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THE CORRECTIVE JUSTICE THEORY OF PUNISHMENT

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The American penal system is racist, degrading, and inefficient. Nonetheless, we cannot give up on punishment entirely, for social peace and cooperation depend on the deterrent threat of the criminal sanction. The question—central to determining the degree to which punishment is justified—is why society’s need for general deterrence is an offender’s problem. Why is it his responsibility to scare off would-be future offenders? His past offense does not magically render him accountable for the actions of total strangers. Existing theories of criminal justice are unable to answer this question.

This Article fills the lacuna—justifying state punishment, but, more importantly, establishing its moral limits—with the help of tort law principles. It argues that deterrent punishment can be justified as a

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means of rectifying an offender's contribution to "criminality"—not merely the perceived but 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. 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.

This novel theory—the corrective justice theory of punishment—entails three sentencing principles. First, punishment must in fact deter crime and must be the most efficient means of doing so. Second, however efficient it may be, punishment must not harm an offender more than is required to repair his criminality contribution. Third, even if it is both efficient and reparative, punishment must not harm an offender to a degree that is entirely out of proportion to the harm prevented by doing so. The Article demonstrates how these three principles, in combination, demand a radical reduction in American sentencing scales. The Article thus concludes that the corrective justice view presents stable moral ground for the de-carceral movement in America.

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INTRODUCTION

The American penal system is racist,¹ degrading,² and inefficient.³ We punish too many people too harshly. Nonetheless, we cannot give up on punishment entirely, for Hobbes is still right: social peace and cooperation in the modern world require state punishment for those who break the law.⁴ Not a lot of punishment.⁵ Much less than we currently dole out—but some. Whether as an expression of human rationality or selfishness,

¹ See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (10th Anniversary ed. 2020); Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 *Am. Pol. Sci. Rev.* 75 (2005); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *Stan. L. Rev.* 1271 (2004).

² See Jacob Bronsther, *Long-Term Incarceration and the Moral Limits of Punishment*, 41 *Cardozo L. Rev.* 2369 (2020); Jonathan Simon, *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America* 10 (2014).

³ See Rachel Elise Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* (2019); David M. Kennedy, *Deterrence and Crime Prevention* (2009); Mark A. R. Kleiman, *When Brute Force Fails: How to Have Less Crime and Less Punishment* (2009); Oliver Roeder, Lauren-Brooke Eisen & Julia Bowling, *What Caused the Crime Decline?* (2015); Franklin E. Zimring, Gordon Hawkins & Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (2001).

⁴ See Thomas Hobbes, *Leviathan* 86–129, 183–221 (Richard Tuck ed., Cambridge Univ. Press rev. student ed. 1996) (1651).

⁵ 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 applied. See Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *Crime & Just.* 199, 201 (2013); Andrew von Hirsch, Anthony E. Bottoms, Elizabeth Burney & Per-Olof Wikström, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* 25–27, 47–48 (1999); Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 *Criminology & Pub. Pol'y* 13, 13–14 (2011).

people behave badly without the threat of the criminal sanction.⁶ Indeed, recent examples of societies operating without criminal justice systems—such as Denmark after German soldiers arrested its police force in 1944,⁷ Iraq after U.S. and coalition forces overthrew the Baathist regime in 2003,⁸ and the Brazilian state of Espírito Santo after its police force went on strike in 2017⁹—loudly support the thesis that we need *some* level of general deterrence to maintain civil order.

The question—central to determining the degree to which punishment *is* justified—is why society’s need for general deterrence is an offender’s problem. How could it be that breaking the law means that the state is entitled to harm you to scare off would-be future offenders?¹⁰ There is something positively sinister in Reverend Sydney Smith’s statement of the deterrence theory from 1824: “When a man has been proved to have committed a crime, it is expedient that society should make use of that man for the diminution of crime: *he belongs to them for that purpose.*”¹¹ Consider, by comparison, that if punishing an entirely innocent person happened to deter crime, we still would not do it. It is not that person’s responsibility to scare off would-be future offenders. But why is it the

⁶ See Hobbes, *supra* note 4, at 86–100 (discussing the limited circumstances in which cooperation is rational); Robert Axelrod, *The Evolution of Cooperation* 3–24 (Penguin Books 1990) (1984) (same); Robert Sugden, *The Economics of Rights, Co-operation and Welfare* 36–57 (2d ed. 2004) (same).

⁷ Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. Pa. L. Rev. 949, 962 (1966) (reporting that during the German occupation of Denmark, when an unarmed watch corps served as a makeshift police force, the frequency of street crimes like robbery rose very sharply).

⁸ Naomi Klein, *Baghdad Year Zero: Pillaging Iraq in Pursuit of a Neocon Utopia*, *Harper’s Mag.*, Sept. 2004, at 43, 46–53 (reporting widespread lawlessness after the fall of the Baathist regime); John F. Burns, *Pillagers Strip Iraqi Museum of Its Treasure*, *N.Y. Times* (Apr. 12, 2003), <http://www.nytimes.com/2003/04/12/international/worldspecial/pillagers-strip-iraqi-museum-of-its-treasure.html> [<https://perma.cc/FN2R-H4U2>] (reporting looting).

⁹ Paulo Whitaker & Pablo Garcia, *Over 100 Dead in Brazil as Police Strike Spurs Anarchy*, *Reuters* (Feb. 9, 2017, 10:21 AM), <http://www.reuters.com/article/us-brazil-violence-espírito-santo-idUSKBN15O1ZT> [<https://perma.cc/993E-JTMS>] (reporting widespread violence in the wake of the police strike); Lola Mosanya, ‘Crazy Violence’ in Brazilian State During Police Strike, *BBC Newsbeat* (Feb. 11, 2017), <http://www.bbc.co.uk/newsbeat/article/-38942911/crazy-violence-in-brazilian-state-during-police-strike> [<https://perma.cc/37LC-GLZN>] (same); Paulo Whitaker, *Some Brazil Police Break Strike Following Wave of Homicides*, *Reuters* (Feb. 12, 2017, 11:36 AM), <http://www.reuters.com/article/us-brazil-violence-idUSKBN15R0SU> [<https://perma.cc/W84S-TLFL>] (same).

¹⁰ “Specific” deterrence, whereby an individual’s punishment is meant to discourage his own future offending, does not raise this concern.

¹¹ Sydney Smith, *The Treatment of Untried Prisoners* (1824), *reprinted in* *Essays: Social and Political* 236, 249 n.* (London, Ward, Lock & Bowden, Ltd. n.d.) (emphasis added).

responsibility of an actual offender? His past offense does not magically render him accountable for the actions of total strangers. His punishment would thus seem to merely sacrifice him for the greater good,¹² in the specific sense that it would intentionally harm him as a means of mitigating a social problem for which he lacks responsibility.¹³ In different guises, this question has been raised many times before.¹⁴ But thus far scholars have ignored or awkwardly side-stepped the issue,¹⁵ leaving a justificatory hole at the center of the criminal law.

This Article presents a solution—justifying state punishment, but, more importantly, establishing its moral limits—through a new conception of criminal justice: *the corrective justice theory of punishment*. On this view, deterrent punishment can be justified, but only to a limited degree, as a means of rectifying an offender’s contribution to the threat of crime in society. Not just an abstract justification of state punishment, but also a set of strict sentencing principles, the corrective justice theory presents stable moral ground for the de-carceral movement in America.

In developing this view, the Article conceives of the criminal law as a system of protections—against murder, rape, theft, drunk driving, and so forth—upon which all citizens rely for their assured liberty and safety, and that depends for its effectiveness on the deterrent threat of punishment. This, I argue, is the *function* of the criminal law. We punish not to give wrongdoers a deserved allotment of suffering or condemnation, as on the retributivist view,¹⁶ nor simply to increase the “cost” of offending, as on the utilitarian theory of deterrence,¹⁷ but to help

¹² See Immanuel Kant, *Groundwork of the Metaphysics of Morals* (1785), *reprinted in Practical Philosophy* 37, 80 (Mary J. Gregor ed. & trans., 1996) (1785) (“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.”).

¹³ See Jacob Bronshter, *Vague Comparisons and Proportional Sentencing*, 25 *Legal Theory* 26, 48 (2019).

¹⁴ See, e.g., Ted Honderich, *Punishment: The Supposed Justifications* 53 (1969); Johannes Andenaes, *The Morality of Deterrence*, 37 *U. Chi. L. Rev.* 649, 649 (1970); Nigel Walker, *The Efficacy and Morality of Deterrents*, 1979 *Crim. L. Rev.* 129, 139; Kent Greenawalt, *Punishment*, 74 *J. Crim. L. & Criminology* 343, 353 (1983); Warren Quinn, *The Right to Threaten and the Right to Punish*, 14 *Phil. & Pub. Affs.* 327, 330–31 (1985); Wojciech Sadurski, *Giving Desert Its Due: Social Justice and Legal Theory* 253 (1985); Igor Primoratz, *Justifying Legal Punishment* 35 (1989); Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* 113–14 (2011).

¹⁵ See *infra* Part I.

¹⁶ See *infra* notes 35–49 and accompanying text.

¹⁷ See *infra* notes 29–30 and accompanying text.

maintain a civil order in which strangers can live together peacefully and productively.

Put differently, the traditional theories understand the criminal law to have only two subjects: offenders and victims. The criminal law either (a) delivers retribution to an offender for creating a victim or (b) prevents the creation of future victims. What these theories have left out, somehow, is everybody else. When it is working, the criminal law is an indispensable source of security for all people, bathing them in protection as they, say, ride a busy subway in the morning and as they sleep in their beds at night. Beyond its protections against violence, the criminal law also helps to regulate cooperative enterprises like the traffic system and the stock market.¹⁸ Of course, other forms of law, like contract law, and non-legal social norms,¹⁹ like the norm against cutting a line, also facilitate civil society. But I maintain, following Hobbes, that these more refined means of civilization depend on the underlying threat of the criminal law.

The Article then explains that the criminal law, as a system of protections, rests ultimately not on police intervention, but rather on people *self-applying* criminal legal norms. This, I argue, is the *method* of the criminal law. When I walk down a street, I am not relying upon the police to protect me like personal guards, but rather upon other people within the jurisdiction to self-apply the rules that prohibit assaulting me, stealing my wallet, and so forth.

This conception of the criminal law clarifies the nature of the criminal wrong. When an individual offender fails to self-apply the criminal law, then, *in combination with other offenders*, he contributes to a wider social threat. This is “criminality”—not merely the perceived but the objective threat of crime. The social costs of criminality are reflected in both the completed offenses themselves and the actions taken to prevent or avoid the completed offenses. That is, in addition to subjecting us to unreasonable risks of harm, criminality also chills the exercise of our rights and forces us to take expensive precautions. Thus, the more criminality there is in society, the less worth the criminal law has as a

¹⁸ See 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).

¹⁹ 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).

guide to the possible incursions of other people, and the less assured is our liberty. Deterrent punishment, as a means of holding an offender responsible for his criminality contributions, is thereby permissible; that is, it does not merely sacrifice him to mitigate a problem for which he lacks responsibility.

In accordance with the corrective justice theory, we can use an offender via general deterrence as a means of repairing the damage to our assured liberty caused by his past criminality contributions. He increased the level of criminality in the past to some degree, contributing to a threat that makes life in society more difficult, perilous, and expensive; and the way to repair that—as a means of securing what tort law theorists call “corrective justice”²⁰—is to use him to decrease the level of criminality in the future. The state is not merely sacrificing him to limit the problem of future crime. Rather, it is forcing him to fulfill his own duty, owed to society as a whole, to repair his criminality contributions and restore the reliability of the criminal law system. 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. In this way, the Article justifies general deterrence with the help of tort law principles. It explains that we ought to conceive of the criminal wrong as a *tort against society*, in the form of a criminality contribution, and then of deterrent punishment as an *equitable remedy* for that wrong.

Does it matter whether we get this theory (or any such theory of punishment) right? Emphatically yes. As John Gardner writes, “criminalization and criminal punishment are *prima facie* such abhorrent practices,”²¹ and so the burden of justifying these practices rests squarely

²⁰ See generally Jules L. Coleman, *Risks and Wrongs* 324 (1992) (“Corrective justice imposes on wrongdoers the duty to repair their wrongs and the wrongful losses their wrongdoing occasions. . . . losses for which they are responsible.”); 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.”); Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 *J. Legal Stud.* 421, 421–22 (1982) (arguing that corrective justice is the foundation of tort law and responding to efficiency-based theories of tort law); Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 *Fla. St. U. L. Rev.* 107, 109 (2011) (suggesting a conception of corrective justice that is compatible with the civil recourse theory of tort law); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *Iowa L. Rev.* 449 (1992) (surveying and critiquing theories of corrective justice).

²¹ John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* 204 (2007).

and heavily upon the state. The stakes for offenders are high, even in mild systems of punishment; and the state needs an honest and convincing answer when someone asks, "Why am I being punished?" The corrective justice theory aims to provide that answer.

Further, a society's theory of punishment is ultimately its theory of criminal sentencing. The reasons that explain why the state can permissibly punish *at all* will also prescribe *how much* and *what type* of punishment is handed down. This Article examines the sentencing implications of the corrective justice theory at length. The basic sentencing principle is as follows: by increasing past criminality by X units, an offender owes a duty to society to decrease future criminality by X units. The Article then develops three subsidiary principles.

First, the infliction of penal harm must be *parsimonious*, meaning that it must generate deterrence and *must be the most efficient means of doing so*. Given that the budget for crime prevention is limited, the state should ask, for each dollar spent, whether investments in the community, such as early childhood development programs, would represent a more efficient means of reducing future criminality.

Second, punishment must be *reparative*, repairing only the offender's wrongdoing, rather than merely being "useful." The offender does not simply "belong to society," as on Rev. Smith's view.²² When punishing an offender is in fact the most efficient means of crime prevention, the state is entitled to harm him to the degree required to erase his criminality contribution, *but no more*. Utilitarian deterrence theories, by comparison, lack internal sentencing limits tied to the severity of offenses and would indeed license the punishment of innocent people if it happened to maximize social welfare.

Third, sentences must be *equitable*. What if the infliction of deterrent harm were parsimonious and reparative, but nonetheless draconian? Imagine that only thirty-year prison sentences could erase the criminality contributions of car thieves. This Article draws insight from the law of equity, examining when courts will grant an injunction in response to a tort or specific performance in response to a breach of contract. The Article concludes that it is impermissible to harm an offender to a degree that is *entirely out of proportion* to the harm prevented by doing so. A thirty-year sentence for a car thief, even if it were the singular means of

²² Smith, *supra* note 11, at 249.

generating the requisite amount of deterrence, would be entirely out of proportion to the reparative benefit gained by society.²³

Finally, the Article explains how jurisdictions can apply these principles in the real world and demonstrates how they would radically reduce American sentencing scales.

This Article proceeds in four parts. Part I demonstrates that the two dominant schools of criminal law theory—utilitarianism and retributivism—are unable to explain how general deterrence might be consistent with a principled refusal to sacrifice people to limit harms or threats for which they lack responsibility. Part II introduces the conception of the criminal law as a system of protections. It shows how this system depends on people self-applying criminal legal norms and how offenders create the threat of criminality as a byproduct of their unreliability with regard to upholding the criminal law. The analogy is to factories contributing to smog and global warming as a byproduct of their pollution. Part II also defends the empirical premise that this system of protections requires a certain amount of deterrent punishment to function effectively. Part III introduces the “corrective justice” principle that provides an exception to the general prohibition on using people as a means to the greater good. This principle explains that an individual has a duty to rectify the losses or damage caused by his wrongful conduct and that he can permissibly be forced to fulfill this duty. Part III then applies this principle to the conception of the criminal law and criminality detailed above to generate the corrective justice theory of punishment. Part IV develops the corrective justice theory of sentencing.

I. UTILITARIAN AND RETRIBUTIVIST RESPONSES

The liberal legal order (using “liberal” in its non-partisan, 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.²⁴ Central to this conception is a refusal to merely sacrifice

²³ Cf. *Blackfield v. Thomas Allec Corp.*, 17 P.2d 165, 165 (Cal. Dist. Ct. App. 1932) (holding that removing an overhang at a cost of \$6,875 was entirely out of proportion to the \$200 in damages suffered by the plaintiff).

²⁴ 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

someone for the greater good, consistent with the Kantian prohibition.²⁵ The precise contours of this “non-sacrifice” principle are difficult to define.²⁶ It does not *absolutely* prohibit using someone as a means to the greater good. There are exceptions, as suggested above, such as corrective justice for past social harm. Another exception is consent. Imagine that someone agrees 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.²⁷ 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. 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.²⁸ 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 that they have nothing to do with. The challenge is understanding how (if at all) this principle might be consistent with the practice of general deterrence, whereby we intentionally (and significantly) harm an offender as a means of warning would-be future offenders, for whom the offender has no personal responsibility. For the sake of brevity, let us call this the “Means Problem.” Utilitarian and retributivist theories of punishment cannot resolve the Means Problem satisfactorily.

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.”).

²⁵ See Kant, *supra* note 12, at 80.

²⁶ See Nigel Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice* 80–85 (1980); Honderich, *supra* note 14, at 49–50.

²⁷ See Coleman, *Risks and Wrongs*, *supra* note 20, at 308 (“[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.”).

²⁸ Bronsther, *supra* note 13, at 48.

A. Efficient Penal Harm

With regard to utilitarian theories, this conclusion is easy to establish. On the utilitarian view, punishment is an “evil,” as Jeremy Bentham writes, insofar as it causes suffering, and its justification depends on, and only on, whether it prevents “greater evils.”²⁹ One’s responsibility for those “greater evils” is not, in and of itself, a relevant moral consideration. As indicated above, utilitarians have a famously hard time explaining what would be wrong with “punishing” an innocent person if—say, with the wider population convinced of his guilt—doing so would happen to prevent crime and maximize welfare.³⁰ Thus, if we accept the non-sacrifice principle, then our theory of the criminal law and state punishment cannot be at its base utilitarian.

While H. L. A. Hart endorses the utilitarian view of the “general justifying aim” of the criminal law, he argues that non-consequentialist reasons ought to limit the “distribution” of punishment in individual cases.³¹ Along these lines, Hart argues that it would simply be *unfair* to

²⁹ Jeremy Bentham, *The Theory of Legislation* 360 (C.K. Ogden ed., Richard Hildreth trans., Morrison & Gibb Ltd. 1931) (1802); see also Jeremy Bentham, *A Fragment on Government and an Introduction to the Principles of Morals and Legislation* 289–311 (Wilfrid Harrison ed., Basil Blackwell 1948) (1789) [hereinafter *Bentham, Morals and Legislation*] (presenting thirteen rules for determining proportional utilitarian sentences).

³⁰ 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 *Phil.* 77 (2001) (criticizing Rawls).

I place the word “punishing” in quotes here because, according to some theorists, only the non-innocent can be punished, as an analytical matter internal to the concept of punishment. On this view, the concept of punishment refers only to a particular response to wrongdoing, such that one who has committed no wrong cannot be punished. Rawls, for instance, refers to the infliction of penal harm on the innocent not as punishment but as “telishment.” Rawls, *supra*, at 11; see also Patrick Tomlin, *Innocence Lost: A Problem for Punishment as Duty*, 36 *Law & Phil.* 225, 229–30 (2017) (describing four pathways by which innocent people might come to be “punished”).

³¹ H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 9 (1968).

pursue crime prevention by “punishing” the innocent.³² Regardless of the fact that Hart’s theory is grounded on, as he writes, “partly conflicting”³³ principles, the point here is that he does not address the Means Problem, which concerns why it is permissible to use those who have actually committed offenses for the purpose of crime prevention.³⁴

B. Good Penal Harm

“Traditional” retributivists, who see the good of punishment as analytically connected to an offender’s suffering, would argue that they are exempt from the Means Problem.³⁵ They would argue that to cause an offender to suffer in proportion to his wrongdoing is not to use him as a means toward any end; it is to generate the intrinsic good of moral desert.

Traditional retributivists understand this desert claim in one of two ways. First, according to “strict” retributivists like Michael Moore (and maybe Kant), it is grounded in the unadorned conviction that wrongdoers deserve to suffer.³⁶ Second, “fair play” retributivists like Herbert Morris, Jeffrie Murphy, and Richard Dagger understand this desert claim to derive

³² *Id.* at 21–24. Hart also provides consequentialist rationales for limiting punishment to the culpable. For instance, he argues that doing so fosters human freedom by enabling people to plan their lives with the knowledge that they can control when the criminal law will come down on them. *Id.* at 28–53.

³³ *Id.* at 1.

³⁴ For criticism of Hart’s idea, *id.* at 9, that we can radically separate the reasons that justify (a) the institution of punishment and (b) the application of punishment in discrete instances, see Nicola Lacey, *State Punishment: Political Principles and Community Values* 51 (1988) (“No sensible system has rules and then fails to apply them: *prima facie*, the reasons for having the rules generate the reasons for applying them in individual cases.”).

³⁵ While I distinguish between “traditional” and “censuring” retributivists, in considering them as part of the same tradition (and in defining retributivism simpliciter), 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) 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 infliction of punishment; the justifying good that punishment creates on this view is thereby epiphenomenal to punishment itself.

³⁶ 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.”).

from a commitment to fairness.³⁷ If we assume that an offender has benefitted from everyone else's restraint in following the law—not always a safe assumption, Murphy argues³⁸—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.

Retributivists of either stripe would argue that if crime deterrence happens to result from retributivist punishment, the state has not thereby used an offender impermissibly for the purpose of achieving that outcome. Any social benefit that results from giving—and intending to give—an offender what he deserves is a “happy surplus,” as Michael Moore writes.³⁹ In this way, they would conclude, the state can kill two birds with one stone, generating sufficient deterrence to maintain an effective civil order as a mere byproduct of giving offenders their just deserts.⁴⁰

The central weakness of the “two birds” argument is that it requires accepting the premise that the suffering of offenders, *regardless of the severity of their offense*, is an intrinsic good, which would be realized even if their punishment occurred in total secrecy and thus had no impact on the level of crime, or even if it were somehow criminogenic. It is an analytic truth that when an intrinsic good is realized, all else equal, the world is a better place. To say nothing of regulatory offenses like speeding, would the world be a better place if, say, car thieves were made to suffer to some degree in total secrecy, with no impact on the crime level? At an absolute minimum, people disagree deeply on these questions; and we should be very hesitant to hang the legitimacy of every

³⁷ 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); George Sher, *Desert* 69–90 (1987).

³⁸ Murphy, *supra* note 37, at 232–43.

³⁹ Moore, *supra* note 36, 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”).

⁴⁰ Moore uses the “two birds, one stone” metaphor in this general way to refer to the process of bringing about deterrence as a byproduct of securing retribution—though he believes that the pursuit of deterrence should not to any degree motivate state punishment. Moore, *supra* note 36, at 28.

criminal law—from car speeding on up—on the conclusion that violators intrinsically deserve to suffer.

Even if offenders *do* deserve to suffer in accordance with traditional retributivism, do they deserve to suffer to a degree that would generate a sufficient amount of general deterrence? Consider “an eye for an eye,” the most famous ideal of traditional retributivist justice, by which the state ought to injure an offender to the same degree that the offender injured his victim.⁴¹ For minor offenses, such as the theft of a bicycle, this sentencing logic would entail sentences that are too lenient for the purpose of deterrence, as Victor Tadros explains.⁴² The principle of “an eye for an eye” does not entail “an eye for a bicycle,” but “a bicycle for a bicycle.” When compounded by the fact that relatively few bicycle thieves are caught and punished, it is unlikely that such punishments would sufficiently protect bicycle ownership. Thus, for minor offenses, at least, it is unlikely that traditional retributivists can hit the second bird of sufficient crime prevention.

C. Prudential Penal Harm

The “censuring” retributivism of Antony Duff and Andrew von Hirsch also fails to provide a safe harbor from the Means Problem.⁴³ By violating “public,” communal values, on this view, offenders deserve the community’s censure. This censure aims at the wrongdoer’s repentance, reformation, and reintegration into the community—a project internal to all censuring, Duff argues.⁴⁴ Duff, though, 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.”⁴⁵ Penal “hard treatment” is “the

⁴¹ For sophisticated defenses of this sentencing ideal (*lex talionis*), see Jeremy Waldron, *Lex Talionis*, 34 *Ariz. L. Rev.* 25 (1992); Jeffrey H. Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 *Phil. & Pub. Affs.* 115 (1985); Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 *Oxford J. Legal Stud.* 57 (2008).

⁴² Tadros, *supra* note 14, at 345.

⁴³ 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) (arguing that the imperative to communicate deserved censure is the formal justification of punishment, but that the content of the message communicated is determined by a diversity of substantive values, such as retribution, crime prevention, and mercy).

⁴⁴ Duff, *supra* note 43, at 80–82, 106–12.

⁴⁵ *Id.* at 83.

means by which the offender can make apologetic reparation to the victim,” and nothing else.⁴⁶ 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. As a response to the Means Problem, Duff would thus be resorting to a version of the “two birds” argument. By aiming at the first bird of censure, *which inherently requires penal hard treatment*, we hit the second bird of crime prevention.

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.⁴⁷ Von Hirsch views hard treatment not as an essential component of censure, but as a supplemental, *prudential* reason a legal system offers to citizens to desist from crime, offered in addition to the underlying *moral* reasons.⁴⁸ Von Hirsch attempts to mask the prudential reason in various ways, in particular via 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.⁴⁹ He side-steps the “cardinal” proportionality issue, though, 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 upwards 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 future crime.⁵⁰

⁴⁶ *Id.* at 98.

⁴⁷ Von Hirsch, *supra* note 43, at 9–14.

⁴⁸ *Id.*

⁴⁹ See *id.* at 15–19, 29–70; see also Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* 142–43 (2005) (arguing that high overall severity levels would be inconsistent with the penal aim to express censure rather than to coerce and threaten offenders, but acknowledging that their model provides only vague limits on punitiveness).

⁵⁰ In forthcoming work, I argue that even if retributivism is a sound theory of punishment, it could justify only the *least harmful* sentence within the vague range of retributively deserved sentences. To impose a sentence beyond this minimum would simply be cruel from a retributive perspective. It would harm an offender to a greater degree without thereby

The framework presented below aims to secure the benefits of both utilitarianism and retributivism, and to do so in a principled manner—thereby exhibiting what Patrick Tomlin calls “constrained instrumentalism.”⁵¹ Like a utilitarian theory, it conceives of punishment as an instrumental “evil,” rather than an intrinsic good, to be used for the direct purpose of crime reduction; but, like a retributivist theory, it licenses punishment only as a proportionate response to someone’s culpable choices, consistent with a liberal conception of people as ends in themselves who may not merely be sacrificed for the good of the collective.

II. A SYSTEM OF PROTECTIONS

This Part outlines (a) the function of the criminal law, which is to generate a system of protections that all members of society can rely upon for their assured liberty, (b) the empirical foundations of this view, and (c) the method of the criminal law, by which individuals within the jurisdiction self-apply criminal legal norms.

A. The Function of the Criminal Law

In responding to the Means Problem, as indicated above, this Article conceives of the criminal law as a system of protections. The criminal law aims to protect us from, say, the “specific crimes” listed in Part II of the Model Penal Code: homicide, assault, reckless endangering, terroristic threats, kidnapping, false imprisonment, rape, arson, burglary, theft, forgery, deceptive business practices, bribery, corruption, perjury, and so forth.⁵² We rely upon these protections in our interactions with other people and, crucially, in planning such interactions. Beyond our safety, we also rely upon them to secure our privacy away from others in, say, our homes and cars. In this way, our *assured* liberty, understood broadly in accordance with neo-republican theorists, depends on the reliability of the criminal law.⁵³ People with assured liberty, as Philip Pettit writes, are

increasing the realization of retributivist ends. Given that the least harmful sentence within von Hirsch’s range would entail no hard treatment, I conclude that his theory cannot justify hard treatment. Jacob Bronsther, *The Limits of Retributivism*, 24 *New Crim. L. Rev.* (forthcoming 2021) (manuscript at 8–9) (on file with the *Virginia Law Review*).

⁵¹ Tomlin, *supra* note 30, at 226.

⁵² Model Penal Code §§ 210–251 (Am. L. Inst., Proposed Official Draft 1962).

⁵³ See Philip Pettit, *Republicanism: A Theory of Freedom and Government* 5 (1997) [hereinafter Pettit, *Republicanism*]; Quentin Skinner, *Liberty Before Liberalism* 5 (1998);

“possessed, not just of non-interference by arbitrary powers, but of a secure or resilient variety of such non-interference.”⁵⁴ To be sure, regulatory “violations” like speeding form part of this narrative.⁵⁵ By promulgating such offenses, the state aims to protect people from dangerous drivers so that they can drive on public roads with a relative degree of safety and reasonably rely upon that safety in planning their days and lives.

On this view, an effective criminal law is the very foundation of modern society or, at least, an indispensable component of that foundation. When others can attack us with impunity, as Hobbes explained, it is rational to attack them first.⁵⁶ An effective criminal law thus precludes the “warre of every man against every man” that marks the state of nature and brings us into society.⁵⁷ Consider a large public park. If we can nonchalantly enjoy the grounds, strolling its sunny hills

Philip Pettit, *Freedom as Antipower*, 106 *Ethics* 576, 590 (1996); John Braithwaite & Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* 9 (1992). This Article travels only so far with republican theorists. While it accepts—and aims to clarify—the republican ideal of an assured and reliable civic liberty, it questions the republican conception of liberty itself, of what, exactly, is meant to be assured in society. Republicans understand liberty to be the state of “non-domination,” whereby other people lack the capacity to interfere with your life in a discretionary or arbitrary manner. See Pettit, *Republicanism*, *supra*, at 51–79. “[F]ree persons,” Pettit writes, “do not depend on anyone’s grace or favour for being able to choose their mode of life.” Philip Pettit, *Criminalization in Republican Theory*, in *Criminalization: The Political Morality of the Criminal Law* 132, 138 (R. A. Duff, Lindsay Farmer, S. E. Marshall, Massimo Renzo & Victor Tadros eds., 2014). But, as I will discuss below, an effective criminal law depends on the self-application of criminal legal norms by people within the jurisdiction. As such, there is no escaping dependence on others’ “grace or favour,” at least to some degree, given that they could choose not to self-apply the criminal law. *Id.* The assured liberty ideal, in sum, is not of the perfect absence of discretionary power in society, but of the confident reliance on people to exercise such power reasonably and in accordance with promulgated rules. See also Thomas W. Simpson, *The Impossibility of Republican Freedom*, 45 *Phil. & Pub. Affs.* 27, 27–28 (2017) (arguing that “freedom as non-domination” is unachievable, because either the state dominates the citizens or the citizens retain the power to dominate each other).

⁵⁴ Pettit, *Republicanism*, *supra* note 53, at 69.

⁵⁵ See Model Penal Code § 1.04(5) (Am. L. Inst., Proposed Official Draft 1962) (providing that an offense is a noncriminal “violation” if no sentence other than a fine or other civil penalty is authorized upon conviction). The view presented here would not make such a hard distinction between “noncriminal” violations and truly “criminal” offenses, understanding them both to be part of the same regulatory project.

⁵⁶ See Hobbes, *supra* note 4, at 86–90.

⁵⁷ *Id.* at 90; see also Alice Ristroph, *Hobbes on “Diffidence” and the Criminal Law*, in *Foundational Texts in Modern Criminal Law* 23, 23 (Markus D. Dubber ed., 2014) (explaining that Hobbes understood the formation of the criminal law to be a response to “diffidence,” the anxiety that people have about their security and standing in relation to each other).

carefree, it is in necessary part because of the criminal law's protections against violence. If we feel differently about walking the grounds after dark, it is because of the criminal law's relative absence. In addition to protecting us from violence, the criminal law also facilitates more complex forms of cooperation. For instance, I will cooperate with others in the creation of a marketable product only if I am secure in the knowledge that neither they nor others can steal it with impunity. As Lindsay Farmer writes, "The criminal law's role in the management of social life is to curb passions and impulsive behaviour, stabilizing expectations about the conduct of others and helping to establish relations of trust."⁵⁸ As indicated above, while other forms of law and non-legal social norms certainly enable cooperation as well, I would venture that these practices depend on a background of relatively effective criminal law. I consider the empirical foundations of this view in the following Section.

This conception of the criminal law is connected to Nicola Lacey's communitarian theory, where we punish not for crude moralistic or utilitarian reasons, but to preserve "a framework of common values within which human beings can develop and flourish."⁵⁹ It also dovetails with Farmer's argument that "securing *civil order* is a general and continuing aim of the criminal law,"⁶⁰ where "civil order" is understood as a

⁵⁸ Farmer, *supra* note 18, at 193.

⁵⁹ Lacey, *supra* note 34, at 169–201; see also John Finnis, *Natural Law and Natural Rights* 261 (2d ed. 2011) ("The 'goal' of the familiar modern systems of criminal law can only be described as a certain form or quality of communal life, in which the demands of the common good indeed are unambiguously and insistently preferred to selfish indifference or individualistic demands for licence but also are recognized as including the good of individual autonomy, so that in this mode of association no one is made to live his life for the benefit or convenience of others, and each is enabled to conduct his own life (to constitute himself over his span of time) with a clear knowledge and foreknowledge of the appropriate common way and of the cost of deviation from it."); Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* 293 (2007) ("An effective and properly functioning system of criminal law and criminal justice is essential for that relative security of mutual expectations which is a condition of the civility of civil society."); Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 *Crim. L. & Phil.* 457, 465 (2015) (arguing that the institution of criminal law "is justified by the basic idea that we do not merely live beside each other but that we live together and as such there are reciprocal duties and obligations we impose on each other in order to secure our common good"); Hyman Gross, *A Theory of Criminal Justice* 10 (1979) ("The criminal law . . . establishes rules of conduct whose observance allows us to enjoy life in society, and in addition provides punishment for violation of these rules, for the rules would not be taken seriously enough by enough people to be generally effective if they could be broken with impunity.").

⁶⁰ Farmer, *supra* note 18, at 27 (emphasis added).

distinctly *legal* form of social order which “is not primarily about moral community, but about the co-ordination of complex modern societies.”⁶¹ In sum, as indicated above, we punish not to give wrongdoers the suffering or condemnation they deserve for creating an individual victim, as on the retributivist view, nor simply to reduce the aggregate level of harm or pain in the world, as on the utilitarian view, but rather to enable and protect a community—a community of strangers living together in society—and the system of rules that offers these strangers the possibility of assured liberty and thereby of human flourishing.

An effective criminal law, in this way, is partly constitutive of the Rule of Law ideal. Respect for the Rule of Law is a virtue of *societies*, not merely of *governments*, as Rule of Law theorists tend to suggest. The Rule of Law demands fidelity to law by the government, of course, but also by the citizenry.⁶² More substantive conceptions of the Rule of Law, which dovetail with the neo-republican conception of assured liberty, maintain that the Rule of Law has value because it provides individuals with a secure place to stand within society and secure pathways in which to move.⁶³ We can appreciate how, on such a view, knowing when and where *other citizens* may be waiting to strike, in addition to knowing

⁶¹ Id. at 193; see also id. at 299 (“The problem of civil order has been seen as a problem of coordinating individuals and their interests, and the criminal law has been used to secure those interests by establishing measures for building and reinforcing trust between individuals.”).

⁶² See Gerald J. Postema, Fidelity in Law’s Commonwealth, *in* *Private Law and the Rule of Law* 17, 40 (Lisa M. Austin & Dennis Klimchuk eds., 2014) (“Law rules not only when government officials are held accountable for the discharge of their duties under law, but also when ordinary citizens structure their relationships by law and hold each other accountable to the common, public terms that the law provides.”); Robin West, The Limits of Process, *in* *Getting to the Rule of Law* 32, 47 (James E. Fleming ed., 2011) (“Law does a lot of things, but one of its core functions is to protect individuals against what would otherwise be undeterred privations against them—not by overreaching state officials but rather by undeterred private individuals, corporations, or entities.”); Malcolm Thorburn, Punishment and Public Authority, *in* *Criminal Law and the Authority of the State* 7, 9 (Antje du Bois-Pedain, Magnus Ulväng & Petter Asp eds., 2017) (“[T]he offender challenges the most basic promise of the rule of law: that we will never be subject to the arbitrary will of others, but only to the general laws that are the product of the legitimate public authority.”); Henry E. Smith, Property, Equity, and the Rule of Law, *in* *Private Law and the Rule of Law*, *supra*, at 224, 239–46 (arguing that a formal system of law depends on a legal culture which opposes opportunistic evasion of the rules, which is endorsed by the wider society, and which is reflected in principles of equity).

⁶³ On the distinction between “formal” and “substantive” conceptions of the Rule of Law, see Paul P. Craig, Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework, 1997 *Pub. L.* 467; Jeremy Waldron, *The Rule of Law and the Measure of Property* (2012).

when and where the state itself may be waiting, is of paramount importance.⁶⁴

B. Empirical Foundations

This Article maintains that some degree of deterrent punishment is necessary for the maintenance of a cooperative modern society. But what if that empirical premise is false? What if we could secure social peace and cooperation without the threat of punishment? Even if one were a thoroughgoing retributivist, to justify the extreme costs of state punishment, the institution must deter crime to some sufficient degree.⁶⁵

⁶⁴ This interpretation of the criminal law—as a system of protections that grounds a cooperative civil order and the Rule of Law—is relatively provocative and distinctive within criminal law theory, as evidenced by the inability of retributivism or Joshua Kleinfeld’s “reconstructivism” to account for its central premises. Rather than a system of protections, retributivists understand the criminal law to be a public schedule of interpersonal wrongs, the commission of which demands the imposition of suffering or censure, as discussed above. The retributivist narrative is thus of the state punishing a wrongdoer for creating a victim. The reliance interest of non-victims on the criminal law plays no role in the story, or at least no direct role. A retributivist criminal law is, in these ways, an essentially moral rather than political project, and it lacks the resources to articulate the idea that an effective criminal law is, ideally, a source of assured liberty for all people within the jurisdiction. On the distinction between “moral” and “political” theories of punishment, see generally Peter Ramsay, *Imprisonment and Political Equality* (London Sch. Econ. & Pol. Sci., Working Paper No. 8/2015, 2015); Corey Brettschneider, *Democratic Rights: The Substance of Self-Government* 96–113 (2007); Chiao, *supra* note 18.

Meanwhile, Kleinfeld argues that the function of the criminal law is to maintain society’s “embodied ethical life,” which he defines as “not just a set of moral imperatives (thou-shalts and thou-shalt-nots) but also rights, values, teleologically structured social institutions and practices, conceptions of good and bad character and good and bad lives, normatively laden social roles and social structures, evaluative understandings and outlooks, and more.” Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 *Harv. L. Rev.* 1485, 1490 (2016). The purpose of punishment, Kleinfeld argues, is to expressively reaffirm the norms and ideals that have been implicitly denied by an offense. “The state in the criminal context,” Kleinfeld concludes, “should be the embodiment and protector of society’s lived moral culture—its way of life.” *Id.* at 1555. However, in modern society, the criminal law guarantees only a small fraction of the norms that comprise our way of life. For instance, the criminal law does not enforce the defeasible norms in favor of friendliness toward strangers or diligence at work. Kleinfeld the sociologist would have difficulty explaining this outcome. And Kleinfeld the moral philosopher owes us an explanation as to why the criminal law ought not to expand to enforce all such norms. In brief, neither retributivists nor reconstructivists can explain the criminal law’s public remit to help maintain the civil order. Retributivists, viewing the criminal law as a public schedule of interpersonal moral wrongs, prove far too little, while reconstructivists, viewing the criminal law as the enforcer of a society’s entire normative universe, prove far too much.

⁶⁵ See Douglas Husak, *Holistic Retributivism*, 88 *Calif. L. Rev.* 991, 996 (2000) (“Retributivists must show not only that giving culpable wrongdoers what they deserve is

This is not just an issue for the corrective justice theory, then, but for all purported justifications of state punishment. If we could secure social peace and cooperation without the threat of punishment—if, say, the operation of non-legal social norms would suffice to diminish the threat of crime—then the enormous expense of the criminal justice system, with its police, prosecutors, defense attorneys, judges, prisons, parole officers, and so forth, would be unjustifiable, given the great mass of suffering that even a relatively mild system of criminal punishment inflicts on offenders and their dependents, and given all that we might otherwise do with those resources. To be clear, it would be unjustifiable even if retributivists were right that, regardless of its deterrent impact, all offenders deserved to suffer or be censured. For the imperative of retributive penal desert, even if legitimate, could not be an absolute trump.⁶⁶ And if the infliction of punishment played a negligible role in deterring crime, then that imperative would be overridden by all the wants and needs that we could otherwise fulfill with penal resources.

What, then, should we make of the empirical claim regarding the impact of the criminal law—of the threat of criminal punishment—on society and social cooperation? It is difficult to know with absolute certainty. It would require assessing a polity with, and then without, a functioning criminal justice system over a sufficiently long period of time. However, as indicated at the outset, the historical examples of modern societies that lose the threat of criminal punishment strongly support the thesis that this threat plays a crucial role in decreasing the crime level.⁶⁷ But these “experiments” were not run for long enough, one might reply, and perhaps over a longer period of time sufficient non-penal and possibly non-legal modes of regulation would emerge to assure people’s liberty.⁶⁸

intrinsically valuable, but also that it is sufficiently valuable to offset what I will refer to as the drawbacks of punishment The first such drawback is the astronomical expense of our system of criminal justice.”); Tadros, *supra* note 14, at 88–110; Michael T. Cahill, *Punishment Pluralism*, in *Retributivism: Essays on Theory and Policy* 25, 39 (Mark D. White ed., 2011).

⁶⁶ Kant famously disagrees. Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* 198 (W. Hastie trans., Augustus M. Kelley Publishers 1974) (1887) (arguing that, even in a disbanding island society, “the last Murderer lying in the prison ought to be executed . . . in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people”).

⁶⁷ See *supra* notes 7–9 and accompanying text.

⁶⁸ Even if that were the case, we might have reason, nonetheless, to prefer a legal to a non-legal system of protections. As Jeremy Waldron writes in discussing the treatment of Romeo and Juliet by the Montagues and Capulets: legal protections have the advantage of not depending upon the potentially fickle affections of a closely-knit social group. Jeremy

Perhaps. Claus Roxin writes perceptively on how we ought to interpret the lack of definitive social science evidence on the deterrent impact of state punishment, given the complex causal relationships at play in someone's decision to offend:

This indeterminacy [in the social science evidence] . . . does not change the fact that a functioning system of social control and criminal justice is—taken in the totality of its social effects—certainly capable of helping to maintain . . . civil peace for citizens. Some crimes will, of course, still be committed. But whereas in Germany one can walk the streets safely at night, there are other countries in which this is impossibly dangerous and where people hide away in their houses surrounded by high walls. One cannot seriously doubt that such a deplorable state of affairs is due to failures of preventive social management, ranging from police work to the operations of the criminal courts and the correctional system. (That these failures are, in turn, a consequence of poverty and other social problems, is a different point.)⁶⁹

Let us continue, then, with the commonsense empirical view that a functioning criminal law decreases the threat of crime significantly, but with the understanding that should this claim prove false, or should there be sufficient non-penal and possibly non-legal modes of securing crime reduction, that it would gravely damage *any* justification of the criminal law. To be sure, as I discuss further in Part IV, this is not to assume that the criminal law's deterrent impact depends upon any particular level of punishment severity, but merely upon the effective threat of at least *some* level of punishment.⁷⁰

Waldron, When Justice Replaces Affection: The Need for Rights, *in* *Liberal Rights: Collected Papers 1981–1991*, at 370, 377 (1993).

⁶⁹ Claus Roxin, Prevention, Censure and Responsibility: The Recent Debate on the Purposes of Punishment, *in* *Liberal Criminal Theory: Essays for Andreas von Hirsch* 23, 29–30 (A.P. Simester, Antje du Bois-Pedain & Ulfrid Neumann eds., Antje du Bois-Pedain trans., 2014); see also MacCormick, *supra* note 59, at 207–08 (arguing that police, prosecutors, and courts working together to enforce a specialized body of criminal law has been a condition of the increasing civility of modern society when they carry out their duties with the restraint demanded by the Rule of Law).

⁷⁰ See *supra* note 5.

C. The Method of the Criminal Law

Moving forward, what we want from the criminal law is a system of protections that we can reasonably rely upon in the planning and execution of our lives, but we want to secure this system consistent with a commitment to human inviolability, that is, consistent with a refusal to sacrifice people as a means of mitigating harms or threats for which they lack responsibility. The linchpin of this project is an understanding of how, exactly, the criminal law works—how it operates to provide protection and secure our reasonable reliance. The criminal law, as a distinctly legal form of protection, depends upon the normative capacities of people within the jurisdiction. This is the *method* of the criminal law, as indicated above. As opposed to the brutish and unpredictable coercion of non-legal modes of governance, legal systems ask citizens to grasp prospective rules and standards and regulate their own conduct accordingly. As Jeremy Waldron writes:

Self-application is an extraordinarily important feature of the way legal systems operate. They work by using, rather than short-circuiting, the agency of ordinary human individuals. They count on people's capacities for practical understanding, for self-control, for self-monitoring and modulation of their own behaviour in relation to norms that they can grasp and understand.⁷¹

Legal systems, in this manner, are more efficient and powerful means of governance than non-legal systems.⁷² When it comes to the latter, the state must be more involved; when you get citizens to do things at the barrel of a gun, you need to actually be there, with a gun. When it comes to law, the state can simply promulgate a rule, which citizens are then

⁷¹ Jeremy Waldron, *How Law Protects Dignity*, 71 *Cambridge L.J.* 200, 206 (2012); see also Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 120–21, 846–47 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (discussing how private persons self-apply criminal regulation); Hart, *supra* note 31, at 227–30 (describing the capacities necessary to understand the law and to conform one's conduct to it); Peter Cane, *Responsibility in Law and Morality* 35 (2002) (“The relevant capacity is the capacity to be guided by rules”); MacCormick, *supra* note 59, at 89–90 (arguing that the conception of the law as a guide to conscious and rational agents relies on a particular conception of the person); Farmer, *supra* note 18, at 167 (explaining that the modern legal person is one who is capable of being guided by norms and who is, accordingly, answerable for their conduct when they violate those norms).

⁷² See Joseph Raz, *The Rule of Law and its Virtue*, in *The Authority of Law: Essays on Law and Morality* 210, 210–29 (1979).

expected to perceive and self-apply. Thus, when someone relies upon a legal protection, she is relying, in large part, upon the self-application of the relevant norm by other people in the jurisdiction. More than an assurance that the state will be there, positively intervening to prevent people from doing *X* or *Y*, the criminal law assures, or rather aims to assure, that people themselves will uphold the legal rules that prohibit *X* or *Y*. When I rely upon the criminal laws against car theft or murder, as indicated above, I am not relying upon the police to wait by my car or my person, like personal guards, but rather upon people to self-apply the legal norms against stealing cars and murdering people. If the threat of punishment generates much of our reliance upon the law's protections—that is, if people self-apply legal norms for prudential rather than moral reasons, out of fear of the criminal sanction—it does not ruin this story; indeed, that is the very purpose of punishment on this view, as I will explain.

1. *Criminality*

With this framework in mind—of the criminal law as a system of protections that depends for its effectiveness on people self-applying legal norms—we can begin to understand the antagonistic relationship between the objective threat of crime and the function of the criminal law to provide people with a map of when and where they can be safe from the incursions of others. Crime diminishes the reliability of this map. Can I rely upon the protection against car theft? In considering this question, I need to know the prevalence of car theft within the jurisdiction. Or, more specifically—and here is the point—I need to know how much ongoing intent there is within the jurisdiction to steal cars. The greater the aggregate intent, the less reasonably I can rely upon the protection. If Alice intends to steal a car, then, in combination with others intending to steal cars, she weakens the reliability of the legal protection against car theft upon which citizens are meant to rely. She contributes to a social threat that makes buying, leasing, and using cars more expensive and dangerous.

Let us say that to fail to self-apply the criminal law is to contribute to *criminality*. There are two types of criminality: “general” and “specific.” We tend to focus on the level of “general criminality,” since we tend to rely on the criminal law as a whole, as a general provider of effective protections. When we walk down the street, for example, we are relying on homicide offenses, non-fatal offenses against the person, driving

offenses, and so forth. It is in this sense that we refer to the criminal law as a *system* of protections. A 1998 study was concerned with general criminality levels when it reported that, in the prior twelve months, twenty-five percent of the residents of twelve American cities had avoided leaving their homes alone to prevent becoming a victim of crime, and twenty-five percent had avoided going out at night.⁷³ Sometimes, however, we are concerned with the “specific criminality” level of a particular offense, say, of car theft when purchasing car theft insurance or parking our car.

Like the threat of bad weather or a natural disaster, criminality in either its general or specific guises will never be perfectly evenly dispersed within a jurisdiction. Nor, indeed, will an individual’s criminality contribution represent a precisely equal threat to every member of society. Sometimes, it will represent a diffuse threat to many people (say, where someone intends to steal one car out of the thousands in an area); other times, it will be much more targeted (say, where someone intends to steal a particular person’s car). If diffuse and targeted threats represent the same outcome for society as a whole in terms of the legal rights directly disrespected (say, one car stolen), then we can understand the threats to constitute equivalent amounts of criminality. Put differently, whether one represents a threat to their family or to strangers-to-be-determined, they represent a threat to constitutive members of society.

However, as suggested at the outset, the social costs of criminality include both the *completed harms* (the losses that result directly from completed offenses) as well as *preventive harms* (the costs that result from our desire to prevent or avoid the completed offenses). Preventive harms are reflected in people exercising their rights less freely or confidently and taking costly precautions against crime. The relationship between the two types of harms is not always rationalized. Compare “street crimes,” like mugging and pickpocketing, with financial fraud. Per unit of completed harm, street crimes seem to generate more preventive harm than financial fraud, which does not impact our daily or long-term planning all that much (even if the total amount of completed harm

⁷³ Steven K. Smith, Greg W. Steadman, Todd D. Minton & Meg Townsend, U.S. Dep’t of Just., *Criminal Victimization and Perceptions of Community Safety in 12 Cities, 1998*, at 20–21 (May 1999), <https://www.bjs.gov/content/pub/pdf/cvpcs98.pdf> [<https://perma.cc/Z4AM-WH6D>]. On the relationship between the objective threat of crime and the perception of crime, see *infra* Subsection III.C.1.

brought about by fraud is staggering).⁷⁴ Though, in the other direction, preventive actions make it less likely that any particular individual who has the intention to commit a street crime will actually be able to complete the offense. Regardless, as discussed further below, the corrective duty of the individual who has, in fact, mugged or pickpocketed someone is effectively limited to preventing one future mugging or pickpocketing or, more specifically, one future intention to mug or pickpocket someone.⁷⁵ Just the same, the corrective duty of the individual fraudster is effectively limited to preventing an intention to commit a fraud of the same size.⁷⁶

2. Criminality and Mens Rea

We want to know, then, how many people are failing to self-apply each criminal law, and to what degree. What this failure of self-application means will depend on the mens rea of the offense. A failure to self-apply a criminal law with intent mens rea, like the law against car theft, involves having an *intention* to commit the prohibited act. A failure to self-apply such a law can come in degrees when considered over time, as between someone who has an intention to steal a car only one time and a professional car thief who has such an intention repeatedly. They have both failed to self-apply the law, but the latter to a greater degree. A failure to self-apply a criminal law with recklessness or negligence mens rea, meanwhile, involves a *willingness* to act in a manner that the law deems overly risky or careless.⁷⁷ Consider, for instance, a person who has few qualms about driving recklessly, and who occasionally drives at very high speeds through school zones, among other reckless driving acts. He does

⁷⁴ See Mark Button, Jim Gee & Graham Brooks, Measuring the Cost of Fraud: An Opportunity for the New Competitive Advantage, 19 J. Fin. Crime 65 (2012); LexisNexis Risk Solutions, 2019 True Cost of Fraud Study E-Commerce/Retail Report (2019), <https://risk.lexisnexis.com/insights-resources/research/2019-true-cost-of-fraud-study-e-commerce-retail-edition> [<https://perma.cc/K9PD-83K8>].

⁷⁵ I write “effectively limited” because, as I explain *infra* in Part IV, offenders can fulfill their reparative duties by preventing offenses of different types.

⁷⁶ On the relevance of “loss amount” for sentencing in the context of financial crimes, see *infra* Section IV.C.

⁷⁷ This assumes that the norm was non-coercive and genuinely legal, following Lon Fuller’s theory of law, such that self-application was possible. This would require at least a due diligence defense for negligence offenses, but I will not engage with those issues here. See Lon L. Fuller, *The Morality of Law* 101 (rev. ed. 1969) (arguing that purported legal rules count as genuine law only if they cohere with the “principles of legality”: generality, publicity, prospectivity, intelligibility, consistency, feasibility, constancy through time, and congruence between the rules as announced and as enforced).

not intend to hurt anybody with his car, but he is willing to bring into the world an unreasonably high risk of that outcome. In this way, he would be failing to self-apply the legal norm against reckless driving—though to a lesser degree than someone who has absolutely no qualms about driving recklessly, and who routinely drives at very high speeds through school zones.⁷⁸

If an offender exhibits any such form of *mens rea*, the broader point is that he is *normatively committed* to performing the prohibited act in the normal course of future events.⁷⁹ To be sure, an individual could change his view as to the authority of the relevant legal reasons and “unsettle” his commitment, but that does not alter the fact that until this happens he is to some degree *coming for us*, and thereby contributing to the objective threat of crime.

How does the impulsive offender fit into this story?⁸⁰ First, he does so as soon as he has an intention or willingness to perform a prohibited act, even if, due to his impulsivity, the intention or willingness is established only thirty seconds before he commits the act. The threat of crime will vary over time, of course, and his surprising act could mean, perhaps, that we have underestimated the threat level for that time and place. In such cases, less than chilling the exercise of our rights or forcing us to take expensive precautions, the threat of crime exposes us to unreasonable risks of harm. In short, an intention or willingness to break the law need not be the enduring and regular commitment of the professional criminal. An intention or willingness to break a law only one time, whether formed impulsively or otherwise, would suffice. Second, we might understand someone’s unchecked and aggressive impulsivity to constitute a willingness to act recklessly in a diffuse criminal fashion, such that we can depend on him to perform a range of criminal acts in the normal course of future events. But how could we know that someone was impulsive in this manner? How could we know, indeed, that anybody was “normatively committed” to offending? As I discuss further below, the evidence is someone’s past offense, which represents dispositive evidence of his *past* intention or willingness to offend.⁸¹

⁷⁸ Thanks to Peter Ramsay for helpful discussion on this point.

⁷⁹ By normal course of future events, I mean assuming that nothing entirely unexpected occurs, like an asteroid strike or the offender’s untimely death.

⁸⁰ Thanks to Nicola Lacey and Patrick Tomlin for pressing me to clarify this point.

⁸¹ See discussion *infra* Subsection III.C.2.

One's criminality contribution will vary with the mens rea level of the offense. For instance, one might self-apply the norm against intentional killing, but not the norm against reckless killing or the norm against grossly negligent killing. If we seek assurance against other people killing us, each homicide offense addresses a separate component of that aim. We want assurance against people who would kill us purposefully, as well as those who would kill us as a result of their conscious risk-taking or their extreme carelessness. And to be unreliable with regard to the law against intentional killing is to make a different and generally more severe criminality contribution than to be unreliable with regard to the laws against reckless killing or grossly negligent killing. It would be possible, though, for someone to be so wildly reckless with regard to the possibility of causing others' deaths that his criminality contributions would be even greater than those of an intentional killer. These issues will be relevant for sentencing, as discussed in Part IV.

3. *Crime Pollution*

Criminality, in sum, is the joint product of people in society who are failing to self-apply criminal legal norms, in the specific sense of having an intention or willingness to offend. The greater the amount of criminality in society, whether in a given moment or when considered over time, the less worth the criminal law has as a system of protections and as a guide to the possible incursions of other people; and thus the less assured is our liberty and the more difficult it is to flourish.⁸²

But how, one might object, could we understand criminality to be the joint product of offenders, such that we could hold them responsible for its impact? It is not as if a car thief wishes to diminish the reliability of the law against car theft; all he wants to do, let us assume, is to make money. To say that criminality is the joint product of offenders, however, is not to argue that criminality is a purposeful joint product akin to organized crime. The better analogy is to pollution. Polluters are not working together purposefully to create a societal threat, but each of them, as a byproduct of their actions, contributes to the social harm of smog or climate change, and we can hold them responsible for their proportional

⁸² See Tommie Shelby, *Dark Ghettos: Injustice, Dissent, and Reform* 207 (2016) (explaining how the threat of crime can diminish social trust and communal bonds).

contributions, morally if not legally.⁸³ Likewise, offenders contribute to the wider social threat of criminality as a foreseeable, necessary, and causally “close” byproduct of their unreliability with regard to upholding the criminal law, and we can hold them responsible for their proportional contributions to this social threat (both morally and legally). We can take the metaphor one step further, indeed, and understand criminality to represent a form of *socio-legal pollution*.

III. DETERRENT PUNISHMENT AS EQUITABLE REMEDY

This conception of the criminal law and of criminality allows us to resolve the Means Problem if we appeal to what I refer to as the “corrective justice means principle.” As indicated above, this principle provides an exception to the general prohibition on using people as a means to the greater good. In other words, to use someone as a means consistent with this principle is not to use him to mitigate a harm or threat for which he lacks responsibility.

A. Corrective Justice Means Principle

The principle of “corrective justice” provides that an individual has a duty to rectify the losses or damage caused by his wrongful conduct and that he can permissibly be forced to fulfill this duty.⁸⁴ The classic statement is found in Aristotle’s discussion of justice in Book V of the *Nicomachean Ethics*.⁸⁵ An individual can be used as a means permissibly, according to the Corrective Justice Means Principle, to restore the *ex ante* status quo that he wrongfully disturbed. To use him in this manner would

⁸³ A.P. Simester and Andreas von Hirsch refer to pollution as a “conjunctive” harm, the prevention of which involves proscribing an act that is “a token of the type of conduct that cumulatively does the harm.” A.P. Simester & Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* 85 (2011). Criminality is such a “conjunctive” harm, with the intention or willingness to offend being the relevant “token.” On the parallel notion of “cumulative” harms, see Andrew von Hirsch, *Extending the Harm Principle: ‘Remote’ Harms and Fair Imputation*, in *Harm and Culpability* 259, 263 (A.P. Simester & A.T.H. Smith eds., 1996).

⁸⁴ See Jules L. Coleman, *The Practice of Corrective Justice*, 37 *Ariz. L. Rev.* 15, 15 (1995); Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 *U. Toronto L.J.* 349, 349–51 (2002); see also Tadros, *supra* note 14, at 131–32 (introducing the concept of an “enforceable duty,” a duty that one can permissibly be forced to uphold because upholding it is necessary to avert a serious harm and, if it is breached, adequate compensation is unlikely to be forthcoming).

⁸⁵ Aristotle, *Nicomachean Ethics* bk. V, at 87–89 (Roger Crisp ed. & trans., Cambridge Univ. Press 2000) (c. 384 B.C.E.).

be consistent with a commitment to human inviolability, since he would not be sacrificed to mitigate a problem for which he lacks responsibility. He would be used, rather, to repair his own wrongdoing.

This principle, of course, grounds one of the central theories of tort law.⁸⁶ Though, as Gregory Keating explains, the principle is *formal* and applies beyond the domain of tort to all situations where wrongful loss emerges.⁸⁷ Further, the principle can justify remedies beyond those traditionally offered by tort law. Tadros has argued that when damages are inadequate, preventing a future wrong can be the best means of rectifying a past wrong.⁸⁸ This Article applies the principle of corrective justice—and, in particular, Tadros’s variant—to the wrongful loss generated by a criminality contribution and, in so doing, crafts a novel, “constrained” theory of deterrent punishment.

Tort theorists sometimes emphasize the *bipolarity* of corrective justice, whereby a particular defendant owes a duty of repair toward a particular plaintiff. This is in distinction to the *multipolarity* of distributive justice, whereby some benefit or burden is divided amongst a class of people in accordance with some criterion of desert. Ernest Weinrib writes: “Corrective justice treats the defendant’s unjust gain as correlative to the plaintiff’s unjust loss. The disturbance of the equality connects two, and only two, persons. The injustice that corrective justice corrects is essentially bipolar.”⁸⁹ However, we should not take Weinrib’s numerical conclusions too literally when attempting to transplant the corrective justice principle to the criminal realm and to the multiparty wrong that is criminality. Of course, this conclusion follows the guidance of the tort system itself. For instance, one defendant can owe a tort duty of repair to many plaintiffs, as with class action suits; and, in the other direction, one plaintiff could sue multiple defendants who share responsibility for the same wrong.

B. Corrective Justice Punishment

There are four basic steps to the corrective justice theory of punishment. First, an offender contributed in the past to society’s level of

⁸⁶ See *supra* note 20.

⁸⁷ Gregory C. Keating, *The Priority of Respect Over Repair*, 18 *Legal Theory* 293, 316–17 (2012).

⁸⁸ See Tadros, *supra* note 14, at 273–79; see also *infra* note 105 and accompanying text (comparing the corrective justice theory with Tadros’s “duty” theory of punishment).

⁸⁹ Ernest J. Weinrib, *The Idea of Private Law* 64 (1995).

criminality via his intention or willingness to flout the criminal law. He contributed, that is, to a social threat in the past that limited the assured liberty of people within the jurisdiction, a social threat that made their lives more difficult, perilous, and expensive. Second, the purpose of deterrent punishment is to reduce the level of criminality in society. Deterrence is not targeted toward specific offenders, but rather toward the general threat of crime faced by citizens. The third step is an appeal to the Corrective Justice Means Principle. And, thus, fourth: Deterrent punishment is permissible in proportion to an offender's past criminality contributions. We are using him as a means of repairing—by way of general deterrence—the damage to our assured liberty caused by his own criminality contributions. He is not, as in the standard conception of deterrent punishment, merely sacrificed to scare off would-be future offenders, for whom he has no responsibility. He has increased the level of criminality in the past, and so the way to repair that, as a matter of corrective justice, is to use him to decrease the level of criminality in the future. Over time, ideally, it would be as if he had never contributed to criminality at all, in terms of the average threat of crime faced by society.

C. The Act Requirement

1. Dangerousness and Drug Laws

What about the act requirement? If we punish to rectify contributions to “criminality,” why wait for an offender to commit a criminal act? Why not punish people for merely seeming dangerous, an outcome that Peter Ramsay and others worry our system is increasingly headed toward?⁹⁰ If someone seems dangerous, is he not contributing to criminality? Or, put differently, why not lock up everybody whom actuarial statistics indicates is “likely” or “very likely” to offend, and thereby dramatically increase legal assurance?

Self-defense principles undergird the conception of the criminal law as a system of protections and of criminality as a culpable attack on the

⁹⁰ See Peter Ramsay, Preparation Offences, Security Interests, Political Freedom, *in* *The Structures of the Criminal Law* 203 (R. A. Duff, Lindsay Farmer, S. E. Marshall, Massimo Renzo & Victor Tadros eds., 2011); Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* 14 (2012); Lucia Zedner, *Security* (2009); Mark Neocleous, *Critique of Security* (2008); Ian Loader & Neil Walker, *Civilizing Security* (2007); Paul Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 *Harv. L. Rev.* 1429, 1429–34 (2001).

people who rely on those protections. There are internal limits to these principles that can prevent such abuses. Within the realm of interpersonal self-defense, for instance, there is no right to attack any person that *may* pose a threat to you (for example, any person that *may* punch you). To activate traditional self-defensive logic, there must be an ongoing attack against you. Within the socio-legal realm, the ongoing attack against people within the jurisdiction simply is criminality, which is composed of offenders' intentions or willingness to flout criminal legal norms, as discussed above. To hang out in the "wrong crowd," say, to be friendly with drug dealers, is not in and of itself to have any such commitment. One could be friendly with drug dealers and then be entirely reliable with regard to the self-application of the criminal law, such that he is not in any way liable to punishment.

But what about preemptive defense? If there is a right to preemptive *self*-defense, it applies only where the aggressor exhibits a clear intention to attack (for example, a person has angrily raised his fist to punch me). Given (a) that the "attack" in the context of criminality is the intention to violate a law with intent *mens rea* or a willingness to violate a law with recklessness or negligence *mens rea*, then (b) preemptive *social* defense could apply only where someone had an intention to have an intention to offend or an intention to have a willingness to offend. Both are essentially meaningless formulations that collapse into having the intention to offend, bringing us back to square one. Preemptive social defense for the purpose of diminishing criminality is thus incoherent. One either has a normative commitment to flout a criminal law, or does not.

The legal assurance promised by the corrective justice theory is thus primarily objective rather than subjective.⁹¹ It is a matter of reducing the actual risk of crime in the future, not reducing people's perceptions of the risk of crime. The reason to punish is to create reliable legal protections—that is, to have criminal legal norms that people in society are in fact upholding and self-applying, so that citizens can confidently plan and successfully execute their lives. Objective legal assurance increases along with the objective reliability of legal protections. Subjective legal assurance, one's personal feeling of the law's reliability, is an important but ultimately derivative concern. This is a central point. Subjective assurance should, of course, increase along with objective assurance, but

⁹¹ On the related distinction between objective and subjective "security," see Ramsay, *The Insecurity State*, *supra* note 90, at 1–15, 54–66; Zedner *supra* note 90, at 14–19; Loader & Walker, *supra* note 90, at 155–61.

this is not always the case.⁹² If we knew, then, that someone was flirting with the possibility of, say, grievously assaulting someone, then while this may worry us and diminish our subjective sense of security, it is not until he actually holds an intention to commit the act that he is, as indicated above, *coming for us*. And it is only then that he has contributed to criminality and diminished our objective assurance, making himself liable to our collective rights to self-defense and corrective justice.

In the other direction, there could be a situation in which we have an unjustified level of subjective assurance. We might blithely assume, say, that the specific criminality level for car theft was vanishingly low, while in fact the jurisdiction was filled with people intending to steal cars. If we then left our car doors unlocked or failed to purchase car theft insurance, our subjective assurance would be *unreasonable*. We would be relying on the criminal law's protections unreasonably, and thereby taking unreasonable risks. We can see here, again, how criminality does not merely chill the exercise of our rights or force us to take expensive precautions; especially when we underestimate its current or future level, criminality also exposes us to unreasonable risks of harm. As indicated above, the social costs of the threat of crime are, of course, reflected in the completed offenses themselves, and not only in the expensive or onerous means that we take to prevent or avoid completed offenses. Along these lines, if one conceals his criminal intentions from public knowledge by being a very professional and secretive criminal—or by being an impulsive and surprising one-time criminal—he has still contributed to criminality.⁹³ We want people to exercise their liberties

⁹² See John Gramlich, Voters' Perceptions of Crime Continue to Conflict with Reality, Pew Rsch. Ctr. (Nov. 16, 2016), <http://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality> [https://perma.cc/5CS2-KM3K] (reporting that 57% of those who had voted or who planned to vote in the 2016 presidential election believed that crime had gotten worse since 2008, 27% believed it had stayed the same, and 15% believed it had gotten better, even though violent crime and property crime had fallen by 26% and 22%, respectively, between 2008 and 2015).

⁹³ Thanks to Antony Duff for helpful discussion on this point. Kleinfeld's "reconstructivist" theory, by comparison, cannot easily escape the challenge of the secretive offender. As indicated above, Kleinfeld understands a crime to expressively reject a social norm and punishment to expressively deny that rejection. If the crime goes unpunished, he argues, then the social norm that it rejects will ultimately wither away. He writes that "crime not only offends the norms on which social solidarity is based but, by showing that those norms can be violated, saps them of authority." Kleinfeld, *supra* note 64, at 1506. He appeals to Durkheim's example of the classroom: "If students start cheating on their exams and see that teachers, who could do something about it, turn a blind eye, the norm against cheating will dissolve and dissolve quickly—and likewise if citizens are known to frequently cheat on their taxes or

confidently, but not unreasonably or foolishly. Subjective assurance, in and of itself, is thus not our primary target. The criminal law, in sum, aims for objective assurance over time, and then for the subjective assurance level to be appropriate given the degree to which it achieves that primary goal.

While the corrective justice theory is largely agnostic in terms of what constitutes criminality—that is, in terms of what actions a society wants legal protection against—understanding the criminal law in this manner would preclude a number of laws in American criminal codes, most strikingly, laws against the use and possession of drugs.⁹⁴ To use or possess a drug does not, *in and of itself*, objectively threaten anybody else’s wellbeing. Let us assume, though, that drug use is positively correlated with actions that do represent such a threat; let us assume, much more bravely, that criminalizing drug use and possession would be an all-things-considered efficient means of crime prevention. Even then, these drug laws would be an illegitimate use of the criminal law. They would merely sacrifice drug users for the greater good, since to use or possess a drug, *in and of itself*, is not to be disrespectful of anyone else’s legal rights; unless there are special circumstances, it has no impact on other people at all.⁹⁵ To then punish a drug user for the ultimate purpose of incentivizing people to respect others’ legal rights would be unjustified. He was not disrespectful of such rights in the past and therefore has no corrective duty.⁹⁶

2. *The Act as Evidence*

On the corrective justice view, an offender is punished for his contribution to criminality, that is, for his intention or willingness to perform a legally prohibited action. In this way, the criminal action itself—say, the pulling of the trigger or the speeding away with the stolen

spouses on one another.” *Id.* In this way, he writes that crimes “endanger—genuinely endanger—ethical life.” *Id.* But it is not the crime itself that would endanger the norm, but the public flouting of the norm followed by the non-punishment of that public flouting. If the flouting were to happen entirely in secret, then the reconstructivist penal logic would fail to apply or at least would apply with far less stringency than if the offender happened to get caught in public. For the secret flouting of a norm, even if unpunished, would not impact the norm’s public standing.

⁹⁴ See, e.g., 21 U.S.C. § 844 (“[p]enalties for simple possession”).

⁹⁵ For relevant discussion, see Douglas Husak, *Liberal Neutrality, Autonomy, and Drug Prohibitions*, 29 *Phil. & Pub. Affs.* 43 (2000).

⁹⁶ Thanks to Shalev Roisman for helpful discussion on this issue.

car—is *evidence* of the criminality contribution.⁹⁷ It is the intention or willingness to create an individual victim that generates criminal liability, rather than the presence of the victim itself. (Indeed, there are many cases where a criminal action does not create an individual victim, as with most regulatory and inchoate offenses.) If criminal liability were based on the individual victim, as on traditional theories, then our understanding of criminality and our response to the Means Problem would dissolve. For to create a victim is not, in and of itself, to contribute to an ongoing social threat.

Erin Kelly argues, for instance, that beyond the harm borne by the victim, we could hold an offender partially responsible for people’s “fear” of offenses of the type he committed.⁹⁸ John Braithwaite and Philip Pettit make a similar point.⁹⁹ They argue that an offender’s primary wrong is to diminish or destroy his victim’s “dominion,” the state of being free from others’ arbitrary interference.¹⁰⁰ The offender also commits a wrong against society as a whole, they argue, by diminishing the “reassurance” of non-victims regarding the security of their own dominion.¹⁰¹ But the “fear” or lack of “reassurance” would be in relation to the risk of *future* offenses—of, say, future robberies—and the offender’s *past* robbery, which is what Kelly, Braithwaite, and Pettit want to hold him responsible for, could not, in and of itself, contribute to that future risk. It may, in combination with other such robberies, indicate to the population an ongoing risk of future robberies. But merely to indicate the existence of an ongoing risk—as a reporter might—is surely not to be responsible for that risk. Only if we see the act as evidence of an offender’s past normative commitments, and understand the objective risk of crime (criminality) to be composed of such commitments, could we aim to hold

⁹⁷ If the evidence were of multiple criminal acts—say, multiple car thefts—none of which had been addressed before by the legal system, then that would be dispositive proof of a greater criminality contribution than evidence of a single act.

⁹⁸ Erin I. Kelly, *The Limits of Blame: Rethinking Punishment and Responsibility* 140 (2018); see also Nozick, *supra* note 24, at 65–71 (arguing that fully compensating crime victims, without prohibiting and punishing the underlying conduct, would inadequately address the fear of crime).

⁹⁹ Philip Pettit & John Braithwaite, *Not Just Deserts, Even in Sentencing*, 4 *Current Issues Crim. Just.* 225, 230 (1993).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (“If I see that crimes are committed against others—especially when the victims of crime do not have their complaints taken seriously or redressed—then the basis for believing that I enjoy resilient non-interference is undermined. My dominion is endangered.”); *id.* at 232.

him proportionally responsible for the impact of that risk on people's legal assurance.

But why, one might reply, do we need the act? Imagine that the state could somehow determine whether a citizen had an intention or willingness to offend before he had taken *any* relevant steps in the real world. Would punishment be legitimate in that situation? No. Even if it decreased criminality to zero, we would never grant the state authority to peer into our minds like this; to do so would increase our objective assurance against other citizens, but profoundly decrease it vis-à-vis the state itself. Whether to protect ourselves against the state, in particular against broad, discretionary, and intrusive powers of investigation, or against offenders, is the question at the center of controversial police practices like "stop-and-frisk." Farmer explains that a "dimension of civil order concerns the civility of the criminal law itself. The criminal law not only has to secure trust between individuals, but also the trust of individuals in the order of law."¹⁰² There is thus an irresolvable conflict within the Rule of Law ideal introduced above, wherein we seek assurance against both crime and an intrusive state. Regardless, through its concern with assurance against the state, the corrective justice theory has the internal resources to forestall an overbearing, illiberal system. The conclusion, then, is that we absolutely need an act requirement, given our need for proof of offenders' normative commitments, when coupled with our concern for assurance against the state.

3. *Inchoate Offenses*

Finally, the corrective justice view can easily explain the practice of interpreting the act requirement flexibly enough to account for inchoate liability doctrines like attempt and conspiracy. This is an important point in its favor. With attempt liability, it would understand the offender taking "substantial" or "more than merely preparatory" steps toward the commission of an offense to be proof of his intention to offend, and thus of his criminality contribution.¹⁰³ The idea is that some lesser form of preparation would not qualify as sufficient evidence of an intention. Likewise, with conspiracy liability, the corrective justice view would

¹⁰² Farmer, *supra* note 18, at 301.

¹⁰³ See Model Penal Code § 5.01(1)–(2) (Am. L. Inst., Proposed Official Draft 1962) (outlining the "substantial step" standard for attempt liability in the United States); Criminal Attempts Act 1981, c. 47, § 1(1) (codifying the "more than merely preparatory" standard for attempt liability in England and Wales).

understand the agreement to offend, when combined with the overt act in furtherance of that agreement, to be proof of the parties' intentions to offend.¹⁰⁴ The attempt and the conspiracy serve the exact same role as the completed act itself—as evidence of an offender's normative commitments. By comparison, inchoate liability doctrines pose interpretative challenges for retributivist theories as well as Tadros's "duty theory," given that such doctrines can impose liability without the presence of individual victims.¹⁰⁵

¹⁰⁴ See Model Penal Code § 5.03 (Am. L. Inst., Proposed Official Draft 1962) (outlining the requirements for conspiracy liability).

¹⁰⁵ The corrective justice view shares a number of features with Tadros's seminal theory. Tadros argues that an offender owes a duty of repair to his victim. Tadros, *supra* note 14, at 275–79. Since damages are inadequate for repairing crimes, Tadros argues, the offender can best fulfill this duty by protecting his victim from a future offense; the victim, in turn, has a right to force the offender to carry out this duty. *Id.* Tadros attempts to ground state punishment in three further steps. First, he argues that victims have a duty to "rescue" non-victims by "donating" their rights against their offenders to the state. *Id.* at 297–99. Doing so will enable a system of state punishment that will protect victims and non-victims alike. Second, he argues that the state itself has a duty to rescue non-victims. *Id.* at 299–302. Third, he argues that offenders have no complaint against being used to protect people who are not their victims, given that the best available method of protecting their own victims is to threaten all future offenders via a system of state punishment. *Id.* at 274–81.

There are at least three major challenges to Tadros's theory—none of which imperil the corrective justice view. See Jacob Bronsther, *A Debt to Society* (July 2020) (unpublished manuscript) (on file with author and the *Virginia Law Review*) (contrasting the corrective justice theory and the duty theory). First, if a crime victim has the right to seek rectification from their offender (which includes the right to harm them to prevent a future offense), it is doubtful that the victim has a duty to "donate" this right to the state. See Kimberly Kessler Ferzan, *Rethinking The Ends of Harm*, 32 *Law & Phil.* 177, 192–94 (2013). Consistent with a liberal conception of rights, victims ought to have a choice: sue for damages or an equitable remedy, donate their right to the state or another individual, or pursue no action at all. The corrective justice view, by comparison, does not require the victim's personal right to rectification to justify state punishment. The relevant wrong is not against the individual victim (if they exist), but rather against the community as a whole in the form of a criminality contribution. This coheres with the legal principle that it is the state, not the victim, that prosecutes individuals. Second, as indicated above, Tadros's theory has difficulty justifying inchoate liability, since such offenses do not generate victims who would then have punishment rights against the offender (which they would then donate to the state). Larry Alexander, *Can Self-Defense Justify Punishment?*, 32 *Law & Phil.* 159, 172–73 (2013). Third, the theory means that crime victims cannot sue their attackers. As a judge might explain in dismissing a victim's suit, the offender has already been harmed for the purpose of protecting the victim (and others), and so the victim has already been made whole. John Goldberg and Benjamin Zipursky argue forcefully that the private right to sue for redress after a legal mistreatment is a basic civil right within the same category as the right to vote. John C. P. Goldberg & Benjamin C. Zipursky, *Recognizing Wrongs* 111, 122–30 (2020). Tadros's theory thus limits the promise of a liberal-democratic state. For, on his view, the state can provide crime protection, but only by forcing crime victims to forgo a basic civil right. By contrast,

IV. SENTENCING IMPLICATIONS

We have now filled in the basic contours of a novel theory of deterrent punishment. The offender, by contributing to criminality, has diminished the assured liberty of everybody in the jurisdiction by contributing to a social threat that (a) chills the exercise of their rights, (b) forces them to take expensive precautions, and (c) subjects them to unreasonable risks of harm. At the far extreme, indeed, criminality can threaten the very existence of a non-violent civil society. Deterrent punishment, which acts to reduce the amount of criminality in society going forward, is the means by which the offender rectifies his past contribution to criminality. In this way, deterrent punishment does not merely sacrifice him to limit the problem of future crime, for which he has no responsibility, but rather forces him to fulfill his own duty of repair. In sum, the theory presents a non-consequentialist, rights-based justification for deterrent punishment—a *deontological theory of deterrence*—which coheres with the principle of human inviolability, that is, with a steadfast refusal to sacrifice offenders as mere means to the greater good.

If this indeed works to answer the *why* question of criminal law theory—Why is the state entitled to harm someone when he commits an offense?—the *how much* question remains nonetheless—How much harm should the state inflict?¹⁰⁶ More particularly, how much harm is the state entitled to inflict upon an offender, looking only to the reasons that positively justify the infliction of penal harm?¹⁰⁷ That is, as we inflict more and more harm upon an offender, at what point do these reasons themselves stop providing a moral justification for doing so? The most

the corrective justice view can justify both criminal punishment and tort damages for crime victims.

¹⁰⁶ Andrew von Hirsch writes that the latter question is often overlooked in criminal law theory: “Philosophical writing has chiefly confined itself to the general justification of punishment, why the criminal sanction should exist at all. Seldom addressed, however, has been what bearing the justification for punishment’s existence has on the question of how much offenders should be penalized.” Von Hirsch, *supra* note 43, at 6; see also Duff, *supra* note 43, at 131 (“A normative theory of punishment must either include, or be able to generate, a theory of sentencing—an account of how particular modes and levels of punishment are to be assigned to particular kinds of offense and offender. Only then can it guide or even connect with the actual practice of punishment.”).

¹⁰⁷ On the distinction between these “internal” punishment limitations, which are grounded in the positive reasons that we have to punish, and “degradation” limitations, which prohibit degrading and inhuman punishments, and which are grounded in a distinct set of reasons associated with the concern to treat an offender as a human being, see Jacob Bronsther, *Torture and Respect*, 109 *J. Crim. L. & Criminology* 423, 430–33 (2019).

basic sentencing implication of the corrective justice theory is as follows: the greater one's criminality contribution, the greater the amount of criminality he has a duty to erase, and thus the more severe the punishment that he is liable to receive. There are, however, a number of subsidiary issues to consider in order to make sense of this claim.

First, how do we know when one criminality contribution is greater than another? Given that the ultimate aim is assured liberty, we can ask the following question: How important is it to people, in the planning and execution of their lives, to be able to rely upon others not performing those acts?¹⁰⁸ We can see, in this way, how an intention to kill represents a greater criminality contribution than a willingness to speed while driving or to drive recklessly.

Second, we need to understand the *fungibility* of criminality when considering an offender's duties. Given that the criminal law is a *system* of protections, such that people rely upon clusters of protections at any given time, as discussed above, one's duties would not be limited to preventing his or her offense type. Consider the murderer. By making their criminality contribution, they—in concert with other offenders—chilled the exercise of our rights, forced us to take expensive precautions, and subjected us to unreasonable risks of harm. They could rectify this by deterring offenses of a different type, given that the negative impact of those other offenses will register in the same manner. They need not deter only murderers, and they would not be acquitted if they happened to be the only murderer in society.

Given the fungibility of criminality, we can restate the basic sentencing principle in the following manner: by increasing past criminality by X units, the offender has a duty to decrease future criminality by X units. To be sure, the notion that we can measure criminality in precise, cardinal "units," akin to measuring in inches or kilograms, is metaphorical; and I will discuss the challenges of calibrating punishment in the real world in Section B. But, in the first instance, the metaphor provides some useful (and not especially distortive) structure to the sentencing inquiry.

¹⁰⁸ For historical and theoretical analyses of why societies criminalize certain actions but not others, and how this deliberative process depends on a society's particular conception of "civil order," see Farmer, *supra* note 18, at 37–60.

A. Proportionate Deterrent Punishment

Assuming that this basic sentencing principle holds, when do the reasons that justify the infliction of penal harm switch off, as it were, failing to license the infliction of further harm? I will outline a number of guiding principles.

1. Parsimonious Punishment

Most fundamentally, according to the corrective justice theory, the infliction of penal harm at any level is justified only so long as it actually deters crime, given that the theory is not retributivist and thereby denies that the suffering of offenders is intrinsically good. It may be more efficient, indeed, for offenders to fulfill their duties of rectification in ways other than (or in addition to) hard treatment, such as fines and community service.¹⁰⁹ Any marginal increase in penal harm that was not met with a marginal increase in crime deterrence would represent a wanton and illegitimate injury. We must endorse those methods of punishment that enable an offender to fulfill his duty with the smallest degree of injury in the process.

Relatedly, given that the suffering of offenders is not an intrinsic good on this view, and given that the budget for crime prevention is limited, the state should ask, for each dollar spent, whether non-penal community investments would represent a more efficient means of reducing criminality. For instance, there is considerable evidence that early childhood development programs are effective in reducing crime.¹¹⁰ Nonetheless, consistent with the discussion in Part II, not *all* crime

¹⁰⁹ See, e.g., Alexander C. Wagenaar et al., General Deterrence Effects of U.S. Statutory DUI Fine and Jail Penalties: Long-Term Follow-Up in 32 States, 39 *Accident Analysis & Prevention* 982, 982, 992–93 (2007) (comparing from 1976 to 2002 the DUI rates in twenty-six states that implemented a mandatory minimum fine policy for first-time DUI offenders with eighteen states that implemented a mandatory minimum jail penalty for such offenders and concluding that the pattern suggested a greater deterrent effect from the mandatory fines than the mandatory jail sentences); Oliver Roeder, Lauren-Brooke Eisen & Julia Bowling, *supra* note 3, at 4 (concluding that the effectiveness of increasing rates of incarceration as a crime-control tactic in America has been limited since 1990, and non-existent since 2000).

¹¹⁰ 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, 2053 (2013); Alex R. Piquero, David P. Farrington, Brandon C. Welsh, Richard Tremblay & Wesley G. Jennings, Effects of Early Family/Parent Training Programs on Antisocial Behavior and Delinquency, 5 *J. Experimental Criminology* 83, 87–89 (2009).

prevention resources could be diverted from the project of general deterrence via the threat of punishment.

We can unite these two concerns—penal harm must generate deterrence and must be the most efficient means of generating deterrence—to conclude that the infliction of such harm must be *parsimonious*.

2. *Reparative Punishment*

If inflicting harm upon an offender is indeed “parsimonious”—an effective and maximally efficient means of generating deterrence—what are the internal limits to inflicting more and more harm? Let’s consider Alex, whose intention to steal a car increased criminality in the past by, say, ten units. What are the internal limits with regard to his punishment? First, the state would be entitled to harm him so as to decrease future criminality by ten units, *but no more*. Traditional Benthamite deterrence theories, by comparison, would license the infliction of progressively more harm upon offenders, so long as doing so were a “frugal” means of reducing pain and increasing pleasure overall in society—taking into account the offender’s own experience of pain as a result of his punishment.¹¹¹ But the Benthamite sentencer would be unconcerned ultimately with the severity of the offense and would be happy to make a vicious example of a well-publicized minor offender—or, indeed, of an entirely innocent person—if it happened to be an efficient means of securing deterrence and increasing the average welfare or pleasure level. It is because the corrective justice theory can foreclose such outcomes, as discussed above, that it is a “constrained” instrumentalist theory.

Once his duty of repair has been fulfilled, even if the state could decrease future criminality very efficiently by inflicting even minor additional harms upon Alex, the corrective justice theory would not license the infliction of any further harm. Alex is only responsible for his own criminality contributions. Someone who steals one car owes a duty to society to prevent one car theft (or an equivalent amount of criminality). As such, Alex “owes” no more to society once he has been used, via general deterrence, to decrease future criminality by ten units.

¹¹¹ Bentham, *Morals and Legislation*, supra note 29, at 289–311 (presenting thirteen principles for determining proportional utilitarian sentences, including a prohibition on “unfrugal” punishments, which would fail to maximize utility overall, taking into account the offender’s pain).

He has at that point made society whole, and to inflict any additional harm upon him is the moral equivalent of hurting an innocent person. In this way, we can say that punishments must be *reparative*, repairing only the offender's own wrongdoing, rather than merely being "useful."

While it is a point to be developed at length elsewhere, the reparative principle, when applied to criminogenic social conditions, will sometimes further limit the state's license to apply deterrent punishment. Consider an African American individual who comes from a neighborhood blighted by extreme racial, economic, educational, and environmental disadvantage. If they commit an offense, the state may be, as Tadros argues, "complicit."¹¹² There are two central moves. First, the disadvantage that marks their community is grounded in social injustice that the state is responsible for as a historical and ongoing matter. Second, that disadvantage is criminogenic.¹¹³ The complicity claim is not grounded in merely "but-for" causation.¹¹⁴ Rather, by fostering criminogenic social conditions, the state has manifested culpable disregard for those impacted by crime in such communities. Along these lines, Tommie Shelby writes:

[I]t is well known that poverty engenders crime and that the state may unjustly contribute to impoverished conditions by failing to maintain a just basic structure. Insofar as violence in ghettos results from resentment toward unjust inequalities or exposure to severely disadvantaged neighborhoods, the state shares blame for the harmful consequences of this violence.¹¹⁵

When the state is complicit in an offense, Shelby argues that it loses the moral standing to *condemn* the offender in the sense of blaming or

¹¹² Victor Tadros, *Poverty and Criminal Responsibility*, 43 *J. Value Inquiry* 391, 393–413 (2009); see also G.A. Cohen, *Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists?*, in 58 *Royal Inst. Phil. Supplement* 113, 117–26 (Anthony O'Hear ed., 2006) (arguing that parties can lose the standing to condemn heinous acts of terrorism when they are responsible for the conditions that make such acts the most effective means of protest); Duff, *supra* note 43, at 185–88, 193–97 (arguing that when a community treats an individual in a manner that persistently and severely contradicts its public values, the community loses the standing to call that individual to answer in court for an offense against those values).

¹¹³ See, e.g., Judith R. Blau & Peter M. Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 *Am. Socio. Rev.* 114, 114–21 (1982); Douglas S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 *U. Pa. L. Rev.* 1203, 1204–10 (1995).

¹¹⁴ See Tadros, *supra* note 112, at 399.

¹¹⁵ Shelby, *supra* note 82, at 245 (2016).

censuring him, but that it does not necessarily lose the right to *punish* him as a means of prevention, given its duty of care to the citizenry at large.¹¹⁶ However, in the context of the corrective justice view, which is only very indirectly in the business of condemnation and censure, the state's complicity has an additional implication. Namely, we ought to understand the wider society to be something like a tort co-defendant who bears proportionate responsibility for an individual's offense. Though, given that the state is in the guise of the tort plaintiff—suing the offender for the tort against society that is his criminality contribution—perhaps it would be more accurate to say that the state is like a plaintiff who bears some degree of responsibility for their own injury, and whose damages ought to be reduced accordingly.¹¹⁷ On either formulation, the reparative principle would demand that the state hold an offender responsible only for his proportionate share of the criminality contribution. His *personal* duty of repair is limited in that manner.

The precise amount of mitigation entailed by this argument is impossible to determine in the abstract, and it is not an issue that I will engage with here. Nonetheless, in general accord with what Shelby writes elsewhere, the degree of mitigation for criminogenic social disadvantage would apply with more force in the context of financially motivated crimes.¹¹⁸ It should be emphasized that when the reparative principle acts to mitigate a sentence in this manner, the state would not be any less invested in crime prevention. It is just that the degree to which the state could permissibly employ deterrent punishment as its chosen means of prevention would be further limited to some degree. Finally, this policy would not disrespect the agency or humanity of the individual offender, a worry that Stephen Morse has articulated in the context of such

¹¹⁶ Id. at 247–48; see also Kelly, *supra* note 98, at 71–121 (arguing that the right to punish criminal acts as a means of defending citizens' legal rights should be divorced from the process of morally condemning criminal wrongdoers themselves).

¹¹⁷ From around 1970 to 1990, all but five U.S. jurisdictions replaced contributory negligence rules (which barred recovery for plaintiffs who were to any degree negligent) with comparative fault schemes. John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *Tort Law: Responsibilities and Redress* 439 (4th ed. 2016). For a critical overview of comparative fault tort law, see Ellen M. Bublick, *Comparative Fault to the Limits*, 56 *Vand. L. Rev.* 977 (2003).

¹¹⁸ Shelby, *supra* note 82, at 220, 238; see also Sudhir Alladi Venkatesh, *Off the Books: The Underground Economy of the Urban Poor*, at xviii–xix (2006) (explaining how life in disadvantaged urban communities centers on an underground system of exchange).

arguments.¹¹⁹ Rather, it would simply add another culpable actor to the story who is responsible for a portion of the harm: society as a whole.

3. *Equitable Punishment*

What if the infliction of deterrent harm were parsimonious and reparative, but draconian? That is, when inflicting penal harm is the most efficient means of generating deterrence *and* the offender has not yet fulfilled his duty of repair, are there any internal limits to inflicting more and more harm? What if, in the case of Alex and other car thieves, the only way to generate their respective ten units of deterrence were to inflict enormous amounts of harm on them, say, by incarcerating them for thirty years each? This might be the case if the chances of crime detection and punishment were very low.¹²⁰ What are the limits, if any, to how much harm one may undergo in order to repair his wrongdoing?

This question would seem to be at home in tort law, except for the fact that the payment of damages is the standard means of repair in that realm. In that case, where the financial “harm” borne by the defendant tortfeasor and the rectifying financial “benefit” gained by the plaintiff are in precise equipoise, the question of whether the cost to the defendant is disproportionate to the benefit to the plaintiff will never emerge.¹²¹ We can, however, find some coarse insights within the law of equity by examining when courts will grant an injunction in response to a tort, most notably in response to a nuisance or trespass, or grant specific performance in response to a breach of contract, most notably with real property contracts.¹²² In those cases, it would indeed be possible that the

¹¹⁹ Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 *S. Cal. L. Rev.* 1247, 1250–51 (1976).

¹²⁰ See Adam Smith, *Lectures on Jurisprudence* 132 (R.L. Meek, D.D. Raphael & P.G. Stein eds., Oxford Univ. Press 1978) (1723) (discussing the deterrent sentencing logic by which crimes that are difficult to detect should be punished very severely).

¹²¹ That is not to say that proportionality has no place in the realm of tort damages. As Jeremy Waldron argues, the financial harm borne by the defendant could be disproportionate to her own moral liability. Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *Philosophical Foundations of Tort Law* 387 (David G. Owen ed., 1995).

¹²² “Specific performance,” according to the Uniform Code of Contracts, “may be decreed where the goods are unique or in other proper circumstances,” especially with (but not limited to) real property contracts. U.C.C. § 2-716(1) (Am. L. Inst. & Unif. L. Comm’n 1999). The premise is that, given the uniqueness of what the claimant has contracted for, it will be difficult if not impossible for her to purchase a suitable substitute, and thus damages would be inadequate as a means of making her whole. See *Javierre v. Cent. Altigracia*, 217 U.S. 502, 508 (1910) (“[A] suit for damages would have given adequate relief and therefore the appellee

cost to the defendant in making the plaintiff whole could outweigh the plaintiff's benefit. And while there is a diversity of authorities on the matter, to be sure, there is an established tradition within the common law of equity that strikes an intuitive balance.

In *Boomer v. Atlantic Cement Co.*,¹²³ for instance, the New York Court of Appeals held famously that a cement factory could continue polluting surrounding properties because the cost of abatement—closing down a \$45 million plant that employed hundreds of workers—far outstripped the plaintiff's damages.¹²⁴ The court awarded continuing damages as a remedy.¹²⁵ Similarly, in *Blackfield v. Thomas Allec Corp.*,¹²⁶ the California Court of Appeal affirmed the denial of an injunction where a wall overhanging the plaintiff's property by 3 5/8 inches and causing \$200 in damages would have cost \$6,875 to be removed. In *Christensen v. Tucker*, the California Court of Appeal followed *Blackfield* and other cases in determining that the *denial* of an injunction in encroachment cases requires (among other factors) that “the hardship to defendant by the granting of the injunction must be *greatly disproportionate* to the hardship caused plaintiff by the continuance of the encroachment.”¹²⁷

should have been confined to its remedy at law . . .”). Real property is not the only type of “unique” good. See *Triple-A Baseball Club Assocs. v. Ne. Baseball, Inc.*, 832 F.2d 214, 224, 228 (1st Cir. 1987) (holding that a minor league baseball franchise, for which the plaintiff had contracted, was “unique in character and cannot be duplicated,” and thus that specific performance of the contract was warranted); *Burr v. Bloomsburg*, 138 A. 876 (1927) (ordering sale of a diamond ring); *Nelson v. Richia*, 232 F.2d 827 (1st Cir. 1956) (holding that an oral agreement to sell business with licensed trade name could support specific performance); *Pat. & Licensing Corp. v. Olsen*, 188 F.2d 522 (2d Cir. 1951) (affirming order to employee to assign patents on process developed in course of employment to employer).

¹²³ 257 N.E.2d 870, 873 (N.Y. 1970).

¹²⁴ Jeff McMahan distinguishes between “narrow” proportionality, which considers whether a harmful action is proportional with regard to the harm it causes those who are liable to be harmed (e.g., opposing soldiers), and “wide” proportionality, which additionally considers the harm it causes those who are not liable to be harmed (e.g., civilians). See Jeff McMahan, *Proportionality and Time*, 125 *Ethics* 696, 697–98 (2015); Jeff McMahan, *Killing in War* 20–21 (2009); Jeff McMahan, *What Rights May Be Defended by Means of War?*, in *The Morality of Defensive War* 115, 124–25 (Cecile Fabre & Seth Lazar eds., 2014). In considering the impact of the plant's closure not only on the defendant corporation but also on its employees and the surrounding community, the court in *Boomer* was engaging in “wide” proportionality analysis.

¹²⁵ *Boomer*, 257 N.E.2d at 875.

¹²⁶ 17 P.2d 165 (Cal. Dist. Ct. App. 1932).

¹²⁷ 250 P.2d 660, 665, 667 (Cal. Dist. Ct. App. 1952) (emphasis added); see also *Wright v. Best*, 121 P.2d 702, 712 (Cal. 1942) (recognizing the “balancing of conveniences” doctrine, by which a “court of equity may deny injunctive relief and relegate the plaintiff to his remedy at law, if the benefit resulting to him from the granting of the injunction will be slight as

English cases provide similar guidance. In *Jordan v. Norfolk County Council*,¹²⁸ for instance, an order for defendant council to replace trees on the plaintiff's land was varied when it emerged that the cost of compliance would be over £230,000. The plaintiff's damage and the property as a whole were both valued at £25,000.¹²⁹

Meanwhile, within contract law, the Second Restatement of Contracts provides, in relevant part, that specific performance would be inappropriate if the relief "would cause unreasonable hardship or loss to the party in breach" or if "the exchange is grossly inadequate."¹³⁰ In *Kilarjian v. Vastola*, the New Jersey Superior Court declined to specifically enforce a contract for the buyers' "dream home" because the seller's health had deteriorated in the interim and moving out of the house might have precipitated her respiratory failure.¹³¹ English law provides, along the same lines, that specific performance may be refused when it would cause "hardship amounting to an injustice,"¹³² or where it would be "oppressive to the defendant."¹³³ In *Patel v. Ali*,¹³⁴ (a case very similar to *Kilarjian*) the Chancery Division denied plaintiff home buyers specific performance because the seller's condition had worsened in the intervening period—as she had lost her leg to amputation and her husband to prison, while gaining two children—and she would have lost crucial assistance from neighbors and nearby family had she been forced to move. The court held that this qualified as an "extraordinary and persuasive circumstance" whereby "hardship" could vitiate one's duty to perform on a real property contract.¹³⁵

compared to the injury caused the defendant thereby."); Restatement (Second) of Torts § 941 (Am. L. Inst. 1977) ("The relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, is one of the factors to be considered in determining the appropriateness of injunction against tort.").

¹²⁸ [1994] 1 WLR 1353 (Ch) at 1353, 1359 (Eng.).

¹²⁹ *Id.* at 1356–58.

¹³⁰ Restatement (Second) of Contracts § 364(1)(b)–(c) (Am. L. Inst. 1981); see also *Pub. Water Supply Dist. v. Fowlkes*, 407 S.W.2d 642, 647 (Mo. Ct. App. 1966) ("[T]he trial chancellor, in weighing the equities, was entitled to consider whether a decree of specific performance would work an unconscionable advantage to the plaintiff or would result in injustice.").

¹³¹ 877 A.2d 372, 375 (N.J. Super. Ct. Ch. Div. 2004); see also *Van Wagner Advert. Corp. v. S & M Enters.*, 492 N.E.2d 756, 761 (N.Y. 1986) (denying specific performance due to disproportionate hardship).

¹³² *Tamplin v. James* [1880] 15 Ch D 215 at 221 (Eng.).

¹³³ *Jaggard v. Sawyer* [1995] 1 WLR 269 (AC) at 288 (Eng.).

¹³⁴ [1984] Ch 283 at 283 (Eng.).

¹³⁵ *Id.* at 288.

We can apply these principles of equity to our conception of penal proportionality. First, we should avoid the (tempting) Benthamite conclusion that the harm borne by the offender must never be greater than the harm prevented in the process. For instance, we do not think that the sellers in *Kilarjian* or *Patel* ought to be able to avoid specific performance based on a showing that moving out would harm them *slightly* more than failing to move out would harm the buyers. Second, and more to the point, we should conclude that it is impermissible to harm an offender to a degree that is *entirely out of proportion* to the harm prevented by doing so, even if that meant that his duty of repair toward society would remain to some degree unfulfilled.

As courts in equity have discerned, duties of repair have an internal limit in this manner—one which is vague both in terms of its practical application and indeed its precise conceptual foundation, but which is, just the same, intuitively compelling if not undeniable. A thirty-year sentence for Alex, even if it were the singular means by which he and society could decrease criminality by a car theft's ten units, would be entirely out of proportion to the reparative benefit gained by society as a result—just as removing the overhang in *Blackfield* at a cost of \$6,875 would be entirely out of proportion to the \$200 in damages suffered by the plaintiff. And it would thereby be impermissible for reasons internal to the corrective justice theory and Alex's duty of repair. It is not that such a punishment might degrade Alex—a separate consideration, to be sure¹³⁶—but that such a degree of harm bears the entirely wrong relationship or proportion to the stringency of his own duty. And as we are taking our cue from the law of equity, we can say that such punishment would be *inequitable*.

B. Punishment as Policy

Let us now step outside of the metaphor that criminality is like height and weight—that we can measure criminality, as well as the amount of criminality that punishment acts to deter, with cardinal precision. Measuring the deterrent impact of punishment is based on a counterfactual: How much crime would there be if we punished to *X*, *Y*, or *Z* degree? The state, of course, can only consider this question *prospectively*, in an inherently broad brush, as a matter of general policy,

¹³⁶ See Bronshter, *supra* note 2 (arguing that decades-long sentences are impermissibly degrading).

delivering a set amount of penal harm for different classes of offenders. It is not as if the state could measure precisely how much criminality Alex's individual punishment prevents, releasing him once the mercury in his personal "criminality prevention thermometer" passes the ten units mark. To answer the prospective policy question requires us to leave the moral and enter the empirical, inquiring into how much deterrence a particular sentencing regime or schedule generates as an empirical matter.

It is, to be sure, an inexact science. The challenge of making society whole, in this way, is interestingly different from the challenge of making an individual plaintiff whole in the context of tort damages. Such damages may rectify her losses only approximately, especially in non-commercial contexts, but that the plaintiff will receive these damages is not in doubt, assuming the defendant (or their insurer) has sufficient resources. In the penal context, as understood here, the complication is reversed. Unlike damages in the civil context—but like an injunction or specific performance—decreasing future criminality would, if delivered in full, represent a perfectly neat means of repair. However, the degree to which the offenders will in fact "perform," in the form of decreased future criminality, is uncertain, even if we assume that the state has vast penal resources at its disposal.

That said, it is not as if those charged with determining deterrent sentences in modern societies are completely in the dark. Far from it. As discussed above, there is substantial evidence that the *certainty* of receiving some level of punishment is more important for the purpose of deterring offenders than the *severity* of the punishment received.¹³⁷ Steven Durlauf and Daniel Nagin carefully survey empirical studies on crime deterrence in America to conclude that the "marginal deterrent effect of increasing already lengthy prison sentences is modest at best."¹³⁸ While they do not define "already lengthy," they are not making any statement as to the deterrent impact of increasing "short" sentences; they include the "already lengthy" modifier only because almost all of the studies that they look at examine the effect of increasing multi-year sentences.¹³⁹ Consider, for instance, California's "Three Strikes and You're Out" law. That law mandates a minimum sentence of twenty-five years after conviction for a third strike-eligible offense. Franklin Zimring, Gordon Hawkins, and Sam Kamin concluded that only those individuals

¹³⁷ See *supra* note 5.

¹³⁸ Durlauf & Nagin, *supra* note 5, at 14.

¹³⁹ *Id.* at 41.

with two strike-eligible offenses showed any indication of reduced offending and that the law reduced the overall felony crime rate by, at most, two percent.¹⁴⁰ Other studies have found similarly modest evidence of the crime-preventative effects of the law.¹⁴¹

Dulauf and Nagin argue that the data strongly favors investments in the police, especially in ways that increase the perceived risk of apprehension.¹⁴² One policy toward this end is stationing officers in crime “hot spots.”¹⁴³ Assuming a limited amount of crime prevention resources—and, more importantly, assuming that the only policy options are more police or more prison time—Dulauf and Nagin conclude that resources would be far more efficiently spent on increasing police presence than on issuing lengthy sentences.¹⁴⁴ Mark Kleiman and David Kennedy have reached similar conclusions.¹⁴⁵ Further, and in a similar vein, criminologists have argued that custodial sentences are criminogenic for offenders.¹⁴⁶

While there are many variables at play, a number of European states have for decades now coupled low crime rates¹⁴⁷ with mild sentencing regimes.¹⁴⁸ This is surely the ideal outcome from the perspective of the

¹⁴⁰ Zimring, Hawkins & Kamin, *supra* note 3, at 85.

¹⁴¹ See Lisa Stolzenberg & Stewart J. D’Alessio, “Three Strikes and You’re Out”: The Impact of California’s New Mandatory Sentencing Law on Serious Crime Rates, 43 *Crime & Delinq.* 457 (1997); Scott Ehlers, Vincent Schiraldi & Jason Ziedenberg, *Still Striking Out: Ten Years of California’s Three Strikes* 12 (2004) (collecting studies).

¹⁴² Durlauf & Nagin, *supra* note 5, at 13–14.

¹⁴³ *Id.* at 34–35.

¹⁴⁴ *Id.* at 37–41.

¹⁴⁵ See Kleiman, *supra* note 3; Kennedy, *supra* note 3.

¹⁴⁶ See Lynne M. Vieraitis, Tomislav V. Kovandzic & Thomas B. Marvell, The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974–2002, 6 *Criminology & Pub. Pol’y* 589 (2007); José Cid, Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions, 6 *Eur. J. Criminology* 459 (2009). But see Avinash Singh Bhati & Alex R. Piquero, Estimating the Impact of Incarceration on Subsequent Offending Trajectories: Deterrent, Criminogenic, or Null Effect?, 98 *J. Crim. L. & Criminology* 207 (2007).

¹⁴⁷ See Nick Cowen & Nigel Williams, Comparisons of Crime in OECD Countries, CIVITAS Institute for the Study of Civil Society (2012), http://www.civitas.org.uk/content/~/files/crime_stats_oecdjan2012.pdf [<https://perma.cc/UGJ7-M6PH>] (comparing rates of homicide, rape, robbery, assault, burglary, and vehicle theft within OECD countries, as well as rates of punitiveness).

¹⁴⁸ Consider the contrast between the U.S. and Swedish sentencing guidelines on burglary. Depending on factors such as criminal 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). U.S. Sent’g Guidelines Manual § 2B2.1 (U.S. Sent’g Comm’n 2018). In

corrective justice theory, given its concern to decrease criminality with as little injury to offenders as possible. To be sure, the effectiveness of penal harm in bringing about deterrence will vary from context to context, and we should not think that the corrective justice theory on its own could immediately ground a Scandinavian system of criminal justice, given all the factors that enable such systems.¹⁴⁹ But if our aim is to create a penal system that reduces future criminality rather than doles out retributive suffering—a system, further, that is parsimonious, reparative, and equitable—then we can expect a radical reduction in the amount of American incarceration and long-term incarceration.

C. Loss Amount

There are two further sentencing issues to raise before concluding. While these two issues are also present in state sentencing guidelines, I will focus on the details of the Federal Sentencing Guidelines.¹⁵⁰ First is the importance of the *amount* of economic loss in the context of economic crimes such as theft, fraud, burglary, robbery, extortion, blackmail, etc.

Sweden, by comparison, “theft” has a maximum sentence of two years. *Brottsbalken* [Brb] [Penal Code] 8:1. The range is different for “gross theft,” a finding that the court can make based upon aggravating circumstances such as the fact that theft took place after intrusion into a dwelling. *Id.* at 8:4. If the offense is deemed “gross theft,” the sentencing range is six months to six years. *Id.*

¹⁴⁹ See generally 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 (2007) (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 contrast between the American penal regime and the French and German regimes); 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 & David Soskice, *Crime, Punishment and Segregation in the United States: The Paradox of Local Democracy*, 17 *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).

¹⁵⁰ U.S. Sent’g Guidelines Manual (U.S. Sent’g Comm’n 2018).

For instance, most theft, larceny, and embezzlement offenses have a Base Offense Level of 6.¹⁵¹ However, the offense level increases along with the amount of loss; and there are a full sixteen loss increments.¹⁵² If the loss was more than \$6,500 but less than \$15,000, the Base Offense Level is increased by 2. If the loss was more than \$15,000 but less than \$40,000, the Base Offense Level is increased by 4. And so forth. At the top end, if the loss was more than \$550 million, the Base Offense Level is increased by 30.

To see how this works, imagine that Brenda and Chris, each without a criminal record, independently set out to steal rare vintage necklaces. Brenda is lucky (or unlucky) and the necklace she steals is worth \$10 million, while Chris is unlucky (or lucky) and it turns out that the necklace he steals is an immaculate counterfeit worth only \$10,000. The Guidelines would grant Chris an offense level of 8 and Brenda an offense level of 26. As first-time offenders, that means that Chris receives 0 to 6 months in prison, while Brenda receives 63 to 78 months (5.25 to 6.5 years). From the perspective of the corrective justice view—let alone of commonsense—this is absurd. Brenda and Chris made the same criminality contribution—expressing the same level of disrespect toward others' property rights by intending to steal what they believed was a necklace of a certain range in value—and thus they deserve the same punishment. A traditional retributivist sentencing theory, which bases the punishment on the size of the wrong suffered by the individual victim, cannot make this point straightforwardly.¹⁵³

That is not to say that the loss amount would be *entirely* irrelevant on the corrective justice view. If one person intends to steal \$100 million, then he makes a greater criminality contribution than another who intends to steal \$10; the former is a much greater objective threat to property

¹⁵¹ Id. § 2B1.1. The U.S. Federal Sentencing Guidelines include a "Sentencing Table," which is arranged along two axes: 43 "Offense Levels," from 1 at the top to 43 at the bottom, which measure the culpability of the offense, and 6 "Criminal History Categories," from Category I at the left to Category VI at the right, which measure the offender's degree of recidivism. Id. § 5A. Within the resulting 258 boxes, the range of recommended months of incarceration increases gradually as one moves downward, increasing the Offense Level, or rightward, increasing the Criminal History Category. Id.

¹⁵² Id. § 2B1.1.

¹⁵³ But see Larry Alexander & Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* 171–96 (2009) (outlining a retributivist theory that understands culpability to be a function of the risk of harm to protected interests that the actor believes he is imposing, as well as his reasons for acting in the face of those risks, such that his sentence would not depend on the amount of harm that he ultimately causes).

rights than the latter. But this analysis should only figure in a *prospective* manner, examining the monetary value that the individual reasonably expected to secure through his actions. Regardless, given the fuzziness of this prospective analysis, the expected loss amount must be profoundly less significant than it is in the Guidelines. Much more relevant than the amount of money a fraudster, embezzler, burglar, or robber might expect to make is his intention to defraud, embezzle, burgle, or rob.

D. Government Assistance

Finally, Section 5K1.1 of the Guidelines authorizes a departure for a defendant who “has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.”¹⁵⁴ The corrective justice view can make perfect sense of this departure. By substantially assisting the government, the defendant has presumably decreased future criminality and thereby partially fulfilled his duty to society to erase his past criminality contributions. As a result, there is less criminality left on his ledger, as it were, for which he must account. Retributivist theories have a more difficult time explaining this policy. It is not entirely clear why an individual deserves less punishment for assisting the government on the retributivist view, given that doing so does not diminish the size of wrong suffered by the *individual* victim.

While the corrective justice view endorses sentencing leniency for those who provide government assistance, there is a serious problem with the procedure by which Section 5K1.1 is applied, as Judge Jon Newman has emphasized.¹⁵⁵ The departure is available only “[u]pon motion of the government.”¹⁵⁶ Even if the defendant cooperates, the departure can be withheld if the prosecutor believes the defendant could have provided more information.¹⁵⁷ Judge Newman recounts a case (not his) where a defendant had provided useful information about six, but not all seven participants in the offense.¹⁵⁸ The defendant explained his reluctance to inform on the seventh individual: “She’s my sister.” Nonetheless, the prosecutor refused to make a 5K1.1 motion. The corrective justice theory would take this prosecutorial leverage away. If the defendant cooperates,

¹⁵⁴ U.S. Sent’g Guidelines Manual § 5K1.1 (U.S. Sent’g Comm’n 2018).

¹⁵⁵ Jon O. Newman, *The Federal Sentencing Guidelines: A Good Idea Badly Implemented*, 46 Hofstra L. Rev. 805, 819 (2018).

¹⁵⁶ U.S. Sent’g Guidelines Manual § 5K1.1 (U.S. Sent’g Comm’n 2018).

¹⁵⁷ Newman, *supra* note 155, at 819.

¹⁵⁸ *Id.*

his sentence must reflect that partial fulfillment of his duty of repair, regardless of how much more information he might have provided.

CONCLUSION

This Article has outlined a foundational problem for the justification of state punishment, namely, how harming an offender for the sake of general deterrence can be consistent with a liberal refusal to sacrifice individuals for the greater good. This Article has resolved this problem in five steps. First, it argued that the function of the criminal law is to maintain a system of protections, upon which a peaceful and productive civil society relies. Second, it argued that this system depends on people self-applying criminal legal norms, rather than direct police intervention. Third, it argued that when an individual offender fails to self-apply these norms, he contributes to society's level of criminality. Criminality hinders the institutional aims of the criminal law, making life in society more difficult, expensive, and perilous. Fourth, by appealing to tort law principles, the Article argued that the offender owes a duty to people living in society to repair his criminality contributions. Fifth, it argued that he can fulfill this duty by decreasing the threat of future crime. As such, when the state uses him to decrease that threat, it is not merely sacrificing him for the greater good, but rather forcing him to erase his own wrongdoing. Finally, the piece examined the sentencing principles entailed by this corrective justice theory of punishment, explaining—most importantly—how these principles demand a radical reduction in the amount of harm that the American penal system inflicts on offenders.
