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Michael Tonry
University of Minnesota Law School, tonry001@umn.edu

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Punishment and Human Dignity: Sentencing Principles for Twenty-First-Century America

ABSTRACT

A new conception of justice in punishment is needed that is premised on respect for offenders' human dignity. It needs to acknowledge retributive and utilitarian values and incorporate independently important values of fairness and equal treatment. Punishment principles, policies, and practices lined up nicely in mid-twentieth-century America. Utilitarian principles implied a primary goal of crime prevention through rehabilitation and avoidance of unnecessary suffering by offenders. Judges and parole boards were empowered to tailor decisions to fit offenders' circumstances and interests. Corrections officials sought to address rehabilitative needs and facilitate achievement of successful, law-abiding lives. The system often did not work as it should, but its ideals, aspirations, and aims were clear. In our time, there are no commonly shared principles; sentencing laws and practices are unprecedentedly rigid and severe; judges and parole boards often lack authority to make sensible or just decisions; corrections officials are expected simultaneously to act as police officers, actuaries, and social workers; and injustice is ubiquitous.

There is no commonly accepted normative framework in the United States for thinking or talking about punishment. This is unique among western European and English-speaking countries. In Scandinavian countries, al-

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Michael Tonry is professor of law and public policy, University of Minnesota.

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most all philosophers, lawyers, and judges, and most policy makers, agree that the severity of punishments should be proportioned to the seriousness of crimes, that comparable offenders should be treated as equally as is humanly possible, and that offenders should not be avoidably damaged by what happens to them. In German-speaking, Benelux, and southern European countries, proportionality is widely agreed to be the primary consideration but counterbalanced by reluctance to harm people by imprisoning them and by aspirations to facilitate offenders' achievement of satisfying, law-abiding lives. In other English-speaking countries, proportionality and equality receive relatively less emphasis than in western Europe but considerably more than in the United States. Utilitarian considerations of deterrence, incapacitation, and moral education loom comparatively large, but constrained by widely shared concerns that offenders be treated fairly and not be punished unduly severely.¹

Please don't misunderstand. The preceding paragraph is not meant to suggest that other Western countries' systems deliver perfect justice or achieve the fairness, consistency, and equal treatment to which they aspire. Human institutions never work like that no matter how hard people try. The descriptions nonetheless accurately depict common aspirations to treat offenders justly and empathetically, to honor the biblical injunction to do unto others as you would have them do unto you.

In all of those other countries, legal institutions, processes, and rules aim to assure that offenders are treated justly, consistently, and humanely or, as the late American philosopher Ronald Dworkin (1977) put it, as equals and with concern and respect for their interests. As protection against foreseeable pressures toward injustice, decisions affecting individuals are insulated from influence by politicians or public opinion: judges and prosecutors are career civil servants. There are tight limits on maximum sentences. When, rarely, laws prescribe particular or minimum sentences for specific crimes, judges have discretion to impose lesser ones.

The United States is an outlier in all these matters. Only in America are judges and prosecutors elected² and are public opinion, media attention, or political considerations widely believed to be germane to their

¹ Sources for assertions about other countries' legal systems in this paragraph and in the next few can be found in Tonry (2012, 2016*b*).

² Except in nonpartisan elections in a handful of Swiss cantons.

work. Only here has the sentencing authority of judges, who are ethically obligated to do justice in individual cases, been subordinated to powers of prosecutors and legislators who have political, career advancement, and other self-interested objectives in mind. To them, concern and respect for offenders' interests are seldom centrally important. Often—as when mandatory minimum sentence, truth-in-sentencing, three-strikes, and life without parole laws apply—they are entirely absent. Only in the United States are prison sentences often measured in decades and lifetimes. Only in the United States is meaningful review of sentences in individual cases largely unavailable.³

Those stark contrasts are recent. They date from the 1970s and 1980s. Before that, the American approach was different from those of other countries but principled and coherent. Every jurisdiction had an indeterminate sentencing system in which treatment of offenders was to be individualized in every case and at every stage. There was wide support for rehabilitation as the primary goal; for judges, parole boards, and prison officials to take account of individuals' circumstances and interests in making decisions about them; and for imposition of the least restrictive appropriate sentence. Retribution per se was not a goal. Retribution is “the unstudied belief of most men,” observed Jerome Michael and Herbert Wechsler (1940, pp. 7, 11), two of the twentieth century's most influential criminal lawyers, but that, like any other ignoble intuition, should be ignored. “No legal provision can be justified merely because it calls for the punishment of the morally guilty by penalties proportioned to their guilt,” they continued, “or criticized merely because it fails to do so.”

“Rehabilitation,” observed Wechsler, later the primary draftsman of the *Model Penal Code* (American Law Institute 1962), “is in itself a social value of importance, a value, it is well to note, that is and ought to be the prime goal” (1961, p. 468). Under the code, judges in every case could

³ This is mostly because the US Supreme Court since the 1970s has emasculated constitutional standards for review of disproportionately severe punishments under the Eighth Amendment's prohibition of cruel and unusual punishments. In *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991), in which the defendant, a first offender convicted of cocaine possession, was sentenced to life without parole, Justice Kennedy observed, “The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” The Court laid foundations earlier. In *Rummel v. Estelle*, 445 U.S. 263, 274 (1980), upholding a sentence of life without parole for theft of \$120.75, the Court observed that the proportionality principle “would . . . come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment.”

impose any lawful sentence from unsupervised probation to the maximum authorized by law. There were no mandatory minimum sentences and no probation ineligibility laws. Parole boards could release prisoners any time after they became eligible. The code created presumptions against the use of imprisonment in every case, including homicides, and in favor of parole release. Prison officials could grant time off for good behavior.

The *Model Penal Code* was not merely an academic exercise. It was commissioned and approved by the American Law Institute, a law reform organization composed mostly of lawyers in large law firms and state and federal judges (Tonry 2004, chap. 7). The drafting committee contained many more judges, prosecutors, defense lawyers, and corrections officials than professors. Nearly half of the code was drafted under the direction of Paul C. Tappan, a career parole official.

Politicians and public officials were on board. This can be seen in a series of contemporaneous initiatives. In 1963, the Advisory Committee of Judges proposed the Model Sentencing Act. In 1967, the President's Commission on Law Enforcement and Administration of Justice led by US Attorney General Nicholas Katzenbach issued its report, *The Challenge of Crime in a Free Society*. In 1971, the National Commission on Reform of Federal Criminal Laws chaired by California Governor Edmund Brown released a *Proposed Federal Criminal Code*. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals, appointed by President Richard M. Nixon and chaired by Republican Delaware Governor Russell Peterson, issued its report. All four documents, like the *Model Penal Code*, supported indeterminate sentencing and sought to improve it.

That consensus soon collapsed. In the cultural climate of the 1970s, when the prisoners' rights, civil rights, and due process movements were strongest, individualized decision making was widely believed to be unfair, to result in unjust disparities, and to produce arbitrary, capricious, and racially biased results (Blumstein et al. 1983). Emphases on individual rights, exemplified by the writings of John Rawls (1971), Robert Nozick (1974), and Ronald Dworkin (1977), helped shape an intellectual climate that emphasized fairness, consistency, and equal treatment.

All of those developments fit more comfortably with retributive than with utilitarian values. Marvin Frankel (1973), a prominent federal judge, described American sentencing as "lawless" and offered then-radical proposals to improve it. Influential books by Norval Morris (1974) and

Andreas von Hirsch (1976) promoted “limiting retributive” and “just deserts” theories calling for the fairness, evenhandedness, and consistency that indeterminate sentencing was said to lack.⁴

A large and sophisticated theoretical literature on retribution emerged but quickly became entirely disconnected from punishment policies and practices. It appeared in the 1970s as if fairer, more just sentencing systems would be widely adopted to replace indeterminate sentencing, but that happened only in a few places, and only for a few years. Criminal justice policy instead became highly politicized, legislatures enacted laws of historically unprecedented severity and rigidity, few people seemed to care much about the new laws’ effects on individual offenders, and imprisonment rates began a three-decade increase (Tonry 2016a, chap. 2). It is impossible to develop principled retributive justifications for lengthy prison terms for sellers of a few grams of drugs, minimum 25-year or life sentences for routine property crimes, or life without parole for almost anything or anyone. Proportionality between offense seriousness and punishment severity is an element of all retributive conceptions of punitive justice. Minor drug sales, thefts, and assaults are in everyone’s minds less serious than rapes and serious violence but often are punished more severely.

As things now stand, there is no generally accepted American jurisprudence of punishment. Mandatory minimum sentence, three-strikes, and life without parole laws, indefensible by any normative theory, coexist with a few state sentencing guidelines systems loosely based on retributive premises and a majority of state systems with hodge-podges of features of determinate and indeterminate sentencing. A plethora of drug and other problem-solving courts, restorative justice initiatives, prisoner reentry programs, and reinvigorated treatment programs fit comfortably within the utilitarian values of indeterminate sentencing.

The lack of a widely agreed jurisprudence is not merely untidy, a matter that should be of concern only to ivory tower intellectuals. It has huge and morally troubling consequences. Individuals charged with drug or violent offenses subject to lengthy mandatory minimum prison sentences, for example, almost always serve those sentences if they are prosecuted and

⁴ Von Hirsch, named Andreas when he was born in Germany, used the anglicized Andrew when he lived in the United States and England. Since returning to Germany, he has resumed use of Andreas, including in scholarly writing. Sources are listed under the name in which they were originally published.

convicted. However, if prosecutors or judges divert them to drug courts, mental health programs, or elsewhere, they may avoid conviction, imprisonment, or both. For cases not subject to mandatories, prosecutors and judges possess unfettered discretion.⁵ The luck of the draw, not normative ideas about justice, determines whether people wind up in prison for years, in community treatment programs, or diverted from the criminal justice system.

Retributive theories remain in vogue in law schools and philosophy departments but do not provide adequate guidance for thinking about justice in the real world. Theorists focus mostly on blameworthiness and moral communication, and incidentally on crime prevention, even though punishment implicates a wider range of important values and interests including fairness and equal treatment. Difficult problems, the English political theorist Isaiah Berlin observed, almost always encompass competing normative principles: “The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others” (2002, pp. 213–14).

Abortion is one example. Some people believe fetuses are human beings, human life is sacred, and abortion is morally wrong and should be prohibited. Others believe women are entitled to control their bodies, pregnancy is quintessentially a private matter, and state interference is morally wrong and should be eschewed. Public policy must favor one set of beliefs over the other or compromise both.

Child protection offers a less polarized example. Most people believe in a principle of family autonomy: parents should be allowed to decide what kinds of lives they and their children live; this implies a strong presumption against state interference. Minimization of harm to children implies a presumption in favor of state action whenever risks exist. Probably everyone believes that family autonomy should be respected and that children should be protected. Both goals cannot be simultaneously maximized. Any imaginable policy choice involves trade-offs: greater autonomy means heightened risks; reduced risks mean less autonomy.

⁵ Meaningful appellate sentence review is unavailable in most states. The US Supreme Court in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), held that discretionary charging decisions by prosecutors are seldom reviewable by courts, and many of the 90–95 percent of defendants who plead guilty are required as a condition to waive their rights to appeal (King and O’Neill 2005).

The way forward concerning punishment becomes clearer when we recognize that it implicates multiple, competing values, including not only deserved punishment and crime prevention but also fairness and equal treatment. A comprehensive jurisprudence of just punishment for twenty-first-century America would thus incorporate four propositions:

- *Justice as Fairness*: Processes for responding to crimes should be publicly known, implemented in good faith, and applied evenhandedly (Rawls 1958).
- *Justice as Equal Treatment*: Defendants and offenders should be treated as equals; their interests should be accorded concern and respect when decisions affecting them are made (Dworkin 1977).
- *Justice as Proportionality*: Offenders should never be punished more severely than can be justified by their blameworthiness in relation to the severity of punishments justly imposed on others for the same and different offenses (Morris 1974).
- *Justice as Parsimony*: Offenders should never be punished more severely than can be justified by appropriate, valid, normative purposes (Tonry 1994).

Those four propositions describe what people accused or convicted of crimes would want for themselves or their loved ones. They describe minimum, interacting requirements of a just system of punishment. Together they provide answers to problems that traditional punishment theories by themselves cannot resolve. Respect for human dignity does not appear as a separate proposition. It encompasses all four propositions.

Human dignity is often dismissed as a nebulous, primarily rhetorical concept (Macklin 2003; cf. Waldron 2014). The reason is partly that neither the term nor the concept plays an independent, substantive role in American law (Steiker 2014) and partly that the term appears prominently in the preambles to international human rights documents such as the 1948 UN Universal Declaration of Human Rights but in their texts is given no concrete work to do (Waldron 2012).

These critiques have merit when human dignity is used rhetorically, but not when it is used concretely, as I show in Section II, in relation to sentencing and other individualized decisions affecting individuals. Torture denies human dignity to its victims. So does solitary confinement in a supermax prison. So does requiring people to live in squalid, inhuman conditions. So does denial to individuals of the possibility ever

to live a satisfying life. So does making decisions about individuals' lives and futures without taking account of their circumstances and interests. None of those practices is practically necessary or morally justifiable. Conceptual and procedural tools exist to acknowledge human dignity in relation to punishment and sentencing. The preceding four propositions about justice in punishment encapsulate them.

The idea that punishment implicates values and interests other than moral blameworthiness, crime prevention, and moral education is not new. Immanuel Kant and Jeremy Bentham, the pioneers of retributive and utilitarian punishment theories, recognized two centuries ago that extrinsic considerations sometimes limit or forbid punishments that could otherwise be justified.⁶ I don't endorse the propositions they offer but quote them to illustrate that even single-minded theorists recognize that punishment implicates values other than retribution and crime prevention.

In this essay, I explain why retributive theories that dominate contemporary scholarly writing cannot adequately elucidate what a just punishment system should look like. I discuss utilitarian and other nonretributive theories only briefly and incidentally. They attract little contemporary support; most people who think or write about these subjects are retributivists of one sort or another. I begin in the first section with a brief primer on punishment philosophy for readers who may not be familiar with retributive punishment theories, ideas, and concepts.⁷ I then canvass a series of fundamental dilemmas courts face on which retributive theories cast little light. These include how to assess blameworthiness, practical problems in administration of the criminal law, and the multiple offense paradox that punishments per offense usually decrease when offenses are sentenced simultaneously but increase when they are sentenced successively (Tonry 2017).

⁶ Kant ([1797] 2011, p. 34) observed that sometimes the sovereign "will want to avoid adversely affecting the feelings of the people" and some penalty other than the uniquely deserved one may be imposed. Bentham ([1789] 1970, p. 164) wrote that otherwise appropriate punishments should not be imposed when too many people would have to be punished, making the aggregate punishment too great; when punishment would cause the loss of the offender's "extraordinary value" to the community; when community opinion is strongly that the offense or offender should not be punished, or punished so much; and when relations with foreign powers would be undermined.

⁷ The primer focuses on basic concepts and uncontroversial distinctions. Readers familiar with punishment philosophy may want to skim or skip subsection I.A.

In the second section, I elaborate on the normative framework set out above. Proportionality, a retributive touchstone, is a core component. It provides tools for comparing punishments for different offenses and different offenders. It and Benthamite parsimony set intelligible limits on punishments that may justly be imposed. So, however, independently, do fairness and equality.

I. The Limited Reach of Retributivism

Few would disagree that authoritative, normative expression of censure for wrongdoing is the, or a, core function of criminal convictions and punishments imposed by judges. Big disagreements emerge, however, when the focus shifts from judges to offenders. To decide how much censure one offender deserves relative to deserved censures of others, convincing ways to assess blameworthiness and to determine just punishments are needed. Large conceptual disagreements and practical impediments stand in the way. Before I discuss them, I first provide a brief introduction to punishment theory.

A. *A Punishment Primer*

Three main strands of punishment theory—retributivism, utilitarianism, and positivism—emerged over the last two centuries. Retributive theories, first developed in some detail in Germany by Kant ([1797] 1965) and Georg Wilhelm Friedrich Hegel ([1821] 1991), called for imposition of punishments apportioned to the seriousness of crimes. Kant famously observed: “What kind and what degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality. . . . Accordingly, any undeserved evil that you afflict on someone else among the people is one that you [deserve]. . . . Only the law of retribution (*jus talionis*) can determine exactly the kind and degree of punishment” ([1797] 2011, p. 32).⁸ Retributive ideas, usually less dogmatic than Kant’s, have been continuously influential in continental Europe though not in the United States (Pifferi 2012, 2016). In the United States they gained support in the 1960s and 1970s and remain

⁸ Hegel expressed the same view: “The universal feeling of peoples and individuals towards crime is, and always has been, that it deserves to be punished, and that *what the criminal has done should be done to him*” (Hegel [1821] 2011, p. 46; my emphasis)

influential today. There are many different kinds of retributive theory, but they share the view that moral blameworthiness is an important consideration in determining just punishments.

Utilitarian theory is usually dated from the publication in 1764 of Cesare Beccaria's *Dei delitti e delle pene* (*On Crimes and Punishments*; 2007). He urged that punishments be scaled to the seriousness of crimes and used to deter offenders and others from wrongdoing. Bentham ([1789] 1970, [1830] 2008), the archetypal utilitarian theorist, developed deterrent ideas in far greater detail. Bentham's proposals were based on ideas he shared with Beccaria, combined with a model of rational human beings who engage in calculation of pains and pleasures. The pains of punishment should always exceed the envisioned pleasures to be gained from crime.

The object of the criminal law for Bentham was to "augment the total happiness of the community" and "to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to exclude mischief" (1970, p. 158). Crime is a form of mischief. To prevent crime through deterrence, Bentham offered detailed prescriptions. Punishments should be severer for more serious crimes to encourage offenders to commit lesser ones, should be increased if the probability of apprehension is low so the deterrent message will not be diluted, should be incrementally scaled to each detail of a contemplated offense so offenders have incentives to stop partway, and should be lower for attempted than for completed offenses to provide incentive to desist. Critically, however, despite his view that the idea of abstract human rights is "nonsense upon stilts" (Bentham 2002, pp. 317–401; Schofield 2003), everyone's happiness—including that of offenders—counts: "But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil" (Bentham 1970, p. 158). Bentham's ideas shaped prevailing ways of thinking in English-speaking countries and provided the impetus to indeterminate sentencing as it emerged and endured in the United States. They remain central in other English-speaking countries.

In our time, the word "consequentialism" is often substituted for utilitarianism.⁹ This, however, is based on a misconception that utilitarians

⁹ In our time, the only well-developed nonutilitarian punishment theory that might also fall under the consequentialist heading is John Braithwaite and Philip Pettit's "republican theory" (1990, 2001). It differs from classic utilitarianism in that it seeks to maximize not

are interested only in deterrence. Bentham did, it is true, emphasize deterrent considerations. However, he also wrote about rehabilitation, incapacitation, and moral education, as did others who preceded him.¹⁰ His overriding aim was to minimize the harms that result from crime, both to victims and to offenders.

In earlier times, including in the United States, many American intellectuals could be described as “positivists” (e.g., Glueck 1928; Pifferi 2016). Positivism is most famously associated with the Italian criminal lawyer Enrico Ferri (1906, 1921). Ferri, like many others of his time, was a determinist and believed that crime resulted primarily from social, economic, and psychological forces affecting offenders. The only valid purpose of the criminal law, he wrote, is the prevention of crime. Accordingly, the likelihood of reoffending should be the primary consideration. All prison sentences should be indeterminate, potentially for life, including for people convicted of minor offenses. Prisoners should be imprisoned only if they are dangerous. They should be released when they cease to be dangerous but held indefinitely if their dangerousness does not abate. Reverberations of positivism echoed through the mid-twentieth century (e.g., Wootton 1959, 1963; Ancel 1965; Menninger 1966), but it has largely disappeared in theoretical writing. Similar views are inarticulately present in the implicit logic behind contemporary prison sentences measured in decades and lifetimes and enactment of three-strikes, career criminal, sexual predator, and life without parole laws.

Only retributivist theories are much discussed in our time or, for that reason, in the rest of this essay. Their details vary; the implications vary

happiness or, synonymously, utility, but “dominion.” Dominion is the human capacity to live an unconstrained life of one’s choosing, limited by the obligation to respect others’ rights to dominion over their own lives. Crimes violate victims’ dominion. The theory has been discussed mostly in relation to restorative justice concerning which it calls for a decrementalist strategy of reduction in the use of punishment. Braithwaite (2018, p. 110), however, plaintively noted, “Braithwaite and Pettit’s (1990) decrementalist research agenda went nowhere in the 28 years since it was proposed.” Republican theory in relation to punishment has not provoked much writing by others, so I do not pursue it further here.

¹⁰ William Blackstone, in his *Commentaries on the Laws of England*, e.g., earlier wrote that the end of punishment is not “atonement or expiation,” but “a precaution against future offenses of the same kind. This is effected three ways: either by the amendment of the offender himself; . . . or by deterring others . . . ; or, lastly, by depriving the party injuring of the power to do future mischief [by execution, permanent confinement, slavery, or exile]” ([1769] 1979, p. 13). Bentham (1970, p. 158, n. a) offers a similar list of crime prevention mechanisms.

less.¹¹ Retributivist ideas began to revive in the 1950s in writings by Norval Morris (1953), John Rawls (1955), and H. L. A. Hart (1959), who argued in different ways that preventive goals should be combined with retributive limits.

Many kinds of primarily retributive theories emerged. In the first generation, Herbert Morris (1966), Jeffrie Murphy (1973), and Andreas von Hirsch (1976) argued that people in a democratic society benefit from public order and security, including others' law-abidingness, are reciprocally obligated in return to accept the burdens and responsibilities of citizenship, and should be punished if they do not. The next generation, exemplified by Joel Feinberg (1970), Herbert Morris (1981), Jean Hampton (1984), and Antony Duff (2001), in different ways emphasized moral communication with offenders, victims, and the larger community about the wrongfulness of crime. Related censure theories offered by Duff (1986) and von Hirsch (1994) focused more narrowly on authoritative denunciation of wrongdoing. A third generation, harking back to Kant and Hegel, portrayed punishment as a morally necessary consequence of culpable wrongdoing (Robinson 1987; Moore 1993).

The lines that separate different kinds of retributive theory blur. Some, especially communicative theories, are difficult to distinguish from utilitarian ones. Most deal only with justification of punishment as an institution and do not explicitly address questions pertinent to individual offenders, particularly how much they should be punished.¹² Discussions of whether the state may justly punish offenders, and why, are intellectually interesting but not especially helpful to policy makers, prosecutors, and judges.

Retributivists of every stripe believe that offenders' blameworthiness is fundamental in some way to justifying punishment. They differ on what

¹¹ Many efforts have been made to describe and taxonomize varieties of retributivism. Classic ones include Hart (1968, postscript), Cottingham (1979), Mackie (1982), and Walker (1991). I provide a recent accounting (Tonry 2011).

¹² For example: "One question is: What might justify the state's creation of legal institutions of punishment? This is what we call the 'justification' question. The second question is: Once the state has determined someone's liability for a crime, how much and what kind of punishment should the state mete out in response? This is the 'sentencing' question. *That a retributivist theorist gives a retributive (or, specifically, communicative) answer to the justification question does not require her to offer a precise answer for each sentencing question. . . . A retributive conception of proportionality need not have much in the way of precision to say about the particular details of punishment's implementation*" (Markel 2010, pp. 950–51; emphasis added).

way. Because some basic retributivist concepts and distinctions arise in subsequent parts of this essay, I highlight several.

1. *Positive and Negative Retributivism.* Positive retributivism is a sword that cuts deservedly deeply and precisely. Negative retributivism is a shield that protects against undeservedly severe punishments.

Positive retributivists believe that deserved punishments must be imposed. Kant and Hegel are often portrayed as positive retributivists. Remember Kant's "principle of equality" and *jus talionis*? Paul Robinson (1987, 2008) and von Hirsch (1994, 2017) offer similar arguments.

Negative retributivists, to the contrary, believe that offenders' blameworthiness in relation to particular crimes sets upper limits on deserved punishments that may but need not be imposed. If good reasons exist for a lesser punishment, or no punishment at all, that is what should be done.

"Limiting retributivism," a form of negative retributivism associated with Norval Morris (1974), warrants separate mention primarily because it has been particularly influential (Frase 2013). The *Model Penal Code: Sentencing*, for example, explicitly adopts it as a normative premise (American Law Institute 2017, sec. 3.102[2]).

2. *Mixed Theories.* "Mixed theories" encompass combinations of retributive ideas with instrumental ideas about preventive effects of sanctions, the significance of contextual considerations, or special circumstances of individual cases. All negative retributivist theories, including limiting retributivism, are mixed theories.¹³

Use of the term mixed theory dates from Hart's *Punishment and Responsibility* (1968), a seminal work, in which he summarized his primarily utilitarian personal beliefs but noted that widely held views about deserved punishment need also to be taken into account. Hart and Norval Morris (1974), essentially utilitarians, believed widely shared intuitions about equality and proportionality in punishment to be important. They feared that the criminal law would lose legitimacy in citizens' eyes, and thus effectiveness, if it departed too much from prevailing community sentiments. Few people today espouse unqualified retributive views (e.g., Moore 1993). Nearly all modern writers offer mixed theories.

3. *Censure and Hard Treatment.* Many contemporary retributivists regard punishment as a form of moral communication (e.g., von Hirsch

¹³ Braithwaite and Pettit's republican theory (1990, 2001) is better thought of as a form of negative retributivism than as a utilitarian or consequentialist theory. They are adamant that the offender's moral culpability sets an absolute, proportionate upper limit on punishment severity and equally adamant that retributive considerations are otherwise irrelevant.

2017). They generally feel obliged, however, to explain why communication of censure for wrongdoing is not the end of the matter: “You have sinned; go forth and sin no more.” Most punishments for crime, however, involve intrusive, burdensome, or otherwise unpleasant elements. Many writers as a result partition punishment into censure and “hard treatment” and try separately to justify hard treatment. Most efforts are nonretributive (von Hirsch 2017: “prudential reasons to obey the law”) or unconvincing (H. Morris 1981; Duff 2001: offenders themselves would wish it so).

4. *Ordinal and Cardinal Desert.* This distinction, first proposed by von Hirsch (1992), addresses the problem of knowing what specific punishment a particular offender deserves. God may know, but human beings have widely different intuitions. The solution, von Hirsch proposed, is to distinguish between punishment that is in some sense absolutely deserved, which he called cardinal desert, and punishment that is deserved for particular crimes relative to those deserved for other crimes. This he called ordinal desert. Ordinal desert can be coherently calculated by creating scales of offense seriousness and specifying appropriate punishments for the most and least serious offenses. Once that’s done, a punishment scale can be created that parallels the offense seriousness scale.¹⁴ The absolutely deserved punishment for robbery may be unknowable, but everyone would agree that the relatively deserved punishment for simple robbery, all else being equal, should normally be less than for aggravated robbery and more than for theft.

These concepts and terms recur throughout the rest of this essay. I use and refer to them because they are in common usage. As a practical matter, however, the problems and solutions I discuss are common to all retributive theories, whether positive or negative, and all mixed theories.

B. Conceptual Impediments

Retributive and mixed theories that link deserved punishments to the seriousness of the crimes of which people are convicted cannot by them-

¹⁴ Hegel recognized that prevailing ideas about severity of deserved punishment change over time: “With the progress of education, however, attitudes toward crime become more lenient, and punishments today are not nearly so harsh as they were a hundred years ago. It is not the crimes or punishments themselves which change, but the relation between the two” (2011, p. 42).

selves resolve two inescapable problems: the multiple offense paradox and assessment of blameworthiness.

1. *The Multiple Offense Paradox.* The emerging if exiguous literature on punishment for multiple crimes exposes a paradox that retributive theories, whether positive ones that specify punishments that must be imposed or negative ones that set upper limits, cannot adequately address or explain. Punishments of people convicted of multiple crimes are often discounted if sentences are imposed at one time (a “bulk discount”) but enhanced if imposed at different times (a “recidivist premium”; Reitz 2010). This is perverse. Exactly the same sets of crimes can be handled either way—in one omnibus prosecution or in a series—depending on how prosecutors choose to proceed or on the happenstance of when offenses come to light. This is a serious problem because it arises in a majority of cases. Most convicted offenders are concurrently convicted of multiple offenses, have been previously convicted, or both.

a. The Recidivist Premium. Some writers, including George Fletcher (1978), Richard Singer (1979), and Mirko Bagaric (2010), reject the recidivist premium in principle. Their logic is that punishing repeat offenders more severely because of their prior convictions is double counting. The increment of additional punishment for the new crime is in effect additional punishment for earlier ones. The constitutional doctrine of double jeopardy forbids the state to try someone twice for the same crime. By extension, the state should not punish someone twice for the same crime.

The few efforts that have been made by retributivists to justify the recidivist premium are unpersuasive. I am not alone in my skepticism. Richard Lippke (2016, p. 17) surveyed the arguments and similarly concluded, “Like others, I find the arguments given on behalf of recidivist premiums unconvincing.”

One unconvincing argument is that repeat offenders who commit new offenses are more blameworthy than first offenders because previous convictions impose special obligations not to offend again (Lee 2010). Everyone, however, has a civic responsibility not to commit crimes. It is hard to explain why the responsibility to obey the law is greater for the previously convicted. It cannot be because greater knowledge or self-control can reasonably be imputed to them. Most repeat offenders no doubt know that behavior they contemplate is unlawful, but so do most first offenders. Members of both groups sometimes commit offenses under extreme social, economic, or circumstantial pressures, or influenced

by deviant subcultural norms, that make law-abidingness especially difficult. This might or might not make individuals less blameworthy, but it offers no basis for differentiating between first-time and repeat offenders.

Other unconvincing arguments supporting the recidivist premium assert that repeat offending is evidence of bad character or constitutes disrespect or defiance of the court, the criminal law, or the state (Bennett 2010; Lee 2017). If any of these considerations were taken seriously, it would require that specific increments of punishment be attributed to character flaws or traits. Punishments for a subsequent crime could be deconstructed into the conventional X months that would be imposed for a first robbery and an increment of Y months, for example, for bad character. Defiance, disrespectfulness, and bad character, however, are not criminal offenses. They might be punishable in China, but not in a liberal democratic state.

Von Hirsch (1986, 2017) has argued that punishments should be discounted for first offenses, and possibly one or a few more. This is a different kind of argument than those justifying the recidivist premium even though the result, punishing repeat offenders more severely than first offenders, is the same. It is based on the premise that first and early offenses may have resulted from extraordinary circumstances or otherwise have been “out of character” and thus warrant less-than-deserved punishment. This is a contingent characterological claim about first offenders: they may, on average, be more responsible people than recidivists are and should be given the benefit of the doubt. There may be good policy reasons to give first offenders benefits of doubts, and this often happens (Braithwaite 2018), but justifying them as reflections of hypothesized good or bad character is as troubling here as elsewhere. Von Hirsch in any case, once the first or early offender discount is exhausted, would not allow increased punishments on account of former offenses.

Contrary to any argument that can be made for the recidivist premium, an empirically grounded argument can be made that prior convictions should mitigate rather than aggravate punishments for subsequent crimes. Collateral social and legal effects of convictions make it foreseeably more difficult for former offenders than for nonoffenders to live law-abiding lives (Ashworth and Wasik 2017). Research showing that imprisonment makes people more, not less, likely to commit subsequent offenses confirms this (e.g., Nagin, Cullen, and Jonson 2009).

b. The Bulk Discount. No one rejects the bulk discount in principle, with the tentative exception of Jesper Ryberg (2017), who canvasses pos-

sible arguments for it and finds none he judges to be persuasive.¹⁵ Lippke (2011) offers the most extensive analysis to date of what a jurisprudence of bulk discounts, taken seriously, might look like and shows that it would be immensely complex and not generally justifiable.

Policy justifications have been offered. One is that no punishment should be so “crushing” that it deprives a person of a large fraction of his or her remaining life (Jareborg 1998; Ashworth and Wasik 2017) or a high proportion of the prime years of life (Bottoms 1998). A second is that bulk discounts can be justified as extensions of mercy based on judges’ holistic assessments of offenders’ lives and blameworthiness (Bottoms 2017). These propositions, however, are ad hoc, unimbedded in broader general theories, and ungeneralizable. The policy they try to justify is no doubt desirable, lest individuals suffer extreme punishments based on the fortuity that they have been charged with more rather than fewer offenses, but it cannot be justified in terms of retributive theories.

There is convincing empirical evidence that majorities of the public, judges, and offenders approve of both the bulk discount and the recidivist premium (Roberts 2008; Roberts and De Keijser 2017). Some argue that those broadly shared intuitions justify the paradox either because democratic values require acknowledgment of and deference to widely shared beliefs or because failure to do so will undermine the legitimacy of law and the legal process in citizens’ minds (Roberts 2011; Ryberg and Roberts 2014). Common intuitions, however, by themselves cannot offer a principled justification for anything. Widely shared intuitions, for example, about racial, gender, ethnic, and sexual preference differences, or in our time about the moral worthiness of immigrants, are often empirically indefensible and normatively repellent.

c. Empirical Reality. No one has satisfactorily offered principled justification for why punitive punches should be pulled when people are sentenced for multiple offenses but swung harder when they have previously been convicted. This is not a small failure. These issues arise in a large majority of criminal cases. The typical defendant is not a first-timer charged with a single offense but a recidivist offender charged with multiple offenses.

Table 1 presents 2009 American data, the most recent available when this was written, on multiple current charges of felony defendants in the

¹⁵ Ryberg (2001) was a decade ahead of the game, canvassing multiple offense issues in detail long before others began writing about them.

TABLE 1
Multiple Charges, by Most Serious Felony,
75 Largest US Counties, 2009

Most Serious Charge	No Other Charge (%)	Other Charges (%)
All felonies	45	55
Violence	37	63
Murder	39	61
Rape	32	68
Robbery	39	61
Property	47	53
Motor vehicle theft	48	52
Burglary	33	67
Drugs	46	54

SOURCE.—Reaves (2013), table 2.

state courts of the 75 most populous counties. Fifty-five percent of all felony defendants' cases involved multiple charges, including 61–68 percent of violent crimes and 53 percent of property crimes (Reaves 2013).¹⁶

Table 2 presents data on prior convictions. Overall, 60 percent of felony defendants had at least one prior conviction; 43 percent had prior felony convictions, 30 percent had two or more prior felony convictions, and 11 percent had more than four. For specific offenses, 48 percent of murder defendants had prior convictions as did 53 percent of all violent crime defendants, 56 percent of property crime defendants, and 66 percent of drug defendants.

The first-time defendant with a clean record is not a mythological beast, but he or she is far from the norm. The multiple offender paradox exposes the inadequacy of traditional or any imaginable retributive theories by themselves. The challenges it poses are equally insurmountable for positive versions of retributive theory that would specify precise punishments in individual cases, for negative versions that specify upper limits, or for mixed theories. Theories of punishment that cannot coher-

¹⁶ The American experience is paralleled elsewhere. Anthony Doob in private communication reported that Statistics Canada data for 2014 show that nationally 60 percent of convictions involved more than one offense, ranging from 55 percent in Quebec to 72 percent in the Yukon. Roberts and de Keijser (2017, p. 1) write of England and Wales, "In England and Wales, the Sentencing Council has estimated that approximately 40 percent of sentencing decisions involved multiple crimes." Good national data are unavailable in either country about the percentage of convicted offenders who have previously been convicted.

TABLE 2
 Prior Convictions, by Most Serious Felony,
 75 Largest US Counties, 2009

Most Serious Charge	No Prior Convictions (%)	Misdemeanor Convictions Only (%)	One Felony Only (%)	Two to Four Felonies (%)	Four-Plus Felonies (%)
All felonies	40	17	13	19	11
Violence	47	16	13	16	8
Murder	52	9	13	14	13
Rape	49	15	14	12	10
Robbery	48	13	13	17	9
Property	44	16	11	16	13
Motor vehicle theft	38	14	11	20	17
Burglary	39	17	13	18	13
Drugs	34	16	13	22	15

SOURCE.—Reaves (2013), table 7.

ently explain how half to two-thirds of people convicted of crime should be punished are fundamentally incomplete.

2. *Blameworthiness.* Most retributive theories assume that assessments of blameworthiness can be made more or less objectively, on the basis of the offense of conviction perhaps modified by circumstances such as weapon use, gratuitous violence, or a victim's special vulnerability that seem inextricably related to moral assessment of the seriousness of the crime. Serious arguments have been made, however, that decisions about punishment should incorporate subjective assessments of the offender's blameworthiness and of the foreseeable effects of contemplated punishments on him or her as a unique individual.

Assessments of blameworthiness are difficult and contested. Nothing inherent in any retributive theory entails a particular approach. Assessments and resulting punishments might be based, objectively, solely on the seriousness of the crimes of which individuals are convicted or, subjectively, on crimes' distinctive features and the social, psychological, economic, and situational circumstances causally related to their commission (von Hirsch 1976; Tonry 2014). Criminal law in English-speaking countries takes no account of motives, caring only about the classic *mens rea* categories of intention, knowledge, recklessness, and negligence, and allows only limited space for defenses of duress, necessity, immaturity,

emotional distress, and mental disability and usually none at all for harms resulting from imperfect self-defense and other honest but unreasonable mistakes.¹⁷ If the substantive criminal law does not take account of these and other complexities of human lives, decisions about punishment can incorporate what Hart (1968) approvingly called informal mitigation. Nigel Walker (1991) proposed that, if retributivists take moral blameworthiness seriously, assessments should be subjective. That, he observed, is how the Recording Angel would do it.

A similar question can be asked about the effects of punishments on individuals. Adam Kolber (2009) and others have proposed that judges making punishment decisions take account of their foreseeable subjective effects on individuals.¹⁸ Otherwise, the suffering caused by seemingly generic punishments will be radically different. Claustrophobic and mentally ill people, for example, will be affected by close confinement substantially differently than are people who are not similarly afflicted. Confinement of people with dependent children will have substantially different direct and collateral effects than does confinement of the childless. Imprisonment may mean very different things to a young gang leader, a flamboyantly gay man, an employed middle-aged parent, and someone who is seriously ill. To ignore such things in relation to comparably culpable people, however culpability is measured, is to accept huge differences in the pains imposed on them.

Walker, Hart, and Kolber make much the better arguments. Systems of punishment that ignore fundamental differences in offenders' subjective blameworthiness, or radical differences in the effects on them of ostensibly generic punishments, cannot be reasonably described as just.

¹⁷ In common law countries but typically not in continental European civil law countries, affirmative defenses such as self-defense are not available to defendants who honestly but unreasonably believe their actions to be justifiable. Imperfect self-defense cases, e.g., involve defendants who genuinely believe themselves to be threatened by serious bodily harm or death when they were not and when reasonable persons would have known they were not.

¹⁸ Kolber revived ideas at least two centuries old. Bentham (1970, chap. VI) was adamant that punishments must be adjusted to offenders' "sensibilities." Kant (1965, p. 101) called for attention to be paid "to the special sensibilities of the upper classes" so that the privileged will be punished equivalently to the poor. His most vivid example is of a "man of a higher class" who would be condemned to "solitary and painful confinement" for an offense for which a "social inferior" would be called on only to apologize "because by this means, in addition to the discomfort suffered, the pride of the offender will be painfully affected, and thus his humiliation will compensate for the offense as like for like."

C. Practical Impediments

The practical impediments are no less confounding. These problems are most acute in the United States, where 90–95 percent of convictions in almost all jurisdictions result from guilty pleas, most emerging from diverse forms of plea negotiation. Practices vary widely. In many charge bargains, some among multiple charges of similar offenses are dismissed. Even in a world of bulk discounts, this reduces sentences. In other charge bargains, defendants are allowed to plead guilty to less serious charges (e.g., theft or sexual assault); more serious ones (e.g., robbery or rape) are dismissed. Conviction numbers and labels thus become fundamentally misleading. In sentence bargaining, defendants plead guilty to the offenses charged, but in exchange for an agreed sentence. In fact bargaining, prosecutors agree not to allege facts that if proven would result in a mandatory minimum sentence, trigger policies that prescribe aggravated penalties, or offend idiosyncratic judicial sensibilities that lawyers believe make harsher penalties more likely. Patterns of plea negotiation often vary substantially between counties within a state: charge dismissals in some, charge reductions in some, and sentence agreements in others. People convicted of the same nominal crime will often have engaged in very different behaviors. Many different kinds of acts reflecting diverse degrees of objective blameworthiness are hidden behind the names of the offenses of which people are convicted. Finally, a “trial tax” almost always results in harsher sentences for defendants convicted at trial than they would have received otherwise (Kim 2015).

These problems are not uniquely American. Plea bargaining in England and Wales is less ornate than in the United States but results in as much as a one-third reduction in sentence for defendants who plead guilty early (Ashworth 2015). From the defendant’s perspective, the English trial tax can be 50 percent. This is considerably higher than is conventional in the United States.

Retributive punishment theories cannot in their own terms provide much guidance for thinking about the handling of particular cases. Blameworthiness, the core concept, is difficult to define in theory and harder to characterize in practice. That does not, of course, make blameworthiness unimportant, but it can provide at best a partial account of how a principled system of punishment should operate. Like the shadows flickering on the walls of Plato’s cave, it provides impressions of what a just system might look like, but no more than that.

The problems with real-world application of retributive punishment theories are fundamental. They are also ironic; the retributivist revival was a reaction to real-world problems. It occurred neither in a vacuum nor from turbulence in university philosophy departments but in response to perceptions of stark injustices (Matravers 2011). By emphasizing blame-worthiness as a primary consideration, and a limit on the discretions of officials, it aimed to right wrongs.

What is needed is a conceptual account of punishment that can address real-world problems in principled ways. The following section suggests how one can be developed.

II. Just Punishment

Questions about justice in punishment cannot be answered by invocation only of retributive and utilitarian theories. They are “monist,” which implies, asserted Berlin (2002), the false view that moral questions have single correct answers and that all those answers dovetail within a single, coherent moral system. In the introduction, I quoted and illustrated Berlin’s famous assertion about value pluralism and the inevitability of conflicts between implications of equally important first principles.

Punishment is a realm in which value pluralism is unavoidable. Since the times of Bentham and Kant, conflict between the implications of preventive utilitarian and blame-imputing retributive premises have been evident, leading to zero-sum-game arguments and the emergence of mixed theories. Values other than those associated with retributivism and utilitarianism, however, also need to be taken into account. Before making that case, two preliminary matters warrant redundant mention.

First, as many people believe about abortion, perhaps the best solution to value conflict about punishment is simply to choose between polar approaches. This is not a real option. No one subscribes in our time to unconstrained utilitarianism. Almost no one subscribes to positive retributivism, the view that people must be punished in a particular amount that is proportionate to the seriousness of their crime, no less and no more. Most people subscribe to forms of negative retributivism or other mixed theories. These positions by definition encompass nonretributive values.

Second, if no single “pure” normative framework is imaginable, perhaps the best approach is simply to adopt a mixed theory approach that directs judges to take retributive and utilitarian elements into account

as appears warranted. As Section I made clear, that won't work. No form of retributivism by itself, or combined only with instrumental crime prevention considerations, can resolve the multiple offense paradox, adequately specify criteria for assessing blameworthiness, or take account of practical administrative issues. In any case, directing judges simply to choose governing punishment purposes case by case would recreate the problems, and dangers, of unconstrained discretion that indeterminate sentencing presented and the retributivist revival sought to address.

A just punishment system would be pluralist and take account of competing normative claims. It would in retributive terms take account of offenders' blameworthiness. It would in Bentham's terms be parsimonious, imposing no unjustifiable human suffering. It would in Dworkin's terms treat offenders with equal concern and respect, allowing each to be assessed according to appropriate criteria in his or her individual circumstances and situation. It would in Rawls's terms be fair, using procedures and standards that are transparent, consistent, and evenhandedly applied.

Fairness, equality, proportionality, and parsimony can all be subsumed within a broader concept of respect for human dignity. The term "human dignity" has, however, wrongly, a bad name in some intellectual circles: largely because of particular contexts, and ways, in which it is used and because it is often used polemically to express strong opposition to something the speaker abhors. Harvard psychologist Steven Pinker (2008, p. 28), for example, wrote that "the problem is that 'dignity' is a squishy, subjective notion, hardly up to the heavyweight moral demands assigned to it." The context was his frustration that religious members of the second President Bush's Council on Bioethics decried abortion, birth control, and fetal tissue research as violations of human dignity, which he found troubling and dogmatic. Pinker's reaction, however, was overblown. He should have objected not to the words "human dignity" but to their use as conversation-stopping "polar words." Thurman Arnold (1937) long ago showed that epithets such as communist and fascist, or in our time racist, sexist, and homophobic, stop discussions entirely or shift their focus from whatever is under consideration to whether the adjectives are being unfairly used. Opposing fetal tissue research as a violation of human dignity is a polemical parallel to use of pro-life and pro-choice to label positions on abortion, emotionally satisfying to advocates but not conducive to dispassionate discussion or problem solving.

Lawyers are troubled by the term's absence from American constitutional law. Harvard law professor Carol Steiker observed that "dignity remains largely a constitutional cipher, lacking a home in any specific amendment of the Bill of Rights or a substantial or well-theorized role in American constitutional jurisprudence" (2014, p. 20). She argued that the concept may be better used to express a general social value than to characterize an individual right and has "collective" value in explaining why practices such as shaming, extreme punishments, and some mandatory sentencing laws are objectionable. Her context is American constitutional law at the end of a 40-year period in which conservative US Supreme Court justices have systematically impoverished legal understanding of individual rights generally, especially concerning the criminal justice system. "Human dignity," however, is no more amorphous than "privacy," "due process," "equal protection," and "cruel and unusual," terms with which American courts and lawyers have dealt for two centuries. That courts have not yet developed a jurisprudence of human dignity does not mean that they cannot or should not.¹⁹

Philosophers have not until recently begun to develop robust understandings of human dignity, but that is changing (e.g., Darwell 2006, 2013; Waldron 2012). Meir Dan-Cohen argued that all of the substantive criminal law, a much broader subject than punishment, should be reconceptualized to replace its traditional emphasis on the "harm principle" with "what may be called the *dignity principle*: the view that the main goal of the criminal law is to defend the unique moral worth of every human being" (2002, p. 150; emphasis in original).

Jeremy Waldron in "What Do the Philosophers Have against Dignity?" (2014) surveyed writing by philosophers troubled by the term's historic associations with social rank and religiosity. As his title implies, he was unconvinced that the concept is inherently too vague to be useful and offered a platform, free of those associations, on which he and others might build: "To respect someone you have to pay attention to them and their situation. . . . As a foundational idea, human dignity might ascribe to each person a very high rank, associated with the sanctity of her body, her control of herself, the demands she can make on others, and her determination of her own destiny, values and capacities" (pp. 10, 15).

¹⁹ Law reviews abound in articles considering the possibilities (e.g., Rao 2008). Henry (2011) identified five emerging legal applications of dignity concepts—concerning institutional status, equality, liberty, personal integrity, and collective virtue.

Waldron's insistence that attention be paid to people and their situation—"morality requires us to do this anyway" (p. 15)—is not very different from Dworkin's (1977) insistence that people be treated as equals and that their situations and circumstances be considered with concern and respect when decisions are made affecting their interests. That is how a just punishment system should deal with people convicted of crimes. This is what Steiker (2014, p. 34) seems to mean when she observed that "respecting the individuality of offenders in sentencing implicates both collective and individual dignity interests." The US Supreme Court in *Woodson v. North Carolina*, 428 U.S. 280, 288 and 304 (1976), acknowledged, though only concerning capital punishment, that "individualizing sentencing determinations generally reflects simply enlightened policy" and that not doing so would be to treat "all persons convicted of a designated offense not as uniquely individual human beings but as members of a faceless, undifferentiated mass." That is self-evidently right, making the Supreme Court's Eighth Amendment jurisprudence of disproportionately severe punishment other than capital punishment a moral anomaly (see n. 3).

Human dignity provides a framework for thinking about punishment for crime. As on many other issues concerning punishment, Kant and Bentham understood this better than many contemporary writers do. Kant, a positive retributivist in the terms used in this essay, argued that convicted murderers should be executed even in a dissolving island society in which all inhabitants would soon embark on ships to live in other places. However, he observed, the murderer should be treated with respect: "But the death of the criminal must be kept entirely free of any maltreatment that would make an abomination of the humanity residing in the person suffering it" (2011, p. 33).

Bentham insisted that all punishment is "evil" and justifiable only when its benefits exceed the detriments experienced by the offender. In making that determination, he further insisted that punishments be individualized to take account of the offender's "sensibilities," those personal characteristics that might make the experience of punishment worse for a particular individual than for others. His notion of what this encompassed was exhaustive.²⁰ His Rule 6 on the distribution of punishment thus provided:

²⁰ "Of Circumstances Influencing Sensibility. . . . It may be of use to sum up all the circumstances which can be found to influence the effect of *any* exciting cause. . . . They seem to be as follows: 1. Health. 2. Strength. 3. Hardiness. 4. Bodily imperfection. 5. Quantity

It is further to be observed, that owing to the different manners and degrees in which persons under different circumstances are affected by the same exciting cause, a punishment which is the same in name will not always either really produce, or even so much as appear to others to produce, in two different persons the same degree of pain: therefore, *That the quantity actually inflicted on each individual offender may correspond to the quantity intended for similar offenders in general, the several circumstances influencing sensibility ought always to be taken into account.* (Bentham 1970, p. 169; emphasis in original)

Taken together, Kant's and Bentham's views, not unlike Dworkin's, require that offenders be treated with concern and respect and treated in ways that accord with their dignity as individual human beings.

Proportionality, parsimony, equality, and fairness are values that characterize a punishment system that respects human dignity. Determining just punishments in individual cases is intrinsically difficult. Nuanced differences between defendants and suspects, and among offenses, lead practitioners to want to handle seemingly similar offenses in different ways. Issues of social and racial injustice are salient in every courtroom. Whether social and economic disadvantage should provide a defense to criminal charges or an appropriate basis for systematic mitigation of punishment is one. Whether evidence of social, racial, ethnic, or religious bias in the operation of criminal justice systems should be taken into account at sentencing is another. A third is that all purposeful infliction of pain including state punishment is an undesirable thing to do, as Bentham believed, and should always lead to imposition of the least restrictive appropriate punishment, or none at all if proportionality concerns do not otherwise require.

English philosopher Matt Matravers (2011, p. 37) explained why retributive principles by themselves are insufficient justifications for punishment. He observed that "the issue is not one of reconciling [punish-

and quality of knowledge. 6. Strength of intellectual powers. 7. Firmness of mind. 8. Steadiness of mind. 9. Bent of inclination. 10. Moral sensibility. 11. Moral biases. 12. Religious sensibility. 13. Religious biases. 14. Sympathetic sensibility. 15. Sympathetic biases. 16. Antipathetic sensibility. 17. Antipathetic biases. 18. Insanity. 19. Habitual occupations. 20. Pecuniary circumstances. 21. Connexions in the way of sympathy. 22. Connexions in the way of antipathy. 23. Radical frame of body. 24. Radical frame of mind. 25. Sex. 26. Age. 27. Rank. 28. Education. 29. Climate. 30. Lineage. 31. Government. 32. Religious profession" (Bentham 1970, p. 52).

ment] practices to desert . . . but rather it is one of thinking about the requirements of liberal justice as a whole.” Thought of in that way, it is clear—as the multiple offense paradox and myriad subjective differences between seemingly comparable cases demonstrate—that values other than blameworthiness and crime prevention should be taken into account.

Incorporation of fairness and equal treatment values into a comprehensive jurisprudence of punishment raises three major matters.²¹ First, these additional values are not simply side constraints on the pursuit of retributive or utilitarian aims. Dworkin (1977) long ago wrote of “rights as trumps.” Fairness and equal treatment need to be recognized as trumps on punishments that might otherwise be justly imposed.

Retributive or utilitarian reasoning may sometimes appear to justify punishments that other values forbid. Retributivists, for example, often argue that the logic of utilitarianism justifies punishment of innocent people if that will minimize human suffering. The classic example is the wrongful conviction and punishment in the American South of an innocent black man charged with rape of a white woman when the judge believes doing so will avert race riots or lynchings (McCloskey 1965). Critics point out that retributivism implies breathtakingly severe punishments and is irreconcilable with the bulk discount: if 3 months is a just punishment for one drug sale or shoplifting conviction, then 300 months should be right for 100 (Ryberg 2017).

When such issues arise, the retributive or utilitarian punishment logic must give way: knowing convictions or punishments of innocent people and imprisonment of people for 25 years for minor offenses are irreconcilable with respect for human dignity. The moral deficiencies inherent in knowing conviction of the innocent are self-evident. Imposition of 25-year prison terms for trifling crimes, no matter how many, warrants elaboration. It violates fairness values. Prosecutors possess enormous discretion and seldom charge or insist on guilty pleas to enormous numbers of equivalent crimes. It denies equal treatment by implying that trifling crimes in any number warrant more censure than individual instances of serious sexual or other violence or large property offenses. It also

²¹ “Equal treatment” here and below is used not literally to mean identical or the same treatment but as shorthand for Dworkin’s “treatment as an equal” with concern and respect. This means that individuals’ personal circumstances and characteristics need to be taken sensitively into account when considering how general rules should be applied.

denies equal treatment by ignoring the underlying psychological or situational reasons why people commit large numbers of minor crimes. More importantly, it implies that the offender's interest in living an autonomous life is unimportant, even though 25 years is more than half of a human being's best years and lengthy imprisonment fundamentally handicaps ex-prisoners' prospects for a good life.

Other countries' legal systems take human dignity seriously in relation to punishment (Whitman 2016). The German constitution declares dignity to be a fundamental principle that governs all applications of law (Whitman 2004). The German Constitutional Court, for example, has forbidden many prison practices that are commonplace in the United States as violations of human dignity. It declared life without parole sentences unconstitutional in part because they are incompatible with human dignity: no human being should be denied the possibility of hope for a better future life (*lebenslange Freiheitsstrafe*, 21 June 1977, 45 BverfGE 187). Similar ideas underlie the shorter maximum prison sentences—often 12 or 14 years for any offense or set of offenses other than murder, and much shorter for most offenses—authorized in continental European than in Anglo-Saxon legal systems (van Zyl Smit and Snacken 2009). They also underlie the ad hoc rationalizations—“crushing sentences,” depriving an individual of too large a portion of his or her remaining life, mercy—that are offered in other countries to explain the bulk discounts received by people convicted of multiple offenses (Jareborg 1998 [Sweden]; Ashworth and Wasik 2017 [England and Wales]; Bottoms 2017 [Australia]).

Second, the multiple values the practice of punishment implicates are not simply alternatives from which judges should choose; all set independent limits. American criminal codes usually provide that the purposes of the criminal law, punishment, or sentencing include at least imposition of deserved punishment, deterrence, incapacitation, and rehabilitation. Those lists serve as buffets from which judges may choose and provide no criteria for making the choices. Matravers (forthcoming) proposes something like a buffet when he calls for a “plural” rather than a “mixed” account of punishment in which censure and deterrence are independent governing principles: “The results may well be counter-intuitive (one might end up threatening more severe hard treatment for less serious, but harder to detect, crimes than for more serious, more easily detected, crimes),” he observes, but “it is not inconsistent so long as censure and deterrence are independent.”

This is not very different from Henry M. Hart's (1958, p. 401) classic refutation of the *Model Penal Code's* primarily rehabilitative purposes.²² He observed that deterrence, rehabilitation, incapacitation, norm reinforcement, satisfaction of the "community's sense of just retribution," and "even socialized vengeance" all have roles to play and that judges and parole boards must take account of them case by case as they are pertinent. Note, however, a fundamental contextual difference. Matravers wrote at a time when retributivism was widely seen as relevant, including by him, as a principled justification for punishment. When Hart wrote 60 years earlier, indeterminate sentencing and utilitarian approaches were unchallenged. Retribution to him was germane not as a general guiding principle but only sometimes, usually in connection with sensational cases, as acknowledgment of public opinion.

Matravers's example of serious crimes punished less severely than lesser ones and Hart's elaboration illustrate and underlay the core problems of indeterminate sentencing that retributive theorists in the 1970s sought to address and remedy. Punishing lesser crimes more harshly than greater ones defies common morality and undermines basic social norms. Conferring authority on individual judges to choose among and apply irreconcilable purposes assures outcomes often based more on judicial idiosyncrasies, personalities, and ideologies than on differences between offenses and offenders. Broad discretions are especially vulnerable to influence by invidious considerations including racial and class bias, negative stereotypes, and unconscious bias.

Third, a comprehensive jurisprudence of just punishment that respects human dignity would require subjective assessments of blameworthiness. David Luban (2007, pp. 70–72) observed that subjectivity lies at the heart of human dignity and that "having human dignity means having a story of one's own. . . . Human beings have ontological heft because each of us is an 'I', and I have ontological heft. For others to treat me as though I have none fundamentally denigrates my status in the world. It amounts to a form of humiliation that violates my human dignity."

William James in *The Varieties of Religious Experience* (1902) offers a similar, more general, metaphorical observation about the need to take

²² Both Matravers and Hart explicitly refer to the purposes of the criminal law rather than of punishment but appear to subsume punishment's within the criminal law's purposes. H. L. A. Hart (1968), by contrast, distinguishes between the—for him, preventive—purposes of the criminal law and other possible purposes of punishment.

individuals seriously: “Any object that is infinitely important to us and awakens our devotion feels to us also as if it must be *sui generis* and unique. Probably a crab would be filled with a sense of outrage if it could hear us classify it without ado or apology as a crustacean, and thus dispose of it. ‘I am no such thing,’ it would say; ‘I am MYSELF, MYSELF alone’” (p. 3).

Plutarch (1957, p. 355) observed of boys playing by a stream on a summer day, “Though boys throw stones at frogs in sport, yet the frogs do not die in sport but in earnest.” The frog’s perspective, Luban’s subjective perspective, cannot be justly ignored. A just sentencing system must harness the tension between the requirement of fairness that there be general standards that apply to all and the requirement of justice that all ethically important grounds for distinguishing between individuals be taken into account.

In the introduction, I described a comprehensive jurisprudence of just punishment consisting of principles of fairness, equality, proportionality, and parsimony. Blameworthiness and censure play central roles. No sentencing system could be said to be just unless it set rigid upper limits, keyed to blameworthiness, on the severity of punishment and unless values of fairness, equal treatment, and parsimony are respected.

Human dignity underlies the case for fairness, which largely concerns process; the case for parsimony, which requires avoidance of gratuitous harm; and the case for treatment as an equal, which requires consideration of an offender’s circumstances and situation. This proposed jurisprudence of just punishment allows judges to make individualized assessments of blameworthiness and insists that gratuitous harm not be done. It recognizes the complexity and myriad differing circumstances of human lives. It cannot resolve fundamental issues of social and racial injustice but empowers judges to make individualized assessments of offenders’ particular circumstances and blameworthiness within the constraints set by the other principles.

The proposed jurisprudence provides solutions to the multiple offense paradox. The bulk discount is morally necessary. Without it, punishments would be so severe that they would be incompatible with human dignity and so mechanical that they would fail to treat offenders and their interests with equal concern and respect. Every human being has but one life to live, lives it within particular circumstances, and makes countless mistakes. To ignore that is to ignore that we are human.

The recidivist premium to the contrary is morally unjustifiable. If the potential aggregate severity of sentences for multiple current convictions calls for imposition of something much less, for “mercy,” the burdens of recidivist premiums call at least as loudly. Depriving individuals of a large part of their remaining lives is as wrong when it is done piecemeal as when it is done at one time. Other objections to the recidivist premium are familiar ones. Imposition of increments of additional punishment because of earlier convictions is double counting, effectively punishing offenders a second time for their prior offenses. Punishing a subsequent offense more severely than a first offender is punished for the same offense breaks the link between blameworthiness and deserved punishment.

The proposed jurisprudence of just punishment provides a firm foundation for operation of the parsimony principle. Lippke (2017) has argued that “parsimony” is redundant, an empty concept, because both retributive and utilitarian theories explicitly reject punishment more severe than is theoretically justifiable. Parsimony is better understood, however, as deriving not from punishment principles but from respect for human dignity. Bentham was adamant: “All punishment is mischief: all punishment in itself is evil. . . . If it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil” (1970, p. 158).

Bentham’s view was imbedded within utilitarianism. It is better viewed as coming from outside as Braithwaite and Pettit (1990, 2001) do when they describe “dominion,” the capacity to live a life of one’s choosing, as the value most at stake in thinking about both crime and punishment.

The requirement that all people be treated with equal concern and respect can help address the problem of “just deserts in an unjust society” (von Hirsch 1976; Tonry 2014). Punishments of people living fundamentally disadvantaged lives, or who are powerfully affected by mental disabilities or acute problems of drug dependence, should be determined in terms of the choices and possibilities available to them and not on the false premise that the hard realities of their lives are different than they are, or do not matter.

There is one important problem, however, that the proposed jurisprudence cannot meaningfully address: determination of ordinally deserved punishments or of the anchoring points of penalty scales that are necessary for any system of ordinally proportionate punishments to work

(Lacey and Pickard 2015). Those judgments depend on cultural attitudes toward crime, criminals, and punishment severity that vary widely and that no mechanical or theoretical fix can resolve. Palpable differences exist between countries in such matters: think only of contrasts between the United States and Scandinavia or between England and Switzerland. Achieving acceptance of ideas about ordinal proportionality and the moral necessity of interoffense comparisons in punishment is a more easily achievable goal and constitutes steps in the right direction.

The issues discussed in the preceding paragraphs require much fuller exploration and elaboration than is possible here. The important thing to recognize, however, is that they raise problems that retributive punishment theories now in use cannot adequately address by themselves but that a normative framework incorporating fundamental principles of fairness, equality, proportionality, and parsimony could.

Moving toward a comprehensive jurisprudence of just punishment will require partial abandonment or substantial amplification of most retributive and mixed theories of punishment. This change may not be as unlikely as some may believe. It will require a paradigm shift, which Thomas Kuhn (1962) demonstrated seldom happens in the physical sciences until prevailing ways of thinking change sufficiently to absorb unfamiliar, seemingly heretical ideas. However, that is what happened when retributive punishment theories replaced utilitarian ones in the minds of most policy makers, philosophers, and academic lawyers in the 1960s and 1970s. The American law professor Albert Alschuler (1978, p. 552) bewilderedly described the then-recent sea change in attitudes toward the rehabilitative presuppositions of indeterminate sentencing: "That I and many other academics adhered in large part to this reformative viewpoint only a decade or so ago seems almost incredible to most of us today." Nozick (1981, pp. 2–3) explained how such things happen:

When a philosopher sees that premisses he accepts logically imply a conclusion he has rejected until now, he faces a choice: he may accept this conclusion or reject one of the previously accepted premisses. . . . His choice will depend on which is greater, the degree of his commitment to the various premisses or the degree of his commitment to denying the conclusion. It is implausible that these are independent of how strongly he wants certain things to be true. The various means of control over conclusions explain why so few philosophers publish ones that (continue to) upset them.

It is time for proponents of retributive and mixed theories to adopt and argue for new “premisses.”

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