowledgments are usually followed by a quick dismissal of the public rhetoric as meaningless propaganda or “justicespeak.”⁷⁹ As noted above, one can easily distinguish between the sophisticated deontological theories favored in the academy and the rough intuitions about desert held by ordinary citizens. But since current efforts to enshrine desert in sentencing policy refer to ordinary intuitions and community sentiment, we should ask whether the rough intuitions, rather than the sophisticated theory, can serve as a limiting principle.

For a notable case study on the clash between elite conceptions of desert as a limiting principle and (the elastic) popular conceptions of desert, consider *Ewing v. California*.⁸⁰ The Supreme Court upheld a twenty-five-years-to-life prison sentence imposed for theft of three golf clubs worth about \$400 each.⁸¹ Interestingly, the plurality seemed to believe that it needed to abandon retributivism—or at least pretend that California had abandoned retributivism—in order to uphold the sentence. Repeatedly, the plurality opinion emphasized that choice of penological purpose was a matter of legislative prerogative not to be second-guessed by the Court.⁸² The three strikes law was labeled “a *shift* in the State’s sentencing policies toward incapacit[ation] and deter[ence].”⁸³ It appears that for the Justices in the plurality, desert is sufficiently inelastic that it cannot permit a twenty-

⁷⁷ Robinson and Darley emphasize that the criminal law can change social norms about the blameworthiness of behavior. See Robinson & Darley, *Utility of Desert*, *supra* note 34, at 473-74. They suggest that changes in criminal law have enhanced the “prohibitory norms against sexual harassment, hate speech, drunk driving, and domestic violence.” *Id.* at 473. Robinson and Darley do not discuss why the criminal sanctions for these behaviors became more severe, but it stands to reason that increased penalties adopted for utilitarian reasons might similarly affect popular conceptions of deserved punishment.

⁷⁸ See, e.g., Kyron Huigens, *Correspondence, What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 820 (2002) (noting that the “quarantine movement” to incapacitate habitual offenders is “often described as a triumph of retributivism,” but arguing that “nothing could be further from the truth”).

⁷⁹ ROBINSON & CAHILL, *supra* note 19, at 14.

⁸⁰ 538 U.S. 11 (2003).

⁸¹ *Id.* at 19–20.

⁸² *Id.* at 24-26, 29-30.

⁸³ *Id.* at 14 (emphasis added).

five-years-to-life sentence for stealing golf clubs. Accordingly, it became necessary to justify the sentence on other grounds.⁸⁴ The dissenting Justices also presumed that the law did not have retributive aims, at least as applied to this defendant, though they would have reversed the sentence as excessive nonetheless.⁸⁵

But to the California public, the statute was easily justified in “just deserts” terms.⁸⁶ In fact, the State emphasized retribution as one of several aims of its three strikes statute until encouraged at oral argument to abandon that position.⁸⁷ The State’s brief to the Supreme Court argued that the three strikes law was justified due to the “enhanced blameworthiness” and “aggravated . . . culpability” of the repeat offender.⁸⁸ At oral argument, however, the Court suggested to the state attorney that the incapacitative purpose of the law actually excluded retributive aims, and the attorney (wisely) agreed.⁸⁹ After the Court had nudged California toward a more

⁸⁴ In a separate concurrence, Justice Scalia stated explicitly that “[p]roportionality . . . is inherently a concept tied to the penological goal of retribution,” and thus “the game is up once the plurality has acknowledged that ‘the Constitution does not mandate adoption of any one penological theory.’” *Id.* at 31 (Scalia, J., concurring).

⁸⁵ “No one argues for Ewing’s inclusion within the ambit of the three strikes statute on grounds of ‘retribution.’” *Id.* at 51-52 (Breyer, J., dissenting); see also *Lockyer v. Andrade*, 538 U.S. 63, 80-83 (2003) (Souter, J., dissenting) (arguing, in a companion case to *Ewing*, that the three strikes law did not advance retributive purposes). Commentators on *Ewing* have similarly accepted the orthodoxy that the statute simply abandoned retributive goals. See, e.g., *Lee*, *supra* note 1, at 735 (“It was no surprise that no one attempted to defend the sentence on retributivist grounds. From the perspective of retributivism as a side constraint, Ewing’s punishment is highly problematic . . .”).

⁸⁶ “[T]he political rhetoric surrounding the enactment of California’s recidivist statute had a distinctly retributivist tone—that it is only ‘just’ that recidivists receive lengthy sentences, that they have ‘made a choice and now must pay the price,’ and so on.” Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Justice*, 2003 UTAH L. REV. 205, 256 (2003). For some specific examples of desert rhetoric in support of the three strikes law, see Vitiello, *supra* note 73, at 1071; Simon, *supra* note 75.

⁸⁷ See, e.g., CAL. PENAL CODE § 667(b) (West 1999) (identifying several purposes of the three strikes statute, including to “ensure . . . greater punishment”).

⁸⁸ Brief of Respondent on the Merits at 8, 18, 21, *Ewing*, 538 U.S. 11 (No. 01-6978).

⁸⁹ As Donald De Nicola, Deputy Attorney General for the State of California, struggled with a question about whether California could constitutionally impose life prison terms on offenders with multiple speeding tickets, Justice Scalia intervened and suggested that the state could escape the difficult questions of proportionality by abandoning retribution. See Transcript of Oral Argument at 41-42, *Ewing*, 538 U.S. 11 (No. 01-6978) (“QUESTION: I would have thought that your response . . . would have been that . . . it depends on what you want your penal goals to be. California has decided that disabling the criminal is the most important thing . . . QUESTION: I mean, proportionality—you necessarily have to look upon what the principal objective of the punishment is. If the objective . . . is retribution, then, sure, I guess it’s disproportionate . . . But if your purpose is disabling the criminal, I’m not sure that [a life term for speeding tickets] is disproportionate. . . MR. DE NICOLA:

exclusive emphasis on incapacitation, the plurality and concurring opinions then proclaimed judicial deference to the state's choice of sentencing purposes and declined to strike down Ewing's prison sentence. In California, meanwhile, prosecutors and others continue to justify three-strikes sentences in terms of desert.⁹⁰

The difference between elite and popular conceptions of desert is stark. Among academic retributivists and even among Supreme Court Justices, enhanced penalties for repeat offenders are apparently viewed as a violation of retributive ideals. But beyond the academy and the high court, it is widely accepted that those who break the law repeatedly *deserve* harsher penalties than first-time offenders. We punish recidivists more severely today than we did fifty years ago, but this is not because we have abandoned desert. Rather, conceptions of desert have adjusted to accommodate the severe sentences dictated by other, non-retributive sentencing goals.

2. Mentally Disabled Offenders

A similar shift in public perceptions of desert—and a similar clash between popular and elite conceptions of desert—can be seen in the substantive criminal law and sentencing policies concerning mentally ill and mentally disabled offenders. In the first half of the twentieth century, the general focus on rehabilitation as the central aim of criminal sentencing produced solicitude toward mentally ill or disabled offenders. Such offenders were often found unfit for trial altogether, or tried but found not guilty by reason of insanity, and they were committed to psychiatric hospitals rather than imprisoned. Today, defendants who claim mental illness are much more likely to be tried, convicted, and sentenced to prison or, in some cases, death.⁹¹ In the substantive criminal law, the insanity

Yes, we do adopt the theory of incapacitation . . .”).

⁹⁰ See, e.g., Jaxon Van Derbeken, *Man Who Burned Son Looking at Third Strike*, S.F. CHRON., Feb. 9, 2005, at A1 (quoting a district attorney seeking a three-strikes sentence as claiming that the defendant “deserves what he is getting”). In 2004, California voters rejected Proposition 66, which would have narrowed the state's three strikes law by requiring second and third strikes to be violent or serious offenses. See Andy Furillo, *Late Infusion of Cash Sank Proposition 66*, SACRAMENTO BEE, Nov. 4, 2004, at A3. Notably, desert rhetoric was prevalent in the debate surrounding Proposition 66. See, e.g., Walter J. Scheiderich Jr., Opinion, *Criminals Would Hail Three Strikes Revision*, L.A. TIMES, Oct. 24, 2004, at M4 (“The cost of \$30,000-plus a year to keep them off the streets is a small price. . . . I for one feel no remorse over putting career criminals in the place they deserve.”).

⁹¹ For an overview of the “liberal” era of mental health law and the transition to today's “neoconservative” era, see John Q. La Fond & Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?*, 39 VILL. L. REV. 71, 74-90 (1994).

defense has been narrowed or abolished in many jurisdictions.⁹² In sentencing practice, the perceived relevance of mental illness or disability as a mitigating factor has diminished.⁹³

As with sentence enhancements for habitual offenders, these legal changes seem to have been motivated in part by a perceived need to incapacitate dangerous individuals. But other factors have also shaped the changes in the way the criminal justice system treats these defendants. To some degree, the more punitive approach to mentally ill offenders may reflect “moral panic” after a few very high-profile crimes. Of the highest profile, perhaps, was John Hinckley’s attempt to assassinate President Ronald Reagan. Hinckley was found not guilty by reason of insanity, and the ensuing public outcry produced dramatic limitations of the insanity defense.⁹⁴ Arguably, the reaction to Hinckley’s acquittal was not so much a changed assessment of the desert of the (truly) mentally ill as an outraged perception that evil-but-sane malingerers were exploiting the law’s overly broad definitions of mental illness.⁹⁵ But other widely publicized cases have involved defendants whose mental illness is questioned little if at all, and yet nevertheless the public reacted with fear and outrage and supported legal changes that ensured harsher penalties for such defendants. Recently, the trial and retrial of Andrea Yates, the Texas woman who killed her five young children at home, have prompted strident calls for harsh punishment; some claim Yates deserves the death penalty.⁹⁶ There is little question that

⁹² See, e.g., *Clark v. Arizona*, 126 S. Ct. 2709 (2006) (upholding Arizona law narrowing insanity defense and excluding evidence of mental incapacity on mens rea issue).

⁹³ In fact, some research suggests that mental illness is actually perceived as an aggravating factor and used to justify more severe penalties. See Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. Rev. 293, 305 (2003).

⁹⁴ See Ellen Byers, *Mentally Ill Offenders and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?*, 57 ARK. L. REV. 447, 509 (2004).

⁹⁵ A few years before Hinckley was acquitted, a California jury convicted Dan White of manslaughter rather than murder in a case almost as notorious. White had gunned down George Moscone, then-mayor of San Francisco, and Harvey Milk, a local official and one of the first openly gay elected officials in the United States. White asserted the defense of “diminished capacity,” and in what came to be known as the “Twinkie defense” (but was in reality a small and probably unimportant part of the trial), a psychiatrist testified that White’s behavior was partly triggered by his consumption of sugary junk food. See *People v. White*, 117 Cal. App. 3d 270 (Cal. Ct. App. 1981); see also Carol Pogash, *The Myth of the “Twinkie Defense”*: *The Verdict in the Dan White Case Wasn’t Based on his Consumption of Junk Food*, S.F. CHRON., Nov. 23, 2003, at D1.

⁹⁶ See Byers, *supra* note 94, at 466 (“In cases like [the trial of Andrea Yates], involving horrific conduct and especially vulnerable victims, public and political reaction leaps over the intractable issue of whether the actor should even be subjected to punishment, landing forcefully, and often righteously, on the question that should be reserved: the punishment the

Yates was deeply mentally disturbed at the time of the killings, but this has not halted calls for severe punishment: as one news commentator recently closed a report on Yates's retrial, "sick or not, to me it's murder."⁹⁷

Again, desert is proving elastic. Offenders who once deserved treatment and assistance are now thought to deserve hard time or even death. The changing perceptions of desert seem linked to a reassessment of the significance of mental impairments. Under the broad definitions of insanity favored by many jurisdictions in the 1960s and 1970s, any "substantial" impairment of either cognition or volition could reduce or eliminate an individual's desert of punishment.⁹⁸ Today, motivated perhaps by a growing sense that mentally ill persons pose great danger, many jurisdictions excuse offenders from responsibility only if they completely lack cognitive capacity.⁹⁹ The degree of mental capacity required to be deserving of punishment is less than it once was. The new severity toward the mentally ill is not an abandonment of desert, but a reconceptualization of it.¹⁰⁰

And as with habitual offender statutes, those who would cite desert as a limiting principle may find wide divergences in elite and popular conceptions of desert. In *Atkins v. Virginia*, the Court found the death penalty unconstitutionally excessive when imposed on any mentally retarded defendant.¹⁰¹ The Court explained that the Eighth Amendment prohibited the imposition of punishments that failed to serve any penological purpose, and found that no retributive purpose was served by a death sentence for a mentally retarded defendant.¹⁰² Such a defendant could not possibly deserve death. Some scholars see *Atkins* as a victory for limiting retributivism, but its aftermath, and even its dissents, illustrate just

actor deserves.").

⁹⁷ *The Abrams Report* (MSNBC television broadcast July 7, 2006) (guest host Susan Filan).

⁹⁸ See, e.g., MODEL PENAL CODE § 4.01(1); see also Bradford H. Charles, *Pennsylvania's Definitions of Insanity and Mental Illness: A Distinction with a Difference?*, 12 TEMP. POL. & CIV. RTS. L. REV. 265, 267 (2003) (noting that most American jurisdictions adopted the Model Penal Code approach and followed it until the early 1980s).

⁹⁹ See RALPH REISNER ET AL., LAW AND THE MENTAL HEALTH SYSTEM 534-36 (4th ed. 2004).

¹⁰⁰ Some scholars have endorsed the elimination of the insanity defense specifically on desert-based grounds, arguing that the criminal law should consider mental impairment in its direct assessments of culpability, rather than as a separate defense. See, e.g., NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982); Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1200-02 (2000).

¹⁰¹ 536 U.S. 304, 321 (2002).

¹⁰² *Id.* at 318-20.

how disputed desert assessments can be.¹⁰³ *Atkins* might not save Atkins: in the three years since the Court's decision, prosecutors have argued that Daryl Renard Atkins is not, in fact, mentally retarded at all.¹⁰⁴ The Supreme Court left to the states the choice of a mechanism to determine mental retardation, and "emergency legislation" enacted in Virginia after the Supreme Court's opinion provides that defendants must prove their mental retardation to a jury.¹⁰⁵ In 2005, a Virginia jury—aware of Atkins' previous death sentence—found that Atkins was not mentally retarded.¹⁰⁶ The Virginia Supreme Court recently held that the 2005 jury should not have been informed of the previous death sentence, and Atkins currently awaits what will be his fourth trial, in which a jury will be asked again to decide whether he is mentally retarded.¹⁰⁷ Tangled in the question of whether Atkins is mentally retarded is the question of whether he deserves to die. The ongoing efforts to put him to death—and repeated jury findings for the prosecution—illustrate how deeply contested the question of desert continues to be.

Desert is typically understood to be a highly individual matter, in the sense that to be deserving or not is dependent on particular traits of the individual. For that reason, judgments about an offender's desert are often viewed as case-specific, which cuts against efforts to use limiting retributivism to ensure minimum or maximum penalties for entire classes of offenders. Dissenting in *Atkins*, Justice Scalia emphasized the individualized nature of desert:

Surely culpability, and deservedness of the most severe retribution, depends not merely (if at all) upon the mental capacity of the criminal . . . but also upon the depravity of the crime—which is precisely why this sort of question has traditionally

¹⁰³ Justice Scalia dissented with characteristic vehemence, challenging both the contention that the Court had the power to assess desert as well as the actual desert assessment. *See id.* at 350-51 (Scalia, J., dissenting).

¹⁰⁴ *See* Adam Liptak, *Court Orders a New Trial for an Inmate on Death Row*, N.Y. TIMES, June 9, 2006, at A23.

¹⁰⁵ *See* *Atkins v. Commonwealth*, 631 S.E.2d 93, 95 (Va. 2006) (citing VA. CODE §§ 8.01-654.2, 19.2-264.3:1.1, 19.2-264.3:1.2, 19.2-264.3:3 (2006)).

¹⁰⁶ *See* Maria Glod, *Va. Killer Isn't Retarded, Jury Says; Execution Set*, WASH. POST, Aug. 6, 2005, at A1. Virginia law requires the defendant to prove by a preponderance of the evidence that he has an IQ of seventy or less. *Id.* at A7. Atkins's IQ has been measured at various times at fifty-nine, sixty-seven, seventy-four and seventy-six. *See id.*

¹⁰⁷ *See* *Atkins*, 631 S.E.2d at 102; *see also* Liptak, *supra* note 104. The Virginia Supreme Court noted that based on Virginia jury instructions, any jury charged with deciding mental retardation for a capital defendant will know that a finding of mental retardation precludes the imposition of death. *Atkins*, 631 S.E.2d at 102. This does not itself create a procedural flaw, but in *Atkins*' 2005 mental retardation trial, the jury was given the further information that a previous jury had already imposed a death sentence. *See id.*

been thought answerable not by a categorical rule of the sort the Court today imposes on all trials, but rather by the sentencer's weighing of the circumstances (both degree of retardation and depravity of crime) in the particular case. The fact that juries continue to sentence mentally retarded offenders to death for extreme crimes shows that society's moral outrage sometimes demands execution of retarded offenders. By what principle of law, science, or logic can the Court pronounce that this is wrong? There is none.¹⁰⁸

Advocates for the mentally disabled may recoil at the suggestion that an incapacitated defendant may nonetheless deserve death, but as a description of at least some communities' intuitions—especially the intuitions of those Virginians who keep sentencing Daryl Atkins to death—Justice Scalia's account is probably accurate. The story of Daryl Atkins and the larger pattern of increased penalties for defendants with mental disabilities cast doubt on the ability of desert to serve as a limiting principle. Even among legal elites, there are continuing disputes about the scope of deserved punishment. And the elasticity of popular conceptions of desert renders such conceptions ill-suited to curtail the increases in criminal sentences.

3. Juvenile Offenders

Juveniles are a third class of offenders for whom sentences have become more severe in recent years. The more severe sentences are largely a product of increasing transfers of underage defendants out of the juvenile court system and into adult courts, where they are exposed to more severe sentences. In addition, some jurisdictions have increased the sentences imposed in juvenile courts or adopted new sentence enhancements specifically applicable to juveniles.¹⁰⁹

As with habitual offender statutes and reduced leniency for mentally disabled, the harsh sentences for juveniles are both decried in academic commentary as violations of limiting retributivism,¹¹⁰ and popularly

¹⁰⁸ *Atkins*, 536 U.S. at 350-51 (Scalia, J., dissenting). Justice Scalia also decried as "arrogance" the majority's contention that "*our own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id.* at 348 (Scalia, J., dissenting).

¹⁰⁹ For a general overview of both the increasing transfer of juveniles to adult courts and the changing law of juvenile sentences, see Cathi J. Hunt, Note, *Juvenile Sentencing: Effects of Recent Punitive Sentencing Legislation on Juvenile Offenders and a Proposal for Sentencing in the Juvenile Court*, 19 B.C. THIRD WORLD L.J. 621, 630-43 (1999).

¹¹⁰ See, e.g., Benjamin L. Felcher, *Kids Get the Darndest Sentences: State v. Mitchell and Why Age Should Be a Factor in Sentencing for First Degree Murder*, 18 LAW & INEQ. 323, 327-28 (2000); David Yellen, *Sentence Discounts and Sentencing Guidelines for Juveniles*, 11 FED. SENT'G REP. 285, 285 (1999).

justified in the rhetoric of desert.¹¹¹ The scope of juveniles' desert has expanded in the judgment of many, possibly as a result of growing utilitarian concerns about incapacitation or deterrence. Desert as a limiting principle would forestall the more severe juvenile sentences only if desert were inelastic, and for most people, it is not.

A decision parallel to *Atkins* presents similar debates over categorical determinations of desert. In *Roper v. Simmons*, the Court prohibited death sentences for defendants who were under eighteen at the time of their offenses.¹¹² The Court reiterated that the Eighth Amendment's prohibition of cruel and unusual punishments disallows punishments that fail to serve any penological purpose and held that for any defendant who committed murder as a juvenile, a death sentence would fail to achieve retributive purposes because it would exceed the defendant's culpability.¹¹³ Some commentators have hailed *Roper* (and *Atkins*) as limiting retributivism in operation—elite conceptions of desert dictated a ceiling on the maximum permissible punishment for these classes of offenders.¹¹⁴ But the dissenting opinions in *Atkins* and *Roper*¹¹⁵ illustrate that the concept of desert remains highly contested, even within elites, and the public reactions to those decisions¹¹⁶ suggest that elites will meet considerable resistance as they attempt to impose their own views of just deserts.

¹¹¹ See, e.g., Tim Doulin & Kevin Mayhood, *More teens pay for crimes with stiffer, adult penalties*, COLUMBUS DISPATCH, Jan. 4, 1999, at 3B (noting local judge's belief that juveniles transferred to adult court deserve to be there, and quoting him as stating, "You get to the point where you have to say to these kids, 'We have done everything we can, and you have earned the right to be moved over'"); Joanna Weiss, *State Takeover of Tallulah Center May Calm Tension; Tales of Abuse of Inmates Abound*, TIMES-PICAYUNE (New Orleans), Aug. 9, 1998, at 1A (quoting a state legislator's response to accusations of abuse at a juvenile prison: "They have been given every opportunity for reform. . . . These are no angels. These are kids that deserve punishment.").

¹¹² 543 U.S. 551 (2005).

¹¹³ *Id.* at 571.

¹¹⁴ See, e.g., Richard Frase, *The Warren Court's Missed Opportunities in Substantive Criminal Law*, 3 OHIO ST. J. CRIM. L. 75, 96 (2005) (describing post-Warren Court capital punishment jurisprudence as a "constitutionalized version of the sentencing philosophy of 'limiting retributivism'"); Lee, *supra* note 1, at 723-25 (arguing that *Atkins* and *Roper* demonstrate the Court's use of "retributivism as a side constraint").

¹¹⁵ In *Roper*, Justice Scalia again forcefully rejected the majority's desert analysis. "The Court's contention that the goals of retribution and deterrence are not served by executing murderers under 18 is . . . transparently false." *Roper*, 543 U.S. at 621 (Scalia, J., dissenting); see also *id.* at 615 (Scalia, J., dissenting) (accusing the majority of "usurp[ing] the role of moral arbiter" for the nation).

¹¹⁶ *Atkins* and *Roper* each prompted much public criticism. See, e.g., Stuart Taylor, Jr., *Dying in the Wrong Way: To stop juvenile executions, Supreme Court imposed its own values on the public*, LEGAL TIMES, Mar. 7, 2005, at 70.

Thus, the contrast between scholarly and public conceptions of desert should be reemphasized. Retributivism has been embraced by many legal elites, including the ALI, precisely because those elites view desert as rigid and *inelastic* at its outer margins. Notwithstanding the three classes of offenders discussed above, supporters of limiting retributivism may challenge my account of the elasticity of desert as disproved by experience: sentencing schemes in several jurisdictions have been praised as the successful implementation of limiting retributivism.¹¹⁷ But those jurisdictions whose sentencing schemes enact a kind of limiting retributivism do not appear to have reduced sentence lengths by appeals to democratic or populist conceptions of just deserts. Instead, elites within these jurisdictions have restricted sentence lengths based on their own determinations of desert, and in many cases, legislatures and the public have responded with active resistance to the elites' assessments of just deserts. For example, the Minnesota Sentencing Guidelines Commission arguably adopted "limiting retributivism" by creating a sentencing system in which defendants were to be sentenced according to utilitarian aims "subject to retributive 'caps'" that would set the upper limits of permissible punishment.¹¹⁸ Although the state legislature initially approved the guidelines without modification, subsequent political pressure led the commission to revise the maximum penalties upward.¹¹⁹ In addition, several pieces of subsequent state legislation introduced mandatory minimum sentences or otherwise increased sentence severity.¹²⁰ Similarly, the success of "limiting retributivism" in Europe has itself been limited: so long as sentencing policy is left to elites who are inclined to enforce restrictions on sentence severity, desert may effectively serve as a limiting principle. But, as European citizens have become increasingly unwilling to leave sentencing to elites, and as new political leadership sees opportunity in expanding penal power, sentences have lengthened and conceptions of desert have certainly not served as a limitation.¹²¹

¹¹⁷ See Frase, *Limiting Retributivism*, *supra* note 28, at 96-104 (arguing that several western European nations and the State of Minnesota have employed a limiting retributivism model in their sentencing laws).

¹¹⁸ Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978-2003*, 32 CRIME & JUST. 131, 149 (2005).

¹¹⁹ *Id.* at 150, 159-60.

¹²⁰ *See id.* at 160-66.

¹²¹ *See, e.g.*, ROBERTS ET AL., *supra* note 49, at 44-53 (noting that retributive rhetoric and "a narrow-desert based system" in the United Kingdom produced reductions in prison sentences as long as "the government turned its back on public opinion," but sentences increased (while retributive rhetoric continued) as the British populace began paying greater attention to penal policy).

Given these contradictions between elite and non-elite conceptions of desert, and given the elasticity of popular conceptions of desert, it appears that desert could serve as a limiting principle only if three conditions are satisfied: a specific elite is charged with determining desert; that elite is inclined to reduce or limit penalties; and the elite's judgments are left undisturbed by the public or other government bodies. If those conditions are met, specialized agencies and experts could set sentencing policies based on their own sophisticated account of desert, and popular conceptions of desert might adjust to match the actual sentences imposed.

This operation of elite conceptions of desert as a sentencing principle may be the hope of the ALI Sentencing Committee, notwithstanding its professed view that "proportionality limitations in a democratic society are best derived through cooperative and collective assessments of community sentiment."¹²² The proposed sentencing provisions would enable both sentencing commissions and judges to make assessments about desert in order to limit criminal sentences.¹²³ Sentencing commissions, as envisioned by the ALI, would consist of judges, state legislators, representatives from the state department of corrections, practicing prosecutors and defense attorneys, academic experts in criminal justice, and possibly a non-jurist public representative.¹²⁴ The commissions would aspire to be "non-partisan" and "representative," but they would certainly not be mirrors of democratic preferences. Again, under ideal circumstances, they might shape those preferences.

To create checks on majoritarian power to inflict "deserved punishment" is not necessarily a bad idea.¹²⁵ Given the force of the rhetoric of democracy, we sometimes forget that in our constitutional system, some decisions—especially decisions that involve the infliction of criminal punishment—might appropriately be made outside of the majoritarian political process.¹²⁶ But desert seems a poor avenue through which to limit

¹²² MODEL PENAL CODE: SENTENCING (Discussion Draft 2006).

¹²³ *Id.* § 1.02(2), cmt. a, 8. In practice, the real "limiting principle" in the proposed sentencing provisions may not be desert, but parsimony (the principle that sentences be no more severe than necessary). See *supra* note 39. Parsimony bears some promise as a limiting principle, but its effectiveness depends on how we define the "necessary." As discussed below, parsimony loses its limiting force if the necessary is defined in terms of the deserved. See *infra* Section III.D. Furthermore, even utilitarian accounts of the necessary, such as deterrence arguments, can stretch to legitimize a very wide range of penal practices. See *infra* Section V.

¹²⁴ MODEL PENAL CODE: SENTENCING § 6A.02; Alternative 6A.02; cmts. a, b, 51-61 (Discussion Draft 2006).

¹²⁵ See Ristroph, *supra* note 42.

¹²⁶ Many leading constitutional cases concerning individual rights strike down majority efforts to use *criminal punishment* to restrict individual liberty. See, e.g., *Lawrence v.*

the power to punish. First, it is unclear that sentencing commissions or appellate judges have any special competence in the assessment of desert. Desert is widely recognized as a subjective and moral notion, and thus within the province of the people rather than legal experts.¹²⁷ Desert assessments by elites are likely to be perceived as legitimate only to the extent that they coincide with popular desert assessments.¹²⁸ And when such coincidence arises, it defeats the function of desert as a limiting principle.¹²⁹ Second, because desert has no independent anchor but is instead dependent on external values, whether non-majoritarian desert will serve to limit harsh punishments or to require still harsher punishments will depend on the particular values of the decision-making elite. Now, most academics and judges seem to view sentences as too harsh—harsher than “deserved”—but a vocal minority argues instead that retribution demands still more severe sentences.¹³⁰ As the federal judiciary grows more

Texas, 539 U.S. 558, 562-64, 578-79 (2003) (finding unconstitutional a Texas statute that criminalized “deviate sexual conduct” between persons of the same sex); Texas v. Johnson, 491 U.S. 397, 400-02 (1989) (finding unconstitutional a Texas statute that criminalized “desecration of a venerated object” as applied to an individual who had burned a U.S. flag); Roe v. Wade, 410 U.S. 113, 116, 164 (1973) (finding unconstitutional a Texas statute that criminalized the administration or procurement of an abortion); Cohen v. California, 403 U.S. 15 (1971) (finding unconstitutional a California statute that criminalized disturbances of the peace as applied to an individual who wore an offensively worded jacket inside a county courthouse); Loving v. Virginia, 388 U.S. 1, 4-5, 12 (1967) (finding unconstitutional a Virginia statute that criminalized miscegenation).

¹²⁷ Cf. Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 734 (2005) (“[I]f the goal of punishment is retribution, it is not immediately clear that an agency is better positioned than a generalist legislator to determine someone’s just deserts. Indeed, one might think the opposite is true because legislators represent the moral views of a broader constituency.”).

¹²⁸ See *supra* notes 101-116 and accompanying text (discussing *Atkins* and *Roper*); ROBINSON & DARLEY, *supra* note 19; Robinson & Darley, *The Utility of Desert*, *supra* note 34.

¹²⁹ It is for this reason that Paul Robinson doubts the efficacy of desert as a “limiting principle” rather than a simple determinant of sentence severity.

For the truth is that desert is not a notion that is a creature of academics or one that can be controlled by a prepared legislative history. . . . [B]lameworthiness . . . has a strong and clear intuitive meaning, one shared among most lay persons and many criminal justice professionals, and it is that view of desert that will in the long term have its say.

Robinson, *supra* note 1, at 12. Robinson is unperturbed that academics and the ALI will not be able to control determinations of the scope of desert, for he is willing to leave that determination to a democratic process. Clearly, I am less sanguine about the desirability of desert justifications for penal practices.

¹³⁰ See, e.g., Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 64, 69 (2000) (arguing that a retributive proportionality principle requires that courts scrutinize criminal sentences for “undue leniency”).

politically conservative, there are good reasons to doubt that elite assessments of desert will actually produce significant reductions in the severity of sentences.

The elasticity of desert relates primarily to questions of quantification—how much punishment is appropriate—but there are important qualitative questions about desert as well. Aside from how much punishment an offender deserves, one might ask what, specifically, makes an individual defendant deserving. A closer examination of sentencers' desert assessments with respect to individual defendants, rather than entire categories of offenders, reveals that desert is remarkably opaque, and this opacity may function to obscure race, class, or social bias in sentencing decisions.

C. THE OPACITY OF DESERT

As the discussions above suggest, we are often imprecise about the “desert basis” of the punishments we impose.¹³¹ When someone says, this defendant deserves ten years in prison, or a life sentence, or the death penalty, we know that the speaker finds the specified sentence morally appropriate. But we do not know how the speaker made the determination of moral desert. Does the defendant deserve ten years because a similar defendant was sentenced last week by the same judge to ten years? Does the defendant deserve a life sentence because he is a cruel and violent repeat offender who poses a continuing threat to society? Does the defendant deserve death because he killed a socially prized victim, a young, wealthy, attractive, white woman? The simple claim that an offender deserves a given punishment is opaque: it does not reveal what factors were used to assess desert.

Assessments of desert for entire categories of offenders—all drug dealers, all three-time recidivists—are certainly opaque. When one scrutinizes these categorical assessments closely, they seem to be influenced by broad utilitarian considerations as well as by fear and panic after well-publicized crimes.¹³² In this Section, I examine judgments of desert with respect to individual defendants. Such judgments are often integrated into the guilt determination at a criminal trial; many offenses

¹³¹ See *supra* notes 21 and 55 and accompanying text.

¹³² As many commentators have noted, California's Three Strikes law was enacted after a widely publicized incident in which a repeat offender murdered a twelve-year-old girl. See, e.g., *Ewing v. California*, 538 U.S. 11, 14 (2003). And as noted above, many of the changes in the criminal law's approach to insanity followed the acquittal of John Hinckley. See *supra* Section III.B.2.

require the factfinder to assess the defendant's degree of "culpability."¹³³ But individualized desert assessments take place most explicitly at sentencing. In most cases, sentencing is formally a judicial task, but the judge's discretion is often limited by sentencing guidelines, mandatory sentence laws, or a plea agreement. In fact, sentencing guidelines and mandatory sentences can be understood as efforts to substitute the kind of categorical desert assessments discussed above for individualized determinations of desert. To study individualized desert judgments, it is helpful to consider a context in which jurors, not judges, do the sentencing: the imposition of death sentences.

For a number of reasons, capital sentencing decisions can shed considerable light on the psychology of desert judgments. The Supreme Court's doctrine of "individualized sentencing" requires that the decision that death is the appropriate punishment must be made on a case-by-case basis.¹³⁴ Juries must not, however, be given free rein to determine the appropriateness of death; the Court has also held that death penalty statutes must provide guidance as to which murderers should be sentenced to execution.¹³⁵ Most states meet this constitutional requirement by identifying "aggravating circumstances" that distinguish death-eligible

¹³³ Cf. Darryl K. Brown, *Judicial Instructions, Defendant Culpability, and Jury Interpretation of Law*, 21 ST. LOUIS U. PUB. L. REV. 25, 27 (2002) (noting that a criminal jury must assess the defendant's blameworthiness).

¹³⁴ See *Lockett v. Ohio*, 438 U.S. 586, 602-05 (1978) (noting the long tradition of individualized sentencing in the United States, and finding that because the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," individualized sentencing is constitutionally required for the death penalty); *Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976) (plurality opinion) (prohibiting a mandatory death penalty). Since the *Ring v. Arizona* decision in 2002, any factual findings that are the basis of a death sentence must be made by a jury rather than a judge. 536 U.S. 584, 609 (2002).

¹³⁵ See, e.g., *Zant v. Stephens*, 462 U.S. 862, 878 (1983) (holding that it is "constitutionally necessary" for capital sentencing procedures to "circumscribe the class of persons eligible for the death penalty"). For a more detailed overview of the constitutional jurisprudence of capital punishment, see Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995). In describing the Supreme Court's capital punishment decisions, Steiker and Steiker distinguish between desert concerns (the concern that everyone sentenced to die is in fact "deathworthy") and fairness concerns (the concern that all "deathworthy" offenders will be treated alike). See *id.* at 364-69. I suggest in this Section that because the concept of desert lacks meaningful independent content, desert itself cannot serve as a reliable gauge of the consistency or equality of our sentencing decisions. I believe Steiker and Steiker would agree. See *id.* at 416 ("[W]e really cannot decide in advance who deserves the death penalty and must rely instead on subjective judgments by institutional actors. If this is true . . . it is a concession that the administration of the death penalty is inevitably arbitrary.").

murderers from other murderers.¹³⁶ These aggravating circumstances often invite an explicit inquiry into moral blameworthiness.¹³⁷ Although utilitarian considerations sometimes factor into a jury's determination that death is the "appropriate punishment in a specific case,"¹³⁸ there is little doubt that capital sentencing decisions are largely the products of inquiries into, and assessments of, the moral desert of the individual defendant.¹³⁹ Finally, we simply have more detailed data on capital sentencing than we do for other sentencing decisions: extensive empirical research on death sentencing has produced a vast literature about how those sentencing decisions are made. The controversial nature of the death penalty and the relative rarity of capital sentencing decisions seem to make death sentencing both easier and more attractive to study.

How does a juror or other decision-maker determine that a defendant deserves to die? What factors shape the quantification of desert? One notable finding, replicated by many quantitative and qualitative empirical studies, is that race seems to matter. This finding may be most famously reported in "the Baldus study," a comprehensive study of approximately two thousand Georgia homicide cases.¹⁴⁰ David Baldus and his co-authors

¹³⁶ See Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1604 n.38 (2001).

¹³⁷ For example, the Court has held that "especially heinous, cruel, or depraved" behavior is a constitutionally appropriate aggravating circumstance. *Walton v. Arizona*, 497 U.S. 639, 652-56 (1990).

¹³⁸ *Woodson*, 428 U.S. at 305; see Aletha M. Claussen-Schulz, Marc W. Pearce & Robert F. Schopp, *Dangerousness, Risk Assessment, and Capital Sentencing*, 10 PSYCHOL. PUB. POL'Y & L. 471, 480 (2004) (finding juror deliberations to center on the "dangerousness" of the defendant).

¹³⁹ Even when jurors focus on dangerousness to determine the appropriate sentence, there is some indication that desert conceptions shape the findings of dangerousness. See Mitzi Dorland & Daniel Krauss, *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-making*, 29 LAW & PSYCHOL. REV. 63, 96 (2005) ("Jurors may base their predictions of future dangerousness on the heinousness of the instant offense, deciding [first] that a defendant deserves to die for a particularly heinous murder and then judging him to be a future danger in order to meet this end."). Cf. Craig Haney, Lorelei Sontag & Sally Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, J. SOC. ISSUES, Summer 1994, at 149, 153 ("Death sentencing is uniquely a process of *moral assessment*, and deciding whether someone deserves to live or die is surely the most profound moral assessment anyone can be called upon to make."); Michael L. Radelet & Marian J. Borg, *The Changing Nature of Death Penalty Debates*, 26 ANN. REV. SOC. 43, 53 (2000) ("In the end, the calculation of how much punishment a criminal 'deserves' becomes more a moral and less a criminological issue.").

¹⁴⁰ See DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 157 (1990); David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An*

found that the race of the victim was an important determinant of whether a murder defendant would receive the death penalty.¹⁴¹ This racial discrimination appeared to affect both prosecutors and jurors: the state was more likely to seek the death penalty if the murder victim was white, and jurors were more likely to impose it.¹⁴² Other studies have found similar patterns in other states,¹⁴³ and some studies have found that decisions to impose death track the defendant's race as well as the victim's.¹⁴⁴ Even after controlling for other possible influences on the sentencing decision, one study found that black defendants were more likely to be sentenced to death than white defendants.¹⁴⁵ Another recent study found that among black defendants who killed white victims, those that appeared more "stereotypically black," in terms of skin color and facial features, were more likely to be sentenced to death.¹⁴⁶

Race is apparently not the only characteristic of the victim or defendant that shapes desert assessments. The social status of the victim, as measured by factors other than race, also seems to play a role in sentencing

Empirical Study of the Georgia Experience, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons From Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985).

¹⁴¹ BALDUS, WOODWORTH & PULASKI, *supra* note 140, at 155-57, 185.

¹⁴² *Id.* at 160-69.

¹⁴³ See, e.g., U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990), reprinted in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 268, 271 (Hugo Bedau ed., 1997); John Blume, Theodore Eisenberg & Martin T. Wells, *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 167 (2004); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 66 (1984) (finding disproportionately high number of death sentences imposed on defendants who murdered white victims); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1, 19-20 (2005) (finding that killers of white victims were over three times more likely to receive the death penalty than killers of African American victims and over four times more likely to receive the death penalty than killers of Hispanic victims).

¹⁴⁴ See, e.g., BENJAMIN FLEURY-STEINER, JURORS' STORIES OF DEATH: HOW AMERICA'S DEATH PENALTY INVESTS IN INEQUALITY (2004) (offering qualitative analysis of interviews with capital jurors and concluding that race pervades sentencing decisions); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998).

¹⁴⁵ Baldus et al., *supra* note 144.

¹⁴⁶ Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 J. PSYCH. SCIENCE 383, 385 (2006).

decisions.¹⁴⁷ A defendant is also more likely to be sentenced to death if he is perceived as an “outsider” to the community in which his crime occurred.¹⁴⁸ And jurors have sometimes explained their decisions to impose death with reference to other factors that should be legally irrelevant, such as the defendant’s religious affiliation.¹⁴⁹

Thus, research on death sentencing indicates that desert may serve as a “placeholder” for prejudice and bias.¹⁵⁰ Of course, the substitution of desert judgments for racial animus, xenophobia, or other bases of dislike almost certainly operates subconsciously most of the time.¹⁵¹ This subconscious substitution is one of the perverse consequences of the opacity of desert. We—not just ordinary citizens, but also philosophers, lawyers, judges and legislators—have difficulty explaining what makes one defendant more blameworthy than another. Strong intuitions that moral desert is a meaningful concept coexist with uncertainty about the factors that should determine desert. Since we cannot consciously explain what makes a person more deserving than another, we seem to do so subconsciously. Desert thus serves as a vehicle to give legal effect and moral authority to our subconscious dislikes.¹⁵²

¹⁴⁷ See BALDUS, WOODWORTH & PULASKI, JR., *supra* note 140, at 157-58; see also FLEURY-STEINER, *supra* note 144, at 57-58 (quoting a capital juror whose fellow jurors cited the victim’s status as a gay AIDS patient to justify their refusal to impose the death penalty).

¹⁴⁸ See, e.g., Roscoe C. Howard, Jr., *The Defunding of Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 920 (1996).

¹⁴⁹ In a process that researchers call “converted mitigation,” evidence introduced in mitigation is sometimes taken by jurors as a reason to impose death. See Haney, Sontag & Costanzo, *supra* note 139, at 164. As one example of converted mitigation, Haney and his co-authors quote a juror who identified the facts that the defendant was a “good” and “religious” person as evidence that the defendant deserved the death penalty for his crime. *Id.*

¹⁵⁰ I borrow the notion of desert as a placeholder from Dan Markel, who has a much more salutary view of what desert represents. See Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1445 (2004) (“The confrontational conception of retribution . . . identifies the idea of desert as a placeholder for three other principles . . . moral accountability for unlawful actions, equal liberty under law, and democratic self-defense.”).

¹⁵¹ Some jurors do actually cite religion, race, or “outsider” status to explain their sentencing decisions. See Haney, Sontag & Costanzo, *supra* note 139, at 164; see also FLEURY-STEINER, *supra* note 144, at 45 (quoting a capital juror who voted for the death penalty for a black defendant, saying, “[S]ome of the jurors were looking at him as your average white kid: he wasn’t a white kid. He came from a totally different environment.”). For a discussion of subconscious and unconscious racism, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT INFORMED THE MOVEMENT 235 (Kimberlé Crenshaw et al. eds., 1995).

¹⁵² In a recent article, Paul Robinson and John Darley acknowledge that when desert guides discretionary decisions, those decisions may reflect individual and societal

Although penalty phases of capital trials offer some insight into the psychology of desert, a caveat is in order. The psychology of desert with respect to death sentences, and perhaps to a few other particularly charged issues in criminal law, may vary from the psychology of desert described above in the context of prison sentences at least in some ways. In the context of capital punishment, desert appears to be much less elastic.¹⁵³ For those strongly opposed to or strongly supportive of the death penalty, it is probably *not* the case that utilitarian considerations drive determinations of desert—if anything, deeply held moral beliefs about desert probably determine individuals' beliefs about whether capital punishment serves utilitarian aims.¹⁵⁴

Still, evidence of the ways that capital jurors assess desert might teach us something about what goes into the calculus of desert in other areas of criminal law. Outside the context of capital punishment, most sentencing decisions are made by criminal justice professionals and not by jurors,¹⁵⁵

prejudices:

To generalize, juries, prosecutors, and judges may deal more leniently with offenders who are physically attractive, racially matched to the jurors, more capable of mustering legal resources . . . or who are otherwise advantaged in public opinion. And, on the other side of the coin, it is also possible for the justice system to accuse and convict those who are regarded as deviants within the community based on "crimes" for which others would not be prosecuted.

Robinson & Darley, *Role of Deterrence*, *supra* note 34, at 984-85. Robinson and Darley are describing the effect of "under the table" intrusions of desert intuitions into a legal system that does not embrace desert explicitly. But they do not explain how "over the table" desert intuitions will be different. It is simply assumed, not explained or defended, that an open embrace of desert will purify it of prejudice.

¹⁵³ This would explain why prosecutors must "death-qualify" capital juries in order to ensure the possibility of a death sentence. Death-qualification refers to the for-cause exclusion of any potential juror who states generalized opposition to capital punishment. See *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968).

¹⁵⁴ See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 438 (1999). With respect to capital punishment, I think Kahan is right that beliefs about desert tend to shape beliefs about deterrence and not vice versa. The same may be true for the two other highly publicized and deeply controversial areas of criminal law, gun control and sentencing enhancements for hate crimes, that Kahan analyzes to support his larger claim that we rely on deterrence rhetoric to mask unresolved moral conflicts. But there are only a few areas of criminal law in which we tend to form very specific and fixed views about how much or what kind of punishment is deserved. While some individuals believe steadfastly that execution is the only morally appropriate punishment for all murderers, few are as committed to the view that, say, ten to twenty years in prison (not three to five or thirty-to-life) is precisely the appropriate range for individuals convicted of drug distribution.

¹⁵⁵ One study of the few jurisdictions that have jury sentencing in non-capital cases found sentence lengths to be correlated with the defendant's race for only three of ten offenses studied in Virginia and none of the offenses studied in Arkansas. Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2

but the racial and economic disparities in the distribution of non-capital sentences may indicate that these professional decisions about desert are influenced in similar ways as jury decisions.¹⁵⁶ Even if desert is less elastic in death sentencing, it is opaque everywhere—and this opacity may protect widespread racial and class bias.

Criminal law scholars often acknowledge that our criminal justice system is riddled with inequality: convicts tend to be disproportionately poor and non-white.¹⁵⁷ Usually, these inequalities are taken as an unfortunate consequence of socioeconomic inequality that has little to do with penological theory.¹⁵⁸ The “unjust world” may be an obstacle to the implementation of ideal punishment, but the unjust world is not itself

OHIO ST. J. CRIM. L. 195, 203-04 (2004).

It is certainly possible that additional research could reveal patterns in non-capital jury sentencing that resemble those found in capital sentencing. But even so, there is reason to doubt that the potential for racial discrimination in jury sentencing will ever garner the same sort of attention in non-capital cases that it has in capital cases.

Id. at 204.

Juries can also affect sentencing in non-capital cases by acquitting “against the evidence.” Studies of juror nullification suggest that jurors who nullify are similarly influenced by extra-legal factors such as the defendant’s physical attractiveness, race, and social status. See John Clark, *The Social Psychology of Jury Nullification*, 24 LAW & PSYCHOL. REV. 39, 48-53 (2000); Erick L. Hill & Jeffrey E. Pfeifer, *Nullification Instructions and Juror Guilt Ratings: An Examination of Modern Racism*, 16 CONTEMP. SOC. PSYCHOL. 6 (1992).

¹⁵⁶ A recent study of judges’ sentencing decisions found that even with criminal history and other aggravating factors controlled, black defendants who appeared more “stereotypically black” tended to be sentenced to longer prison terms. See Irene V. Blair, Charles M. Judd & Kristine M. Chapleau, *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 677-78 (2004).

¹⁵⁷ See, e.g., Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 85-86 (1997) (“Criminal offenders throughout history have tended to be poor and disproportionately comprised of minorities, . . .”) (citations omitted).

¹⁵⁸ One recent article does attempt to take racial and socioeconomic inequality seriously, yet concedes, “viewed in isolation, the race and class position of America’s inmate population tells us nothing regarding the legitimacy of the sentences being served.” Dolovich, *supra* note 28, at 311. Dolovich attributes the point to David Garland and also cites Bonnie Honig, *Rawls on Politics and Punishment*, 46 POL. RES. Q. 99 (1993). I disagree with this claim. The effects of our chosen policies bear upon their legitimacy. Of course, the disparate impact of sentencing policies may be largely caused by factors independent of those policies—such as racial or socioeconomic inequality—but the fact that prison sentences reproduce or magnify those independent inequalities is relevant to the legitimacy of the sentences. Cf. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1280 (2004) (“Empirical evidence of community-level harm presents a compelling moral indictment of mass imprisonment, regardless of the moral deserts of individual offenders.”).

typically incorporated into punishment theory.¹⁵⁹ Sentencing theory that fails to address “the unjust world” may simply provide an avenue to reproduce socioeconomic injustice or racial bias into penal practice. Desert theory appears to do this particularly well.

D. THE MORALITY OF DESERT

One final feature of desert’s operation in practice is worth scrutinizing. Because desert is a moral concept, a normative claim about the way the world should be, the concept of deserved punishment provides a moral insurance policy that underwrites our criminal justice system. The retributive theory of “just deserts” claims that punishment is a positive moral good—not simply a necessary evil.¹⁶⁰ In this respect, desert claims are different from other commonly cited rationales for punishment.¹⁶¹ Whereas utilitarian theories acknowledge the costs and pain of even socially necessary punishment, strong retributivism tells us to be proud—flag-wavingly patriotic, even—when we impose punishment.¹⁶² Importantly in

¹⁵⁹ As Michael Tonry has observed, some retributive theorists acknowledge the problem of “just deserts in an unjust world,” but even these theorists do not take actual economic or social injustice to invalidate their retributive claims. MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 158-59 (1995); see also Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1242 (2005) (“In Murphy, von Hirsch, and Duff, you will find discussion of the problem of ‘just deserts in an unjust world’—recognition that unequal distribution of life chances makes it far easier for some to be law-abiding than for others—but you will find no proposals for how punishment can be used to enhance life chances or to compensate for disadvantages.” (citing R.A. DUFF, *TRIALS AND PUNISHMENTS* 294 (1986); VON HIRSCH, *DOING JUSTICE*, *supra* note 19, at 143-49; Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973))).

¹⁶⁰ Alschuler, *supra* note 9, at 15 (“A retributivist believes that the imposition of deserved punishment is an intrinsic good.”).

¹⁶¹ In comparison to other sentencing theories, retributivism starts with less and claims to finish with more. It starts with less in the sense that assertions of desert are not subjected to (or capable of) any empirical verification other than correspondence with majority sentiment. It finishes with more in that it asserts that punishment is not simply necessary or expedient, but affirmatively morally valuable. There is an edge of righteousness to retributivism, a righteousness sometimes, but not necessarily, derived from divine authority. See David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1647 (1992) (noting the “aggressive righteousness” of retributivism).

¹⁶² Retributivists from Robert Nozick to Jean Hampton have invoked C.S. Lewis’s argument that when God inflicts pain, he does so not out of cruelty, but to awaken the wrongdoer and to alert him to his sins. As Lewis put it, retribution “plants the flag of truth within the fortress of a rebel soul.” C.S. LEWIS, *THE PROBLEM OF PAIN* 95 (Macmillan ed., 1962), *quoted in* ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 718 n.80 (1981); Hampton, *supra* note 13, at 1. Hampton, to her credit, expresses reservations about whether a *state* should attempt to plant flags of truth in rebel souls. See Hampton, *supra* note 13, at 1-2. Nozick, a professed libertarian, expresses no similar skepticism. See, e.g., NOZICK,

this “age of empiricism,” the moral claims of retributivism are non-falsifiable: one can dispute whether a punishment accords with community sentiments of desert, but one cannot disprove the underlying claim that it is morally right to impose deserved punishment. Even the mitigated, more modest language of desert invokes these non-falsifiable claims of right and can thus serve as a moral warranty to our sentencing practices. The elasticity of desert helps it serve this function. We would be in real trouble if we had to reach actual consensus about the precise scope of criminal sentences on desert grounds alone.¹⁶³ But we do not have to reach such consensus. So long as most of us agree on the very broad principle that criminals deserve punishment, desert can provide moral legitimacy to a wide range of sentencing policies whose specific details may be dictated by utilitarian arguments.

Thus, whatever the causal relationship between the concept of desert and race and class disparities in sentencing, desert may protect those disparities from efforts to eliminate them. Most individuals who receive criminal sentences have done something illegal, even if not the precise offense of conviction. Hence, even if desert is always based on a finding of illegal action, we can safely conclude that all those poor, black men in prison deserved at least *some* punishment. The color and poverty of our prison population and death rows are not products of discrimination, the argument goes, but the unfortunate results of the fact that racial minorities and poor people are disproportionately involved in criminal behavior. The demographic disparities are too bad, but we have to give these criminals what they deserve.

supra, at 377-78 (questioning whether a nonteleological retributivist would endorse the institution of capital punishment, but raising no concerns about the institution of state-imposed punishment generally).

¹⁶³ See Kahan, *supra* note 154, at 421-28. Kahan notes disagreement about what moral desert requires and argues that we retreat to *deterrence* rhetoric to mask those disagreements. According to Kahan, the notion of deterrence is fluid enough (and the empirical research on deterrence sufficiently inconclusive) that opposing sides of criminal justice controversies can all claim that their favored policy deters. Thus, deterrence rhetoric serves as an amoral, or only thinly moral, linguistic domain that is more suitable for liberal public discourse than expressly moral argument. See *id.* at 480-84. To my claim that desert provides moral cover for policies whose utility is uncertain, Kahan might counter that deterrence provides neutral cover for policies whose morality is contested. But Kahan may overlook the elasticity of desert: it is not a particularly contentious statement to say that punishment is deserved. It is only very precise statements about what penalty is deserved that become more contested. In general, though, I find Kahan's analysis largely persuasive and not inconsistent with my own: both desert and deterrence can be quite elastic. See *infra* Section V.

Such reasoning seems to underlie *McCleskey v. Kemp*,¹⁶⁴ the noted Supreme Court decision addressing racial disparities in capital sentencing. Warren McCleskey argued that his death sentence violated his right to equal protection.¹⁶⁵ To support his claim, he introduced the research by David Baldus, discussed above, demonstrating racial bias in the pattern of imposition of death sentences.¹⁶⁶ The Supreme Court found that the defendant failed to show *intentional* discrimination and dismissed the statistical research as inconclusive.¹⁶⁷ The Court concluded, "Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious."¹⁶⁸ We can decline to scrutinize unexplained and seemingly invidious patterns only if we are fairly confident in the overall justice of what we do, and the notion of desert provides that confidence.

The moral warranty offered by desert may also sometimes insulate sentencing practices from charges of disutility. Strong public support for a particular utilitarian policy may shape public conceptions of deserved punishment, as discussed above. At the same time, more contested claims of utility or disutility may not be subjected to rigorous scrutiny if we can avoid the conflict by retreating to desert. In fact, given the asymmetric elasticity of desert, sentencing policies originally motivated by utilitarian concerns may become immune to claims of disutility once we have convinced ourselves that the sentences are deserved. This vicious cycle may be evident with respect to long prison sentences for recidivists. The long policies were originally motivated by a perceived need to incapacitate dangerous offenders, but quickly justified in terms of desert as well. Now, several scholars report that the long prison terms may have little crime reduction effect, because offenders are incarcerated long past the age at which they are likely to commit new offenses.¹⁶⁹ So far, this new evidence has not prompted policy changes.

Given the elastic and moralistic quality of our desert conceptions, invocations of desert may actually undo the work done by the parsimony principle and demands for an "evidence-based" approach to sentencing.¹⁷⁰ The parsimony principle insists that penalties should be no more severe

¹⁶⁴ 481 U.S. 279 (1987).

¹⁶⁵ *Id.* at 291.

¹⁶⁶ *Id.* at 286-87.

¹⁶⁷ *Id.* at 297.

¹⁶⁸ *Id.* at 313. For a similar reading of *McCleskey*, see Roberts, *supra* note 158, at 1280.

¹⁶⁹ See Shepherd, *supra* note 67, at 510; see also Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out" Law*, 11 STAN. L. & POL'Y REV. 65 (1999).

¹⁷⁰ See *supra* note 39.

than necessary. When the bounds of necessity are determined with reference to desert, necessity may become as elastic as desert. And since claims that punishment is deserved are non-falsifiable, they elude any demand for empirical verification.

E. THE INEVITABILITY OF DESERT?

There are good reasons to doubt that democratically determined conceptions of desert can serve as an effective limiting principle to counter the continuing tendency of criminal laws to spread farther and punish more severely. At the same time, the notion of deserved punishment is deeply engrained in the way most people think and talk about the criminal law. Desert rhetoric is probably inescapable. Limiting retributivism, flawed as it may be as a plan to introduce limitations on sentences, is probably a roughly accurate description of the way most people think about sentencing. But it is not merely the way we think about sentencing now—some hybrid, do-it-all approach to sentencing seems to have shaped the expansion of incarceration in the late twentieth century. The public has always wanted the criminal justice system to pursue utilitarian goals *and* also impose deserved punishment. And should the twenty-first century see substantial sentencing reform, that reform will probably occur under continuing efforts to pursue a wide array of sentencing purposes.

Although I have suggested that desert cannot independently anchor sentencing reform, I do not think it will necessarily prevent such reform. As a sentencing principle, desert is dangerous but not fatal. It is dangerous because it is opaque and because it provides a cloak of moral authority that can obscure prejudice or disutility. But desert is not fatal, because it is elastic. The elasticity of desert suggests that if we do scale back criminal sentences, and if we can generate popular support for such sentencing reforms, desert conceptions will adjust to view the new sentences as appropriate. And there is some hope that utilitarian considerations will actually generate popular support for reform. In several states, the sheer cost of the vast correctional system is creating significant financial pressure to rethink sentencing policy.¹⁷¹ To shrink desert conceptions is probably harder than to stretch them, but it does not seem to be impossible.

Rather than seek quixotically to eliminate the rhetoric of desert, we should remember that it is a “placeholder” and be attentive to its dangers. We can try, for example, to make individualized desert assessments less

¹⁷¹ For a discussion of cost-pressures on state sentencing policies, see Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276 (2005).

opaque.¹⁷² We could devote more attention to desert-bases; we would have to say more precisely how to deserve. This is the aspiration, if not always the reality, of enumerated “aggravating factors” in capital sentencing and of clear sentencing factors generally.¹⁷³ Because we cannot eliminate discretion in sentencing, we cannot eliminate the possibility of prejudice, but we can certainly scrutinize desert more closely to try to reduce the effects of prejudice.

The greatest obstacle to sentencing reform is not that we think in terms of desert, but rather that we have so little inclination to think critically about desert. Desert intuitions are certainly widely and deeply held; they seem part of the basic structure of our moral views. But they are also ill-defined and unstable over time, and part of the reason it is so easy to speak in terms of desert is that desert can mean so many different things.¹⁷⁴ Desert’s ubiquity makes it attractive, but what makes desert ubiquitous also makes it dangerous. Sentencing theorists should not simply endorse the ubiquitous desert rhetoric or invoke that rhetoric to advance retributive aims. Rather, what theorists can contribute to policy reform is a critical analysis of desert. These kinds of critiques have already been made in the realm of distributive justice, as the next Section discusses.

¹⁷² This appears to be one aim of Paul Butler’s work, which employs retribution in pursuit of a less racially discriminatory criminal justice system. See, e.g., Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004); Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873 (1999).

¹⁷³ Of course, the very choice of sentencing factors may reflect bias or produce racial disparities. For example, federal law provides for more severe sentences for possession of crack cocaine than for possession of powder cocaine. The Anti-Drug Abuse Act of 1985 creates a much decried 100:1 ratio of powder to crack: one must possess five kilograms of powder but only fifty grams of crack cocaine to receive the Act’s ten-year mandatory minimum penalty. 21 U.S.C. § 841(b) (2000). Since crack cocaine use is more common among blacks and powder cocaine use more common among whites, this distinction has been subject to extensive academic criticism and to Equal Protection challenges. See, e.g., DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 142-43 (1999) (offering statistics for crack and powder cocaine use in different racial groups, and citing failed federal Equal Protection challenges). As Cole notes, the Equal Protection challenges have been unsuccessful. *Id.*; see, e.g., *United States v. Holton*, 116 F.3d 1536, 1548-49 (D.C. Cir. 1997); *United States v. Watson*, 953 F.2d 895, 897-98 (5th Cir. 1992).

¹⁷⁴ See Lamont, *supra* note 51, at 49 (“The reason why so many writers have been able to affirm so confidently such a diverse and conflicting set of desert-claims in debates over distributive justice is not because the true conceptual and moral core of desert is so complex and difficult to discern. It is because the true conceptual and moral core of desert allows the introduction of external values and goals.”).

IV. DISTRIBUTIVE AND RETRIBUTIVE DESERT

Self-identified liberals began scrutinizing moral desert as a basis for wealth distribution at around the same time that they began reinvigorating moral desert as a basis for punishment. And the skepticism toward desert in the realm of distributive justice appears about as widespread as the revival of desert in punishment theory.¹⁷⁵ The critique of desert in distributive justice (and a cursory distinction between distributive and retributive justice) can be traced to John Rawls's 1971 book *A Theory of Justice*.¹⁷⁶ There, Rawls rejects the claim that "those better situated deserve their greater advantages whether or not they are to the benefit of others."¹⁷⁷ The factors that lead to social and economic advantage, such as talents, intelligence, or aptitude for hard work, are often beyond an individual's control and thus "undeserved."

It seems to be one of the fixed points of our considered judgments that no one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society. The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit. . . . Thus the more advantaged representative man cannot say that he deserves and therefore has a right to a scheme of cooperation in which he is permitted to acquire benefits in ways that do not contribute to the welfare of others.¹⁷⁸

Rawls concludes that "the concept of moral worth does not provide a first principle of distributive justice."¹⁷⁹ Instead, moral worth (or desert) is "secondary," and in a well-ordered society people, "deserve" only what they can legitimately expect based upon existing institutions.¹⁸⁰

[W]hen just economic arrangements exist, the claims of individuals are properly settled by reference to the rules and precepts (with their respective weights) which these practices take as relevant. . . . [A] just scheme gives each person his due: that is, it allots to each what he is entitled to as defined by the scheme itself.¹⁸¹

¹⁷⁵ "Contemporary liberal theory appears to attach relatively little importance to the concept of desert." Samuel Scheffler, *Justice and Desert in Liberal Theory*, 88 CAL. L. REV. 965, 965 (2000).

¹⁷⁶ RAWLS, *supra* note 4.

¹⁷⁷ *Id.* at 103.

¹⁷⁸ *Id.* at 104.

¹⁷⁹ *Id.* at 312.

¹⁸⁰ *Id.* at 312-13.

¹⁸¹ *Id.* at 313. As Sections I and II argued, *supra*, that desert is too indeterminate to serve as a limiting principle for punishment, Rawls suggests that moral desert is too indeterminate to serve as the basis of wealth distribution. Intuitively, we attach deservingness to voluntary "conscientious effort," but we cannot determine the extent to which conscientious effort is

This account is sometimes described as a theory of “institutional desert,” in which individuals deserve only what is promised by existing institutions.¹⁸² Pre-institutional desert—desert based on moral worthiness and not on compliance with the rules of an existing institution—is irrelevant to this liberal theory of just wealth distribution.¹⁸³

Rawls, who elsewhere endorses a partially retributive justification of punishment,¹⁸⁴ explicitly (but cursorily) dismisses the possibility that his critique of desert as a principle of distributive justice might extend to desert-based punishment. The criminal law serves an entirely different purpose—“to uphold basic natural duties”—and punishments “are not simply a scheme of taxes and burdens designed to put a price on certain forms of conduct.”¹⁸⁵ Criminal behavior “is a mark of bad character, and in a just society legal punishments will only fall upon those who display these faults.”¹⁸⁶

voluntary. *Id.* at 312.

¹⁸² See, e.g., SHER, *supra* note 22; WHAT DO WE DESERVE? A READER ON JUSTICE AND DESERT (Louis P. Pojman & Owen McLeod eds., 1999); Lamont, *supra* note 51. Note that one could understand criminal penalties in terms of institutional desert—once a system of criminal laws with prescribed sanctions is put in place, anyone who breaks those laws deserves to be punished exactly as much as prescribed by law. But this account of desert depends on the existing institution and thus cannot serve to justify that institution or to dictate modifications to it. For desert to justify or modify existing practices, it must be pre-institutional—precisely the kind of desert that liberals tend to reject as a principle of distributive justice.

¹⁸³ In later works, Rawls acknowledges the existence of preinstitutional desert, but argues that intuitions about such desert are too particular and subjective for preinstitutional desert to serve as the basis for distribution in a contemporary, pluralistic liberal democracy. See JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 72-73 (2001).

¹⁸⁴ John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

¹⁸⁵ RAWLS, *supra* note 4, at 314-15.

¹⁸⁶ *Id.* at 315. Notably, Rawls does not ever explain why “bad character” should be a basis for punishment given that, in his discussion of distributive justice, he traces character to “family and social circumstances for which [the individual] can claim no credit.” See *id.* at 104. Rawls rarely mentions punishment in *A Theory of Justice*. As he explains toward the end of the book, his argument assumes “strict compliance” and has little to say about non-compliance or disobedience. *Id.* at 575. Nevertheless, Rawls insists that parties in the original position would agree to a system of punishment as necessary to “maintain just institutions.” See *id.* at 576. For some persons, the “just arrangements do not fully answer to their nature,” but of these people Rawls says (somewhat glibly) “their nature is their misfortune.” *Id.* For an illuminating discussion of Rawls on punishment, see BONNIE HONIG, POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS 138 (1993) (“From Rawls’s perspective, the bad character is so bewilderingly deviant that Rawls is forced back into a discourse he disavowed: the discourse of antecedent moral worth.”). Sharon Dolovich deploys Rawls to develop an account of legitimate punishment but points out reasons to disbelieve the claim that most crime is simply a matter of “bad character.” See Dolovich, *supra* note 28, at 370-74 (arguing that persons behind the veil of ignorance could not be sure

Not surprisingly, after the publication of *A Theory of Justice* much of the subsequent philosophical work on desert focused on distributive justice and on whether we deserve things we tend to want, like money, prestigious or lucrative jobs, political offices, and admission to elite educational institutions.¹⁸⁷ Most commentators seem to agree that some of what each of us has is morally arbitrary, but some of it is not. One ongoing debate is whether a little moral arbitrariness is enough to make desert disappear altogether, or instead if we can be both lucky (because we have morally arbitrary talents) and deserving (because we put our talents to good use).¹⁸⁸ This debate is hardly resolved, but there is little doubt that Rawls has been enormously influential in prompting skeptical, critical analyses of the concept of desert as a principle of distributive justice.¹⁸⁹ The key point is not that after Rawls, everyone abandoned desert—that is obviously not true.¹⁹⁰ Rather, after Rawls, we subject desert claims to much more scrutiny; we look carefully at the desert basis, and we do not consider desert to be an automatic trump that necessarily defeats other social interests.

Regrettably, Rawls's asserted distinction between distributive and retributive justice has produced less debate than his rejection of desert in the distributive realm. And the few philosophers who have attacked the distributive/retributive distinction are usually focused not primarily on punishment, but on efforts to revive desert in the distributive realm.¹⁹¹ Against these critiques, Samuel Scheffler has defended the distinction with the claim that distributive justice (but not retributive justice) is "holistic."¹⁹²

that, if greatly socioeconomically disadvantaged, they would resist all temptation to criminal activity).

¹⁸⁷ See, e.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* 299-301 (1986) (applying a Rawlsian critique to the argument that admission to medical school should be based on "merit"); see also MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 137 (1982) (noting the parallels between Dworkin and Rawls, and critiquing both).

¹⁸⁸ One can imagine a parallel retributive argument that because not all poor are criminals, we know that poor criminals are still agents. In other words, one can be both unlucky (because poor) and deserving (because he committed a crime).

¹⁸⁹ For an overview of the key arguments, see Schmidt, *supra* note 22.

¹⁹⁰ Samuel Scheffler suggests that the conservative attack on contemporary liberalism was due in part to "resistance to [the] diminished conception of responsibility" that seemed to underlie Rawlsian theory. See Scheffler, *supra* note 5, at 300-01.

¹⁹¹ See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 224-25 (1974); SANDEL, *supra* note 187, at 89-92; SHER, *supra* note 22; Alan Zaitchik, *On Deserving to Deserve*, 6 *PHIL. & PUB. AFF.* 370 (1977).

¹⁹² Samuel Scheffler, *Justice and Desert in Liberal Theory*, 88 *CAL. L. REV.* 965, 984 (2000). "[W]hereas desert is individualistic, distributive justice is *holistic* in the sense that the justice of any assignment of economic benefits to a particular individual always depends—directly or indirectly—on the justice of the larger distribution of benefits in society." *Id.*

Given the scarcity of resources, and given a commitment to equality of persons, distributive justice must look beyond the particular individual's moral worth.¹⁹³ In contrast, Scheffler argues, we have a more or less infinite supply of punishment, and determinations of whom to punish and how much can be made on a purely individualistic basis.¹⁹⁴

There are a number of reasons why the critical scrutiny of distributive desert should be applied to retributive desert as well. In a response to Scheffler, Douglas Husak has "raise[d] doubts about whether any domain of justice is completely independent of the justice of other social institutions."¹⁹⁵ Retributivism, too, must be holistic: it must consider the practice of punishment as part of a larger social system, and it must consider the effects of penal practices on that social system as a whole. "Retributivists must show not only that giving culpable wrongdoers what they deserve is intrinsically valuable, but also that it is sufficiently valuable to offset what I will refer to as the drawbacks of punishment—negative values that inevitably are produced when an institution of punishment is created."¹⁹⁶ Husak identifies three such drawbacks: the financial expense of the criminal justice system, the risk of errors in assessing individual culpability and in choosing what to criminalize, and the risk that punitive authority will be abused.¹⁹⁷ These are valid concerns, but far too narrow—the social costs of (even deserved) punishment extend much further. Incarceration imposes great costs on the families of offenders and on the communities in which they live.¹⁹⁸ The overrepresentation of minorities in the criminal justice system damages race relations and the perceived legitimacy of the state. Incarceration also appears to increase recidivism; at the very least, years away from the community and the burdens of collateral

¹⁹³ *Id.* at 984-85.

¹⁹⁴ Scheffler says that "the 'supply' of punishment is not, in principle, unlimited," but nevertheless "the problem of retributive justice is not a problem of limited supply; supply can safely be assumed to exceed demand." *Id.* at 986. "By contrast, the problem of retributive justice does not concern the allocation of advantages at all, and it is not a problem posed by conditions of scarcity." *Id.*

¹⁹⁵ Douglas Husak, *Holistic Retributivism*, 88 CAL. L. REV. 991, 993-94 (2000).

¹⁹⁶ *Id.* at 996.

¹⁹⁷ *Id.* at 998. Husak does not explain the third drawback except to refer obliquely to the confrontation at David Koresh's compound in Waco, Texas and to corruption among customs officials. *See id.*

¹⁹⁸ *See* R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 55 STAN. L. REV. 2229 (2003); Angela P. Harris, *Criminal Justice as Environmental Justice*, 1 J. GENDER RACE & JUST. 1 (1997); Roberts, *supra* note 158. For a proposed approach to criminal justice that incorporates the costs and benefits of penalties, see Darryl Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323 (2004).

sentencing consequences decrease the likelihood that offenders will lead law-abiding lives upon release from prison.¹⁹⁹

Even if we recognize desert as a compelling moral intuition, it is not clear that it should be the basis of political action.²⁰⁰ There are certainly circumstances in which we use the language of desert but do not necessarily think the state should intervene to give people what they deserve. (A cheating spouse may deserve to be divorced, but this does not mean the state should *sua sponte* end the marriage of every adulterer.) Of course, skepticism toward desert claims would not lead us to conclude that the state should not respond to crime, but it might encourage us to think more carefully about the precise reasons for, goals of, and limits to the state's intervention.

Further, the philosophical distinction between retributive and distributive justice obscures—or appears to render irrelevant—the rather significant extent to which crime is associated with distributive inequality. This is particularly problematic given that contemporary theories of retributive justice—the kinder, gentler, desert-based retribution detailed in Section II—begin with presumptions of social equality. For example, the egalitarian retributivism of Herbert Morris insisted that all persons bear the benefits and burdens of the law equally. Crime disturbed the balance of benefits and burdens, and punishment restored the balance and restored equality. It is crucial to this theory that benefits and burdens are in fact distributed equally by the legal system. If the initial, pre-crime distribution is not equal, “the difference between coercion and law disappears.”²⁰¹ But after making this surprisingly frank acknowledgment of the need for an equal initial distribution of benefits and burdens, Morris says nothing about whether real-life legal systems satisfy or even approximate an initial equal distribution.²⁰²

¹⁹⁹ See Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443, 455-60 (1993).

²⁰⁰ See Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 371 (2002) (“[T]here is reason to hope that debate about utility and autonomy in criminal lawmaking will become more productive once it is redefined as a political debate about institutions rather than a moral debate about the conduct of criminals and officials.”); see also Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 510-11 (1987) (distinguishing between moral and political theories of punishment).

²⁰¹ Morris, *supra* note 10, at 103. Andrew von Hirsch initially endorsed Morris's burdens-and-benefits retributivism, but later modified his position after noting that Morris's argument “require[d] a heroic belief in the justice of the underlying social arrangements.” VON HIRSCH, *supra* note 30, at 58 (referring to VON HIRSCH, *supra* note 19).

²⁰² On at least one occasion, Kant explicitly acknowledges that class differences complicate the calculation of just deserts and suggests that fines may be inappropriate punishments for rich wrongdoers in some circumstances. IMMANUEL KANT, THE

I think it fairly obvious that they do not. Despite ongoing redistributive efforts, there is unquestionably great socioeconomic inequality in the United States. Leaving aside for the moment the question of whether further redistributive measures are appropriate, the crucial point here is that the initial equal distribution required by egalitarian retributivism does not exist. Not surprisingly, perhaps, crime is closely correlated with poverty.²⁰³ Both the perpetrators and the victims of criminal activity tend to be poor.²⁰⁴ For different reasons, progressives and conservatives alike are wary of emphasizing the correlation: progressives may wish to avoid stigmatizing the poor (most of whom are law-abiding), and conservatives may wish to avoid suggestions that criminals are not fully responsible for their bad behavior. But the correlation is there, and an adequate account of crime and our responses to it needs to address this relationship.

Jeffrie Murphy has developed a similar point. Crediting Marx for the notion that “philosophical theories are in peril if they are in constructed in disregard of the nature of the empirical world in which they are supposed to apply,” Murphy argues that the crucial presuppositions of retributive theory are simply contrary to basic social facts.²⁰⁵

The retributive theory really presupposes what might be called a “gentleman’s club” picture of the relation between man and society—i.e., men are viewed as being part of a community of shared values and rules. The rules benefit all concerned and, as a

METAPHYSICS OF MORALS 155 (Mary Gregor trans., 1991) (1797) (“Now it may well appear that class differences do not allow for the principle of retribution whereby like is exchanged for like. . . . [A] monetary fine on account of a verbal injury, for example, bears no relation to the actual offence, for anyone who has plenty of money could allow himself such an offence whenever he pleased.”). When the wrongdoer is of a higher and wealthier class, alternative sanctions may be preferable—just deserts may require the wrongdoer “not only to apologise publicly, but also, let us say, to kiss the hand of the [victim], even though he were of lower station.” *Id.* at 156.

²⁰³ For a review of several statistical studies establishing a link between poverty and crime, see Travis C. Pratt & Frances T. Cullen, *Assessing Macro-Level Predictors and Theories of Crime: A Meta-Analysis*, 32 *CRIME & JUST.* 373, 411-14 (2005). See generally JEFFREY REIMAN, . . . AND THE POOR GET PRISON: ECONOMIC BIAS IN AMERICAN CRIMINAL JUSTICE (1996) (describing several forms of economic bias in the American criminal justice system that make the poor more likely to be convicted and imprisoned). Of course, as Reiman notes, the link between poverty and crime is somewhat exaggerated by the fact that the criminal justice system tends to focus on detecting and prosecuting “street crime” rather than “white collar” crime. *Id.* at 99-104.

²⁰⁴ Because race and class are themselves correlated in the United States, perpetrators and victims are also disproportionately non-white. As several commentators have discussed, criminal justice policy has failed non-white communities both in over-punishing individual offenders and in under-protecting crime victims. See, e.g., RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1998); Harris, *supra* note 198, at 19-21 (“To be poor is to be vulnerable to crime, and African Americans are disproportionately poor.”).

²⁰⁵ Jeffrie G. Murphy, *Marxism and Retribution*, 2 *PHIL. & PUB. AFF.* 217, 232 (1973).

kind of debt for the benefits derived, each man owes obedience to the rules. . . . Now this may not be too far off for . . . business executives convicted of tax fraud. . . . But to think that it applies to the typical criminal, from the poorer classes, is to live in a world of social and political fancy. Criminals typically are not members of a shared community of values with their jailers And they certainly would be hard-pressed to name the benefits for which they are supposed to owe obedience. If justice, as both Kant and Rawls suggest, is based on reciprocity, it is hard to see what these persons are supposed to reciprocate for.²⁰⁶

Of course, one's view of the justice of existing wealth distribution may affect one's assessment of whether retributive theories can apply in today's world. Some desert proponents may insist that the poor do receive great social benefits ("handouts") for which they should be grateful. But for those who doubt that law's benefits and burdens are equally distributed today, there is good reason to be a skeptic about desert as a sentencing principle.

A standard retributive response to arguments like Murphy's is to insist that whatever the influence of poverty on criminal choices, it is not entirely determinative and thus does not deprive the criminal of responsibility for his actions.²⁰⁷ True, the most radical rejections of desert are "hard determinism,"²⁰⁸ and most of us are not hard determinists. We think we can make choices and exercise meaningful control over our lives, given the chance. But we need both chance and choice. Surely there are a great many offenders who are given good opportunities and make bad choices, and those bad choices are relevant to sentencing decisions. There are also a great many offenders who had bad chances and also made bad choices, and there are even some criminals who probably made the best choices they could given really miserable chances. The most well-intentioned desert assessments could be understood as attempts to distinguish the degree to which the crime is a product of individual agency as opposed to environmental or other factors beyond the defendant's control. We are not necessarily very good at making those assessments, according to

²⁰⁶ *Id.* at 240.

²⁰⁷ Markel, *supra* note 150, at 1467 n.138 ("While it is true that many offenders are motivated to commit crime by environmental factors, the truth is that there are many people who have substantially similar backgrounds and experience the same environmental factors who do not commit crimes. Hence the Marxist critique of retribution . . . fails to persuade."). Contrary to Markel's suggestion, Murphy's version of the Marxist critique does not depend on a claim that crime is entirely determined by socioeconomic position. Rather, the argument is that just retribution depends on an equal initial distribution and socioeconomic inequality—not because that is the only world in which people can exercise choice, but because that is the only world in which we can fairly portray crime as a disruption of equal benefits and burdens.

²⁰⁸ Schmidt, *supra* note 22, at 776.

psychological research: when humans are asked to evaluate other people's behavior, a cognitive bias known as "fundamental attribution error" leads the observers to exaggerate the extent to which others could control their actions and the consequences of those acts.²⁰⁹ But a more skeptical attitude toward desert might at least make us more attentive to the interplay of choice and chance, and to the extent which socioeconomic disparities weaken retributive claims.²¹⁰

Wealth distribution influences not only who breaks the law, but also who is detected, arrested, convicted, and punished. Among the people who disobey the law, poor criminals are probably more likely than rich criminals to be detected by law enforcement. Poverty often exposes individuals to increased government supervision; those with more property tend to enjoy more privacy.²¹¹ Furthermore, the poor are certainly more likely to receive inferior legal defense services.²¹² These disparities further undermine the claim that the benefits and burdens of law are distributed equally, and they suggest additional reasons to resist a sharp dichotomy between distributive justice and criminal justice.

Socioeconomic disparities are also particularly critical in light of current claims that desert-based punishment is necessary to preserve the moral credibility of the criminal law.²¹³ Certainly, moral credibility is crucial to a stable legal system; it is probably much more effective than the threat of punishment as a means of ensuring obedience to the law.²¹⁴ But

²⁰⁹ For a discussion of the psychological research, and an application of it to punishment theory, see Donald Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383 (2003). "Although people tend to attribute their own misconduct to external constraints, they tend to attribute the behavior of others to personality rather than context." *Id.* at 1388. Interestingly, this attribution error occurs even when the observers are informed of strong and even irresistible external constraints on the actor. *See id.* at 1396-99.

²¹⁰ For examples of works that critically scrutinize claims of deserved punishment, but do not ultimately abandon desert as a sentencing principle, see Dolovich, *supra* note 28, at 370-74; Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 765-69 (2005).

²¹¹ *See, e.g.*, Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1432-34 (1991) (noting that "poor women are generally under greater government supervision" such as through contacts with publicly provided medical treatment, welfare agencies, and probation officers).

²¹² *See, e.g.*, COLE, *supra* note 173, at 63-100 (1999); Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1169-70 (2001) (describing "the systemic neglect of indigent clients").

²¹³ *See* Robinson & Darley, *Utility of Desert*, *supra* note 34, at 457-58; Robinson & Darley, *Role of Deterrence*, *supra* note 34, at 996.

²¹⁴ *See* TOM TYLER, *WHY PEOPLE OBEY THE LAW* 3-4 (1990); Tracey Meares, *Norms, Legitimacy, and Law Enforcement*, 79 OR. L. REV. 391, 404-08 (2000) (contrasting norm-

the patterns of criminal behavior, and the correlation of crime with poverty, should prompt us to ask: for whom does the law lack moral credibility and legitimacy? If respect for the law prompts obedience, then the law's biggest legitimacy crisis would seem to be among the people breaking the law. Among this group, the law may well lack legitimacy, but not because it does not punish harshly enough. Rather, the law, and perhaps the state more generally, lacks legitimacy among poor and minority communities because it is perceived as not protecting them well: the law is perceived as sacrificing the interests of poor and non-white individuals in order to serve the wealthy and the white.²¹⁵ This is the legitimacy crisis most in need of attention.²¹⁶

The difficult but unavoidable reality is that the most effective efforts to address crime—including but not limited to efforts to renew legal legitimacy—probably do not lie in sentencing policy or anywhere in criminal law. Instead, substantial crime reduction almost certainly requires improved education, wealth redistribution, and other policies much broader than the criminal justice system can address alone. Accordingly, among practitioners and scholars of criminal law, there is an enormous temptation to punt on all the issues of broad social justice. It becomes nearly irresistible to seize upon the bare fact that most offenders do make some meaningful choices and to place the entire weight of American crime upon those choices. We should resist this temptation. Sentencing policy cannot fix crime, but it can certainly exacerbate it, and policies inattentive to socioeconomic and racial inequalities are likely to exacerbate both crime and the underlying inequalities.²¹⁷ The notion of deserved punishment

based law enforcement with a punitive model).

²¹⁵ For references to some of the empirical research on varying perceptions of the legitimacy of the legal system, see Kathryn K. Russell, *The Racial Hoax as Crime: The Law as Affirmation*, 71 IND. L.J. 593, 594 nn.7-8 (1995). Cf. Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1228-29 (2000) (noting that although blacks are likely to perceive the legal system as racially biased against them, they may support increased policing due to a sense of particular vulnerability); L. Marvin Overby et al., *Justice in Black and White: Race, Perceptions of Fairness, and Diffuse Support for the Judicial System in a Southern State*, 25 JUST. SYS. J. 159, 172 (2004) (reporting empirical findings that “[b]lacks and whites have very different perceptions of the justice system’s record of dispensing justice equitably”).

²¹⁶ The proposed revisions to MPC sentencing provisions are sensitive to this fact. See, e.g., MODEL PENAL CODE: SENTENCING § 1.02(2), 14 (Discussion Draft 2006) (identifying the need “to increase the transparency of the sentencing and corrections system, its accountability to the public, and the legitimacy of its operations as perceived by all affected communities”); see also *id.* at 35, 64.

²¹⁷ The MPC revisions are sensitive to this point as well. See MODEL PENAL CODE: SENTENCING 171, 174 (Discussion Draft 2006).

appears to function as an isolationist strategy, an attempt to pretend that crime has purely individual causes, and punishment has no negative social effects.²¹⁸ But crime and punishment both affect and are affected by the larger political and social system in which they occur, and skepticism toward desert may encourage us to address crime through more effective laws and policies both inside and outside of the field of criminal law.

Though disputes about just wealth distribution continue, in the realm of distributive justice we tend to interrogate desert fairly thoroughly. We demand to know desert bases and try to ferret out arbitrariness. And our “holistic” approach to distributive justice will not let desert be the final word: even if we do think Bill Gates deserves his wealth, we insist on considering the larger implications of a world in which the state protects all of that wealth. In the realm of punishment, we should be as skeptical. We should interrogate closely the asserted bases for desert, which may require us to investigate more thoroughly the causes of crime, and we should consider that punishment imposes social costs that may sometimes outweigh its asserted benefits. We probably will not, and perhaps should not, eliminate desert’s relevance from the penal system, just as we did not eliminate it from discussions of distributive justice. But a little skepticism is in order.

V. CONCLUSION

If judicial review of democratically enacted laws presents a countermajoritarian difficulty, the near-absence of such review in criminal law and sentencing policy might be said to present a majoritarian difficulty. Except for a narrow range of activities protected by the First Amendment and a highly contested set of “fundamental” liberties, courts have been reluctant to declare any category of activity beyond the reach of state penal power.²¹⁹ And once a state or federal government has criminalized a given offense, courts have been even more reluctant to declare limits to the

²¹⁸ Carol Steiker cites a *New Yorker* cartoon in which a jury foreperson announces, “We find that all of us, as a society, are to blame, but only the defendant is guilty.” Steiker, *supra* note 210, at 767.

²¹⁹ Outside the First Amendment and fundamental liberties contexts, the courts’ discussions of the scope of the power to criminalize have concerned whether status or involuntary acts may be made criminal. See, e.g., *Powell v. Texas*, 392 U.S. 514 (1968); *Robinson v. California*, 370 U.S. 660 (1962); *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136-37 (9th Cir. 2006). But if the act in question is conceded to be voluntary, it can almost certainly be made criminal. Doug Husak has noted that a legislature could probably make sausage consumption into a criminal offense to prevent obesity. See Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEG. STUD. 207, 210-11 (2004).

severity of the sentences imposed for the offense.²²⁰ Since majority rule typically operates as a “one-way ratchet”²²¹ that continues to expand the penal power, and since courts have recognized few constitutional limits on this power, reformers who would restrict the reach of the criminal law or the severity of sentences are still in search of a limiting principle.

External limitations—limitations imposed by a branch of government not itself exercising the power—are likely to be the most effective restrictions on the scope of the penal power. And there are good reasons to understand the Eighth Amendment as an external, countermajoritarian restriction on the penal power.²²² Since courts have repeatedly declined to view the Eighth Amendment in that way, it is certainly worth considering other ways in which the penal power might be restricted.²²³ If courts, experts, or other nonmajoritarian institutions are empowered to assess desert, desert as a limiting principle could serve as an external limitation. I have suggested that this avenue holds little promise for those who think current sentences are too severe. Not only are American jurisdictions unlikely to entrust elites with the assessment of desert, but the political leanings of the American judiciary hardly guarantee that judicial determinations of desert will be substantially different from populist determinations.²²⁴

Some of the most recent calls for desert as a limiting principle seem to construct it as an *internal* limitation—one that should guide the very institutions exercising the power to punish. Once attention is redirected to the purposes underlying criminal laws, the argument goes, those exercising power will see that those purposes prescribe their own limitations.²²⁵ The idea seems to be that we should get the democratic populace, and its elected representatives, to be more attentive to desert, and increased attention to desert will then produce more rational, less severe sentencing policies. This

²²⁰ See *Ewing v. California*, 538 U.S. 11, 30-31 (2003); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (“Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.”).

²²¹ Stuntz, *supra* note 65, at 509 (referring to criminal law as a “one-way ratchet” that “makes an ever larger slice of the population felons, and that turns real felons into felons several times over”).

²²² I have argued elsewhere for an interpretation of the Eighth Amendment’s prohibition of cruel and unusual punishments as a proportionality limitation on the penal power. See generally Ristroph, *supra* note 42.

²²³ See discussion of *Ewing*, *supra* notes 80-90 and accompanying text.

²²⁴ Even if it is parsimony, rather than desert, that is the real source of limitations on sentences, the reinvigoration of desert threatens to render parsimony ineffective. See *supra* note 170 and accompanying text.

²²⁵ This appears to be Richard Frase’s approach to limiting retributivism. See, e.g., Frase, *Punishment Purposes*, *supra* note 1.

strategy assumes that desert is a distinct value with meaning independent of other social and political goals, a concept capable of quantification without reference to other values. That assumption is belied by the history of desert rhetoric, the psychology of desert judgments, and the conceded vagaries of desert philosophy on questions of measurement.

And indeed, internal limiting principles on the penal power seem always to prove unreliable.²²⁶ For this reason, my critique of desert should not be read as a call to reinvigorate deterrence or other professed punishment goals as better sources of criminal law reform. Other sentencing theorists have described what we might call the elasticity of deterrence.²²⁷ If deterrence and desert are both elastic, so are rehabilitation and the notions of dangerousness that underlie incapacitation. Norval Morris argued that “[t]he concept of dangerousness is so plastic and vague—its implementation so imprecise—that it would do little to reduce either the present excessive use of imprisonment or social injury from violent crime.”²²⁸ But replace “dangerousness” with “desert,” and Morris’s sentence is no less true. Similarly, Francis Allen criticized “the rehabilitative ideal” for ostensibly justifying increasingly severe and

²²⁶ Most famous among these approaches, perhaps, is the harm principle. Under this view, we have a system of criminal proscriptions and punishments in order to prevent social (or individual) harm. It follows that behavior that causes no harm should not be criminalized. The harm principle is often associated with John Stuart Mill, who announced “one very simple principle” to regulate the societal coercion of individuals: “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.” JOHN STUART MILL, *ON LIBERTY* 9 (Elizabeth Rapaport ed., Hackett 1978) (1859). In the twentieth century, H.L.A. Hart and others invoked Mill’s harm principle as a limitation on the scope of the criminal law. See, e.g., H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 4-6, 14-18, 75-79 (1963); see also JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 3-4, 11-16, 219-20 (1984); HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 296 (1968). But the harm principle has had little effect in slowing the spread of the criminal law. Harm has proved to be a considerably elastic concept: any candidate for criminalization can be portrayed as causing some kind of harm. For a thorough analysis of several activities alleged to be harmless but later criminalized under rhetoric of harm, see Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 *J. CRIM. L. & CRIMINOLOGY* 109 (1999).

²²⁷ See Kahan, *supra* note 154, at 427-28 (noting the “empirically speculative nature of deterrence” and arguing that individuals use preexisting normative judgments to resolve uncertainty about deterrence). In a recent article, Paul Robinson and John Darley argue that deterrence rhetoric and deterrence rationales have pernicious effects on the criminal law. See Robinson & Darley, *Role of Deterrence*, *supra* note 34. They note that deterrence is invoked to justify a wide range of criminal law practices that are actually based on non-deterrence considerations. *Id.* at 971-74. Deterrence is simply too indeterminate to be of use—in fact, “reliance on deterrence arguments can easily lead to doctrinal formulations that reduce rather than increase deterrence.” *Id.* at 977.

²²⁸ NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 62 (1974).

lengthy sentences.²²⁹ Because the length of confinement necessary for rehabilitation was too hard to quantify with precision, “there is a strong tendency for the rehabilitative ideal to serve purposes that are essentially incapacitative rather than therapeutic in character.”²³⁰ Like desert and deterrence, rehabilitation and incapacitation prove elastic and opaque in practice.

Theoretical attempts to justify punishment are of minimal use to sentencing reform strategy. Although penological theories are first articulated by scholars who see clear limits to penal power, those theories quickly become translated into broad, vague rhetoric that is invoked to justify more or less anything. In their most sophisticated forms, both retributive and utilitarian accounts of punishment presume strong proportionality principles that limit the appropriate penalties in particular cases.²³¹ But in the messy world of politics and legal practice, proportionality limitations can be ignored or avoided by appeals to a new penological purpose (or a new understanding of the demands of an old purpose). Sentencing theorists often identify this weakness—elasticity in practice—in rival theories but fail to spot it in their own.²³²

We might be able to develop a democratic strategy for sentencing reform, but we will not get there by reminding ourselves why we punish. Instead, we need to generate greater skepticism and scrutiny of America’s vast punitive system; we need to remind ourselves why not to punish. Now, punishment is overly justified and incompletely just. It is overly justified in that generations of theorists have offered comprehensive apologies for the institution of punishment, so that those who want a moral safety net beneath penal practices have considerable options among which to choose. Yet punishment remains incompletely just. It is incompletely just because no theory succeeds as a comprehensive defense; no single account adequately defends all instances of punishment. It is incompletely just in the sense that sometimes, penalties are imposed that cannot be explained by *any* of the available theoretical accounts. It is incompletely just in that it fails to

²²⁹ Francis Allen, *Legal Values & The Rehabilitative Ideal*, in SENTENCING, *supra* note 10, at 110, 114.

²³⁰ *Id.*; see also *id.* at 113 (“[T]he rehabilitative ideal has been debased in practice and that the consequences resulting from this debasement are serious and, at times, dangerous.”).

²³¹ See Frase, “Proportionality” *Relative to What?*, *supra* note 1, at 588-98; Ristroph, *supra* note 42, at 272-84.

²³² See Luna, *supra* note 86, at 245 (“Some scholars lob criticisms at other theoretical camps oblivious to the fact that nearly identical attacks can be leveled against their own espoused theories of punishment. When retributivists attack utilitarian calculus as fanciful in its aggregation of costs and benefits, for instance, they seem to ignore similar problems in determining the appropriate just deserts for a given offense.”).

account for broad social and economic inequalities that affect who commits crimes, which crimes are detected and prosecuted, and what punishments are imposed. It is incompletely just in that our penal practices seem to exacerbate criminal behavior, which is surely unjust to tomorrow's crime victims. And it is incompletely just because even in the best case scenario, even when penalties successfully deter or accomplish other penal goals, even then penalties exact great social costs and fail to repair completely the damage of crime. In most if not all crimes, we know that we would have been better off had the offense never occurred and the penalty never been necessary.

Thus, it is not a theory of punishment purposes that we need to generate democratic support for sentencing reform. Instead, we need a healthy dose of democratic skepticism—a willingness to think critically about our criminal justice system and some of its most fundamental tenets. Skepticism about desert is a place to start. This does not mean we must avoid desert rhetoric altogether, but it does mean that we should scrutinize desert claims in the criminal law as closely as we do in the realm of distributive justice. The use of desert rhetoric need not stand as an obstacle to sentencing reform; given the elasticity of desert, we could punish much less severely and much more effectively and still call criminal sanctions “deserved.” But since desert is elastic and opaque enough that it is always possible that bias, fear, hostility, or other extra-legal considerations will affect the determination of just deserts, we should remember that desert is a “placeholder” and continually investigate the (possibly arbitrary) considerations whose places desert might hold. And we should not think that desert itself can serve as an independent agent of penal reform.