THE LIMITS OF RETRIBUTIVISM

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"Limiting retributivists" believe that the vagueness of retributive proportionality represents a moral opportunity. They maintain that the state can permissibly harm an offender for the sake of crime prevention and other nonretributive goods, so long as the sentence resides within the broad range of retributively "not undeserved" punishments. However, in this essay, I argue that retributivism can justify only the least harmful sentence within such a range. To impose a sentence beyond this minimum would be cruel from a retributive perspective. It would harm an offender to a greater degree without thereby increasing the realization of our retributivist ends. Thus, if our nonretributive policy aims required a harsher sentence, the offender's retributive desert could not provide the rationale, and we would need another theory that explains why, if at all, harming an offender as a means of realizing the desired nonretributive good is permissible.

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INTRODUCTION

This essay presents an internal critique of Norval Morris's "limiting retributivism."[1] Limiting retributivists, like Morris, Michael Tonry, and

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1. This piece builds upon prior work. *See* Jacob Bronsther, *Vague Comparisons and Proportional Sentencing*, 25 LEGAL THEORY 26, 45 (2019).

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Richard Frase, seek to exploit the vagueness of retributive proportionality.[2] Morris writes:

> [A] deserved punishment . . . does not mean the infliction on the criminal offender of a pain precisely equivalent to that which he has inflicted on his victim; it means rather a *not undeserved* punishment which bears a proportional relationship in a hierarchy of punishments to the harm for which the criminal has been convicted."[3]

Within the range of "not undeserved" punishments that bear a "proportional relationship" to the offense, limiting retributivists argue that (a) any punishment is retributively legitimate and (b) nonretributivist considerations—like deterrence, incapacitation, rehabilitation, social norm maintenance, and so forth—should determine the choice of punishment. Limiting retributivism has proven to be hugely influential. Rarely has an academic theory been installed so directly and quickly into the legal system. For instance, limiting retributivism is the explicit basis for the "modified just deserts" sentencing guidelines in Minnesota, as well as the guidelines in Washington, Oregon, Kansas, and North Carolina, which were all based on Minnesota's system.[4] It has been endorsed by the American Law Institute and its Model Penal Code on Sentencing, which was updated in 2017, and by the American Bar Association.[5] Loose versions of the theory are

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2. *See generally* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974); NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982); NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM (1990); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005); RICHARD FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM (2012) [hereinafter FRASE, JUST SENTENCING]; Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 365–78 (1997); Richard S. Frase, *Limiting Retributivism*, *in* THE FUTURE OF IMPRISONMENT 83 (Michael Tonry ed., 2004).

3. MORRIS, MADNESS AND THE CRIMINAL LAW, *supra* note 2, at 179 (emphasis added).

4. FRASE, JUST SENTENCING, *supra* note 2, at 3–4; MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE 9 (1980) (adopting modified just deserts approach).

5. MODEL PENAL CODE: SENTENCING § 1.02(2) (2017) ("The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system, are: (a) in decisions affecting the sentencing of individual offenders: (i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders; (ii) when reasonably feasible, to achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders,

implicit in all the other American guidelines systems, as well as in the sentencing regimes of most Western nations.[6] Frase concludes that limiting retributivism is the "de facto consensus theoretical model of criminal punishment."[7] In this essay, however, I will argue against the theory's central premise that any punishment within the range of "not undeserved" sentences is retributively legitimate. Retributivism, I believe, can justify only the *least harmful* sentence within such a range. To impose a sentence beyond this minimum would be cruel from a retributive perspective. It would harm an offender to a greater degree without thereby increasing the realization of our retributivist ends. Thus, if our nonretributive policy aims required a harsher sentence, the offender's retributive desert could not provide the rationale. Assuming we refuse to become part-time consequentialists, the question is then whether there are other principles—neither retributivist nor consequentialist—that might enable and constrain the pursuit of nonretributive goods. This essay suggests that the principles of corrective justice and self-defense are promising candidates.

I. HARMFUL VAGUENESS

Pretend that retributive desert is our singular sentencing aim.[8] We have no concern for deterrence, incapacitation, or whatever it may be. Only

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restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding community, provided these goals are pursued within the boundaries of proportionality in subsection (a)(i) . . . "); AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING (3d ed., 1994); AMERICAN BAR ASSOCIATION JUSTICE KENNEDY COMMISSION, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES (2004).

6. FRASE, JUST SENTENCING, *supra* note 2, at 4.

7. *Id.*

8. In defining retributivism, I follow Mark Michael, who writes, "For a utilitarian, the event that justifies punishment occurs subsequent to the punishment, whereas for the retributivist the punishment and its justifying event/state of affairs begin simultaneously." Mark A. Michael, *Utilitarianism and Retributivism: What's the Difference?*, 29 AM. PHIL. Q. 173, 175 (1992). Retributivists, according to Michael, see the justifying good of punishment (say, the intrinsic good of deserved suffering or censure) as being connected analytically to punishment itself. For utilitarians, by comparison, the relevant good (say, crime deterrence) is "epiphenomenal" to punishment. *Id.* at 178–79. Michael's theory thus entails that "negative" retributivists, like Anthony Quinton, are not genuine retributivists. *See* A.M. Quinton, *On Punishment*, 14 ANALYSIS 133, 134–35 (1954). Negative retributivists believe that wrongdoing makes offenders liable to punishment, but that other positive reasons or goods, like crime deterrence, justify the actual

retributive desert. We are then presented with an offender who, say, stood watch while his accomplice broke into someone's house and stole $5,000 worth of goods. How much punishment does he retributively deserve? Although the answer will depend to some degree on the variant of retributivism one endorses,[9] limiting retributivism as embodied in legal sources does not take a hard stand on this internal debate. For instance, the Model Penal Code on Sentencing provides the broad instruction to "render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders."[10]

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infliction of punishment; the justifying good that punishment creates on this view is thereby epiphenomenal to punishment itself.

9. There are least two major schools of retributivism.

First, "traditional" retributivists see the good of punishment as analytically connected to an offender's suffering. They believe that to cause an offender to suffer in proportion to his wrongdoing is to generate the intrinsic good of moral desert. Traditional retributivists understand this desert claim in one of two ways. According to "strict" retributivists like Michael Moore (and maybe Kant), it is grounded in the unadorned conviction that wrongdoers deserve to suffer. *See* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 91 (1997) ("Retributivism is a very straightforward theory of punishment: We are justified in punishing because and only because offenders deserve it."). Meanwhile, "fair play" retributivists like Herbert Morris, Jeffrie Murphy, and Richard Dagger understand this desert claim to derive from a commitment to fairness. *See* Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 478 (1968); Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFFS. 217, 228 (1973); Richard Dagger, *Playing Fair with Punishment*, 103 ETHICS 473, 475 (1993); RICHARD DAGGER, PLAYING FAIR: POLITICAL OBLIGATION AND THE PROBLEMS OF PUNISHMENT (2018); *see also* GEORGE SHER, DESERT 69–90 (1987). If we assume that an offender has benefitted from everyone else's restraint in following the law—not always a safe assumption, Murphy argues—then he has gained an unfair advantage by breaking the law and failing to restrain himself in turn; and the harm or suffering of punishment is thus deserved as a means of stripping away the offender's unfair gain. Murphy, *supra*, at 232–43.

Second, "censuring" retributivists like Antony Duff and Andrew von Hirsch argue that, by violating "public," communal values, offenders deserve the community's censure. *See* R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001); ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993); *see also* John Tasioulas, *Punishment and Repentance*, 81 PHIL. 279, 285 (2006). I discuss censuring retributivism further below. *See infra* pages 315–16.

10. MODEL PENAL CODE: SENTENCING § 1.02(2) (2017). Even "censuring" retributivists like Antony Duff are committed to sentencing proportionality in general accord with the MPC's direction. As Duff writes:

Along these lines, retributive proportionality analysis requires one to (a) measure the harmfulness of an offense, (b) combine that measurement with the offender's culpability level, and then (c) select the punishment (normally, the number of months in prison) that represents a proportionally "grave" injury. As to the measurement of harm, Andrew von Hirsch and Andrew Ashworth provide a convincing theory of harm as that which reduces someone's "standard of living"—the "means and capabilities that would *ordinarily* promote a good life."[11] It is only one conception of harm, but it is thoughtful and prominent, and there is no reason to believe that any other honest attempt could avoid the issues that beset their theory.[12] Von Hirsch and Ashworth argue that "standard of living" has four main components: (1) physical integrity, (2) material support and amenity, (3) privacy, and (4) freedom from humiliation.[13] The problem is that these values are multifaceted and interdependent. For example, many instances of material support and amenity (e.g., having a home) depend upon privacy for their impact upon one's living standard. Further, material support and amenity is *itself* an interdependent mixture of goods that depend on each other for their impact (e.g., food, shelter, clothes, liquid assets,

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> A requirement of proportionality is intrinsic to any theory on which the, or a, primary purpose of punishment is to communicate the censure that offenders deserve for their crimes. We must determine not just that an offender deserves censure but how severe that censure should be: the more serious the crime, the more severe the deserved censure. That censure is communicated by penal hard treatment, and severity is a dimension of penal hard treatment as it is of censure. Thus the severity of the penal hard treatment will communicate the severity of the censure: the more severe the hard treatment, the more severe the censure it communicates. But it is then a simple requirement of justice (and of communicative honesty) that the severity of the offender's punishment (as penal hard treatment) be proportionate to the seriousness of her crime. To punish her with disproportionate severity, or leniency, is to communicate to her more, or less, censure that she deserves. This is, however, dishonest and unjust, since it is to punish her more, or less, severely than she deserves.

DUFF, *supra* note 9, at 132 (internal citations omitted).

11. ANDREW VON HIRSH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 144–45 (2005).

12. *Cf.* JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW, VOL. 1: HARM TO OTHERS 31 (1987) (defining a "harm" as a "setback to interest"); Matthew Hanser, *The Metaphysics of Harm*, 77 PHIL. & PHENOMENOLOGICAL RES. 421, 442 (2008) ("Every instance of someone's suffering a harm is either an event of the schematic type S's *losing some quantity of basic good G* or an event of the schematic type S's *being prevented from receiving a benefit of type B*. . . .").

13. VON HIRSH & ASHWORTH, *supra* note 11, at 145.

communication devices, access to transportation, access to markets, etc.). Thus, while reduction of living standard seems to be the right metric for measuring harm, it is exceptionally vague. The room for reasonable disagreement over how much a specific offense impacts one's living standard, and how it compares to other offenses, is expansive. Compare, for instance, the impact of a humiliating crime like being spat on by a stranger to that of a financial fraud that impacts one's material support, or to that of a burglary that impacts one's privacy in addition to one's material support.

Even if we were able to emerge from this harm analysis unscathed by extreme vagueness, we would need then to combine it, somehow, with the culpability judgment.[14] H.L.A. Hart expresses the difficulty concisely: "Is negligently causing the destruction of a city worse than the intentional wounding of a single policeman?"[15] In this manner, we see how vague retributive proportionality is as a device for determining criminal sentences. Nicola Lacey and Hanna Pickard go so far as to argue that retributive proportionality is a "chimera" and that it is incapable as an abstract ideational device of determining sentences, as evidenced in part by the dramatic variations in punishment severity within contemporary and historical communities looking to apply retributively proportional sentences.[16] They argue that "what has been thought of as proportionality is not a naturally existing relationship, but a product of political and social construction, cultural meaning-making, and institution-building."[17]

With this understanding of the bases of retributive proportionality, let us return to the burglary case. How much punishment does the defendant retributively deserve? Assume that prison is the only available punishment and that, like in most systems, it can be meted out only in month-long increments. After reflecting on the degrees of "harm" and "culpability" presented by the offense, we might survey retributive sentencing scales worldwide. For instance, depending on various factors—such as criminal

14. *Cf.* CHRISTOPHER SLOBOGIN, PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS 43–44 (2007) (arguing that evidence about past mental states is at its base narrative, rather than objective fact).

15. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968).

16. *See* Nicola Lacey & Hanna Pickard, *The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems*, 78 MOD. L. REV. 216, 227–28, 231 (2015).

17. *Id.* at 216.

history; the value of the property taken, damaged, or destroyed; the degree of planning; and whether the burglar possessed a dangerous weapon—the U.S. Sentencing Guidelines' recommended range for "residential burglary" is 24 to 210 months (17.5 years).[18] Meanwhile, in Sweden—where the underlying discourse is indeed of meting out retributive justice[19]—the sentencing range for "theft" is 0 to 6 months and the range for "gross theft," which can include burglary, is 6 to 72 months (6 years).[20] Let's say that after collecting all such conceptual and doctrinal resources, and after engaging in reflective equilibrium, we decide that the range of "not undeserved" sentences for this particular offense is 1 to 100 months of imprisonment. One could reasonably argue for a range even wider than this, especially at the bottom end if we could calibrate the sentence more finely, but the 1-to-100 scale provides some analytical clarity for our purposes.[21] How do we select a punishment within this range if our only positive sentencing aim is retribution?

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18. U.S. SENTENCING GUIDELINES MANUAL § 2B2.1 (U.S. SENTENCING COMM'N 2016), at 118–20.

19. Maritha Jacobsson, Lottie Wahlin, & Tommy Andersson, *Victim-Offender Meditation in Sweden: Is the Victim Better Off?*, 18 INT'L REV. VICTIMOLOGY 229, 230 (2012); *see also* Ville Hinkkanen & Tapio Lappi-Seppäläm, *Sentencing Theory, Policy, and Research in the Nordic Countries*, 40 CRIME & JUST. 349 (2011) (finding the retributive turn in the 1970s to be especially pronounced in both Sweden and Finland).

20. BROTTSBALKEN [BrB] (PENAL CODE) 8:4 (Swed.), translation available at https://www.government.se/492a92/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf.

21. As further support for the breadth of the retributivist range, Christopher Slobogin and Lauren Brinkley-Rubenstein asked subjects to examine 12 crimes and then to indicate the appropriate punishment on a 13-point scale. The standard deviations and the range of sentences were extraordinarily broad, even when dispositions beyond two standard deviations were thrown out. Moreover, in only the least and most serious crime scenarios did more than 25 percent of the sample choose the same punishment. Christopher Slobogin & Lauren Brinkley-Rubenstein, *Putting Desert in its Place*, 65 STAN. L. REV. 65, 94–96 (2013); *see also* MORRIS, MADNESS AND THE CRIMINAL LAW, *supra* note 2, at 151 (arguing that while people can agree on broad sentencing parameters outside of which punishment would seem patently unjust, these parameters were "overlapping and quite broad"); MODEL PENAL CODE: SENTENCING § 1.02(2) (2017) ("Even when a decisionmaker is acquainted with the circumstances of a particular crime and has a rich understanding of the offender, it is seldom possible, outside of extreme cases, for the decisionmaker to say that the deserved penalty is precisely x. . . . [S]ome punishments will appear clearly excessive on grounds of justice, and some will appear clearly too lenient—but there will nearly always be a substantial gray area between the two extremes.").

Limiting retributivists have not provided us with a decision theory for this scenario. However, for their system to work as intended, the decision theory essentially must be empty, such that retributivism has no means of further specifying the sentence once the range has been established, and nonretributivist considerations can then determine the choice freely. Perhaps, in the retributivism-only context, the judge could base the sentence on a roll of "official" dice, or on the medallion number of the next taxicab to drive by the courthouse.[22] What complaint would the offender have, assuming they receive a "not undeserved" sentence? Retributivism is what provides the moral justification for actually harming an offender, according to limiting retributivism; on this view, it is because (and only because) the sentence is retributively justified that the state can permissibly use the offender for nonretributive purposes.[23] Thus, the state must exhaust its retributivist sentencing resources before inviting nonretributive policy considerations to fill in any remaining gaps. Is it really the case, though, that retributivism would have nothing to say when presented with the 1-to-100-months scenario, such that any decision procedure would be retributively legitimate? I don't believe so.

Inherent to retributivism—and to any coherent moral theory—is the parsimony or non-cruelty principle. The basic idea is that to increase the amount of harm in the world for no good reason is unjustifiable. While limiting retributivists are champions of penal parsimony, they understand the principle to entail that state punishment should be (a) no more harmful than necessary to carry out the state's nonretributive penal purposes, so long as (b) the punishment remains on the retributivist scale. Morris writes: "This principle [of parsimony] is utilitarian and humanitarian; its justification is somewhat obvious since any punitive suffering beyond societal

22. Put differently, a retributivist could "pick" rather than "choose" a sentence on the scale. *See* Edna Ullman-Margalit & Sidney Morgenbesser, *Picking and Choosing*, 44 SOC. RES. 757, 757 (1977) (explaining that one "picks" an alternative when they are strictly indifferent with regard to the choices, whereas one "chooses" an alternative when the selection is determined by their preferences over the options).

23. Michael Moore writes that any social benefit that results from giving—and intending to give—an offender what he deserves is a "happy surplus." MOORE, *supra* note 9, at 89, 153; *see also* B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution*, 8 LAW & PHIL. 151, 195 (1989) (introducing a mixed Kantian theory of punishment whereby the state threatens punishment for the instrumental purpose of deterring rights violations, but inflicts punishment because the offender intrinsically deserves treatment "equivalent to the damage represented in the offense").

need is, in this context, what defines cruelty."[24] However, limiting retributivists fail to consider what parsimony entails in the retributivism-only setting. Retributivism is not so mysterious that it would reject the principle. Indeed, retributivism is grounded on the broad notion that people deserve to suffer or be censured when they bring harm into the world without good reason to do so. In this very general way, non-cruelty is built into retributivism. And given that retributivists qua retributivists are not cruel, the answer to the question of what sentence within the 1-to-100-months range ought to be imposed on the burglary accomplice is straightforward. Retributivists ought to sentence the offender to the *least harmful* "not undeserved" sentence: 1 month of imprisonment. To sentence him any more severely would just be cruel. That is, it would inflict *wanton* harm. It would harm him to a greater degree *for no reason*, as the state increases the amount of harm borne by the offender without in any way increasing the realization of its motivating penal aim. Put differently, if every sentence on the scale brings about the intrinsic good of desert to the same vague degree, then the least harmful sentence will maximize the realization of that good while causing the least amount of harm in the process. And thus to increase the sentence beyond that point would be cruel and retributively unjustified.

A retributivist might conceive of the vagueness differently. She might believe that there is an exact amount of time in prison that is retributively deserved. A nanosecond above or below would be unjust. She does not know what that precise amount of time is, but she knows that it resides somewhere on the scale. I suspect this position represents a very small minority of retributivists, but it has a serious philosophical pedigree.[25] On this view, it would seem that every point on the scale has the same probability of being the singularly deserved sentence. Of course, one possibility is that the probability of success is so low for any given point—

24. MORRIS, THE FUTURE OF IMPRISONMENT, *supra* note 2, at 6; *see also* FRASE, JUST SENTENCING, *supra* note 2, at 32–33; Christopher Slobogin, *Limiting Retributivism and Individual Prevention*, *in* THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF SCIENCE OF PUNISHMENT 49, 55–57 (Farah Focquaert et al. eds. 2020).

25. Some philosophers believe that epistemic uncertainty, rather than semantic indeterminism, causes vagueness, such that there are always precise, cardinal answers, but we simply lack the epistemic resources to discern them. *See, e.g.*, TIMOTHY WILLIAMSON, VAGUENESS (1994). On vagueness as semantic indeterminism, *see, e.g.*, Kit Fine, *Vagueness, Truth and Logic*, 30 SYNTHESE 265 (1975).

infinitesimally low if desert is really measured in nanoseconds—that *no* sentence is retributively justified. But assuming that does not follow, then this conception of retributive vagueness, when combined with the non-cruelty principle, would also entail the least harmful sentence. The least harmful sentence would maximize the chances that the offender receives what they deserve—just as any sentence on the scale would—while inflicting the least amount of harm in the process. To be sure, if the probability of success varied on the scale for some reason, it would not invalidate the broader critique of limiting retributivism.[26] If, say, the median sentence had the greatest chance of being the precisely deserved sentence, then retributivism would demand *that* sentence, with no vagueness remaining for nonretributivist considerations to specify. Nonetheless, I will move forward with the understanding that the probability of success is uniform on the scale, such that even this conception of retributive vagueness also leads to the least harmful position.

The requirements of "ordinal" proportionality in the retributivism-only context would not impede the movement to the bottom of the scale. Ordinal proportionality is the ideal that the scale of punishments ought to reflect the scale of offense severity, so that the "graver" the offense, the more severe the punishment. This is contrasted with "cardinal" proportionality, which is meant to "anchor" this scale by determining the absolutely deserved punishment for a minimum of one or possibly two offenses,[27] that is, the punishment deserved only by reference to the offense's moral gravity. The ordinal scale is set, in theory, by reference to these few points of cardinal judgment. Without such cardinal anchors, ordinal proportionality loses much meaning, as many commentators have noticed, since its principles would be realized even if the scale were set at an extremely high level, where minor regulatory offenses receive 100 lashes, and on up for the worst offenses, or at an extremely low level, where the worst offenses receive a $100 fine, and on down to a 10-cent fine. As Lacey and Pickard write, "[T]he very idea that a certain punishment is deserved—and with it, the whole basis for proportionality's purported capacity to set

26. Thanks to Kiel Brennan-Marquez and Will Thomas for helpful discussion on this point.

27. *See* Greg Roebuck & David Wood, *A Retributivist Argument Against Punishment*, 5 CRIM. L. & PHIL. 73 (2011); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 83 (1992).

upper limits on, or to generate substantial criteria of fittingness of, punishment—rests on cardinal rather than ordinal proportionality."[28] In this way, even if ordinal proportionality will guide the sentencer in the retributivism-only context, she still needs to anchor her ordinal scale, and it is that anchoring decision which will be most determinative of the sentence. We might then reformulate the question as follows: If we are anchoring our ordinal scale with this particular 1-to-100-months decision—and if retribution is the only sentencing aim—which sentence should we select? The non-cruelty principle should operate in the same manner in this setting, with the 1-month sentence grounding the wider system.[29]

II. USING HARM

Let us now return to the real-world scenario where we have nonretributivist sentencing aims as well. Let us assume that sentencing offenders to the least harmful "not undeserved" sentence is not the optimal choice for realizing these other aims. Let us assume, more particularly, that sentencing offenders in this manner (or anchoring the scale in this manner) will lead to a dramatic increase in crime. Limiting retributivists would then insist that we ought to increase sentences to the optimal point for the purposes of incapacitation and deterrence, so long as we stay within the retributivist range—say, 50 months for offenses as serious as the burglary in question. In this way, where the zone of discretion is exceedingly wide, the retributivism within limiting retributivism fails to provide much of any sentencing guidance, with all the work being done by the "external" nonretributivist considerations. The notion, then, that we are punishing an offender for the purpose of giving him his just deserts is almost completely diluted. Nonetheless, limiting retributivists would insist that the offender has no complaint if we increase his sentence, since we still do not punish him more than he deserves—and we might as well, because the rest of us will be much

28. *See* Lacey & Pickard, *supra* note 16, at 227.

29. This conclusion assumes that penalties less harmful than one month of prison would allow for sufficient ordinal "spacing" for crimes less severe than burglary; examples include fines and other noncustodial punishments as well as even shorter terms of confinement. Although I will continue with this (reasonable) assumption, to the extent that it did not hold—and to the extent that we put stock in the demands of ordinal spacing—we would have to increase the anchoring sentence to some modest degree. *See* Von Hirsch, *supra* note 27, at 82–83 (discussing spacing).

better off. Furthermore, they might continue, the extra harm inflicted on the offender is consistent with their conception of penal parsimony, since the punishment is no more severe than necessary to carry out the state's various nonretributive purposes (and it remains on the retributivist scale).

It strikes me that the offender could raise at least two objections to his 50-month sentence. First, as suggested above, retributivism is meant to provide the second-person moral justification for his punishment. When the offender asks, "But why *me*?," the limiting retributivist state replies, "Because *you* deserve it." It does not reply: "Because it is useful and efficient for society as a whole." Limiting retributivists are fully aware of the hazards of purely consequentialist state punishment, whereby the efficient pursuit of social welfare rather than respect for individual rights determines the distribution of intentional penal harm.[30] For instance, consequentialists have a famously hard time explaining what is wrong with punishing innocent people or making terrible examples out of minor offenders if doing so happened to maximize social welfare.[31] The limiting retributivist solution, again, is to establish the vagueness of retributive desert as a first step, and then to house consequentialism within that vagueness as a second step. However, they are not entitled to the second step because retributivism on its own demands the least harmful sentence on the scale. There is thus no resulting retributive vagueness in which to morally sheathe the process of harming the offender for the purpose of crime prevention.

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30. For examples of consequentialist penal theory, see, e.g., JAMES Q. WILSON, THINKING ABOUT CRIME (1983); J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, *in* J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 1 (1973).

31. Bentham, for one, is not ashamed. *See* Jeremy Bentham, *Principles of Judicial Procedure, with the Outlines of a Procedure Code*, *in* 2 THE WORKS OF JEREMY BENTHAM 5, 21 (John Bowring ed., 1843) ("In point of utility, apparent justice is everything; real justice, abstractedly from apparent justice, is a useless abstraction, not worth pursuing, and supposing it contrary to apparent justice, such as ought not to be pursued."); *see also* Saul Smilansky, *Utilitarianism and the 'Punishment' of the Innocent: The General Problem*, 50 ANALYSIS 256, 257 (1990) (arguing that the question of punishing the innocent is not merely philosophical, because "in the creation and daily application of the criminal law we are constantly facing a general situation in which utilitarians would be obliged to promote the 'punishment' of the innocent"); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 9–10 (1955) (arguing that a form of rule utilitarianism could save utilitarianism from punishing the innocent); *but see* J. Angelo Corlett, *Making Sense of Retributivism*, 76 PHILOSOPHY 77 (2001) (criticizing Rawls).

There is a related but somewhat deeper second objection. The offender sentenced to the 50-month term could reasonably worry that he is being merely sacrificed to mitigate a social problem—future crime—for which he has no personal responsibility. When the state is concerned, and only concerned, to give him his just deserts, he receives a 1-month sentence. The only reason for inflicting a greater degree of penal harm is that it would help the rest of us to mitigate a social problem. But that is a good reason for harming someone more than we would otherwise be entitled to only if he is to some degree responsible for that problem. If he is not responsible, then by harming him further we fail to respect his inviolability.

The liberal legal order (using "liberal" in its nonpartisan, philosophical sense) is founded on a conception of the individual as an inviolable bearer of rights, rather than as a fungible piece of a larger social whole.[32] Central to this conception is a refusal to merely sacrifice someone for the greater good, consistent with the Kantian prohibition.[33] The precise contours of this "non-sacrifice" principle are difficult to define.[34] It does not *absolutely* prohibit using someone as a means to the greater good. There are exceptions, the most straightforward of which is probably consent. Imagine that

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32. *See* JOHN RAWLS, A THEORY OF JUSTICE 3–4 (1971) ("Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others."); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 32–33 (1974) ("Why not . . . hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall social good? But there is no *social entity* with a good that undergoes some sacrifice for its own good. There are only individual people, different individual people, with their own individual lives. Using one of these people for the benefit of others, uses him and benefits the others. Nothing more. What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up."); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at xi (1977) ("Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.").

33. *See* IMMANUEL KANT, *Groundwork of the Metaphysics of Morals* 4:429 (1785), *reprinted in* PRACTICAL PHILOSOPHY 37, 80 (Mary J. Gregor ed. & trans., 1996) ("So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.").

34. *See* NIGEL WALKER, PUNISHMENT, DANGER, AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE 80–85 (1980); TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 60–61 (1969).

someone consents to being used by the collective, say, by running for public office. Perhaps consent is unnecessary when the harm to the person being used is de minimis and the benefit to society is very large.[35] A further exception might be public necessity plus equal distribution of the burden; this might explain the permissibility or impermissibility of certain forms of military conscription. Another possibility yet—discussed further below—is corrective justice for social harm, whereby the state is entitled to use an individual to prevent a future harm to society as a means of rectifying his past harm to society. Regardless, at a minimum, the non-sacrifice principle prohibits intentionally and significantly harming someone without his consent as a means of mitigating a problem for which he lacks responsibility. Put differently, it is impermissible to simply pluck a person off of the street and injure them as a means of resolving a problem or realizing a goal they have nothing to do with. And our burglar could rightly wonder why the extra punishment inflicted upon him for the purpose of crime prevention does not treat him in an analogous manner. If there are people in society who require the threat of nonmild punishments to desist from crime, why are they *his* problem? Without their presence, he would receive much less prison time, perhaps years less. The mere fact that he committed a wrong is not a sufficient explanation for the additional harm, given that, if we looked only to that wrong, he would receive a much more lenient sentence.

This point sharpens when we appreciate that the logic of limiting retributivism is not strictly limited to crime policy. Assuming that we stay within the "not undeserved" range, we would be entitled to use an offender for *any* social purpose. Again, limiting retributivists are not claiming that the offender has any personal responsibility to decrease future crime, just that we can efficiently use him toward that end (while staying within retributivist bounds). Given that we are not constrained by the offender's responsibility, there may be ends that we could use him for that are far afield of traditional crime policy. Imagine that, in the case of the burglar, we increase his sentence from 1 to 20 months as a means of providing financial support to prison guards. Or perhaps we sentence him to 74

35. *See* JULES COLEMAN, RISKS AND WRONGS 308 (1992) ("[W]e might hold that it is sometimes permissible to impose a wrongful loss in order to eliminate another wrongful loss only if there is a significant or substantial difference between the loss eliminated and the loss created, not otherwise.").

months in honor of Independence Day (7/4), as a means of bolstering our flagging patriotism. Surely, it would not justify these sentences to demonstrate that they were parsimonious means of maximizing social welfare, taking into account the costs to the offender himself. Regardless of an offender's retributive desert, it is not his responsibility to support prison guards financially or to enable patriotism, and thus retributivism cannot provide the moral cover to use him for such ends. The fact that limiting retributivists seek to use the offender for crime-related social purposes does not change this analysis.

III. HARMFUL CENSURE

Although he was a critic of Morris's initial call for wide sentencing ranges and is not traditionally considered a limiting retributivist, the same general worry applies to Von Hirsch and his sentencing theory. Antony Duff and Von Hirsch agree that offenders deserve the community's censure when they violate "public," communal values.[36] This censure aims at the wrongdoer's repentance, reformation, and reintegration into the community—a project internal to all censuring, Duff argues.[37] Duff believes that deterrence is an inappropriate penal aim at any level. To address citizens "in the coercive language of deterrence," he writes, "is to cease to address them as members of the normative community."[38] Penal "hard treatment" is "the means by which the offender can make apologetic reparation to the victim," and nothing else.[39] Hard treatment is a necessary part of the communication between the public and the offender, Duff argues, not a method of scaring or threatening would-be future offenders. Von Hirsch, however, is more straightforward about the need to deter crime and about the limits of delivering deserved censure as a means of achieving that aim. He argues, I think rightly, that censure need not take the form of hard treatment, and could be communicated, for instance, by the mere fact of public conviction.[40] Von Hirsch views hard treatment not as an essential component of censure, but as a supplemental, *prudential* reason a legal

36. *See generally* DUFF, *supra* note 9; VON HIRSCH, *supra* note 9.
37. DUFF, *supra* note 9, at 80–82, 106–12.
38. *Id.* at 83.
39. *Id.* at 98.
40. VON HIRSCH, *supra* note 9, at 9–14.

system offers to citizens to desist from crime, offered in addition to the underlying *moral* reasons.[41]

Von Hirsch attempts to mask the prudential reason through the argument that (a) penal hard treatment is a means of communicating censure (even if not an inherently necessary means), (b) the censure deserved for a given offense, in accordance with ordinal proportionality, depends on the amount delivered for other offenses, and thus (c) we can incorporate hard treatment into our system, while still giving offenders the censure they deserve, by giving more hard treatment—that is, more censure—to those who commit worse offenses.[42] While Von Hirsch argues that high overall severity levels would be inconsistent with the penal aim to express censure rather than to coerce and threaten offenders, he acknowledges that his model provides only vague limits on punitiveness.[43] Von Hirsch thus accepts that there is a relatively broad range of "not undeserved" sentencing schedules consistent with his theory, and he empowers the state to select the schedule that allows it to prevent crime efficiently. Von Hirsch, however, side-steps the "cardinal" proportionality issue and fails to explain why, even if what offenders deserve is relative to one another, the state is entitled to raise the entire scale of sentences upward for the purpose of deterrence. That is, he fails to explain why the state is entitled to use offenders and their suffering as a tool for mitigating crime, restoring the economy, or whatever our social goal might be. If retributive censure were our only penal concern, an offender would receive no hard treatment on Von Hirsch's view; thus, Von Hirsch's retributive theory cannot justify hard treatment.

If this argument against limiting retributivism works, it has dramatic implications for retributivism as the purported foundation of state punishment. When determining how much penal harm to inflict upon an offender or how to anchor the ordinal scale, the retributivist ought to ask themself what is the *least harmful* punishment that is "not undeserved" by reference to their favored theory of retributivism.[44]

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41. *Id.*

42. *See id.* at 15–19, 29–70.

43. VON HIRSCH & ASHWORTH, *supra* note 11, at 142–43.

44. For arguments that racial and social injustice severely limit the retributive blameworthiness of most offenders, see, e.g., Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873 (1999); Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983 (2004); Christopher Lewis, *Inequality, Incentives, Criminality, and Blame*, 22 LEGAL THEORY 153 (2017); David Gray & Jonathan Huber, *Retributivism for Progressives:*

IV. RIGHTS WITHOUT RETRIBUTION

Given the vagueness of retributive proportionality, this principle would generate an extremely mild sentencing regime—mild by comparison to *any* contemporary system, let alone the harsh American and British systems.[45] Such penal mildness is a prima facie attractive conclusion in this age of penal severity and mass incarceration. But the question remains: Will this be *enough* punishment for the sake of our nonretributive penal aims, most importantly for the sake of deterrence and incapacitation? Crime deterrence is not a luxury item. It is not simply about reducing the aggregate amount of harm in society; it is about maintaining the social trust that grounds a well-functioning and cooperative civil order, upon which, in turn, the possibility of human flourishing depends.[46] There are at least three reasons to believe that the least harmful "not undeserved" sentences *would* be enough punishment to reduce the objective threat of crime sufficiently. First, there is considerable evidence that the *certainty* of receiving some level of punishment is more important for the purpose of deterrence than the *severity* of the punishment received.[47] Second, the money

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A Response to Professor Flanders, 70 MD. L. REV. 141 (2010); Allega M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1235 (2015); RICHARD L. LIPPKE, RETHINKING IMPRISONMENT 80–103 (2007).

45. *See* Nick Cowen & Nigel Williams, *Comparisons of Crime in OECD Countries*, CITIVAS: INSTITUTE FOR THE STUDY OF CIVIL SOCIETY (April 2012), http://www.civitas.org.uk/content/files/crime_stats_oecdjan2012.pdf (comparing crime and punishment rates within OECD states).

46. On the idea that the function of the criminal law is to maintain a cooperative civil order, see THOMAS HOBBES, LEVIATHAN 86–90 (Richard Tuck ed., Cambridge 1996) (1651); Nicola Lacey, *Criminalization as Regulation*, *in* REGULATING LAW 144 (C. Parker et al. eds., 2004); NICOLA LACEY, IN SEARCH OF CRIMINAL RESPONSIBILITY: IDEAS, INTERESTS, AND INSTITUTIONS 1–24 (2016); LINDSAY FARMER, MAKING THE MODERN CRIMINAL LAW: CRIMINALIZATION AND CIVIL ORDER 37–60 (2016); VINCENT CHIAO, CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE 35–70 (2019); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 261 (2d ed. 2011); NEIL MACCORMICK, INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY 293 (2007); Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457, 465 (2015); HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 10 (1979); Alice Ristroph, *Hobbes on "Diffidence" and the Criminal Law*, *in* FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 23 (Markus D. Dubber ed., 2014); Jacob Bronsther, *The Corrective Justice Theory of Punishment*, 107 VA. L. REV. 227, 242–48 (2021).

47. *See, e.g.*, Daniel S. Nagin, *Deterrence in the Twenty-First Century: A Review of the Evidence*, *in* CRIME AND JUSTICE IN AMERICA: 1975–2025, 199 (Michael Tonry ed., 2013); ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN

saved from lengthy sentences could be spent on nonpenal crime reduction policies, such as police presence (which increases the certainty of punishment)[48] and investments in the community like early childhood development programs.[49] Third, the threat of punishment is not the only reason that people desist from crime and cooperate; there are also, for instance, noncriminal legal institutions, like tort and contract law, as well as nonlegal social norms.[50] Whether an extremely mild system of punishment would indeed be sufficient for the purpose of deterrence is a difficult empirical question. Importantly, the answer may vary from society to society, given all the variables that impact crime rates.[51]

ANALYSIS OF RECENT RESEARCH 25–27, 47–48 (1999); Steven N. Dulauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both be Reduced?*, 10 CRIMINOLOGY & PUB. POL'Y 13 (2011).

48. Dulauf & Nagin, *supra* note 47.

49. There is significant evidence that early childhood development programs are effective in reducing crime. *See* James Heckman, Rodrigo Pinto, & Peter Savelyev, *Understanding the Mechanisms Through Which an Influential Early Childhood Program Boosted Adult Outcomes*, 103 AM. ECON. REV. 2052 (2013); Alex R. Piquero et al., *Effects of Early Family/Parent Training Programs on Antisocial Behavior and Delinquency*, 5 J. EXPERIMENTAL CRIMINOLOGY 83 (2009).

50. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (arguing that informal norms can enable social cooperation); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 135 (1996) (examining the interactions between the legal and non-legal normative orders).

51. *See generally* Nicola Lacey, David Soskice, & David Hope, *Understanding the Determinants of Penal Policy: Crime, Culture, and Comparative Political Economy*, 1 ANN. REV. CRIMINOLOGY 195 (2018) (analyzing four paradigmatic determinants of penal policy—crime rates, cultural dynamics, economic structures and interests, and institutional differences—and considering the impact of race as an independent determinant of U.S. penal policies); NICOLA LACEY, THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES (2008) (examining political economic, institutional, and cultural determinants of penal severity); John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess, Part I: The Nature and Roots of Scandinavian Exceptionalism*, 48 BRIT. J. CRIMINOLOGY 119 (2008) (arguing that high levels of social trust and solidarity have grounded Scandinavian criminal justice systems and considering demographic and economic factors conducive to those high levels); John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess, Part II: Does Scandinavian Exceptionalism Have a Future?*, 48 BRIT. J. CRIMINOLOGY 275 (2008) (same); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) (arguing that cultural and ideological differences explain the difference between the American penal regime, on the one hand, and French and German regimes, on the other);

Let us assume, though—not outrageously—that such a mild sentencing regime will be *insufficient* for the purpose of preventing crime, both in terms of securing general deterrence and, in rare situations, of incapacitating demonstrably dangerous individuals.[52] In that case, even if we accepted all of the retributivist claims about who deserves punishment and why, retributivism would fail as the foundation of state punishment, or at least it would fail as the sole foundation of state punishment. For it could justify the infliction of punishment, but not the infliction of enough punishment or the right kind of treatment for the criminal law to realize its nonretributive function of maintaining a civil order in which strangers can live together peacefully and productively. What, then, for a liberal state? Assuming it declined the contradiction of occasional consequentialism,[53] it would require *deontological* theories of deterrence and incapacitation that explained when and to what degree it were permissible to harm or coerce an individual to realize such ends. But how can we justify intentionally harming an offender for the purpose of deterrence or coercing an individual for the purpose of incapacitation if we can appeal to neither (a) the idea that such treatment is "not undeserved" nor (b) the plain fact (which we are assuming to be the case in some instances) that doing so maximizes social utility?

As to deterrence, the basic intellectual challenge, as I see it, is to explain why it might be the offender's personal responsibility to decrease the threat of future crime posed by other people, such that harming him for that purpose respects his status as rights-bearer and does not merely sacrifice him for the greater good. I will very briefly sketch two possible answers. First is Victor Tadros's "duty" theory of punishment.[54] Tadros argues that

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Nicola Lacey & David Soskice, *Crime, Punishment and Segregation in the United States: The Paradox of Local Democracy*, 4 PUNISHMENT & SOC'Y 454 (2015) (arguing that local government autonomy in the United States, and the resulting fact that criminal justice policies are filtered through local electoral politics, presents unique challenges for garnering political support for integrative criminal justice policies).

52. *See* Steven Sverdlik, *Desert as a Limiting Condition*, 12 CRIM. L. & PHIL. 209, 219–20 (2018) (arguing that, if the probability of punishment is low, *maximally* harmful retributive punishments may be insufficient for the purpose of deterrence).

53. *Cf.* Douglas Husak, *Why Legal Philosophers (Including Retributivists) Should Be Less Resistant to Risk-Based Sentencing*, *in* PREDICTIVE SENTENCING: NORMATIVE AND EMPIRICAL PERSPECTIVES 33 (Jan W. de Keijser, Julian V. Roberts, & Jesper Ryberg eds., 2019).

54. VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW chs. 12–15 (2011).

the offender has a duty to rectify the wrong he has committed against his individual victim. The offender can best fulfill this duty, Tadros continues, by protecting his individual victim from a *future* wrong. If the victim "donates" this right to repair to the state—which Tadros believes the victim has a duty to do—the offender can realize his rectificatory duty by allowing himself to be harmed by the state for the sake of general deterrence, thereby contributing to an umbrella of protection that will shield his individual victim (and other people in society) from future wrongs. Second is the "corrective justice" theory of punishment that I have developed in recent work.[55] I argue that deterrent punishment can be justified as a means of rectifying an offender's contribution to "criminality"—the objective threat of crime in society. Criminality chills the exercise of our rights, forces us to take expensive precautions, and exposes us to unreasonable risks of harm. By having increased the level of criminality in the past, an offender owes a duty of repair to society as a whole, a duty of "corrective justice" in the language of tort theorists.[56] He can fulfill this duty by decreasing the threat of crime in the future. In this way, deterrent punishment does not merely sacrifice him to limit the problem of future crime, for which he has no personal responsibility. Rather, it forces him to fulfill his own duty of repair. Over time, ideally—with would-be future offenders appropriately deterred—it would be as if he had never contributed to criminality at all, in terms of the average threat of crime faced by society.

Assuming that extremely mild retributivist sentences were insufficient for the purpose of deterrence, then even the most ardent retributivist would have to bolt some such theory onto their system, with the result being that the offender both (a) deserves to suffer or to be censured, irrespective of its consequentialist impact, and—potentially more importantly when it comes to justifying his punishment—(b) has a personal duty to contribute

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55. Bronsther, *supra* note 46.

56. *See generally* ERNEST J. WEINRIB, CORRECTIVE JUSTICE 17 (2012) ("Because the defendant, if liable, has committed the same injustice that the plaintiff has suffered, the reason the plaintiff wins ought to be the same as the reason the defendant loses."); COLEMAN, supra note 35, at 324 ("Corrective justice imposes on wrongdoers the duty to repair their wrongs and the wrongful losses their wrongdoing occasions . . . losses for which they are responsible."); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992); John C.P. Goldberg, *Twentieth Century Tort Theory*, 91 GEO. L. REV. 513, 570–78 (2003); Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107 (2011).

to some degree to crime deterrence. Without the cover of retributive vagueness, the system would then be forced to calibrate the infliction of deterrent harm much more carefully and judiciously—especially given how inefficient penal severity is as a means of crime prevention.[57] Further, if and when punishing an offender were the most efficient means of crime prevention, the state would be entitled to harm him to the degree required to rectify his wrong, *but no more*. On the corrective justice view, for instance, if his past offense contributed, say, 10 units of criminality to society, then the state would have a license to use him to decrease 10 future units of criminality.[58] But once that debt to society is paid off, the offender has made society whole, as it were, and the state cannot permissibly harm him further, no matter how efficiently it might deter crime in the process. To harm him any further would be the moral equivalent of harming of innocent person.

Incapacitation represents a separate challenge for the state that rejects both consequentialism and limiting retributivism. The setup is the same, though: To justify an individual's incapacitation beyond the retributive minimum, the state could not appeal to his vague retributive deserts, *contra* Morris, Christopher Slobogin, and others.[59] But perhaps, as Douglas Husak suggests, someone can retributively deserve to be punished for their dangerous character (and then be incapacitated as a byproduct of their retributive punishment).[60] Even if that held, it would raise the same issue ultimately, for the (least harmful) retributive punishment that one might

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57. *See supra* note 47.

58. Bronsther, *supra* note 46, at 264–79 (discussing the sentencing implications of the corrective justice view).

59. *See* Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 CRIME & JUST. 1 (1985) (arguing that limiting retributivism justifies risk-based sentencing); Slobogin, *supra* note 24; Christopher Slobogin, *A Defense of Modern Risk-Based Sentencing*, *in* PREDICTIVE SENTENCING: NORMATIVE AND EMPIRICAL PERSPECTIVES 107 (Jan W. de Keijser, Julian V. Roberts, & Jesper Ryberg eds., 2019); Jennifer L. Skeem & Christopher T. Lowenkamp, *Risk, Race, and Recidivism: Predictive Bias and Disparate Impact*, 54 CRIMINOLOGY 680 (2016). *But see* Christopher Lewis, *Mass Incarceration, Risk, and the Principles of Punishment*, 112 J. CRIM. L. & CRIMINOLOGY (forthcoming 2021) (draft on file with author) (arguing that, even if we assume the legitimacy of limiting retributivism, risk-based sentencing is unjust because the least well-off individuals tend to pose the greatest risk of reoffending and they would thus receive harsher sentences).

60. Douglas Husak, *Lifting the Cloak: Preventive Detention as Punishment*, 48 SAN DIEGO L. REV. 1173, 1191–1201 (2011).

deserve for being dangerous would doubtfully coincide with the state's forward-looking preventive aims, as Darin Clearwater explains.[61] Related, Jesper Ryberg points out that Husak's position leads to the awkward conclusion that one ought to be retributively punished for their past dangerousness, even if they never harmed anyone and were no longer a threat.[62] Finally, even if some people have sufficient control over their characters such that they are retributively culpable for their dangerousness, that is surely not the case for all extremely dangerous individuals.

There is a simpler solution. Whereas general deterrence requires the state to use someone as a means of mitigating a threat posed by others, incapacitation involves coercing an individual to mitigate a threat that he himself poses. Following Stephen Morse, incapacitation can thus be grounded on the non-consequentialist logic of self-defense.[63] That does not mean, of course, that the state can act without restraint. Defensive coercion is permissible only within the bounds of necessity and proportionality.[64] The theory, then, is not that the offender is a "bad guy" who has forfeited his moral standing and who can be banished to prison forever. Nor is it that confining people with his risk profile is on balance cost-efficient for society. Rather, the notion is that—in unusual cases—an individual can pose such a serious, credible, and ongoing threat to others that his confinement is a proportionate response on traditional defensive grounds. Of course, such predictions of dangerousness are rife with the possibility of error for even well-meaning factfinders.[65] And it may well be

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61. Darin Clearwater, *'If the Cloak Doesn't Fit, You Must Acquit': Retributivist Models of Preventive Detention and the Problem of Coextensiveness*, 11 CRIM. L. & PHIL. 49 (2017).

62. Jesper Ryberg, *Risk and Retribution: On the Possibility of Reconciling Considerations of Dangerousness and Desert, in* PREDICTIVE SENTENCING: NORMATIVE AND EMPIRICAL PERSPECTIVES 51, 63–65 (Jan W. de Keijser, Julian V. Roberts, & Jesper Ryberg eds., 2019).

63. Stephen J. Morse, *Neither Desert Nor Disease*, 5 LEGAL THEORY 265, 266 (1999) ("[S]ociety does have the right to intervene, to impose pure preventive detention or equivalent deprivations, when the risk of serious harm is grave.").

64. On the moral foundations and limits of self-defense, see, e.g., Kimberly Kessler Ferzan, *Justifying Self-Defense*, 24 LAW & PHIL. 711 (2005); GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 27–36 (1988); SUZANNE UNIACKE, PERMISSIBLE KILLING (1994); Daniel Farrell, *The Justification of Deterrent Violence,* 100 ETHICS 301 (1990); TADROS, *supra* note 54, at chs. 8–11.

65. *See* Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 126 (1996) (concluding that even in the closely monitored environment of a mental health institution, "the ability of mental health professionals to predict future

the case that the state can *never* meet its burden of proof,[66] whatever it ought to be.[67] But consider, at the extreme, a serial killer who himself insists that he will try to kill again if he is let out.[68]

While incapacitation justified through limiting retributivism is still intentionally harmful *punishment*, that is not the case if it were justified on purely defensive grounds akin to quarantine.[69] Thus, assuming the state meets its evidential burden, it would have to provide the individual with extensive rehabilitative and therapeutic resources, with the facility featuring

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violence among mental patients may be better than chance, but it is still highly inaccurate, especially if these professionals are attempting to use clinical methods to predict serious violence").

66. On the evidentiary challenges of preventive detention, see Norval Morris, *Keynote Address: Predators and Politics*, 15 PUGET SOUND L. REV. 517 (1992); PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 109–34 (2008); David J. Cooke & Christine Michie, *Limitations of Diagnostic Precision and Predictive Utility in the Individual Case: A Challenge for Forensic Practice*, 34 LAW & HUM. BEHAV. 259 (2010); MIKE REDMAYNE, CHARACTER IN THE CRIMINAL TRIAL 65–66 (2015); *see also* Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490 (2018) (arguing that preventive detention runs afoul of the presumption of innocence and prohibition on pretrial punishment); R.A. Duff, *Pre-Trial Detention and the Presumption of Innocence*, *in* PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 115 (Andrew Ashworth, Lucia Zedner, & Patrick Tomlin eds., 2013).

67. *See* Carol S. Steiker, *Proportionality as a Limit on Preventive Justice: Promises and Pitfalls*, *in* PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 194, 202 (Andrew Ashworth, Lucia Zedner, & Patrick Tomlin eds., 2013) ("The degree of procedural reliability that is required increases with the intrusiveness of the preventive intervention at issue, with long-term confinement requiring the greatest assurances of reliability."); Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty* (2021) (unpublished manuscript) (on file with author). *But see* Michael Louis Corrado, *Punishment and the Wild Beast of Prey*, 86 J. CRIM. L. & CRIMINOLOGY 778, 793–94 (1996) (arguing that the burden of proof ought to be lower for preventive detention than for backward-looking punishment, because inaccuracy in the former case has greater costs).

68. For real-world examples rather close to this, see Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. L. REV. 1, 1 (2003).

69. *See* Paul Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001) (arguing that the criminal justice system's tendency to cloak preventive detention as deserved punishment is bad both for the system's ability to do justice and for its ability to provide community protection); Bernard E. Harcourt, *Punitive Preventive Justice: A Critique*, *in* PREVENTION AND THE LIMITS OF THE CRIMINAL LAW 252 (Andrew Ashworth et al. eds., 2013); Jacob Bronsther, *Long-Term Incarceration and the Moral Limits of Punishment*, 41 CARDOZO L. REV. 2369, 2430–32 (2020).

a non-punitive ethic of care.[70] Further, the state would have to provide the individual with regular opportunities to demonstrate his rehabilitation,[71] say, every six to twelve months, with the state bearing the burden on each occasion to prove that he is sufficiently likely to commit very serious offenses in the future.[72] As Andrew Ashworth and Lucia Zedner write, "the absence of periodic review and impossibility of release suggests that the preventive element is subsidiary to the punitive."[73] Analogously, a quarantining authority has a duty to regularly test the person confined to ensure that she no longer has the disease, or is no longer contagious, as well as to provide medical care, so as to bring her back to health sooner.

This section has provided only a brief outline of what a rights-based system of deterrence and incapacitation might look like. The point was to demonstrate that a state that seeks to respect individual rights while preventing crime is not lost outside the penumbra of retributivism. It need not become a strategic and intermittent maximizer. There are principles that are neither retributivist nor consequentialist, such as corrective justice and self-defense, that can guide and restrain the state in its task of cultivating a cooperative society of individuals.

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70. *Compare* Case of M. v Germany (App no. 19359/04) IHLR 3709 (ECHR 2009), ¶ 129 ("[P]ersons subject to preventive detention orders must be afforded such support and care as part of a genuine attempt to reduce the risk that they will reoffend, thus serving the purpose of crime prevention and making their release possible."), *with* Kansas v. Hendricks, 521 U.S. 346 (1997) (approving Hendrick's confinement under Kansas's "Sexually Violent Predator" law, even though the state had failed to provide him with therapeutic resources); *see also* Slobogin, *supra* note 68, at 16.

71. *See* Steiker, *supra* note 67, at 198; Rinat Kitai-Sangero, *The Limits of Preventive Detention*, 40 McGEORGE L. REV. 903, 928 (2016); Paul Robinson, *Life Without Parole Under Modern Theories of Punishment*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 138, 144 (Charles J. Ogletree & Austin Sarat eds., 2012).

72. California's "Sexually Violent Predator" law used to require an application for extension every two years, at which point it would have to be determined at trial beyond a reasonable doubt that the offender fulfilled the criteria for confinement. However, after Proposition 83 ("Jessica's Law") passed in 2006, the statute now leads to an indefinite term of confinement. Cal. Proposition 83 § 27 (2006); *see* CAL. WELF. & INST. CODE § 6604 (West Supp. 2007) ("If the court or jury determines that the person is a sexually violent predator, the person shall be committed for an indeterminate term to the custody of the State Department of State Hospitals for appropriate treatment and confinement in a secure facility designated by the Director of State Hospitals."); *see also* James Vess, *Preventive Detention Versus Civil Confinement: Alternative Policies for Protection in New Zealand and California*, 12 PSYCHIATRY, PSYCHOL. & LAW 357, 360–62 (2005).

73. ANDREW ASHWORTH & LUCIA ZEDNER, PREVENTIVE JUSTICE 156 (2014).

CONCLUSION

In this piece, I have argued that the vagueness of retributive desert cannot provide (much) moral cover for the process of harming people as a means of promoting nonretributive policy aims. This is because in the retributivism-only context an offender ought to receive the least harmful "not undeserved" sentence. To harm him to a greater degree would be cruel; and retributivists are not cruel. Thus, beyond that least harmful position, no retributive vagueness remains in which to encase the pursuit of our nonretributive aims. I doubt that every limiting retributivist will be convinced. But I also wonder about the form of the disagreement. Will they insist that I've misread them and that—in their capacity as retributivists, at least—they *are* cruel?